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Science**

*An Institutional and Compliance Approach to Labour
Standards in Central America and the Dominican
Republic*

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Declaration

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Abstract

This thesis considers how to establish respect for labour rights. It aims to inform the analysis of compliance problems and create a diagnostic approach to implementing labour rights. The ultimate goal is to provide insight into the interventions necessary to progressively implement labour rights as defined in international law.

The project creates a conceptual framing of labour rights by joining two theoretical approaches: institutions theory and compliance theory. Drawing on institutions theory from political economy, the thesis reframes labour rights regulations, as holistic institutions comprised of rules, norms and actual behaviours, the so-called ‘rules of the game’ in employment. In this context, problems in implementing labour rights are understood as employment practices that are embedded in a web of formal and informal rules governing work within society. Once, reframed in institutional terms, employment practices that violate labour rights can then be analyzed and shortcomings identified using compliance theory. Compliance theory is well suited to institutional approaches because it, like institutions theory treats norms, rules and behaviours as critical components in achieving compliance.

The thesis integrates the framework into a diagnostic methodology and tool for comparison of labour rights compliance among the countries that are parties to the Dominican Republic, Central America Free Trade Agreement (DR-CAFTA). It applies the methodology to two cases. The first case examines obligatory overtime and trafficking and the second focuses on freedom of association. The analyses are based on publicly available documentary evidence from distinct perspectives such as the International Confederation of Trade Unions (ICFTU), the United States State Department Human Rights Reports and ILO Committee of Experts reports and observations.

The thesis concludes that the diagnostic methodology can help to uncover institutional patterns associated with labour rights compliance problems as well as problems with the international legal norms themselves.

Declaration of word length

I declare that my thesis consists of 75,043 words.

Signature: Diane F. Frey

Date: February 12, 2012

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Chapter 1 Introduction
I. Introduction
A. Statement of Problem

The purpose of this research project was to develop a diagnostic tool to help establish respect for and enforcement of labour rights. Despite almost universal adoption of international labour rights conventions, there is widespread non-compliance. This gap between widely-accepted legal obligations and their persistent violation presents a compelling challenge. Such gaps have been called “the most significant problem in the field of human rights” (Freeman 2008 p. 1). Historically, the gaps between rights in law and in practice were considered the realm of lawyers and legal academics that primarily focused on the formulation of legal standards and their interpretation by courts (Galligan & Sandler 2004 p. 25). Increasingly, social scientists and socio-legal scholars have turned their attentions and conceptual tools to look at the social and political conditions that affect compliance (Galligan & Sandler 2004 p. 25).

Policy debates about international labour standards and how to improve compliance are often polarized or compartmentalized, mirroring the historical separation between pro and anti labour standards camps as well as divisions between legal and social perspectives. Some argue that the problem is predominantly in the formulation, interpretation, and enforcement of laws, while others focus on social and economic problems contributing to violations. Labour and human rights activists have advocated for trade sanctions as the best mechanism for achieving enforcement of these universal standards and have paid less attention to other labour-standard enforcement mechanisms. This trend has been particularly evident since the World Trade Organisation (WTO) broadened

its scope of regulation to include enforcement of other legal regimes such as intellectual property protection.

B. Aims, Goals and Objectives

This dissertation aims to inform analysis of enforcement problems and policy responses by creating a diagnostic tool and approach to implementing labour rights. The goal is to provide insight into the interventions and processes necessary to progressively implement labour rights as defined in international law. For this purpose, the project creates a diagnostic tool: (1) to understand and frame labour rights as institutional employment practices; (2) to enable systematic comparison of these employment practices to relevant compliance obligations in ILO Conventions, and (3) to help identify and suggest areas for possible interventions to improve congruence between domestic employment practices and ILO obligations as well as possible shortcomings and contradictions within the ILO Conventions themselves.

The tool is based on a conceptual framing of labour rights by joining two theoretical approaches: institutions theory and compliance theory. Drawing on institutions theory from political economy, the dissertation reframes labour market regulations related to labour rights as holistic institutions, comprised of rules, norms and actual behaviours, the so-called ‘rules of the game’ of employment. In the context of this reframing, problems implementing labour rights are not just violations of international legal norms but are employment practices that are embedded in a web of formal and informal rules governing work within a society. The conceptual tools underpinning the dissertation have been applied in comparative employment systems and politics but here are applied to problems of labour rights (Hall and Soskice 2001; Schmidt 2002; Helmke and Levitsky 2006).

Once reframed in institutional terms, employment practices that violate internationally recognised labour rights can then be analyzed and shortcomings identified using compliance theory. In this way, institutional shortcomings can be diagnostically matched to compliance interventions. Compliance theory is well suited to institutional approaches because it, like institutions theory treats norms, rules and behaviours as critical components in achieving change and compliance.

C. Research Approach

The idea for this research grew out of my experience organizing immigrant workers in the building services industry in Boston, Massachusetts. The building services industry in Boston is dominated by immigrants from the Dominican Republic and Central America. As an organizer I would visit many office buildings in the mornings and afternoons at shift change. In the course of these visits I began to notice that I was seeing the same Dominican workers at different buildings but they would be wearing a different nametag for each building. I had stumbled upon an employment practice that violated the law. Had the workers worked at the second building under their own name, the employer would be required to pay them time and one half overtime pay. By working under a second name, the worker received extra pay but at their regular hourly rate without overtime premium pay. Dominican supervisors arranged the work schedules insulating higher management from knowledge or responsibility. The union did not object. The workers paid union dues twice based on each name and job.

In effect, the violation of the overtime law was an informal but regular employment practice and employers, workers and the union received different distributional benefits from the violation. After a city-wide strike in which many of the janitors' demands for health care and pay were met, there came to be an enhanced confidence among workers regarding their collective power. For the

first time, as an organizer, I began to hear complaints from workers about being forced to work under two different identities as part of the overtime avoidance scheme. What had formerly been an informal workable practice between workers, employers and the union became a problem. The union reformed its dues systems, allowing dues refunds to its members who worked multiple jobs (even under different names) and workers increasingly insisted that additional work time be paid at overtime rates. Employers reacted by restricting extra work opportunities to avoid overtime.

The experience working with immigrant workers from the Dominican Republic and Central America raised the possibility that we think about labour rights violations in the wrong way. As I had seen in the case of overtime and multiple nametags, violations were not aberrations from the system but rather an integral component of the system. It was also striking that such an integral, well-known employment practice could exist ‘off the books’ completely informally and without explicit knowledge of the employer’s top management or the union’s top leadership even though both actors benefited from its continuance. Also, of note was that the equilibrium allowing the practice was disturbed by a successful strike and the new equilibrium entailed changes in behaviour by workers, the union and the employer.

This experience led to three avenues of inquiry. The first was to better understand the societies and employment systems of the countries from which the immigrant janitors had come. The second was to identify what conceptual tools could be used to understand labour rights violations as an integral part of an employment system rather than as an aberration. The third was to explore whether this knowledge could be usefully applied in real cases of labour rights

violations to help guide interventions to improve compliance. Based on these goals, the methodology of the project became a search for such a conceptual framework based on an examination of the employment systems in the countries from which the janitors had come. Once the framework was created, two case studies were undertaken with specific labour rights based on a qualitative comparative analysis on forced labour and freedom of association and collective bargaining. The research examined six Spanish-speaking countries composing the Dominican Republic Central American Free Trade Agreement (DR-CAFTA). The countries are Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua. For purposes of the research, the ILO Conventions underlying Core Labour Standards (CLS) are examined in place of an imprecise notion of labour rights.

D. Plan for the Remainder of the Dissertation

In this research project, institutional arrangements associated with several aspects of core labour standards will be compared in the six countries. The remainder of the introduction explains the rationale for the selection of core labour standards and countries, the reasons for undertaking the study at this time, relevant debates in the literature and the selection of cases for purposes of comparison. Chapter two presents the steps in the research process over the course of the project as well as an examination of labour rights monitoring methodologies in the literature, their limitations, the methodology adopted for this project and identification of obstacles to be overcome in the project.

Chapter three presents the countries in comparative context based on the country studies undertaken as part of the research. To facilitate comparisons that are made in the case studies, the chapter explores a system for comparing the countries in accordance with frameworks developed by Evans (1995) and

Standing (1991). These frameworks are not intended to be an outcome of the thesis but were necessary to facilitate the sorting and comparing of the countries. Chapter three also provides some historical context and profiles of the countries in the study.

Chapter four presents the diagnostic tool after a review of the literature and theoretical basis for the tool in institutions theory from political economy and compliance theory from international law. The chapter first explains and then synthesizes and matches both of the theoretical bases. The compliance theory adopted for use in the tool is based on the work of Harold Koh (1997; 1998). The chapter then explains the tool on two levels: the first being the international level (Table 4.2). At this international level the text of ILO Conventions are adopted through compromise and represent institutional settlements at the international level among ILO social partners. Once adopted, the institutional settlement is further altered at the international level as a result of interpretation and enforcement by the ILO Committee of Experts through its process of supervision of countries that ratify the Conventions.

The chapter then explains the domestic level of the diagnostic tool (Table 4.3). If a country ratifies the ILO Convention, then the Convention text as interpreted by the Committee of Experts represents a set compliance obligations for the country. At this domestic level, domestic institutional arrangements can be systematically compared with compliance obligations and specific areas of incongruence can be identified as well as possible interventions.

Chapter five presents the first case study on forced labour in the form of obligatory overtime and trafficking. The Chapter presents the historical context for the ILO Conventions governing forced labour as well as the compliance

obligations for each kind of forced labour examined. The two forms of forced labour are also compared in terms of compliance obligations and institutional patterns among the countries.

Chapter six presents the second case study on freedom of association and right to collective bargaining. This case study is different from forced labour since freedom of association is really a compound right composed of many components. The case study first presents an examination of the historical process by which the Conventions were adopted and the compliance obligations that resulted from their adoption as well as subsequent interpretation that significantly expanded on the rights explicitly found in the texts of the Conventions. Finally, chapter seven presents a brief discussion of concluding thoughts about the research project.

II. Background on the Project

A. Why Core Labour Standards?

This research project is based upon evidence of compliance and non-compliance with rights that are among the ILO four Core Labour Standards: (1) abolition of forced labour, (2) abolition of child labour, (3) elimination of discrimination in employment and (4) freedom of association and the right to collective bargaining. Although there are numerous labour rights frameworks that could provide the basis for this research project, including the Decent Work Initiative of the International Labour Organisation (ILO), there are three reasons for selecting rights within the Core Labour Standard framework. These are (1) universality, (2) comparability, and (3) adequacy of evidence.

First, the four Core Labour Standards have been ‘elevated’ to universally accepted labour rights since the ILO 1998 Declaration of Fundamental Principles and Rights at Work (ILO 1998 a). These “core” rights are enumerated in eight

previously existing ILO conventions but the Declaration applied the “principles” underlying the Conventions to all ILO member states by virtue of their membership in the ILO, regardless of whether they have ratified the specific conventions (ILO 1998 a, Eliot & Freeman 2003 p. 93). They are thus universal by virtue of being considered “fundamental to the rights of all human beings at work, regardless of the level of development of a country and applicable to all sectors, including the informal sector and Free Trade Zones” (Hensman 2001 p. 125; Van Roozendaal 2002).

Second, as a result of their universality, the labour rights contained in the Declaration provide a common currency and useful benchmark for purposes of comparison between countries (Maupin 2005a p. 136). Other rights such as the right to work contained in the International Covenant on Economic, Social and Cultural Rights and the Organisation of American States’ Protocol of San Salvador – or other ILO Conventions such as workplace safety and health and minimum wages – have not received the same treatment and so their status as rights is distinctive from the Core Labour Rights (Alston 2004). These non-core labour rights, although universal in the sense that they are included in the United Nations Universal Declaration of Human Rights, do not impose enforcement obligations upon a country unless the country adopts specific international human rights treaties or ILO conventions. All ILO member countries share an obligation to comply with and enforce core labour rights and this serves as a common basis for comparison.

Third, as a result of establishing the Core Labour Standards, there is now a developed research methodology on monitoring compliance as well as collecting data and evidence on all four rights in all five countries. The Declaration included

two follow-up mechanisms that add to the body of evidence available: (1) ILO annual reports reviewing the efforts of countries that have not ratified relevant core labour standards, and (2) global reports alternating among the four rights to provide a picture “of the state of implementation of each category of fundamental principles and rights” (Alston 2004 p. 511; Maupin 2005a p. 136). The Declaration has “unquestionably attracted enormous attention” (Alston 2004 p. 459) including development of specific research methods and critiques of those methods for monitoring compliance (Alston 2004 p. 510; Moran 2005; Hilton 2005). Part of this developing research methodology includes identifying and assessing various sources of information on compliance (Hilton 2005 p. 281).

Despite the sound reasons for applying the Core Labour Standards framework, there are problems with the framework that must be acknowledged. Several critiques of the Core Labour Standards have emerged. Most notably, Philip Alston has argued that the concept of the “Core” Labour Standards (1) violates long established human rights frameworks, (2) weakens labour rights by de-linking them from well established treaty obligations, and (3) replaces internationally recognised enforcement regimes with “soft promotionalism” (Alston 2004). His critique raises doubts about whether the ILO 1998 Declaration and resulting Core Labour Standards system has contributed to improvement or deterioration of the international labour rights regime.

The first criticism is that the Core Labour Standards depart from the international human rights regime’s insistence that all human rights are “universal, indivisible, interdependent and interrelated” (United Nations 1993 Vienna Declaration and Programme of Action). Regional human rights regimes – such as in the San Salvador Protocol – also support this notion of the indivisibility and

interdependence of all human rights (Ghandi 1995 p. 307). The ILO's 1998 Declaration abrogates the equal importance of all ILO conventions and instead privileges the four Core Labour Standards as hierarchically superior (Alston 2004 pp 459-460). Using the Core Labour Standards for comparison purposes in this project runs the same risk, namely that the rights included for comparison comprise an "inadequate list of rights," and "downgrades" those rights not included as core rights (Alston 2004 p. 462).

Secondly, the ILO 1998 Declaration establishing the Core Labour Standards does not actually commit member states to comply with the corresponding ILO Conventions, but rather,

to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning fundamental rights which are the subject of those Conventions (ILO 1998a).

This language allows the Core Labour Standards to be accepted apart from acceptance of and compliance with the conventions themselves thus "delinking" and "liberating the standards" from ILO Convention-based definitions of rights and obligations' (Alston 2004 p. 457, p. 460). The delinking transforms the convention-based workers' rights regime into a new regime of ILO membership-based "principles" in which the definitions of specific rights and obligations are debatable and "treaty based formulations," which are "too precise," can be avoided (Alston 2004 p. 468). In fact, the ILO employer group supported the Declaration only on the condition that the Declaration "should impose no new legal obligations on Members" and "should not impose on Member States detailed obligations arising from Conventions they had not freely ratified" (ILO 1998b).

Third, the ILO 1998 Declaration establishing the Core Labour Standards has been criticised for its "unstructured and unaccountable decentralisation of

responsibility for implementation” and reliance on soft promotionalism rather than enforcement (Alston 2004 p. 457). Evidence supporting this criticism includes the employer group’s uncontested condition for supporting the Declaration that “it should impose no new reporting obligations on member states, should not be concerned with technical and legal matters but only with making an overall policy assessment, should not result in new complaints based bodies and should have no links with questions of international trade” (ILO 1998b). As Alston points out, “it is difficult to imagine that the 1998 Declaration will be permitted to escape from the straightjacket which was very clearly applied to it by its drafters” (Alston 2004 p. 470).

Despite these criticisms, the labour rights contained in the 1998 ILO Declaration provide a useful tool for purposes of this research project. Even within the contentious debates, its main participants (Alston 2005; Langille 2005 and Maupin 2005b) agree that the Declaration “has a potentially important role” and that “more creative institutional and other arrangements are required” to supplement the ILO’s traditional role (Alston 2005 p. 14). In addition to recommending systematic analysis and evaluation of the Declaration’s effectiveness and pitfalls, Alston points out the need for “country-specific critiques” that should emerge on the basis of systematic comparative analysis (Alston 2005 p. 16). The research agenda, for which Alston argues, includes ILO investigations as well as independent research and evaluation (Alston 2005 p. 15). This independent research project seeks to investigate institutional arrangements that sustain or curtail labour rights enforcement. It also seeks to provide country specific as well as systematic cross-national comparison and analysis.

For all of the above reasons, this research project will be based on a subsection of labour rights contained in the ILO 1998 Declaration creating the Core Labour Standards. This in no way is to suggest that other labour standards, such as health and safety or minimum wage regulations, are less important or would be less useful as benchmarks for comparison if there were universally accepted standards and adequate data collection. While adopting the framework of the four Core Labour Standards as a basis for comparison, this project is undertaken from a human rights perspective. In other words, the project assumes that labour rights are human rights as recognized in numerous international human rights treaties. Thus, the term core labour *rights*, as opposed to *standards* or *principles* is used throughout the paper.

B. Why DR-CAFTA Countries?

The goal of this research project is to explain and interpret variation in realising labour rights in the tradition of qualitative, holistic comparative methods (Ragin 1987 p. 5). Cross-national differences and similarities provide “specific experiences and trajectories” that are interesting on their own account and also provide possible answers to help understand and explain variable outcomes (Ragin 1987 p. 6). Toward this goal, Central America as a region and each of its countries are well suited for cross-national comparisons of core labour rights. First, Central America has coherence and identity as a region, sharing history, culture, geography and economic development trajectories. Second, countries in Central America share many characteristic similarities in their economic, social and employment institutions. Finally, there are distinctive regional divides and gaps between countries, the most striking of which is between the high level of human development in Costa Rica compared to much lower levels in the other countries.

Dating from Spanish colonial history, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua share a regional identity. They have a closely aligned trajectory from “discovery” through independence from Spain, and then, with the exception of the DR, share a period of federation as one country before final independence and statehood. One enduring example of this shared inheritance is the continued importance of the Catholic Church and its status as the ‘official’ religion in all five of the countries. It is a small region with a combined land area of 423,118 square kilometres -- just slightly larger than Japan (377,801 sq km) and Paraguay (406,752 sq km) and just smaller than Iraq (438,317 sq km) and Sweden (449,964 sq km) (Reckziegel 1999). Panama is excluded from the research project because its origins are Columbian and South American and the Chiapas province of the United States of Mexico is also excluded because, while it began as a province of Guatemala along with the other five countries, after independence from Spain, it was incorporated into Mexico. The Dominican Republic is added because it is one of the participants in the U.S. - Dominican Republic, Central America Free Trade Agreement (DR-CAFTA Treaty).

Central American regional identity, and the larger Latin American context as well, have also influenced political, economic and human rights development in modern times. The Organisation of American States (OAS) to which all six countries belong, approved the American Declaration of Human Rights seven months before the Universal Declaration was approved by the United Nations in 1948 (Cavallaro & Schaffer 2004 p. 224). Although the Declaration is not directly binding on countries, the OAS interpreted it as “indirectly binding on all member states by virtue of their ratification of the OAS Charter,” (Cavallaro &

Schaffer 2004 p. 230), echoing a similar logic used by the ILO in its 1998 Declaration. Costa Rica, Guatemala, Honduras and Nicaragua all have constitutional provisions that make explicit reference to the state's obligation to implement OAS Conventions (Cavallaro & Schaffer 2004 pp. 232-233). In 1987, Central American presidents negotiated their own regional solution and peace to the civil wars in El Salvador, Guatemala and Nicaragua without intervention by the US or international community at the Esquipulas II regional summit (UNDP 2002). No other region of the world in recent times has been able to find and implement such a transition to peace without international intervention (UNDP 2002).

Regional identity and coherence have also had expression in economic coordination and efforts at integration. Import substitution policies dating from the 1950s were regionally coordinated with the countries "banding together and shutting off their region to imports" to support industrial growth (Baker 2005 p. 1346). Central American countries were the first after the European Economic Community to establish a common market, the Central American Common Market creating a EU style customs union in 1960 (Baker 2005 pp. 1347). In addition to the customs union, the Central American Common Market Treaty provided for "coordination of macroeconomic policies and the creation of cross-border industrial development" (Baker 2005 p. 1348). Regional identity has not been without conflict however, as in the case of the Central American Common Market in which Costa Rica waited three years to join and Honduras quit in 1969 (Baker 2005 p. 1347 note 126). After the demise of the Common Market in the 1970s, efforts at integration were re-discovered in the 1990s with reforms to the Common Market and negotiation of new trade agreements culminating in the

relatively new U.S. - Central America-Dominican Republic Free Trade Agreement (DR-CAFTA).

In addition to regional identity and coherence, Central American countries share important commonalities including (1) the structure of their economies, (2) persistent poverty, extreme income inequality and social divisions, and (3) institutional commitments and arrangements for protecting workers' rights and regulating the employment systems. Tables below accompany each of these themes.

1. The Structure of the Economies

The common structures of economies can be seen in terms of the relative importance of agriculture, industry and services across the countries. The service sector is the largest contributor to GDP for all six countries and agriculture, despite its historic importance, now has the lowest share contribution towards GDP. An equivalent shift in occupations has not happened in every case. Guatemala's economy, reflected in its GDP composition, looks like it is largely service sector based but its employment remains overwhelmingly agricultural with half the labour force working in agriculture but contributing only 13.3% to GDP. Honduras also has this mismatch between GDP and labour force occupational composition.

Table 1.1 Composition of Economy and Labour Force Occupation by Sector

	Costa Rica	Dominican Republic	El Salvador	Guatemala	Honduras	Nicaragua
Economy						
Agriculture	6.3%	11.5%	11%	13.3%	12.4%	17.6%
Industry	22.9%	21%	29.1%	24.4%	26.9%	26.5%
Services	70.8%	67.5%	59.9%	62.3%	60.8%	56%
Labour						
Agriculture	*14%	**14.6%	*19%	***50%	**39.2%	28%
Industry	22%	22.3%	23%	15%	20.9%	19%
Services	64%	63.1%	58%	35%	39.8%	53%

(Europa 2005; Reckziegel et al 1999, Updated with CIA World Fact Book 2011)

*2006, **2005, ***1999

Another common element of their economic structures is continued shared reliance on exports of primary products such as bananas and coffee while shifting from agriculture to manufactured goods, particularly textiles and services. The countries also share a common reliance on imports of raw materials, consumer goods and fuels. Finally, the economies are small and rely on asymmetrical trade relations with the United States. The United States is the most important trading partner to each Central American country but combined they are only the 13th most important trading partner to the United States (Baker 2005 p. 3151). The combined 2003 GDP of all Central American countries amounted to only 1.4% of the United States economy (Baker 2005 p. 1351).

Table 1.2 Exports & Imports 2010

	Costa Rica	Dominican Republic	El Salvador	Guatemala	Honduras	Nicaragua
Exports	Banana Pineapple Coffee Melons Plants Sugar Beef Seafood Electronic Components Medical Equipment	Feronicel Sugar Gold Silver Coffee Cocoa Tobacco Meats Consumer Goods	Off Shore Assembly Coffee Sugar Textiles & Apparel Gold Ethanol Chemicals Electricity Iron Steel	Coffee Sugar Petroleum Apparel Bananas Fruits Vegetables Cardamom	Apparel Coffee Shrimp Wire Harnesses Cigars Bananas Gold Palm Oil Fruit Lobster Lumber	Coffee Beef Shrimp Lobster Tobacco Gold Peanuts Textiles & Apparel
Imports	Raw Materials Consumer Goods Capital Equipment Petroleum Construction Materials	Foodstuffs Petroleum Cotton Fabrics Chemicals Pharmaceuticals	Raw Materials Consumer Goods Capital Goods Fuels, Foodstuffs Petroleum Electricity	Fuels Machinery Transport Equipment Construction Materials Grain Fertilizers Electricity	Machinery & Transport Equipment Industrial Raw Materials Chemical Products Fuels Foodstuffs	Consumer Goods Machinery & Equipment Raw Materials Petroleum Products

(Europa 2005; Reckziegel et al 1999, Updated with CIA World Fact Book 2011)

Table 1.3 Export and Import Partners 2009

	Costa Rica	Dominican Republic	El Salvador	Guatemala	Honduras	Nicaragua
Export Partners	USA Netherlands China	USA Haiti	USA Guatemala Honduras	USA El Salvador Honduras	USA El Salvador Mexico	USA El Salvador Costa Rica
Import Partners	USA Mexico Venezuela	USA Venezuela Mexico	USA Mexico Guatemala	USA Mexico China	USA Guatemala El Salvador	USA Venezuela Mexico

(Europa 2005; Reckziegel et al 1999, Updated with CIA World Fact Book 2011)

2. Persistent Poverty, Extreme Income Inequality and Social Divisions

Central American countries share high levels of persistent poverty and extremely high levels of income inequality. A 2002 United Nations Development Program (UNDP) report on the region indicated that three out of every five Central Americans live in poverty with two out of five in severe poverty (Saxe & Cullell 2002). According to the same report, “income and wealth distribution continues to be highly concentrated, and it is not improving” (Saxe & Cullell 2002). Agriculture and textiles provide sources of wealth for owners but workers receive low salaries throughout the region (Saxe & Cullell 2002). Newer industries such as tourism and finance are equally concentrated (Saxe & Cullell 2002). Poverty and extreme poverty disproportionately affect overlapping categories of the population: people who live in rural areas and people who are employed in informal jobs. Across Central America there are extreme disparities within each country with respect to levels of human development (UNDP 2002).

Table 1.4 Percentage of Population Below Poverty Line Various Years

	Costa Rica	Dominican Republic	El Salvador	Guatemala	Honduras	Nicaragua
Population below poverty line	(2006) 16%	(2004) 42.2%	(2009) 37.8%	(2004) 56.2%	(2010) 65%	(2005) 48%

(CIA World Fact Book 2011)

Table 1.5 Gini Index and Share of Household Income or Consumption of Highest and Lowest 10% 2005

	Costa Rica	Dominican Republic	El Salvador	Guatemala	Honduras	Nicaragua
Gini Index	47.2	50	49.7	53.7	55.3	52.3
Highest 10%	35.5%	38.7%	37%	42.4%	42.2%	41.8%
Lowest 10%	1.5%	1.5%	1%	1.3%	0.7%	1.4%

(UNDP, <http://hdrstats.undp.org/en/indicators/161.html>; Segundo Informe Sobre Desarrollo Humano en Centro America y Panama updated with CIA World Fact Book 2011)

3. Institutional Commitments and Arrangements

All of the DR-CAFTA countries are members of the ILO as well as the Organisation of American States and Inter-American System. In addition to their participation in these organisations, the countries have made human rights treaty-based commitments to labour rights by ratifying United Nations human rights treaties and ILO conventions. Each country has ratified all four of the ILO conventions that were included in the ILO 1998 Declaration (Table 6).

Table 1.6 Core Labour Rights Convention Ratifications

	Costa Rica	Dominican Republic	El Salvador	Guatemala	Honduras	Nicaragua
Elimination of Forced Labour Conv. 29 Adopted 1930	1960	1956	1995	1989	1957	1934
Conv. 105 Adopted 1957	1959	1958	1958	1959	1958	1967
Abolition of Child Labour Conv. 138 Adopted 1973	1976	1999	1996	1990	1980	1981
Conv. 182 Adopted 1999	2001	2000	2000	2001	2001	2000
Elimination of Discrimination Conv. 100 Adopted 1951	1960	1953	2000	1961	1956	1967
Conv. 111 Adopted 1958	1962	1964	1995	1960	1960	1967
Freedom of Association & Right to Collective Bargaining Conv. 87 Adopted 1948	1960	1956	2006	1952	1956	1967
Conv. 98 Adopted 1949	1960	1953	2006	1952	1956	1967

Source: <http://www.ilo.org/ilolex/english/index.htm>

Table 1.7 Core Labour Rights-Related Treaty Ratifications

	Costa Rica	Dominican Republic	El Salvador	Guatemala	Honduras	Nicaragua
Elimination of Forced Labour ICESCR Art 6	1968	1978	1979	1988	1981	1980
Abolition of Child Labour ICESCR Art 10 Convention on Rights of the Child	1968 1990	1978 1991	1979 1990	1988 1990	1981 1990	1980 1989
Elimination of Discrimination ICCPR Art 3, 22, 26 ICESCR Art 7 CEDAW CERD	1968 1968 1986 1967	1978 1978 1982 1983	1979 1979 1981 1979	1992 1988 1982 1983	1997 1981 1983 2002	1980 1980 1981 1978
Freedom of Association & Right to Collective Bargaining ICCPR Art 22 ICESCR Art 8	1968 1968	1978 1978	1979 1979	1982 1988	1997 1981	1980 1980

Source Ghandi 2000, United Nations Office of the High Commissioner for Human Rights (OHCHR) Treaty Body Database,

All DR-CAFTA countries have also ratified other international treaties (Table 8) that correspond to the labour rights contained in the ILO conventions such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Cultural and Social Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Convention on the Rights of the Child (CRC). Labour rights enumerated in these international treaties are also

recognized in regional treaties (Table 9) specified in each country's constitution as well as in industry-specific legislation (USTR 2005).

Table 1.8 Core Labour Rights- Related Regional Treaty Ratifications

	Costa Rica	Dominican Republic	El Salvador	Guatemala	Honduras	Nicaragua
Elimination of Forced Labour Amer Conv on Human Rights Art 6 Protocol of San Salvador 7(g)	1970 1999	1978 Not Ratified	1978 1995	1978 2000	1977 Not Ratified	1979 Not Ratified
Abolition of Child Labour Amer Conv on Human Rights Art 19 Protocol of San Salvador Art 7(f)	1970 1999	1978 Not Ratified	1978 1995	1978 2000	1977 Not Ratified	1979 Not Ratified
Elimination of Discrimination Amer Conv on Human Rights Art 1, 24 Protocol of San Salvador Art 3 Belém Do Pará Art 1, 7(d)	1970 1999 1995	1978 Not Ratified 1996	1978 1995 1996	1978 2000 1995	1977 Not Ratified 1995	1979 Not Ratified 1995
Freedom of Association & Right to Collective Bargaining Amer Conv on Human Rights Art 8, 16 Protocol of San Salvador Art 7(d), 8	1970 1999	1978 Not Ratified	1978 1995	1978 2000	1977 Not Ratified	1979 Not Ratified

Source Ghandi 2000, Organization of American States 2006

Finally, there is a common framework for implementing and enforcing labour rights across Central American countries. In each country there is a labour ministry responsible for labour relations including registering trade unions, overseeing collective bargaining including dispute resolution, inspecting work places to ensure compliance with laws and related follow-up and administrative procedures for investigating and determining the validity of complaints (USTR 2005). This common administrative framework is complemented with similar specialised labour courts and appeals procedures such that disputes concerning labour rights violations are heard and appealed through steps within the judicial system and ultimately may be appealed to a court of last resort (USTR 2005).

In contrast to the economic, social and institutional commonalities shared by Central American countries, they also provide a useful basis of comparison due to their distinctiveness and the startling divides between them. These differences result from geographical context and historical choices as well as divergent contemporary policies. The most striking divergence is the contrast between Costa Rica's high-level of human development and income compared to its neighbours. This difference allows this study to investigate, among other variables, the impact of the level of development of a country on the enforcement of labour rights.

One example of distinct historical trajectories originates at the time of colonisation. Costa Rica's settlement was last and involved an almost complete genocide of indigenous peoples. It was considered an unimportant backwater far from the political centre in Guatemala and was largely ignored by Spain. Based on its homogeneity – the indigenous people having been killed – and relative freedom from direct colonial control, it developed a society and state far more

egalitarian and democratic than its neighbours. The opposite extreme is Guatemala where it is contested and unclear whether Spanish-identified Ladinos comprise a majority of the population. In contrast to Costa Rica's celebrated democracy, Guatemala, El Salvador and Nicaragua have suffered long periods of dictatorship, civil war and in the case of Guatemala, modern allegations of genocide.

Economic policy and development choices have also been distinct despite the many common structural aspects of the economies. In the wake of the failure of import substitution, the World Bank (WB) and International Monetary Fund (IMF) began pressuring Central American Countries to implement structural adjustment programs. Here, the specific policy programs and responses to them varied distinctively. Costa Rica was vulnerable to pressures of the IMF and the WB based on its debt crisis arising from its higher level of social spending. Great differences between countries in social spending persist. Costa Rican resistance to IMF and WB prescriptions, particularly with respect to privatisation, continues. On the other hand, although the Salvadoran government embraced the policy prescriptions of structural adjustment, its implementation was delayed due to fears that the fallout of structural adjustment would enhance public support for guerrillas fighting the government in the civil war. El Salvador has been called the most neo-liberal country in the region while neo-liberal reforms are popularly opposed in Costa Rica.

Economic differences between countries include wide differences in levels of income and human development. Income and poverty differences can be seen in divergent levels of informal and formal employment (Tables 10 and 11). Half of all employment in Costa Rica is in the formal sector compared to 19.9% in

Guatemala (UNDP 2002 p. 67). Employment in agriculture also varies with Costa Rica having a low of 17.2% of its labour force working in agriculture compared to more than 30% in Guatemala, Honduras and Nicaragua (UNDP 2002 p. 67). Most striking are the differences in the Human Development Index and GDP per capita between Central American countries with GDP per capita in 2003 ranging from a high of US \$4,410 in Costa Rica to a low of US \$767 in Nicaragua (in constant 2000 US\$).

Because these countries have such similar histories and yet such distinctive trajectories, comparing labour rights enforcement between them may offer insights into what factors and patterns of factors are present or absent in labour rights enforcement. Based on preliminary country studies completed over the past year, there are indications of striking differences with respect to labour rights enforcement within and between countries. In accordance with methodological guidance from qualitative comparative analysis, the cases are “comparable” but also “display diversity with regard to conditions and outcomes” (Rihoux 2006 p. 688). This allows utilisation of both ‘most similar systems design’ (Przeworski & Teune 1970) and newer approaches that combine ‘similar systems design’ and ‘different systems design’ to identify similar cases that display different outcomes as well as different cases that display similar outcomes (Rihoux 2006).

4. Framework for Categorizing Differences

For purposes of comparison of the countries, they are grouped in accordance with their proximity to an ideal types of countries in terms of: (1) *State Capacity for Institutional Action* (Evans 1995), and (2) and *Labour Market*

Regulatory Regime (Standing 1991 cited in Itzigsohn 2000 p. 140). Both of these are explained in Chapter 3, Countries in Comparative Context.

State capacity for institutional action refers to a state's general regulatory orientation over many areas of state bureaucracy. Costa Rica is consistent with the ideal type *developmental state* based on its relatively high functioning state apparatus in service of the country as a whole. In contrast, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua are each closer to the ideal type *predatory state*. The character of the state apparatus in predatory states is that the state apparatus is a market serving only those segments of society with the power or economic services to buy state services or protections. In these systems, corruption tends to create the central logic to the running of the state. In reality, the countries do not exist purely in one ideal type or the other but rather on a continuum between them.

The second dimension to categorizing the countries is their respective *labour market regulatory regime*. These are ideal types created by Guy Standing (1991) to characterize distinctive roles that states play in labour market regulation. Standing described three different ideal types along which the countries can be said to fit. In *repressive regimes*, the state's role in regulating labour markets is to repress collective action by workers. The Dominican Republic, El Salvador, Guatemala and Honduras fit best in this category. In *paternalistic regimes*, the state legislates regulations based on the values of elites rather than in negotiation with workers. Costa Rica fits relatively well in this category. Lastly there are *protective regimes* in which worker organization and negotiations are more likely to influence labour market regulations. In this category I have added the

characteristic of an absence of repression so that unions and negotiations take place. Nicaragua fits this category.

Like *State Capacity for Institutional Action*, countries exhibit more than one kind of regulatory influence and in reality exist on a continuum. For example, repressive regimes may have paternalistic elements such as minimum wages.

5. Groupings of Countries

Based on these typologies three different groups of DR-CAFTA countries emerge. They are:

Table 1.9

Developmental Paternalistic	Predatory Protective (non-repressive)	Predatory Repressive
Costa Rica	Nicaragua	Dominican Republic El Salvador Guatemala Honduras

C. Why Now?

Recent changes in regional as well as international economic, political and social arrangements make the current investigation comparing labour rights in Central America timely. Such changes include the relatively recent increase in data available as a result of the 1998 Declaration, a relatively new (2005) DR-CAFTA trade agreement replacing earlier labour rights/treaty enforcement mechanisms, increased inclusion and visibility of labour rights in the Inter-American System, and finally, changes in migration patterns, which have resulted in transnational Central American communities that appear to endure and have the potential to influence policies of Central American countries.

First, enough time has elapsed since the establishment of the ILO 1998 Declaration to gather data and investigate patterns and changes with respect to

labour rights. This research would not have been possible before the establishment of core labour rights or immediately following their establishment. Many ILO reports, analysis and projects since 1998 have focused on Central America and so there is more data available to enable comparisons to be drawn. There is also a burgeoning literature on methods for collecting data and comparing compliance.

Second, a new and controversial trade agreement (DR-CAFTA) was signed in May 2004 and has been ratified by all the countries by 2005. DR-CAFTA is important because it replaced the former Caribbean Basin Trade Partnership Act (CBI) and the CBI's General System of Preference (GSP) mechanisms. Under GSP, Central American countries gained preferential access to US markets but that access was conditioned on their commitment to enforce certain internationally recognised labour rights. Violation of these rights could lead to unilateral U.S. trade sanctions and loss of access to U.S. markets. There was extensive use and analysis of GSP with respect to Central America (Frundt 1998). In its place, DR-CAFTA removes the possibility of sanctions and requires countries to enforce their own domestic labour regulations. It also has no minimum standards and allows each state to exercise "discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters" (USTR DR-CAFTA Final Agreement Section 16.1 2004 p. 16.1; Pagnattaro 2006).

The absence of GSP-like conditionality in DR-CAFTA created a contentious debate within the United States about whether the trade deal would cause labour standards to improve or deteriorate. To ease concerns over possible worsening of labour standards, the U.S. Trade Representative and the U.S. Congress struck a deal to provide U.S. \$20 million to improve labour rights

enforcement as part of the trade deal. The funds have been focused on recommendations developed by Labour Ministers from each of the DR-CAFTA countries in a 2005 White Paper (Working Group 2005). Approximately U.S. \$3 million was given to the ILO to verify progress implementing the White Paper recommendations (ILO 2007a Baseline Report p. 3). Despite numerous projects funded and twice yearly ILO reports an NGO recently reported the lack of “substantive advances” (WOLA 2009 p. 7). In fact, the NGO noted, “...it is not clear whether this has resulted in reduced labor violation or improved working conditions” (WOLA 2009 p. 7).

Third, there has been increased inclusion and visibility of labour rights in regional human rights bodies such as in the Inter-American System’s Commission on Human Rights and the Inter-American Court of Human Rights. Most notably, the Court has given its authoritative interpretation of the right to freedom of association extending due process rights to a fair trial beyond criminal trials to labour court proceedings (Baena Ricardo et al 1999). In doing so, the Court effectively integrated regional human rights treaties with ILO Conventions and opinions of the ILO Freedom of Association Committee by drawing on a previous decision by the ILO Committee of Freedom of Association, which dealt with the same facts (Wilson and Perlin 2003). The Court’s approach and decision is important because it was the first time that an international court has relied upon an ILO decision.

The Inter-American Court of Human Rights has also been active in deciding cases related to labour rights such as undocumented migrant workers’ rights and equality and non-discrimination rights (Butler 2004), and it has been instrumental in linking civil and political rights with economic and social rights.

In the Baena case and subsequent cases, the court has noted that violations of civil and political rights, such as freedom of association, entail violations of labour rights that are social and economic (Cavallaro & Schaffer p.23). These include Inter-American System rights such as the right to work and the right to a “decent dignified living” (Protocol of San Salvador 1988, Cavallaro & Schaffer 2004). The Inter-American Commission and Inter-American Court of Human Rights offer the possibility of novel strategies for achieving enforcement of labour rights through civil society, non-governmental organization (NGO) mobilisation and mainstream litigation (Cavallaro & Schaffer).

Finally, extensive migration due to natural disasters, civil wars and poverty, has reframed concepts of citizenship and shifted power balances in Central America. Migration provides a new dynamic that can influence the enforcement of labour rights for better or worse. Central American migrants predominantly seek to settle in the U.S. and are poor by U.S. standards but comprise a rising influential ‘middle class’ in Central America. The money migrants send home in the form of remittances has become critically important to supporting families and entire economies. For example, one recent estimate in El Salvador from Latin America Public Opinion Project (LAPOP) indicates that much of El Salvador’s poverty reduction has been due to remittances sent by Salvadorans working abroad rather than economic development at home (Macías & Cruz 2004 p. 5; Agunias 2006 p.4).

Remittances are greater than foreign direct investment in every country except Costa Rica. As a result, government policy is shifting with governments such as Guatemala increasingly playing an activist role with expatriate communities (Mahler 2000 p. 31). Migrants in turn are becoming more influential

and demanding more rights such as dual citizenship and transnational voting rights (Mahler 2000 p. 3). Research on the Dominican Republic has shown that in addition to economic remittances, migrants also engage in social remittances based on their experiences as migrants (Levitt 2001). For example, migrant experiences of rule compliance or ‘rule of law’ can change perceptions and normative attitudes about the rule of law in their country of origin and can influence attitudes there (Levitt 2001).

On the other hand, migration and reliance on remittances can also make migrants and their home countries vulnerable to violations of labour and other human rights. Nicaraguans who have left Nicaragua for work in Costa Rica and undocumented Central Americans in the U.S. are vulnerable to labour rights violations as a result of negative attitudes held towards them (Vargas-Cullell & Rosero-Bixby 2004). Voters in El Salvador, and more recently Nicaragua, have received threats from the U.S. government warning that its migration and remittance policies will be tightened, if left-leaning politicians are elected to government (Beachy 2006; Bertelsmann 2006). In sum, migrants are demanding recognition, status and improved rights both in the U.S. and from their homelands. It remains to be seen whether a government’s concern for protecting the rights of its migrants abroad translates into improvement of rights enforcement at home.

In conclusion, the reasons that this project is timely include the contrary trajectories in labour rights at this particular moment under a new trade agreement regime that displaced GSP labour rights enforcement tools. Activists have argued that this is a step backwards for labour rights enforcement. At the same time, Latin America is poised to embrace labour rights within treaty-based human rights courts and migrants themselves may be able to play an increasingly influential

role in debates about labour rights enforcement. All of these countervailing forces and influences are buttressed by additional data, evidence, methodologies and (debates) that have arisen as a result of the ILO 1998 Declaration.

D. Current Debates

There are two broad areas of debate about labour standards: (1) whether labour standards are human rights, and (2) how labour rights should be enforced.

1. Debate: Labour Standards vs. Labour Rights

The first thematic debate concerns two issues: whether there are (or should be) international labour standards and whether these standards are or should be considered human rights. The first is undoubtedly the oldest debate arising during the process of Britain's Industrial Revolution (Engerman 2003 pp. 22-23). As Engerman points out, the arguments on both sides have not changed much since 1802 (Engerman 2003 p. 29). Pro-labour standards arguments include moral imperatives such as to aid poor, voiceless, powerless workers (Engerman 2003 p. 23). Economic arguments in favour of labour standards include the improved efficiency of economies and the necessity to correct market failures (Engerman 2003 p. 23; Palley 2004). Related to moral and economic arguments, are social arguments supporting labour standards as a means to improve public health, education and political stability (Engerman 2003 p. 23). Notably, these arguments are about "standards" not "rights" and the *raison d'être* of "standards" is that they are instrumental because they serve as a means to an end rather than an end in themselves.

Modern anti-labour standards arguments are also consistent with earlier arguments highlighting the higher costs that result from labour standards, making trade less competitive and therefore having an adverse impact on employment

levels and living standards (Engerman 2003 p. 30). Other longstanding anti-labour standard arguments focus on the protectionist motives for their establishment, the cultural imperialism of developed countries imposing standards on less powerful countries, and the interference with the freedom of employers and employees to enter into contracts (Engerman 2003 p. 30; Brown 2001 p.91). As above, anti-labour standards advocates focus on “standards” not “rights” and in fact argue that standards may interfere with legal rights to contract. To anti-labour standards advocates, labour standards are also a means to an end but it is an end to be avoided. Ultimately, Engerman points out that policy changes implementing labour standards have resulted from changes in attitude, rhetoric and political power rather than any new or innovative arguments for or against them.

The second part of this debate on the status of labour standards is more subtle and ambiguous than the pro-anti positions. For example, the source of the standards is debated in terms of social justice (Hepple 2003) vs. human rights (Alston 2004). The ambiguity of the status of labour standards has been noted as well as the preference to “avoid the language of rights” and instead “argue that a consensus is emerging” on standards (Brown 2001 p. 92). In a recently published book on labour standards, “International Labor Standards,” Engerman points out such a consensus,

In general, there are now some very basic terms of internationally agreed upon labor standards, reflecting both moral and economic beliefs”(Engerman 2003 p. 11).

His list of consensus standards is extensive, including sexual harassment and some of the core labour standards but omitting freedom of association and collective bargaining. It is unclear clear why freedom of association, which is

included in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, is not a consensus standard.

In addition to the explicitly anti-labour standards arguments, subtle arguments and ambiguity, there is, within social sciences, more stealth approaches to undermining the idea of labour standards as human rights. In these approaches, labour rights are either entirely invisible or irrelevant to economic, political and social debates. Here is one example from industrial relations and human resource management literature that illustrates the point:

Because of high productivity and low unemployment in the United States during the 1990s relative to Europe, many have argued that Europe should emulate key features of the U.S. economy, including weaker unions... (Michel et al 2003 p. 397).

Making “weaker unions” is described as an ‘exportable policy choice’ and feature of an economy, like tax or welfare policy. The policy choice is framed in its relation to employment levels without reference to issues or concerns about the human rights implications of making freedom of association more difficult for workers to exercise. Importantly, the author is concerned with the detrimental effects of the U.S. model in terms of poverty and inequality for workers but ignores human rights in the discussion.

Within this first frame of debates, this research project seeks to place obligations for compliance with labour standards/labour rights based on the country’s ratification of the relevant standard and agreement to be supervised by the ILO Committee of Experts (CEACR) and other ILO supervisory bodies. In fact, many countries do renounce ratifications of ILO Conventions (See ILO ILOLEX). Countries may ratify ILO Conventions or other treaties as a means to an end such as greater stature in their relations with other countries. Nevertheless, the obligations contained in the ratified Conventions are not merely instrumental

‘means to an end’ but rather, borrowing from Sen (2000 p. 10) on development and freedom, they are the “end” for which we the Country must find the “means.” Admittedly, there are many philosophical and political theoretical debates that contradict this premise and approach. This research project does not contest them on philosophical or theoretical grounds but on the much more mundane basis that human rights are the subject of international treaties and therefore impose the legal commitments and obligations contained in the treaties themselves.

2. Debate: Labour Rights Enforcement

The second broad area of debate on international labour rights begins with a rights-based premise and is concerned with how to best enforce labour rights. One part of the enforcement debate centres on the question of whether the existence of so many rights hinders their enforcement (Langille 2005; Alston 2004). Other aspects of the enforcement debate concern (1) what role the ILO and other international institutions should play (Alston 2005; Maupin 2005; Langille 2005), (2) whether the ILO 1998 Declaration is an effective approach (Alston 2004; Langille 2005; Maupin 2005) (3) whether trade sanctions should be included as an enforcement mechanism (Frundt 1998; Brown 2001; Griffin, Nyland & O’Rourke 2003; Singh & Zammit 2004), (4) whether corporate social responsibility and self-regulation is an effective tool or a worthless ploy (Wick 2005; Feinberg 2009), and (5) whether multiple interventions and mechanisms are necessary (Frundt 1998; Verma 2003; Douglas et al 2004).

Over the course of the research project these debates have been reflected in the many reports on labour rights in Central America. These include the ILO (2003a), Human Rights Watch (2004), the U.S. Trade Representative (2005), the AFL-CIO (2005), Central American Labour Ministers (Working Group) through the Inter-American Development Bank (2005), Stop CAFTA.org (2006), the

Washington Office on Latin America (WOLA) 2005 and 2009, the International Labor Rights Forum along with its regional non-governmental organization partner Asociación Servicios de Promoción Laboral (ASEPROLA) (ILRF/ASEPROLA) 2004. In 2009, a political economist noted that despite the numerous studies there are insufficient benchmark studies to definitively characterise the state of labour standards and practices in the region (Feinberg 2009 p. 3). In effect, the many studies are fodder for conflicting points of view in the contentious debates over DR-CAFTA and labour standards enforcement.

Chapter 2 Research Process

I. Introduction

A. Summary of the Research Method

The goal of my research has been to develop a theoretical framework that could serve as an analytical model and method for examining and comparing labour rights compliance in DR-CAFTA countries (or any other group of countries for that matter). The methodology is qualitative and comparative. Qualitative assessments are carried out using narrative documentary evidence from a variety of sources. These include U.S. State Department Human Rights Reports and nongovernmental organisation reports from the International Trade Union Confederations (ITUC) and regional organizations such as the Asociación Servicios de Promoción Laboral (ASEPROLA). A central source of narrative evidence comes from Individual Direct Requests and Individual Observations of the ILO Committee of Experts on the Applications of Conventions and Recommendations (CEACR). The use of these distinctive perspectives mirrors the process the ILO Committee of Experts (CEACR) utilizes in supervising country compliance with ILO Conventions. The CEACR considers reports submitted by the country in which it discusses its compliance with the conventions along with ‘shadow reports’ from trade unions and NGOs often contradicting claims made by the government.

The development of the theoretical framework and its connection to the methodology was an iterative process based on the interaction between my own experiences, reading, reflecting, testing and proposing ideas and receiving feedback leading to further reflection from presentation of the ideas in seminars, conferences and papers. Driving my search for an adequate theory and methodology was my continual discovery of partial answers and further puzzles as

I read and reflected upon what I had discovered. This section briefly outlines the method adopted in the research and process of developing the analytical model.

II. Steps in Research Process

A. Step One: Framing the Field in Relation to My Own Experience

The first step in the research process was framing the issue of labour standards compliance. My own experiences organizing workers, particularly immigrant workers in Boston strongly influenced the area of research. Having learned about comparative employment systems in the masters' program, I began re-thinking my organizing experiences. The works of Amable (2003) and Hall and Soskice (2001) that I had read, provided a beginning of a theoretical framework upon which I could organize my experiences. I considered the formal and the informal rules within which my organizing experience had occurred. I also, saw my former work in various industries, such as health care and education, as fundamentally trying to change the institutional settlement between the employer and workers at the work site level.

In the masters' program I had learned that institutional settlements at the work site were influenced by larger scale institutional settlement of U.S. labour relations and the U.S. liberal market economy. It was puzzling, because ideas about institutional complementarities indicated that transformative change in labour rights might be very difficult to accomplish. On the other hand, Streeck and Thelen (2005) presented ideas about incremental yet transformative change. So I had both an appreciation for how difficult institutional change might be to accomplish but also how it might be achieved in surprising and small ways.

B. Step Two: Selection of Countries

The next step was to select the countries that I would examine more closely in the thesis. I considered choosing the United States but I felt that my

familiarity and experience working in the U.S. system might undermine the quality of the research because it would be easier for me to take social facts uncritically for granted in the context of the United States employment system relative to other systems. I kept returning to the puzzle of the immigrants from the Dominican Republic and Central America and how little I knew about the employment systems from which they had come. Labour rights compliance in the Dominican Republic was the topic of my masters' dissertation. Broadening the research to Central American countries was consistent with examining the Dominican Republic as part of the masters' research. The other Central American countries generally share with the Dominican Republic preferential immigration relations with the US. Even before the DR-CAFTA trade agreement, the countries were also interesting in light of their connection to the United States through trade and foreign policy. Before settling on DR-CAFTA countries as the subject of the study, I also spent weeks reading local newspapers on line through the Guardian and local web sites to begin to get an understanding of employment in the region.

C. Step Three: Labour Standards and Employment Systems in the Dominican Republic and Central America

Turning from my own experiences in the U.S., I traveled to three of the countries I wanted to study, keeping in mind institutions theory and employment systems and how formal and informal rules interact. I worked and traveled in Costa Rica, Nicaragua and Guatemala in 2003-2004 after finishing my masters' and before starting the PhD. My goals were to become more knowledgeable of employment systems in the region, to improve my Spanish language proficiency, to become familiar with unions and non-government groups and to begin thinking about research design and questions for the PhD project.

My work in the region included providing assistance to a Costa Rican non-governmental organization supporting labour rights that was organizing among agricultural workers in pineapple and banana production. Some of this work took place among indigenous Bribri living on the border of Costa Rica and Panama. This is an area of Costa Rica where banana worker solidarity was relatively strong and organizing was successful partly because the workers' solidarity was based on indigenous identity. It was also very useful to experience and better understand what informal market relations looked like in Nicaragua and how the Guatemalans I met discussed the 1996 peace treaty that was signed but not approved by voters or implemented by the government. Traveling in the region helped to frame some of the vast differences that exist between the countries despite their common history, language and religion.

D. Step Four: Labour Standards Monitoring Literature

Upon returning to academic research, I started with an examination of existing labour rights monitoring methodologies. I did this for two reasons. Initially, I wanted to pursue a more quantitative approach or alternatively create indicators of respect for labour rights and I was looking at possible methodological models. Among the systems I considered was the left-leaning Bertelsmann Index, an index and country ranking system based on democracy and socially-responsible market economies (Bertelsmann 2006) as well as the right-leaning, Heritage Foundation Index of Freedom (Heritage Foundation 2006). One of the Heritage Foundation reports referred indirectly to informal labour rights arrangements in its rankings. It mentioned that Guatemala had a very burdensome minimum wage system, but did not downgrade the country's score because the

law was hardly ever applied. Most importantly, I examined the Cingranelli Richard Human Rights Dataset (2004) discussed below.

My second reason for examining existing monitoring systems was to preview how each of the countries and the region as a whole performed in terms of respecting labour rights. This survey of quantitative research on the region provided useful background information but ultimately raised more questions than it answered. The insights and limitations in these approaches therefore led me to choose a qualitative diagnostic approach rather than a quantitative approach based on indicators.

Labour rights compliance monitoring predates the 1998 ILO Core Labour Standards and post World Trade Organization (WTO) trade agreements including DR-CAFTA. One of the most respected human rights monitoring systems was developed by political scientists Cingranelli and Richards and greatly influenced my methodology and conceptual approach. Cingranelli and Richards created a database to measure respect for labour rights, among other human rights. Annual measures of respect for human rights are based on content analysis of U.S. State Department and Amnesty International human rights reports (CIRI 2004). Respect for worker rights is a composite measure, roughly covering rights covered by the ILO's Core Labour Standards on freedom of association, the right to collective bargaining, the prohibition against forced labour, the minimum age for employment of children and discrimination in employment (CIRI 2004).

In Cingranelli and Richards' system, countries receive a score of "0" when the government does not allow workers to form unions or to strike. A score of "1" indicates that the government allows workers to form unions and to strike but problems exist with other protections such as forced labour, discrimination or

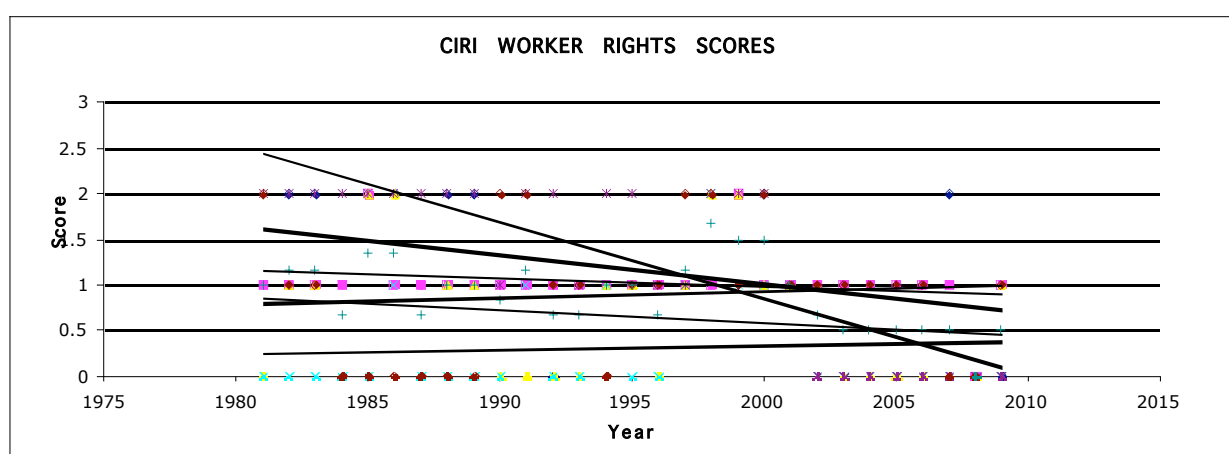
employment of children. A score of “2” indicates that the government ensures that workers have the right to form unions and strike, and in addition there are no other problems with other labour rights protections (Abouharb and Cingranelli 2007 p. 197). The inter-rater reliability for the data is high at 0.944 (Cingranelli and Richards 2010). The raw scores for DR-CAFTA countries from 1981 to 2009 are charted below in Figure A and presented afterwards as trend lines in Figure B.

Table 2.1

Year	1981	82	83	84	85	86	87	88	89	1990	91	92	93	94	95	96	97	98	99	2000	01	02	03	04	05	06	07	08	09
CR	1	2	2	1	2	2	1	2	2	1	1	0	1	1	1	1	1	1	1	2	1	1	1	1	1	1	2	0	0
DR	1	1	1	1	2	1	1	1	1	1	1	1	1	1	1	1	1	1	2	1	1	1	1	1	1	1	1	0	1
ES	0	1	1	0	2	2	0	1	1	0	0	0	0	1	1	0	1	2	2	1	1	1	0	0	0	0	0	0	1
G	0	0	0	0	0	1	0	0	0	0	1	0	0	1	0	0	1	2	1	1	1	0	0	0	0	0	0	0	0
H	2	2	2	2	2	2	2	2	2	1	2	2	1	2	2	1	1	2	2	2	1	0	0	0	0	0	0	0	0
N	2	1	1	0	0	0	0	0	0	2	2	1	1	0	1	1	2	2	1	2	1	1	1	1	1	1	0	0	1
Total	6	7	7	4	8	8	4	6	6	5	7	4	4	6	6	4	7	10	9	9	6	4	3	3	3	3	3	0	3

CIRI Worker Rights Scores 1981-2009

Figure 2.1



CIRI Worker Rights Scores 1981-2009 Trends

The scores and trend lines demonstrate several remarkable changes from the 1980s's through the establishment of ILO Core Labour Standards in 1998 and more changes become apparent through the ratification and implementation of

DR-CAFTA from roughly 2003 through 2009. In the 1980s, there were very clearly delineated well-performing and poor-performing countries. Costa Rica and Honduras consistently scored higher, having 79% of all the best scores of “2.” Guatemala, El Salvador and Nicaragua consistently scored the worst accounting for 100% of all the worst scores of “0.”

From the end of the 1980s through to 1998/99 when the ILO Declaration of Fundamental Principles and Rights at Work established Core Labour Standards, the scores across the region began converging with longstanding best performer Costa Rica scoring a “0” for the first time and the formerly poorly performing Nicaragua attaining a score of “2” four times throughout the ten years. The scores for the region as a whole reached their peak in 1998, as Core Labour Standards were coming on line, when no country received a “0,” Costa Rica and the Dominican Republic each received a “1” and the remainder, even Guatemala received a score of “2.” The total scores for the region in 1999 and 2000 continue to be higher than previous decades but the trend abruptly ends in 2001 when total regional scores continually decline. Remarkably, in 2008, for the first time, every country received a score of “0.”

The CIRI scores represent a perplexing mixture of results—change for the better, change for the worse and sometime little or no change at all. The two consistently high performers in the 1980s, Costa Rica and Honduras experienced a stark reversal from receiving the highest score 66% and 100% respectively in the 1980s to 20% and 0% from 2000-2009. Interestingly, not all reversals were negative. Nicaragua reverted from its relatively poor performance in the 1980s, scoring a 1 or better only 33% of the time, to scoring 1 or better 80% of the time between 2000 and 2009. Guatemala’s performance in the 1980s improved over

the course of the 1990s but worsened again after 2000, returning very close to its 1980s level. El Salvador's performance has consistently declined in each period. Finally, the Dominican Republic has received the same score of "1" in 26 out of 29 years, roughly 90% of the time.

The Cingranelli-Richards (CIRI) Human Rights Dataset scores created many puzzles for my research. The scores appeared to show a trend towards convergence at the time that the ILO Core Labour Standards were launched. The changes in CIRI average scores over 28 years shown in Appendix 2, Figure C indicate a regional deterioration. From 2005 to 2009, the years during which DR-CAFTA was ratified by the United States and all of the countries, the scores appeared to be further declining, and I questioned whether CIRI had captured a regional race to the bottom. However, the scores themselves do not explain why there were reversals as in the case of Honduras, Costa Rica and Nicaragua. Equally, the scores do not explain why there was little or no change in the Dominican Republic or why scores changed for a period of time before reverting to their former level as in the case of Guatemala.

Table 2.2

Average Scores	1981-1989	1990-1999	2000-2009	Net Change
Costa Rica	1.66	0.9	1.0	-0.66
Dominican Republic	1.11	1.10	0.9	-0.21
El Salvador	0.88	0.70	0.40	-0.48
Guatemala	0.11	0.60	0.20	+0.09
Honduras	2.00	1.60	0.30	-1.70
Nicaragua	0.44	1.30	0.90	+0.46
Regional Average	1.03	1.03	0.61	-0.42

CIRI Worker Rights Scores 1981-2009 Averages

The limitation of the CIRI system is that it is not designed to reveal the underlying processes leading to change, or alternatively processes leading to an

unchanged score. A score of “1” such as that received by the Dominican Republic about 90% of the time indicates that the government allows workers to form unions and to strike but does not explain which other labour rights problem or possibly multiple problems prevent a score of “2” from being given. Similarly a score of “0” does not indicate whether problems occur with respect to both organizing and strikes or possibly one without the other. Further, it does not indicate whether freedom of association problems exist in conjunction with other labour rights problems such as forced labour, discrimination or child labour.

To address the puzzles and unanswered questions from CIRI, I turned to more recent monitoring projects and began to consider taking a qualitative rather than quantitative approach for the research. The 1998 ILO Declaration on Fundamental Principles and Rights at Work, “Core Labour Standards” spurred considerable interest in methodologies to monitor compliance with labour standards. One such approach under development was a project of the US-based National Research Council of the National Academy of Science (National Research Council 2004). The project aimed to establish a world-wide database to aid in labour standards monitoring and to influence data collection and analysis methods. Its 2004 publication identified several problems in monitoring compliance with labour standards. These included (1) problems defining the specific obligations of countries to comply with labour standards, (2) problems with identifying indicators of compliance or non-compliance, (3) problems associated with sources of information and (4) problems associated with making appropriate inferences (National Research Council 2004, Moran 2005). The project was subsequently unfunded and no database was ever established but the outline of compliance monitoring challenges was nevertheless a useful guide in

shaping the problems that my research method would need to address. In order to address the problems identified by the National Research Council and the limits of systems such as Cingranelli and Richards I decided I needed learn about the history of the region and gain knowledge specific to each of the countries in my study.

E. Step Five: Country Studies

The next step was to research and write background papers on each of the six countries. In addition to historical context and employment systems, I was also able to identify actors and available data evaluating labour standards compliance. In the course of this research I was able to explore country specific themes such as corruption, racism, historic development of trade union movements and the extent of the informal economy. The timing of this part of the research coincided with intensifying conflict and debate within DR-CAFTA countries over ratification of the trade agreement. As a result, many of the reports on labour standards compliance in the region first described and then made judgments about respect for labour standards for the purpose of either supporting or arguing against the trade agreement.

The model for the country studies was the country-study that I completed on the Dominican Republic for my dissertation for the masters' degree. The dissertation was also an initial and rough attempt to apply institutions theory to explain persistent labour rights enforcement problems in the Dominican Republic. The data that I examined for the six country studies included Spanish and English language qualitative reports on labour standards in each country from NGO's proposing or using different approaches to examine labour rights, the ILO Committee of Experts (CEACR) Individual Observations and Direct Requests, the

International Trade Union Confederation (ITUC) Annual Surveys of Trade Union Rights, U.S. State Department Human Rights Reports and academic monitoring articles and systems proposed by the U.S. National Science Foundation.

It was immediately apparent from these diverse sources that judging labour rights performance is sometimes contentious and conflictual. These divergent compliance pictures have continued throughout the research. For example, non-governmental organizations and the ILO were extremely critical of Costa Rica's protection of freedom of association and right to collective bargaining while the US State Department characterizes Costa Rica as respecting and protecting the rights (ILO CEACR 2009 Individual Observation Costa Rica; US State Department 2009). Occasional conflicts between sources especially those concerning Costa Rica and Nicaragua continued but generally there was substantial agreement as for example on El Salvador and Guatemala. The country studies ranged from 40 to 60 pages. The country studies are summarized in Chapter 3.

In the process of trying to incorporate the country studies into the body of the thesis, it became apparent that they were overly long and descriptive. They were useful in becoming familiar with each country but not helpful in generating ideas and approaches to comparisons across the countries. In the process of writing the thesis, I re-examined and updated the content of the country studies with additional material. In addition, I re-worked them into a comparative study to identify potentially important differences and distinctions between the countries. To do this I searched for how others had done country comparisons within regions. Roberts (2007) had a system based on examination of import substitution policy differences across the countries. I tried this approach in an

early version of the case on Freedom of Association but its usefulness was very limited.

Ultimately I borrowed aspects of Itzigsohn's (2000) comparative developmental study of Costa Rica and the Dominican Republic and in particular his use of Evans' (1995) State Capacity for Institutional Action and Standing's (1991) Labour Market Regulatory Regimes to facilitate meaningful comparisons from among the six countries to carry forward through the two case studies. In addition, for the freedom of association case study, I kept but narrowed Robert's idea about unions' role in politics by limiting consideration to the uniquely distinctive relationship between Nicaraguan unions and the Sandinistas. These frameworks were incorporated to facilitate comparisons among the countries but not a key outcome of the project.

F. Step Six: Research Questions

With deeper knowledge of country specific history, employment systems, patterns of labour rights violation and sources of documentary evidence I developed the following three research questions for the project:

- How are formal commitments such as ILO Convention ratifications disregarded in practice?
- Is there cross-national variation in how this disregard occurs?
- Does the formulation of the ILO Conventions and their interpretation influence their disregard?

The first two research questions developed over the same time as I reflected on the puzzles and limitations in the labour standards monitoring literature and as I became more knowledgeable about the countries through the country studies.

The third question arose after I began to more closely examine the ILO conventions underlying Core Labour Standards. The ILO conventions themselves had distinct historical and political contexts contributing to their content and to their adoption. In an institutional sense, the conventions were institutional settlements made at particular moments by the social partners at the ILO. Once adopted, the conventions continue to be interpreted and for some of the conventions I examined such as forced labour, were re-interpreted in light of new or evolving employment practices. This made the ILO conventions less a one-dimensional list of obligations and instead required that they be considered in a more dynamic way. It raised the question of how the content of the conventions and their interpretation by the ILO influence how states implement or disregard them.

G. Step Seven: Building a Theory and Diagnostic Tool

With these research questions before me, I began reading the institutions and compliance literatures, deepened my knowledge of each and synthesized the two literatures together into the chapter on literature and the theoretical framework (Chapter 4). I presented this work at a PhD seminar in Trier Germany and received valuable critiques from my advisor and others in attendance. With this valuable feedback, I found that the compliance theories I had examined under emphasized the role of power and conflict relative to their prominence in the work I had done on institutions. I set about analyzing the absence of power and conflict in the compliance theories I was using and adjusted the framework to give power more prominence. The chapter on the theoretical synthesis is very dense and not workable as an actual tool for analysis. As a result, I drew a theoretical framework from the synthesis, shedding components that were not absolutely

necessary, making the role of power more explicit and translating the theory into an analytical tool to guide the theory's application to evidence. The literature review and synthesis from institutions and compliance theory is found in Chapter Four and the analytical tool is in Tables 4.2 and 4.3 at the end of chapter 4.

H. Step Eight: Putting the Theory and Method into Operation

1. Case Study Research Process

Putting the theory and analytical tool into operation involved the collecting of evidence as guided by the tool to allow identification of specific patterns of disregard for the ILO conventions as well as cross-national variation in respect or alternatively, disregard for conventions. I carried out two case studies to test the approach. The case study process involved (1) selecting one of the core labour standards, (2) identifying the relevant labour rights obligations, (3) gathering evidence of performance and institutional patterns, (4) analyzing the evidence using the theoretical tool developed from institutions and compliance theories, (5) comparing each country's performance to their obligations and to the performance of one or more other countries, (6) identifying compliance interventions using compliance theory and (7) identifying gaps in the ILO system of obligations.

The evidence selected for use and the process for gathering it were theoretically driven by compliance theory. Harold Koh argued that gaining compliance with international legal norms such as ILO Conventions is dependent upon processes in which a group such as the ILO Committee of Experts receives criticisms of a state's performance and is able to test and define the norms in relation to the state and articulate judgments about their violation or respect of the norm (Koh 1998, p. 650).

The Committee of Experts interprets the meaning and application of ILO Conventions in its process of monitoring and supervising a country's compliance

with the ILO Conventions it has ratified. The Committee examines reports submitted by governments as well as communications, or ‘shadow reports’ often from trade unions or other nongovernmental organizations that challenge the government’s assertions of compliance with ILO conventions.

The CEACR publishes neither the government reports, nor communications from trade unions critical of government compliance. Instead, the Committee reports its findings to the annual International Labour Conference. In addition, the Committee reports its interpretations and findings in Observations and Individual Direct Requests referenced to specific countries. The Committee also undertakes an annual General Survey in which it examines country reports from ILO member states on one specific labour standard for which the country may or may not have ratified. Here again, the Committee does not publish the government report nor the shadow reports and instead submits its findings and interpretations of the labour standards to the Governing Body of the ILO.

To mirror the process of the CEACR, the methodology called for the use of evidence from a variety of perspectives including narrative documentary evidence from U.S. State Department Human Rights Reports and nongovernmental organisation reports from ITUC and the Asociación Servicios de Promoción Laboral (ASEPROLA). A central source of narrative evidence came from Individual Direct Requests and Individual Observations of the CEACR. The use of these distinctive perspectives in documentary form also mirrors the *interactions* envisioned by Koh.

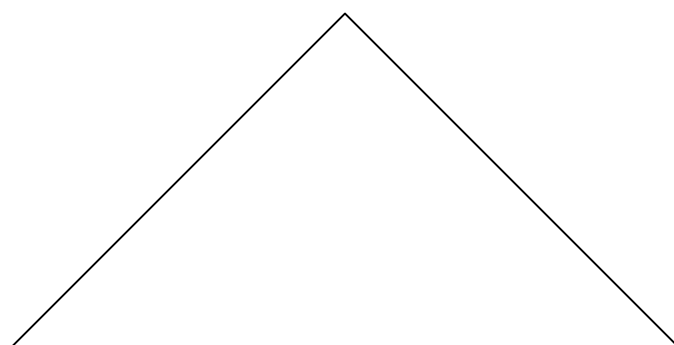
The distinct perspectives in these documents represent at least some of the collective voices in debates over compliance with ILO conventions and core labour standards. Ultimately, a transparent assessment based on these sources

explicitly allows independent evaluators to identify where they disagree within the assessment methodology (Moran 2005). In the end, the goal is not a technical debate over compliance with ILO Conventions but a wider debate about how to involve all sectors of society toward progressively achieving respect for the rights. The tool is intended for use with publicly available material and not meant to establish the ‘authoritative’ or ‘whole’ story. Nevertheless because it is theoretically based, the diagnostic and compliance interventions that arise from the tool’s use can be helpful in debates about the status of specific labour rights.

In keeping with compliance theory, ILO sources at one corner of this triangle are treated as the most authoritative. The US State Department Human Rights Reports take up another corner of the triangle offering a sceptical perspective towards international human rights. For example the US State Department reports treat obligatory overtime as a matter of working conditions rather than forced labour. The International Trade Union Confederation (ITUC) and non-governmental organisations fill the final corner of the triangle offering a distinct perspective sometimes critical of ILO or US State Department perspectives.

Figure 2.2 Evidence for Case Studies

ILO Direct Requests and Observations



**Non-governmental groups:
ITUC, Asociación Servicios
de Promoción Laboral
(ASEPROLA)**

**U.S. State Department
Human Rights Reports**

2. Forced Labour Case Study

The first trial case concerned all of the forms of forced labour in the evidence. Later as a result of my evaluation of the trial, the case focused on two aspects of forced labour— obligatory overtime and trafficking. The second case study examined anti-union discrimination and overall respect for freedom of association and right to collective bargaining.

The trial case study on forced labour was selected because it is the least controversial of the core labour standards as it is tied to the abolition of slavery. For the other core labour standards, there remain counter-arguments about the desirability of compliance. Child labour is argued to be a necessary step to development for example while freedom of association is characterized as undermining development (Engerman 2003). In my reading to date, no one had argued for the re-establishment of slavery. I thought I could start from the simplest case and then move through more contested core labour standards.

The research process for the case study on forced labour involved inter-related steps. First, documentary evidence of forced labour was gathered from sources, intended to mirror the transnational legal process in which the ILO CEACR considers reports submitted by State parties as well as shadow reports submitted by national and international labour organizations such as the ITUC.

Second the documentary evidence was divided by country into the specific forms of forced labour such as obligatory overtime, trafficking and forced prison labour. Third, institutional components of rules, interpretations, enforcement, social norms, social conventions and institutions from other realms of social life were sorted and analyzed to discern ingredients and institutional arrangements supporting forced labour as an enduring practice. Fourth, it was necessary to identify the ILO compliance obligations including their context in history and their application to obligatory overtime and trafficking. Fifth, the institutional components and outcomes were analyzed in comparison to compliance obligations arising from ILO Forced Labour Convention Nos. 29 and 105 obligations.

Finally, when these steps were completed, two kinds of compliance analysis were possible. First, using Koh's compliance theory framework, institutional conditions associated with non-compliance were linked with multiple compliance interventions. This allowed the identification of complex and often multiple interactions and combinations of conditions and causal paths to forced labour practices (Ragin 1987; Rihoux 2006). Second the compliance obligations arising ILO Convention Nos. 29 and 105 could be analyzed and compared to each other and the social reality of forced labour practices.

The first lesson from the case study was that the idea of a *Core Labour Standard* such as *elimination of forced labour* was a label that belies complex compliance regimes involving differential obligations for state imposed prison labour, eliminating trafficking in persons and forced obligatory overtime. In fact, after looking at the evidence, there was very little overlap in institutional arrangements across these different forms of forced labour. Nevertheless, I compiled and analyzed the evidence across prison labour, traditional forced labour, trafficking and obligatory overtime for all the countries. The results were unruly, not very meaningful and ultimately were mostly a fine-grained description of the violations as employment practice institutions. The most interesting results from this work on the first case was discovering how the ILO's obligations although they came from the same two conventions varied for each different form of forced labour.

I learned from this observation that the analytic tool does not explicitly or sufficiently address the fact that the ILO convention obligations that anchor it are themselves, imperfect institutions that come about as a result of power asymmetries, compromise and struggle. Employment practices that one would expect would violate an ILO convention sometimes actually comply with it, as is shown in the case study on forced labour in chapter 5. This unanticipated outcome caused me to pay particularly close attention to perverse outcomes in which employment practices were not violations of conventions.

Through the process of research it became increasingly apparent that the study of ILO core labour rights, as a whole entity, would not be pragmatic. Upon closer examination of the rights through the course of the research, it became clear that the labels identifying the four core labour rights are oversimplifications. Each

one of the rights labelled Core Labour Rights entails multiple and inter-related rights and facets of rights. The necessity for further refinement of selection within Core Labour Rights became apparent. Core Labour Rights may be a useful shorthand device for purposes of debate but as a concept for theoretical and empirical inquiry, it was not manageable for this project. I came to realize that the most useful or relevant unit of analysis was not each “Core Labour Standard.” Based on feedback from the case study I set out to try again with a more modest goal to compare two forms of forced labour—trafficking and obligatory overtime across the DR-CAFTA countries.

3. Freedom of Association Case Study

Based on modest success with the smaller comparisons I set out to expand the scope of the work in the next case study on freedom of association. Freedom of Association and Right to Collective bargaining was selected as the second case for three main reasons. First, it was in the context of association and bargaining rights working with immigrant union janitors that my interest and curiosity for understanding more about labour rights violations as institutional employment practices began. Second, association and bargaining rights are directly responsive to the puzzling convergence of the CIRI scores and method I had examined at very early stages in the research. Finally, it presented a worthwhile test for the analytical approach that I had developed because there are so many inter-related aspects of freedom of association. It presented an opportunity to work at institutional analysis at a finely grained level of one aspect of freedom of association as well as at a higher level of abstraction examining freedom of association as a whole system.

I also selected freedom of association because it was directly relevant for comparison purposes to Cingranelli and Richards' system. Additionally, freedom of association has also been among the most neglected of the core labour standards. For example, since the establishment of Core Labour Standards in 1998, the ILO Committee of Experts has done no further work on freedom of association in general surveys. Some of its former work and general surveys are being removed from access the ILO's web site because they are so dated.

To do this case study, I took a different approach than the forced labour case study and experimented with two different levels of institutional analysis. The first, like the obligatory overtime study, examines anti-union discrimination, one aspect of freedom of association. The second level of analysis was at the configurational level by categorizing the complex web of inter-related rights into categories: rules that prevent workers from organizing into unions, rules that control/limit unions once they come into existence and rules that help unions go out of existence. For this, I used the idea of characterizing a state's policy towards trade unions or *regulatory objective* based on Roy Adam's 1992 work. Looking at the overall configurational level, state policies and institutions could be regarded as *repressing, tolerating or encouraging* freedom of association and right to collective bargaining. I also, tested an idea about the role of institutional hierarchies on state policy and institutions related to freedom of association based on the work of Roberts (2007) arguing that union roles in politics is an institutional hierarchy influencing respect for freedom of association.

III. Overcoming Obstacles in the Research Process

For both case studies I returned to the National Academy of Science project and the problems it identified as necessary to deal with in labour standards

monitoring: (1) problems defining specific obligations of countries to comply with labour standards, (2) problems with identifying indicators of compliance or non-compliance, (3) problems associated with sources of information and (4) problems associated with making appropriate inferences (National Research Council 2004, Moran 2005). Below is how I addressed the challenges:

A. Identifying Specific Obligations of DR-CAFTA Countries

In this project, the obligations of DR-CAFTA countries to comply with labour standards is defined explicitly by ILO Conventions and their interpretation by the ILO Committee of Experts as well as the ILO Committee on Freedom of Association. These obligations are well established, but not necessarily broadly known although spelled out in the Conventions themselves as well as in subsequent ILO publications and cases. All six DR-CAFTA countries have ratified all of the ILO Conventions underlying the Core Labour Standards. Even if they had not all ratified the standards, the ILO Conventions would still be useful benchmarks for purposes of defining country obligations.

B. Identifying Indicators of Compliance or Non-Compliance

The National Research Council did not seek to authoritatively delineate between categories of compliance or set authoritative thresholds (Moran 2005 p. 150). Nevertheless there have been attempts to create indicators based on the ILO (Böhning 2003) and U.S. labour standards (Cingranelli Richards 2004). My initial goal was to create an indicator system based on ILO Conventions because I thought it would make comparisons between countries meaningful. In the end, I simply made my own qualitative assessment based on comparing the evidence I had gathered in each case to the ILO obligations. Very often there were diplomatic yet explicit indications of non-compliance in the documentary

evidence from the ILO Committee of Experts observations and direct requests that were part of the documentary evidence.

C. Problems Associated with Sources of Information

A tremendous amount of information and guidance has emerged since 1998 on collecting and evaluating data concerning labour rights. This has emerged from the ILO as well as from independent academics and from government sponsored research such as the U.S. National Research Council (National Academy of Sciences 2004). There is also an increasing amount of information available from wide-ranging sources such as trade unions, non-governmental organisations, government ministries (trade, labour etc.), international human rights groups and international trade union confederations. Despite this expanding body of information, there were challenges in data/evidence collection because (1) some rights still suffer from low levels of data (Bales 2005), (2) the glut of data on other rights brings its own challenges and limits which need to be dealt with (Compa 2005; Moran 2005) and (3) research processes and selection of sources of data and evidence needs to be transparent so that assessments and inferences based upon them may be contested (Moran 2005).

On balance, in looking for evidence upon which to construct patterns of rights enforcement, two overarching goals were important. First, it was important to expansively look for a variety of sources because it broadens the base upon which the patterns are established and secondly it is important to critically evaluate the sources in terms of whether they are individually and collectively:

- Reliable
- Representative
- Comparable
- Unbiased

The data collection process began over the course of producing country studies that included investigating preliminary patterns of labour rights and violations. Given the nature of holistic assessment, which is “problematic and contingent,” these problems cannot be erased but rather accounted for in research design by having a structure and research process which is revealed transparently and explicitly (Moran 2005 p. 150). Such a process of “thorough, transparent” assessment “allows alternative evaluators to identify where they disagree in assessment” (Moran 2005 p. 147).

D. Identifying and Solving Problems Associated with Making Appropriate Inferences

The research process and design outlined above should lead to the creation of a body of evidence with which qualitative comparative analysis could be used. The strategy in answering the research questions involves using the analytical tool to systematically assess labour rights enforcement outcomes relative to ILO obligations and then linking the outcomes to “combinations of causally relevant conditions” in the form of formal and informal institutional arrangements (Mills et al 2006 p. 624). Comparative analysis is well suited to this goal and entails “comparing similarities and differences... to uncover empirical relationships between the presence of key explanatory factors” (Landman 2006 p. 66). Two different research designs enable the isolation of explanatory factors and an ability to link them to observed outcomes: ‘most similar systems design’ (MSSD) and ‘most different systems design’ (MDSD) (Przeworski & Teune 1970). MSSD compares different outcomes across similar countries, and MDSD compares similar outcomes across different countries (Landman 2006 p. 66).

Both designs originate in Mill's 'method of difference and logic of agreement' (Landman 2006 p. 66). Ragin argues that comparative methods based on Mill's method of difference and logic of agreement, if used in a step-wise process, can help to categorise different "patterns of multiple causation" and help to elaborate "crucial differences between positive and negative cases" (Ragin 1987 p. 44). In this way, qualitative comparative analysis "leaves room for complexity" (Rihoux 2006 p. 682). The case studies bear out that complexity and multiple causal pathways are relevant in studying labour rights. One example can be seen in the freedom of association case, where Guatemala and El Salvador achieve similar outcomes but through distinctive institutional arrangements, the former relying on social conventions of violence and the latter relying on the enforcement of repressive rules.

Systematic comparisons of labour rights outcomes allow evaluative inferences to be drawn based on comparing the outcomes of each right to international obligations. Comparisons and inferences can also be made across countries with respect to one or more labour rights. Using the institutions and compliance frameworks including concepts of complementarities and internalization to make such assessment creates a holistic alternative to current quantitative assessment methods (National Research Council 2004; Böhning 2003; Cingranelli-Richards Human Rights Dataset). It is modelled on transparent replicable methodologies from labour rights monitoring and newly emerging human rights methodologies (Moran 2005; Landman 2006). Transparent, replicable assessment of labour rights enforcement may also contribute important information to debates about the effectiveness of the current international labour rights regime.

Comparing labour rights outcomes with patterns of institutional arrangements sheds light on the complex interactions that protect labour rights or alternatively sustain their violation. As the evidence shows, labour rights violations result from multiple and combinatorial causation (Ragin 1987). Systematic analysis helps to identify different recipes for violations as well as recipes for respect and what differentiates them. The inferences that are drawn from the research are very limited. First, inferences are limited to particular case and context and relate the particular labour rights problem to the corresponding intervention based on Koh's compliance framework. One other area where inferences may be usefully drawn is where an institutional hierarchy is found to influence respect for labour rights.

In sum, the advantages of employing qualitative comparative analysis as a methodological strategy and approach is its usefulness in explaining and interpreting diverse experiences and in helping to corroborate or refute theories-theory testing (Ragin 1987 p.53; Rihoux 2006 pp. 683-684). The process by which this occurs has been described as a 'dialogue of ideas and evidence' by engineering a confrontation between theory and data (Ragin 1987). With respect to labour rights enforcement debates and controversies, this project seeks to utilize qualitative comparative analysis to interpret the diverse experiences of Central American countries in enforcing labour rights and to test a theory about why states and actors do or do not comply and enforce norms (Koh 1998).

Chapter 3

DR-CAFTA Countries in Comparative Perspective

I. Introduction and Background

A. Why Country Studies?

During the first year, my research focused on in-depth studies of each of the five Central American countries, including learning and documenting the main sources of information and data. The objective was to prepare comprehensive literature reviews for each of the countries that would provide background and understanding of the political economy of each country in the study, as well as an introduction to the employment systems in the countries. It also made evident the specific labour rights violations in the region generally and in each country specifically. The country studies also served to document sources that address all six countries, to become familiar with areas where information and data is lacking and to design the research for the coming years to account for these shortcomings. The in-depth studies provided the background on which the methodology for data collection and cross-country comparison could be tailored.

B. Comparative Method

In contrast to the individualized country studies, the research project is comparative with the goal of examining respect for labour rights across Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua—the countries that are treaty participants in the Dominican Republic-Central America Free Trade Agreement. Comparative research and its design raise questions about the purpose of comparisons to be made and the appropriateness of “things” being compared. In this case, the theoretical framework presented in Chapter 4 guides the comparisons. In addition to theory,

comparative methods can also be fruitfully guided by close attention to history and context (Ragin1987).

The appropriateness of the countries for purposes of comparison is based on “most similar” comparative design (Przeworski and Teune 1970). Chapter 1 of the dissertation began to outline the appropriateness of this group of countries as comparable cases. Important similarities and shared characteristics are historical and include Spanish Colonialism, Catholicism, their relatively small size as peripheral economies, their parallel development paths and models, first as small primary product export-based economies, followed by a period of import-substitution from the 1940’s through the 1980s and a return to export-led models of development since the 1980s (Bulmer-Thomas 187; Perez-Brignoli 1989).

There are, however, important differences among the countries and these may help to explain different levels of respect or disregard for labour rights. The country studies drilled down in each country and examined in great detail its own context including:

- Historical, Political, Economic Contexts
- Employment Systems
- Migration Patterns and Impact
- Legal Frameworks
- Labour Rights Obligations
- Labour Rights Enforcement Assessments

The point of this chapter is different than the country studies even though it is largely based upon them. The purpose of this chapter is to re-examine the social facts in each of the countries and find meaningful patterns of differences that may account for what is found later in applying the theory to the empirical evidence. Re-examining the country studies is undertaken to (1) identify

meaningful differences and (2) to identify possible explanations and sources of the differences

C. Chapter Plan

Following this introduction, Section 2 explains the two main organizing principles behind categorizing the countries in the study. They are *state capacity for institutional action* based on work by Evans (1995) and Guy Standing's (1991) *labour market regulatory regimes*. This is followed by an explanation for how each of country falls within the two sets of categories. Section 3 presents a discussion of why countries fall into the different categories based on critical junctures in which divergences occur. Four specific junctures are proposed and explained as relevant for the purposes of Central America and the Dominican Republic. These are (1) colonial experience, (2) state formation, (3) import substitution and (4) export-oriented development and structural adjustment. Section 4 presents illustrations of how the critical junctures influenced divergent paths for each of the categories represented in the study. Costa Rica is presented for the *developmental paternalistic* category. Nicaragua is presented for the *predatory protective* category and the Dominican Republic is presented for the *predatory repressive* category. As part of the discussion of critical junctures there is also, where relevant, a discussion of the strong influence the United States has played in the internal affairs of the countries. Section 5 presents some discussion of the comparisons and conclusions.

II. Framework for Categorizing Differences

For the purposes of carrying out this re-examination of the country studies, I have adopted the approach taken by Itzigsohn in his book comparing development policy in Costa Rica and the Dominican Republic (Itzigsohn 2000).

Itzigsohn (2000 p. 140) borrows from other theorists setting up the following typologies as points of divergence among the countries: (1) *State Capacity for Institutional Action* (Evans 1995), and (2) *Labour Market Regulatory Regime* (Standing 1991). The two conceptual guides help in the interpretation of the individual country study documents.

The sources for these comparisons and analyses are the individual country studies I authored in the first year and a half, comparative institutional analysis of Costa Rica and the Dominican Republic done by Itzigsohn (2000) and updated data on sources in my original country studies from Bertelsmann as well as Itzigsohn's analysis of Costa Rica and the Dominican Republic and updated country reports from Bertelsmann.

A. State Capacity for Institutional Action

States are actors with authority to establish and implement policy, maintain order, enforce laws, collect revenue etc but their capacity (institutional and political) and objectives vary (Skocpol 1985). State capacity for institutional action refers to a state's regulatory orientation over numerous state institutions and bureaucracies. How a state performs its role has been usefully conceptualised in ideal types by Evans (1995).

Predatory states are states in which central control and bureaucratic norms have disintegrated and corruption rules. Different groups in the state bureaucracy attempt to maximize their own profits by selling their services in the market. There is a market- logic to the state apparatus in every area of state functions and services, contracts and justice. Those with wealth have access and buy state services and others exit the state institutional system (Evans 1995). When predatory states are headed by dictators they take on a specific form of predation

called *neopatrimonialism* (Hartlyn 1998). There are two key characteristics of *neopatrimonial* states. The first is a centralization of power through patron-client relationships and the second is a blurring of boundaries between the state's public interests and the ruler's private interests.

Developmental states are states in which there are well functioning and centrally coordinated state bureaucratic agencies. These agencies are connected to the main economic actors through different organizational networks. The linkages involve the flow of ideas and people between state and economic organizations creating feedback for both. These networks do not, however, diminish the autonomous nature of work in state bureaucracies. These have been called socially connected bureaucracies (Evans 1995).

B. Labour Market Regulatory Regimes

In addition to this general capacity for institutional action, it is useful to also examine the state's specific role in labour market regulation. The state as an actor plays an essential role in establishing the regulatory mechanisms governing relations and conflict between the working class and elites (Howell 2005 p. 21). Guy Standing (1991) developed a typology to characterize distinct state roles in establishing regulatory regimes within labour markets. Overall, the character of the State's labour market regulation may be characterized as tending towards the one of three ideal types:

Protective regimes are those in which workers achieve protective regulations through negotiating with employers and the state and result from the strength of workers' organizations. Resulting regulations (institutional settlements) reflect the relative balance of power. To Standing's definition, I have also incorporated into this category labour market regimes that enable collective

worker organization and negotiation through the absence of repressive regulations.

Paternalistic regimes are those in which the regulations are those legislated by the state either as an attempt to co-opt segments of the working class or as a result of values about the issues held by the elites in office. In other words, regulations do not necessarily reflect the relative class balance of power in society.

Repressive regimes are those in which labour market regulation is designed to limit or completely eliminate collective action on the part of workers.

States may straddle more than one category along these dimensions in their labour market regulation. For example, a state may strongly limit collective action by workers but provide paternalistic regulations on minimum wages or a social safety net for unemployment. Each of the six countries in the study can nevertheless be located within the dimension they fit best in an overall sense. I have categorized the countries in the study based on the country studies performed at the outset of the research project, Itzigsohn's (2000) analysis and updated material from Bertelsmann (2010).

C. Groupings of Countries

Based on these typologies three different groups of DR-CAFTA countries emerge. They are:

Table 3.1

Developmental Paternalistic	Predatory Protective (non-repressive)	Predatory Repressive
Costa Rica	Nicaragua	Dominican Republic El Salvador Guatemala Honduras

D. Assignment of Countries within Classifications

Re-examining the updated country studies and the work on Itzigsohn, countries are assigned into the above groups and brief explanations and rationale are provided for each country's placement below.

1. Developmental Paternalistic

Costa Rica is a *developmental state* with a *paternalistic* labour market regulatory regime. It has a relatively highly functioning autonomous government apparatus free from the kinds of elite capture found in predatory states. It also has had a stronger ability to enforce regulations and a more highly developed and broader coverage by its welfare state than any other country in the study. Costa Rica's economic development and state apparatus has not exclusively focused on enriching a small oligarchy as in predatory states. It suffers from great inequality like the rest of the region but much of its development policy has been directed at maintaining a middle class. There is corruption among public officials particularly in procurement contracts and clientalistic relationships exist but these are not the primary basis of organization of the government and its apparatus.

Costa Rica is among the longest-lived and most peaceful and stable democracies in Latin America. It is the only DR-CAFTA country that put ratification of the trade agreement forward for approval in a popular vote. Much of its bureaucratic structure and agencies are completely free from legislative and presidential control and oversight including their budgets. It is also known for having an independent judiciary. It is the only country in the study that does not rely on the export of labour to provide income support in the form of remittances.

Costa Rica's economy has been relatively successful and the state has played and continues to play a major role in the economy leading and supporting

innovative growth strategies. A good example of this orientation is the historic concern that the country has had with preserving its natural resources and environment as public goods. It has used its environmental quality as a means to develop its tourism industry, which now accounts for 20% of total export earnings (Bertelsmann 2010 p. 4).

Costa Rica is oriented towards a paternalistic labour market regulatory regime based on its historic discouragement of trade union activity accompanied by a strong emphasis on minimum wage and other laws regulating working conditions. When structural adjustment related policy changes increased poverty, the government prioritized poverty alleviation in food support and housing. Costa Rica was the only country not plunged into a domestic economic crisis during structural adjustment largely because of the government's emphasis on social consensus and support.

2. *Predatory Protective*

Nicaragua is a *predatory* state with periods of time in which it adopts more developmental characteristics and elements. Its regulatory regime in labour markets is *protective* based on its startling lack of *repressive* regulations. In many ways, Nicaragua is a hybrid. It shares a solidly *neopatrimonial* past with the Dominican Republic, El Salvador, Guatemala and Honduras. It is highly politically polarized but more peaceful than similarly polarized El Salvador and Honduras. It retains a small economic elite and there remains a massive chasm between the rich and the poor. It also continues to suffer from corruption in its state apparatus and judiciary but these no longer follow narrow demarcations of economic elites and are instead based on political competition between two highly polarized political parties. The parties and their members are organized around

deep programmatic and ideological differences. The leaders of the parties have informally agreed to share power through government institutions by influencing them in traditionally predatory ways. There is blatant politicization of state institutions.

The Sandinistas took power in a revolution in 1979 and ruled democratically until their electoral loss to the liberals in 1990. The Sandinistas came back into power in 2006 elections, defeating the liberal party. Both parties share predatory tendencies but there have been moments and elements of a more *developmentalist* approach. After the Sandinista Revolution in 1979 the government expropriated lands, companies and wealth and broadly collectivized them. Somoza era elites lost their central place in politics and politics became dominated by political collective actors who compete in elections rather than through violence. When the Sandinistas lost the elections in 1990 to the liberals, the liberals did not reverse the Sandinista's expropriations or revert to neopatrimonialism. Instead, liberals implemented orthodox structural adjustment policies beginning in the 1990s. When they returned to power in 2006, the Sandinistas resisted further neoliberal reforms but have not sought to reverse existing policies.

Nicaragua is very poor, the second poorest country in the region and is highly dependent on foreign aid. Nevertheless there has been more effort and resources of its own spent in trying to address poverty and education under both Liberal and Sandinista rule. In stark contrast to all the other countries, Nicaragua is not repressive and there is some evidence of protection in the form of meaningful bargaining with public sector unions. Its lack of repression can be seen in its unrestricted freedom of association and evidence of workplace

organization dating from the Sandinista Revolution. Much of the agricultural sector is organized and overall about half of the workforce is organized. Its lack of repression is also seen in the sharp public debates about policy. The Sandinista government continues to emphasize collective organization since coming back into power in 2006 establishing local collectives (Consejos del Poder Ciudadanos (Citizen Power Councils) to consolidate Sandinista political control at local levels.

3. *Predatory Repressive States*

a. The Dominican Republic

The Dominican Republic is considered a *Moderately Predatory State*. It is also *repressive and mildly paternalistic*. Its repressive regulatory orientation differs from others such as El Salvador in that its repression is expressed through inaction and non-enforcement rather than by design. Itzigsohn argues that the country has more recently begun to drift towards a *developmental* orientation (Itzigsohn 2000 p. 35). Nevertheless, the Dominican Republic has a long history of military dictatorship followed by democratically elected leaders who maintain neopatrimonial governance. Its military and police are implicated in narcotics related crime, trafficking in persons and repression. It's a country known for enacting patrimonial legislation that is not applied in practice. The Dominican Republic is one of the cases that is more fully explained in reference with specific critical junctures in the next section.

b. El Salvador

El Salvador is *predatory and repressive*. Despite its peace agreement and democratic elections since 1992, the state apparatus is firmly in service of the country's small oligarchic elite even while the country has enthusiastically implemented neoliberal reforms. Only oligarchic elites benefit from market activity and also benefit from the country's judicial system and many other

agencies. There are few efforts to remove corrupt government officials. The military has been implicated in participating in and directing narcotics trafficking.

The state safety net is very small and foreign donor governments, not the government of El Salvador largely finance poverty reduction projects. It has a tax burden that is among the lowest in the region. There is a low level of schooling partially due to the state's maintenance of illegal school fees. Poverty has increased and has led to more subsistence agricultural activity and the exit of poor people from the market economy. The social security system is privatized and foreign owned. Remittances from Salvadorans working abroad have increased during the global financial crisis and play a significant role in poverty reduction but Salvadoran migrants do not have political rights at home.

El Salvador is *repressive in its labour market regulatory regime*. The country differs from the Dominican Republic in its failure to soften its *repressive* regulations or co-opt segments of the workforce with *paternalistic* regulation.

It is highly polarized along class lines with active left and right wing political party rivals. Along with Guatemala and Colombia, El Salvador is among the most violent societies in Latin America. It has recently criminalized popular protests by enacting anti-terrorism laws and applying them to protests against privatization. This has enabled the country to respond to social protests with military intervention. Salvadorans have the lowest level of faith in the practical effects of protest in Latin America. Trade unions are prohibited in the public sector. After the country ratified ILO Convention No. 87 on Freedom of Association, El Salvador's Supreme Court declared the Convention unconstitutional under Salvador law.

c. Guatemala

Guatemala is a *predatory and repressive* state. Guatemala's development model has remained consistent despite the 1996 peace accords ending a civil war that started in 1960. The economy remains based on the extraction of natural resources (gold, silver, copper etc), low utilization of formal labour and remittances from Guatemalan migrants abroad. Enactment of neoliberal reforms such as privatization have perpetuated and deepened the inequalities and privileges of the elites.

There are three different groups composing Guatemala's elite. Military leaders control some state institutions and are connected to another group of elites who head criminal and drug trafficking networks. Elites from among criminal networks have also gained access to state agencies and even pay congressional representatives. There is also a small group of urban oligarchic elites. Their organization successfully opposes policy reform challenges to the status quo such as tax reform. Guatemala has one of the lowest tax rates in the world. In surveys, Guatemalan elites have said that they support democracy only as long as it does not challenge their position of dominance.

In Guatemala, the oligarchy does not have its own political party and instead financially supports multiple parties through formal and informal channels. There are numerous fragmented political parties that are based on personality and clientalistic relationships, not policy or programmatic differences. No governing party has been reelected to the presidency since the 1996 peace accords. Predatory influence of elites over the state apparatus remains constant however. Much of the former state apparatus has been dismantled as a result of the peace accords, but the new apparatus remains influenced or undermined by the

elites. Access to state services and resources remains firmly based on power relations. Even efforts to decentralize bureaucratic institutions to more local levels provide opportunities for earmarking government resources along clientalistic lines at local levels. When people in government institutions exhibit independence, as has occurred occasionally in the judiciary, invariably threats of violence and often actual violence including assassination follows.

Guatemala is also strongly repressive in its labour market regulatory regime. It is the next most violent country after El Salvador and like El Salvador is highly polarized along class and racial divides. Unlike El Salvador, Guatemala does not have an organized left, leaning party. Repression in Guatemala is largely based on pervasive violence that is committed with impunity. The government calls upon long shelved cold war era laws that allow them to suppress protests and strikes. Protests are considered criminal and can result in lengthy prison sentences if the protest disrupts private enterprises that contribute to Guatemala's economic development.

Like El Salvador, there is a near total absence of *paternalistic* labour regulation or a welfare state. The absence of paternalistic labour market regulations is so severe that the main option for Guatemalans is exit and legal or illegal work abroad. The real minimum wage has declined 11% between 2008 and 2009. Remittances from Guatemalans working abroad are the main form of income support.

d. Honduras

The overall character of Honduras is *predatory and repressive*. In contrast to El Salvador and Guatemala there are some counter tendencies in enclaves among urban middleclass areas where the state apparatus is more independent of

oligarchic elites. There are also some exceptions to the repressiveness of the state evidenced in the incorporation of some labour unions and union activity in the public sector.

The elite in Honduras do not appear to be as unified as those in El Salvador and Guatemala. Like Guatemala and El Salvador there is a military element, an economic oligarchic elite and also clandestine criminal networks tied to drug trafficking. The criminal elite work inside state agencies and appear to be connected to military, economic and political elites. Conflicts and competition between and within elite factions as well as between factions and the government are often settled violently. Efforts to combat corruption and clientalism in state bureaucracies are largely coordinated campaigns to improve the reputation of the political parties without any change in bureaucratic governance.

Elites also define the policies of the two political parties that dominate election competition and so there are not ideological or programmatic differences between the parties. The leaders of opposing parties are often linked to each other and the same families and interests. The competition between the parties is over the clientalistic spoils of electoral victory that are then delivered through the state apparatus.

Overall, like El Salvador, the expansion of the economy from its traditional agricultural exports into textile assembly and other low cost consumer goods and greater integration in the global economy have benefited Honduras' oligarchic elites. In addition to acting through state institutions and the judiciary, elites also control the country's media through ownership, informal networks or bribery and intimidation when necessary.

Honduras is *repressive* with some possible contrary elements of *protection*. Like El Salvador and Guatemala it is extremely violent. Labour and civil society activists who challenge social and political power elites are threatened and victimized by violent attacks and assassination. The state violently represses protests. On the other hand, middleclass unions of state employees, teachers and physicians with strong political ties to the parties are tolerated and are even able to exert pressure on the government through strikes as occurred in public health. Only one-third of the population lives above the poverty line.

Structural adjustment inspired policies cutting government social spending and public sector employment have deepened inequalities in health and education. Like El Salvador and Guatemala, Honduras is heavily reliant on remittances for support of its poor. Unlike the Dominican Republic there is no evidence of ameliorating paternalistic regulation to offset its repressive nature but given its tolerance of unions in at least some sectors, it is possibly more *protective*. Notably, protective regulation in the case of Honduras, may well be an outcome of clientalistic relationships between the unions and elites. It is unclear if Standing anticipated this possibility in his ideal type.

III. Critical Junctures

Each country comes to belong somewhere on a continuum within the dimensions as a result of the cumulative effects of history and the divergent choices made over the course of that history. Power relations in systems of politics and economic production explain divergence particularly during periods of transformation or ‘critical moments’ in which power balances shift, resulting in new areas of conformity and diversity. These shifts in turn influence variations in

the trajectory of the state, labour movements and industrial relations within each society (Collier and Collier 1991; Bulmer-Thomas 1987, p.267).

At these critical moments a country's tendency to be *developmental* or *predatory* and its tendency to be oriented towards *protective*, *paternalistic* or *repressive* labour market regulation may be reinforced, amended or overthrown. As part of locating the six countries in terms of their respective capacity for institutional action and labour market regulatory regime, four critical moments will be examined. These are based on Bulmer-Thomas (1987) Itzigsohn (2000):

(1) Colonial Experience: Some institutional inheritances had origins in colonial times. These institutional traits came in the process of establishing Spanish rule. They include the geographic location of elites, their cohesiveness and competitiveness, their proximity to and relations with colonial centres of power in Guatemala. A key inheritance is the forms of coercion in labour that developed based on the kinds of work performed and the availability of land.

(2) State Formation: The formation of newly independent nations in Central America and the Dominican Republic were critical moments and the countries diverged between relative peace and unity or protracted conflict and war. The first formal state institutions for production and politics were established and, depending on the process and choices, some countries developed strong military institutions rather than social democratic institutions.

(3) Import Substitution: From the end of World War Two, Latin American countries attempted to industrialize, transforming their economies from their agricultural exports base to domestic production and consumption of manufactured goods. They did this by creating barriers to the import of products to protect local producers of the same products. They also indirectly subsidized

industrial development by enhancing public expenditures and services and increasing the social wage (Itzigsohn 2000 p. 43). The process began in the 1930s in Latin America, but started much later in the Dominican Republic and Central America.

(4) Post Import Substitution/Structural Adjustment: Import substitution was not a sustainable development model due to its resulting trade imbalances from extensive imports of capital and intermediate goods to support industrialization and rapid exhaustion of internal markets for newly produced consumer goods. Oil shocks in the late 1970s worsened deficits and world-wide recession was accompanied by a decline in prices for agricultural exports. The totality of these circumstances led to a crisis in debt, as well as in social and economic spheres and led to a change from import substitution back to export-oriented development. These changes were accompanied by neoliberal ideology and policy frameworks of opening economies to foreign trade, downsizing of the state and its expenditures and diminishing its interventions in the economy (Roberts 2007; Itzigsohn 2000). There were changes in the economy and also in the State's role in the economy including labour market regulation (Itzigsohn 2000 p. 46). Remodeling the economy based on primary exports, low skilled services, low wage manufacturing and in some cases export of citizens to work abroad and support families through remittances. Nevertheless, there were important differences in how neo-liberal reforms have been implemented and economies restructured.

Using Itzigsohn's model and analysis as a starting point, I used and then extended it beyond Costa Rica and the Dominican Republic to the other countries in the study. This entailed re-examining the country studies to be able to create a

profile of each of the countries in terms of its institutional capacity for action and labour market regulatory regime. Next some expectations for the country's performance are presented based on its categorizations. Finally, in addition to placing the country within appropriate categories and discussing expectations based on its categorization, the historical material in the country studies is re-organized and summarized along the lines of the critical moments to identify potentially important historical underpinnings.

IV. Selected Country Profiles:

A. Costa Rica (Developmental Paternalistic)

1. Historical Contexts

a. Colonial Times

During the period of Spanish colonial rule, Costa Rica was an ignored backwater of little importance to the center of Spanish Colonial power in Guatemala. Land was plentiful and access to it remained open to peasants. Coerced labour was not part of Costa Rica's colonial development.

b. State Formation Background

Dating from colonial time, Costa Rica's elites settled in the country's central valley and did not disperse geographically. In addition, elites were more cohesive than in other countries, sharing the same economic interests and activity focused on coffee production. When conflict among elites occurred, it was not as protracted or destructive as the Dominican Republic and other countries in Central America. There was a brief civil war in 1935 and military rule occurred sporadically between 1905 and 1924. Since the second half of 19th century the Costa Rican state actively promoted its coffee economy but in addition also promoted and funded expansion of education dating from the last quarter of the 19th century.

2. Critical Juncture of Social Reform and Democracy in State Formation

From 1940-1948, Costa Rica was led by two reform minded leaders in succession who had support from a coalition of other reform-minded elites, the communist party, trade unions and the Catholic Church. During this time Costa Rica enacted a labour code, progressive income tax system and created a social security system. By 1948, the election of the next hand-picked successor was contested by an opposing group of conservative elites and young social democrats from the rising middleclass. This latter group prevailed.

The leader of the winning side was a military leader who offered to govern through a junta for eighteen months after which he would hand over the government to the elected leader. This was agreed to and during this time the junta repressed the coalition partners on the losing side including the communists and already weakened trade unions. Nevertheless, the junta also continued to implement the reforms initiated by the reformist group it had defeated. These reforms included abolition of the armed forces, nationalization of banks and insurance companies. The state became an active promoter of economic development in service of the middleclass. When the conservatives took over the government after the junta, they too continued the reforms.

Neither side in the conflict opposed the reforms. Further, the reforms did not fundamentally challenge the coffee oligarchy but rather opened an economic and political space for inclusion of the middleclass. To do this, the elites decided to defeat some of their own more recalcitrant segments but they also defeated the organized communists and trade unionists.

The institutions of the state that developed from Costa Rica's political and economic development were not completely free of clientalism but there was a

higher degree of bureaucratic autonomy allowing them to function freely relative to the Dominican Republic and other Central American countries.

a. U.S. Role

A key element of the process and outcome of Costa Rica's 1948 crisis was the absence of a destabilizing U.S. intervention. Costa Rica was a close ally of the U.S. throughout the cold war and even outlawed its communist party. Further, none of the reforms directly threatened U.S. private or government interests.

b. Import Substitution Era

In Costa Rica, import substitution was implemented by addition to the existing agricultural base rather than as a replacement to it. The state continued to support agricultural exports throughout the import substitution era. Unlike predatory states, in Costa Rica, import substitution had a strong social as well as industrial aspect. The already advanced welfare state was further extended and the state increased its enforcement of regulation of labour markets. Minimum wage laws and the labour code were "seriously enforced" (Itzigsohn 2000 p. 44). Coverage by the social security system increased from 17.7% in 1961 to 83.4% in 1991 (Itzigsohn 2000 p. 44). These improvements occurred in a solidly *paternalistic labour market regulatory regime*. The state improved social conditions in line with its class consensus model while unions remained weak and fragmented and the state discouraged trade union organization (Itzigsohn pp. 44-45). The state encouraged formation of alternatives to unions called Solidarista associations at the firm level and discouraged trade union organization (Itzigsohn 2000 p. 45). Roberts calls this import substitution model "elitist" because it did not rely on mobilizing workers or their organizations and was not as deeply redistributive as other cases such as Nicaragua (Roberts 2007)

c. Export Oriented Development & Neoliberal Reforms

In Costa Rica, the return to export oriented development and neo liberal reforms caused the deterioration but not the dismantling of welfare state. There were more poor people and fewer resources for the welfare state to address the poverty. Similarly, the public sector was reduced but still remained important. Pressures and protests led to ad-hoc policies and social consensus against structural adjustment helped to delay and soften the impact of its implementation. Costa Rica's transition was gradual, with a safely intact *developmentalist* orientation.

These modifications of Costa Rica's neoliberal transition were supported by United States foreign aid during its conflict with Nicaragua. The United States used Costa Rica as a development ideal model and alternative to Nicaraguan revolution. Immediately after the war ended, the United States withdrew the financial support that had enabled the gradualism to occur. Also the aid that Costa Rica received was conditioned on the country's privatizing public companies, the banking system and creating new private institutions to take over formerly public institutional functions. In effect Costa Rica was required to dismantle elements of its system that made it an ideal model in the first place.

Costa Rica's social consensus democratic model also contributed to its relatively gradual implementation of structural adjustment policies. The public popularly opposed cutting social spending and increasing costs of products like electricity. As a result, Costa Rica's structural adjustment was not accompanied by a recession or the devastating social costs that occurred elsewhere. In contrast to its prescribed role retreating from the economy, the government retained its developmental orientation.

The state actively promoted traditional and new non-traditional agricultural exports beyond the Central American market. It also, supported the development of maquilas and Export Processing Zones with tax incentives. What changed was how the state performed its development role. Instead of directly leading development, it switched to facilitating private sector actors to do it (Itzigsohn 2000). Itzigsohn argues that Costa Rica's decision to emphasize low-wage textile assembly nudged Costa Rica away from its *developmentalist* tradition towards a more *predatory* orientation.

Paternalistic labour market regulation remained evident in the neoliberal structural adjustment era with the government focused on the provision of food and housing for the poorest and for the homeless. In addition, the government initiated programs to support self-employment and micro enterprises. Throughout the process, Costa Rica continued to support and enforce its minimum wage laws. Over this period, Costa Rica's overall enforcement capacity suffered as evidenced by the increasing rates of complaints from workers who despite the law were paid below the minimum wage.

B. Nicaragua (Predatory Protective)

1. Historical Contexts

a. Colonial Times

Like Costa Rica and the Dominican Republic, Nicaragua was unimportant to Spain's Colonial center. There were multiple forms of forced labour practiced in early colonial times. Indigenous people were captured and sent into slavery in Panama and Peru to work in mines and others were allowed to remain working in traditional cultivation of cacao, which the Spaniards taxed (Weaver 1994 p. 14). Forced labour was also used in mines, forests, shipyards and indigo plantations and began to decline due to disease (Whisnant 1995 p. 20; Weaver 1994 p. 15).

Labour was scarce but systems to extract labour were less successful and regulated (Europa 2005 p. 654).

b. State Formation Background

Fierce competition over labour, landholdings and wealth developed during colonial times between two competing groups of elites, with former Spanish soldiers becoming the liberals in Leon and upper-class Spaniards becoming the conservatives in the city of Granada. Nicaragua was weak and its independence from Spain in 1821 did not lead to the formation of the state until 1838. There were frequent conflicts between rival groups of elites. Conservative elites dominated in Nicaragua until the late 1890s partly due to miscalculation by and the unpopularity of liberals when they hired a lawyer from the United States, William Walker to invade Nicaragua at their behest. He did so but immediately sought to make the country a U.S. slave state.

State formation and even the “liberal revolution” were incompletely accomplished in Nicaragua. New infrastructure was built to support coffee, bananas, gold and timber export products but the process left significant conservative enclaves largely untouched (Weaver 1994 p. 69 and 89). The process of taking land away from peasants so that they could be made to work through vagrancy laws and other coercive forms of labour were largely ineffective. When coercion was attempted peasants walked off finding vacant land further away. The divided elite could not form an effective alliance to coerce peasants.

2. Critical Juncture of Social Reform and Democracy in State Formation/U.S. Role

In Nicaragua, the critical juncture related to social reform and democracy was largely influenced by United States intervention. The liberal revolution

included creating a separation of church and state, modernizing state apparatus and building a canal through Nicaragua to compete with the Panama Canal. This provoked an invasion by the United States to protect its canal monopoly in Panama. The occupation involved running the Nicaraguan government as well as the economy, including collecting customs revenues on behalf of US banks and companies and established a professional national guard (Weaver 1994 p. 99). Like the Dominican Republic, occupation by the United States helped to bolster strong military institutions rather than democratic institutions.

The invasion and occupation was opposed by liberals led by Sandino and the U.S. could not win so it negotiated a deal to run any possible canal in the future and to run elections and to help set up a neutral national guard with General Anastasio Somoza at the head. A liberal won the election, signed a peace treaty with Sandino who was killed in 1934 by Somoza's national guard. Fraudulent elections in 1937 installed Anastasio Somoza García as President and he ruled until his assassination in 1956 when his son Luís Somoza Debayle took over until his death 1967 followed by his younger brother Anastasio Somoza Debayle. The last Somoza ruled until 1979.

Under the Somoza dictatorships, the Nicaraguan export economy based on beef, sugar, cotton and coffee grew and some industrial development occurred (Europa 2005 p. 655). State apparatus also grew to support the economy and essentially acted to service (Somoza's) own business interests (and those of their closest allies) (Europa 2005 p. 655). Consistent with Trujillo in the Dominican Republic, Somoza controlled 40% of the Nicaraguan economy (Europa 2005 p. 655).

a. U.S. Role

United States intervention has influenced other critical junctures in Nicaragua as well. The resignation of the last Somoza dictator (Anastasio Somoza Debayle) in 1979 was the product of both organised internal insurrection by the Frente Sandinista de Liberación (FSLN) and withdrawal of support from the US after reports of human rights abuses, stealing humanitarian aid in the wake of a 1972 earthquake and the assassination of conservative opposition politician Pedro Joaquín Chamorro in 1978 (Europa 2005 p. 655, Economist Country Report 2005 p. 4). Once the FSLN won democratic elections, the U.S. worked to destabilize the government through trade embargoes and supporting anti-FSLN ‘contra’ fighters (Economist Country Report 2005 p. 4). It is estimated that 250,000 people were forced to flee their homes during the war and approximately 45,000 Nicaraguans were killed, injured or abducted (Europa 2005 p. 656). Peace negotiations began in 1987 leading to disarmament and a framework for elections in 1990 (Europa 2005 p. 656). The FSLN lost the 1990 election to Violeta Barrios de Chamorro and an alliance of opposition parties (UNO) (Europa 2005 p. 656, Economist Country Report 2005 p. 4).

b. Import Substitution

The import substitution era in Nicaragua overlapped with the coming to power of the FSLN and its leader Daniel Ortega. At the time of the revolution in 1979, the economy was devastated by the Samozas. GDP had fallen significantly during the fighting and Samoza’s thefts, and homelessness and hunger were widespread. Import substitution in Nicaragua was deeply redistributive with the nationalization of the entire wealth of the Samoza family and its associates and all of their assets including domestic and foreign banks. They redistributed land to

collectives rather than to individuals. They completely dismantled and replaced the military and police forces and did so through organized groups of workers. The Sandinista built a publicly funded social safety net with government share of GDP rising from 15% to 41% (Bertelsmann 2010 p. 4).

c. Post Import Substitution/Structural Adjustment

The Export Oriented Development model and neoliberal structural adjustment period began towards the end of Sandinista rule by the end of the 1980s in response to mounting debt and inflation resulting from hostilities of the U.S. and economic policies implemented upon coming to power. Structural adjustment began weakly under Sandinista rule and accompanied protests and divisions within the party and between the party and trade unions. With the defeat of the Sandinistas in 1990 to the liberals, structural adjustment policies deepened but did not dismantle redistributive policies arising from import substitution. Poverty reduction continued to be a priority for the liberal party as well.

C. The Dominican Republic (Predatory Repressive)

1. History

a. Colonial Times

The Dominican Republic was a backwater and largely ignored and peripheral to Spanish Colonial centers of power in Guatemala. Land was accessible to peasants. Coerced labour of indigenous people occurred but was for a relatively short period of due to the rapid decimation of indigenous populations and short duration the gold extraction in mines before the Spanish left to look elsewhere (Levitt 2001 p. 31.) By 1520 African slaves were imported to replace the decimated populations of the indigenous (Levitt 2001 p. 31).

b. State Formation Background

Economic elites in the Dominican Republic were not cohesive and historically weaker than military centers of power. Elites were separated geographically and by different economic interests and activities. There were protracted conflicts among elites who did not unite despite external aggression by Haiti. Unlike the countries in Central America, the Dominican Republic gained its independence from Haiti not Spain. State formation began during periods of dictatorship (1886-1889, 1906-1911) and ultimately was consolidated during and after U.S. occupation in 1916-1924. U.S. occupation helped to further develop the status of the military as the strong united elite in the country. Its leader, Trujillo was dictator for thirty years. The consolidation of Dominican state occurred as an authoritarian neopatrimonial regime—the economy, development and state institutions were subordinated to supporting the wealth and welfare of Trujillo.

2. Critical Juncture of Social Reform and Democracy in State Formation

A critical juncture occurred after Trujillo's assassination and the first return to democratic elections. A reform-minded social democrat was elected campaigning on reforms similar to those in Costa Rica but more explicitly invoking divisions between rich and poor. Elites feared reforms. Neither military nor economic elites had a commitment to democracy or saw electoral defeat as an obstacle since they maintained control of state bureaucracy.

A coalition of military, business and church interests campaigned against the reform candidate as communist infiltrated. A coup in 1963 prevented the new president from taking office. In 1965, a pro-reformist military/civilian coalition attempted to return the elected candidate to office and this was strongly opposed by the conservative military. The United States once again invaded and occupied.

The next democratically elected President was a conservative who continued patron-client politics of the former dictatorship apportioning the state apparatus to reward elites for their support.

a. U.S. Role

The U.S. had actively helped with the transition from Trujillo to the first democratic election but did not comment or intervene when the democratically elected reform candidate was overthrown in a coup. In contrast, during the attempt by the pro reform military/civilian coalition to return the elected candidate to office, the U.S. denounced it as communist and invaded. During occupation, former leaders of the reform coalition were violently repressed by the police and military. The U.S. supervised the next democratic election in which conservative ally of Trujillo won popular support and the election.

b. Import Substitution Era

The government of the Dominican Republic promoted the expansion of industry, education and public employment for mobility of the urban middleclass. This model was still predatory and repressive however. It was based on granting cheap labour to capital by freezing the salaries of the working class in the absence of a rising minimum wage or welfare safety net. The state protected private sector employers from increasing costs of urban labour. The state in turn subsidized its low paid urban labour by freezing prices on rural agricultural products bought by the urban working class. Rural people migrated to cities and as their standard of living declined, the city working class drifted into increasingly informal work arrangements as their standard of living declined (Itzigsohn 2000 p. 45). Import substitution in the DR was more oriented towards “modernization” than redistribution or social transformation.

The labour market regulatory regime in the Dominican Republic remained nominally paternalistic but effectively repressive. The labour code dated from intellectuals linked to Trujillo during his reign and updated from time to time so as to be “modernized” to accommodate international standards, but the code and its reforms were seldom implemented in practice. The very small working class was largely unorganized despite industrializing that was occurring. There were few protections for workers and, what few protections existed were seldom enforced (Itzigsohn 2001 p. 45).

c. Post Import Substitution/Structural Adjustment

Structural adjustment and a return to export oriented development were precipitated by a debt crisis in the Dominican Republic. The first response was a reduction in imports and the spending of collective savings to pay down the debt obligations. The Dominican Republic also began reorganizing its economy away from industry and towards the service sector in tourism, low skill, low wage textile assembly and the export of workers for remittances.

Like Costa Rica, the Dominican Republic benefited during structural adjustment from its relationship with the United States. The Dominican Republic gained access to a trade program sponsored by the United States to prevent political destabilization as a result of the worsening economy in the region. The U.S. promoted imports from the region through the U.S. Caribbean Basin Initiation. (CBI). Under the CBI the U.S. would import textiles from Caribbean basin countries like the Dominican Republic. The U.S. also facilitated a substantial and rapid increase in the number of Dominicans it allowed to enter the U.S. as the economic situation worsened in the DR.

Four different administrations implemented structural adjustment policies and did not always take a consistent or orthodox approach to neo-liberal reforms. Though policy approaches varied, clientalism was a constant. The size of the public sector decreased, and public sector resources were invested for construction projects for housing, roads and dams targeted for the benefit of political supporters and financed through discretionary presidential budgets. The predatory nature of this program can be seen in the fact that the construction investment and development actually contradicted the export-oriented development plan since the construction was not directed at export-oriented industries (Itzigsohn 2000 p. 49).

There was a continual decrease in role of the state in social services and cuts in social wages, health and education. Overall expenditures in health increased but only because of rising costs, which were shifted from the state to private individuals and families through privatization. Part of the clientalistic construction program resulted in the investment of money to build hospitals for patronage purposes but for which no budget existed to provide health care services at the newly constructed facilities. Similarly, the Dominican Republic decreased expenditures on its social security system to the point where the state was violating its own social security law. Increasing social polarization followed the decline in real incomes. Poverty grew and the government did not have policies or plans to alleviate the consequences of the poverty.

One aspect of structural adjustment changed the shape of clientalism and predatory government at the time. The downsizing of the state in the Dominican Republic included both decreasing its size as well as public sector salaries. Public sector salaries were increasingly below poverty level wages and state bureaucracies became less important centres of power and resources than they had

been formerly. This may have helped to disrupt the predatory arrangements between presidents and the elites running different agencies of government. Of course, this may also have contributed to the construction investment and development program as well.

V. Discussion

The six countries have much in common. They all owe their modern existence to colonization by Spain followed by eventual independence and statehood. They have consistently followed generally similar economic development models including import substitution followed by neoliberal structural adjustment. Nevertheless, at each moment, the countries have made distinctive choices or alternatively failed to make choices that would have led a different path. In all cases, choices are constrained by the asymmetrical relationship with the United States. Costa Rica's relatively cohesive elites escaped attention from Colonial Guatemala and were united in a common idea about development and a route to development not based on coercing labour. Neither did elites encourage collective labour organization and negotiation. Instituting reforms to create a social safety net and preserve the middleclass came at a cost of de-mobilizing unions and communists.

The Dominican Republic was also relatively independent from colonial Guatemala but had a geographically divided elite not engaged in the same economic activities and much more reliant on coerced labour in its initial development approach. Strong military leaders and the institutions they created became dominant and the state developed to serve their interests and needs. Democratic challenge to reform the system may have won as it did in Nicaragua, but instead was truncated by United States interests and intervention. Throughout

the dictatorship period, the Dominican Republic enacted labour policies that looked *paternalistic* on their face and continued to ratify ILO conventions because to do so was a symbol of modernization and civility.

El Salvador, Guatemala and Honduras share many of the critical traits with the Dominican Republic including periods of dictatorship, internal conflicts and steadfast and effective support for the status quo from the United States. Their economies and state systems of bureaucracy have consistently served the interests and well-being of the elites. Such good long-standing service of the state apparatus for the elites is dependent upon the prevention and repression of organized challenges to it.

Nicaragua is the example of the predatory repressive state that had a different outcome in its organized challenge to the oligarchy. Despite dictatorship, a history of a neopatrimonial state and the strong opposition of the United States, the old oligarchic elites were overthrown in Nicaragua in 1979. In addition, their neopatrimonial institutions were dismantled, their wealth distributed, rather than stolen by the victors and new policies were implemented with a logic not based on enriching and preserving the status of the oligarchic elite. The transformation was possible due to collective mobilization of workers expressed in fighting, and in continued organization in civil society and in unions. In contrast to its undemocratic past, after years of pressure from the United States, economic collapse and worsening social and economic situation for the people, there was an election and liberals came back into power. Unlike Costa Rica in 1948, the return to power by the liberals in Nicaragua did not result in repression of the losers. Instead there was accommodation and fortunately or unfortunately predatory deals cut between leaders of the ideologically opposing parties.

VI. Summary

The chapter presented two ways to frame how the countries in the study are distinctively different based on State Capacity for Institutional Action (Evans 1995) and specific labour market regulatory regimes (Standing 1991). Using this framing, there are significant differences among the countries. El Salvador, Honduras and Guatemala represent predatory repressive systems. Costa Rica and Nicaragua each represent a different ideal type. Costa Rica is developmental and paternalistic and Nicaragua is, like El Salvador, Honduras and Guatemala predatory. Unlike all of the other countries however, Nicaragua is not repressive. The framing and grouping of countries within the framing raise several issues for the project.

First, in the institutions literature it will be necessary to account for these distinctions and how they might influence core labour rights in the countries. This is part of what is addressed in Chapter 4 reviewing the literature and presenting a theoretical framework. Second, the grouping can help guide the comparisons in specific cases of labour rights and make the comparisons more meaningful. Without groupings, the case studies could result in lots of information on different dimensions and aspects of labour rights that are not anchored in any historical or social context. These contexts are critical in why countries might perform better or worse on their respect for core labour rights.

Finally, the grouping can help to highlight the meaning of comparisons of countries in the same group. El Salvador, Guatemala and Honduras belong to the same ideal type i.e. *predatory repressive*. There may be, however, significant differences in how each country expresses repression over different rights. If change in respect for labour rights is to be possible, it must begin with a picture of

how labour rights violations exist as employment practices embedded in a web of formal and informal rules in societies that differ in important ways.

Chapter 4

Literature and Theory Supporting the Diagnostic Tool

I. A Labour Rights Diagnostic Tool Based on an Institutional and Compliance Theory

A. Introduction

DR-CAFTA countries share with many other countries sharp and persistent contradictions between the formally adopted rules establishing labour rights on the one hand and the reality of labour practices violating the rules on the other. This chapter presents a diagnostic tool to better understand these gaps as well as a review of the relevant literature and theoretical foundation for the diagnostic tool based on a close examination and synthesis of institutions theory from political economy and compliance theory from international law. Illustrations are drawn from the International Labour Organisation (ILO) Core Labour Standards in Central America. These rights include (1) freedom of association and right to collective bargaining, (2) non-discrimination in employment, elimination of (3) child and (4) forced labour.

Borrowing from comparative political economy, this chapter contrasts Core Labour Standards with labour rights institutions or ‘rules of the game’ comprised of rules, norms and actual behaviours. The diagnostic tool allows analysis of (a) the formal institutions, including the rules, norms, and enforcement behaviours; (b) interactions between formal and informal institutions, such as corruption and blacklisting; and (c) interactions between formal institutions such as hierarchies and complementarities.

Incorporating the institutional framework into the diagnostic tool makes it possible to identify problems and combinations of problems in labour rights protection. For example, norms may exist that contradict articulated rules. Alternatively, there may be rule-based problems in which a written rule may

contradict or fail to adequately give effect to its normative goal and therefore undermine it. Of course, even well-written rules may not be effectively enforced. Additionally, these formal labour rights institutions interact with informal institutions such as corruption, bribery or blacklisting, and in the face of weak formal institutions, they may prevail in structuring social behaviour. Finally, formal institutions beyond the labour sphere may impact on labour protections. These institutional complementarities include, for example, immigration institutions interacting with labour rights.

These insights from institutional theory are useful in understanding labour rights violations but limited in terms of providing strategies for overcoming obstacles to achieving protection of labour rights. To address this shortcoming the diagnostic tool also incorporates an approach to labour rights compliance that draws on Harold Koh's compliance theory in international law. Compliance theory is well suited to institutional approaches because it, like institution theory, treats norms, rules and behaviours as critical components in achieving change and compliance. Koh's compliance theory allows a critical evaluation of labour rights enforcement and reform in terms of the coercive/self-interest effects of rules, the enhancement or deterioration of norms underlying the rules and the existence or absence of multiple processes of reinforcement. To be successful, interventions must be integrated, multiple and mutually reinforcing, creating circumstances where actors adopt norm-based behaviours because they are internalized.

After this introduction, the chapter sets out the institutional theory underpinning the diagnostic tool by examining various kinds and combinations of obstacles to achieving protection of labour rights and their theoretical context within institutional theory. This institutional underpinning includes an

explanation of the components of institutions and how institutions change. Part three of the chapter explains the literature on compliance theories upon which the other half of the diagnostic tool is based. It also explains the compliance theory based on work by Harold Koh, which is incorporated into the diagnostic tool. Part four brings the two theoretical frameworks together into a diagnostic tool for examining problems with labour rights protection.

The diagnostic tool is explained at two levels. The first is the international level (Table 4.2) in which ILO Conventions can be thought of as institutional settlements and also compliance benchmarks. The international-level institutional settlement and compliance benchmarks that arise from ILO Conventions as depicted in Table 4.2 can then be applied as a diagnostic tool for examining national-level labour rights problems in Table 4.3.

II. Institutions Theory Underpinning the Diagnostic Tool

A. Obstacles to Realizing Labour Rights

What are the obstacles to realizing the rights to freedom of association, collective bargaining and non-discrimination as well as eliminating child and forced labour? There are many obstacles. First, there may be problems with the laws themselves. For example, in El Salvador retaliation against trade unionists is illegal but there is no provision in law requiring reinstatement of illegally fired workers (U.S. State Department 2006 p. 10). Second, even if the law is ‘well-written,’ it may not be enforced as evidenced, for example, by employers routinely ignoring judicial orders in Guatemala (ICFTU 2005 p. 3). Third, social norms may exist that undermine or contradict a right as in the case of Honduras, where child labour is widely accepted (ILO 2005 p. 226). Such obstacles may also occur in combination so that the law, its enforcement and/or wider social norms are inadequate, ambiguous or even contradict respect for the rights.

As the case of child labour in Honduras illustrates, in addition to the explicit, there may be informal influences (Helmke and Levitsky 2004 p. 725). Corruption and bribery — among and between employers, the state and workers — may interfere with respect for labour rights. Examples of this kind of corruption have been reported among state labour inspectors in El Salvador (U.S. State Department 2006 pp.11-12). Even without corruption, employers may follow the rules of the law “to the letter” but not comply with the law’s intent, taking a creative compliance approach (Helmke and Levitsky 2004 p. 729). Finally, institutions beyond the labour sphere may interact with and impede protection of labour rights. For example, immigration institutions in the Dominican Republic make Haitian immigrants as well as Haitian descended Dominicans vulnerable to labour rights violations despite formal protection in labour law (Lizin 2003 p. 6; U.S. State Department 2003 pp. 14-16; U.S. State Department 2007 p. 17). In addition, economic development relying on labour-intensive, wage-sensitive industries may create incentives for exploitive and predatory employment relationships. All of these examples involve problems with labour rights institutions, which are “the rules of the game” with respect to work.

B. The Concept of Institutions

Institutions are “durable systems of established and embedded social rules that structure social interactions” (Hodgson 2006 p. 13). They are “humanly devised constraints that shape human interactions” (North 1990 p. 3). Institutions structure and enable human interactions by constraining them (Crouch 2005 p. 14; Mantzavinos, North and Shariq 2004 p. 77). Institutions inform agents of the behaviours that are expected. They are recognizable to other agents and are

common knowledge (Amable 2003 p. 36). In this way, institutions help influence strategic choices (Amable 2003 p. 36, Scharpf 1997). Institutional constraints are therefore not necessarily ‘the antithesis of freedom’ but instead can be ‘its ally’ (Hodgson 2006 p. 2).

Institutions influence individuals and groups of individuals acting together such as political parties, labour unions, corporations and the state (Scharpf 1997 p. 39). They define the membership of these composite actors as well as their resources, purposes, collective powers, powers of individuals with differing roles within them, the “values they are to consider” in arriving at choices and how “outcomes as a result of choices are evaluated” (Scharpf 1997 p. 39). This concept of institutions does not require that people and actors be “perfectly rational” or perfectly “grasp all of the institutional interdependencies or consequences of their actions” but rather requires only “enough rationality to be able to decide what constitutes a desirable course of action in a strategic context” (Amable 2003 p. 12).

The emergence of institutions has been explained in two different ways. First, outcome-based explanations maintain that institutions emerge because of the role they play in producing collective benefits such as optimal or efficient social or economic outcomes (Knight 1992 p. 10). Alternatively, process-oriented explanations emphasize various means through which institutions are established and change: by spontaneous, evolutionary or intentional design (Knight 1992 pp 10-11). From a labour rights perspective, institutional outcomes do not necessarily produce collective benefits for workers. For purposes of the diagnostic tool, the process-oriented approach is adopted and institutions represent on the equilibrium, ‘rules of the game’ in any one moment that results from

political compromise (Amable 2003 p. 10; Knight 1992). Compromise is a result of conflict over disparate interests and power asymmetries (Amable 2003 p.10; Knight 1992). As such, rather than simply coordinating the interaction among actors, institutions have distributional consequences (Amable 2003 p. 39; Knight 1992). States have a central role in employment institutions since in the “absence of action on the part of the state, employers, workers and their collective organizations are rarely able to create stable mechanisms for regulating class conflict” (Howell 2005 p. 21).

Institutions exist at different levels. They encompass operational rules, such as national laws prohibiting race or gender discrimination in employment, but also at other levels such as the rules about legislative procedures and strategies to enact national anti-discrimination laws, as well as how legislators are elected. Institutions also exist at the international level such as operational rules in ILO Conventions that underlie core labour rights and the membership and legislative procedures at the ILO to adopt Conventions. Institutions exist between national and international levels as can be seen in how national actors interact within the international labour rights regime of the International Labour Organisation to enact, adopt and comply with ILO Conventions (Ostrom 2005 p. 59).

C. Components of Institutions

Broadly speaking, institutions express values beyond mere wealth-maximizing human motivation (North 1990 p. 25). Although a widely used concept, there is little consensus on many aspects of the component parts of institutions (Hodgson 2006 p. 1; Crawford and Ostrom 1995 p. 589). Drawing upon North’s work, the diagnostic tool incorporates the view that constraints may take different forms, including (1) formal rules and their enforcement, unwritten,

informal rules such as (2) informal social norms — which are values, beliefs, ideologies and codes of conduct; and (3) informal social conventions, which are widely held expectations (North 1990 p. 4; p. 23). These sources of institutional constraints are next defined before turning to how they act and interact to create labour rights outcomes.

Formal rules are the written, enforced regulations or prescriptions that “allow, require, or forbid” actions and outcomes and indicate the mechanisms that exist to enforce the rules (Ganz 1971; Ostrom 1980; Commons 1968 cited in Ostrom 2005 p. 18; Crawford and Ostrom 1995 p. 583). These rules are openly codified and non-compliance brings a codified formal sanction delivered by a legitimate authority within the relevant community (Amable 2003 p. 26, Black 1962 cited in Ostrom 2005 pp. 16-17). For analytical purposes, formal rules can be reduced to “institutional statements” with five components: (1) to whom the statement applies, (2) deontic verbs of permission, obligation or forbiddance, (3) the particular actions or outcomes to which the verbs apply, (4) conditions defining when, where, how and to what extent that action or outcome in question is permitted, obligatory, or forbidden and (5) the “or else” statement defining the sanctions to be imposed for not following the rule (Crawford and Ostrom ‘1995 p. 584). One example of a formal rule as an institutional statement is the national law that employers are forbidden from discriminating in hiring practices “or else” face fines. Institutional grammar can also be found and analyzed at the international level within the text of ILO Conventions.

This formal institutional “grammar” (Crawford and Ostrom 1995) can help with the sorting of formal labour rules into the various kinds of typologies of labour rights such as (1) for whom labour rights exist -citizens vs. non-citizens;

(2) types of obligations — respect, protect, fulfil; (3) whether the right is individual or collective; and (4) whether the obligation applies vertically to governments or horizontally to private actors or both (Fudge 2007 pp. 28-31). The “or else” portion of the grammar is more problematic because law is evolving away from relatively simple questions of what happens in the event of non-compliance with the rule. Law, as formal rules, increasingly fulfils other functions beyond complaint-based processes focused on judicial enforcement (Fredman 2006 p. 59 cited in Fudge 2007 p. 31). In place of “hard” substantive rules and outcomes, law is becoming “soft” and reflexive, naming merely guiding principles and procedures (Teubner 1987 in Fudge 2007 p. 33). The shift in orientation has been attributed to the decreasing effectiveness of law in regulating and impacting on social life (Fudge 2007 p. 32). This recent evolution in law requires modification of Crawford and Ostrom’s five-component notion of institutional grammar.

Whether hard or soft and no matter how detailed, formal institutions are never entirely complete. They leave gaps because all contingencies cannot be anticipated (Helmke and Levitsky 2004 p. 730). Further, actors who do not like the formal rules but lack the political power to change them may use informal strategies and skirmish within the rules as a “second best alternative to changing the formal rules” (Helmke and Levitsky 2004 p. 730, Streeck and Thelen 2005 p. 19). Lastly, actors pursue some goals knowing that they are counter to socially-accepted norms and will never be formalized (Helmke and Levitsky 2004 p. 730). Informal institutions invariably emerge as a result of formal institutional design, strategic interactions before, during and after formal institutional design, or as unintended consequences of conflicts and compromises within an institutional

context (Helmke and Levitsky 2004 p.731). For these reasons, it is insufficient for the diagnostic tool to consider formal institutions in isolation from the informal (Helmke and Levitsky 2004 p. 726).

Informal institutions are “created, communicated and enforced outside of officially sanctioned channels” (Helmke and Levitsky 2004 p. 725). Informal institutions include social norms that are based on values and are “observed irrespective of others’ behaviour” (Amable 2003 p. 37). They correspond with the concept of “precepts” or “maxims for prudential behaviour” and North’s “codes of conduct” (Black 1962 cited in Ostrom 2005 p. 17, North 1990 p. 4). North’s example of a social norm is “good sportsmanship,” which constrains players from injuriously fouling other players even though they could successfully do so without detection or penalty (North 1990 p. 4). To Ostrom, particular precepts of prudential behaviour may be shared to greater or lesser degrees depending upon “the extent of homogeneity in the value preferences of those living in the community; the size and composition of the relevant community; and the extent of inequality of basic assets among those affected” (Ostrom 2005 p. 27).

Unlike social norms, social conventions refer to socially-accepted behaviour and depend on the fact that others observe the convention rather than precepts or prescriptions of prudential behaviour (Amable 2006 p. 26; Black 1962 cited in Ostrom 2005 p. 17). In this way, social conventions focus on “shared expectations” rather than “shared values” (Helmke and Levitsky 2004 p. 728). For example, corrupt behaviour of government officials in *predatory systems* is an expected and common occurrence but “prevailing norms” prevent its legitimization (Helmke and Levitsky 2004 p. 730). Therefore corruption, like torture, is a social convention in some countries but is not an accepted social

norm. In other cases, a social convention can become “elevated to the status of social norm” (Amable 2003 p. 37). In the case of informal institutions, the sanctions are not official or codified, as in the case of formal rules. Penalties for non-compliance and rewards for compliance with informal institutions – social norms and social conventions – nonetheless exist (Helmke and Levitsky 2004 p. 726). Penalties and rewards include social exclusion, loss or gain of social status, self-esteem, reputation or utility, or violent retaliation (Amable 2003 p. 37; Helmke and Levitsky 2004 p.731).

D. An Institutional Framework for Labour Rights Compliance Outcomes

Returning to the examples, respect for labour rights – and alternatively, the absence of respect – can be understood as outcomes in three related institutional dimensions: (1) the formal institution itself (Amable 2003; Helmke and Levitsky 2004), (2) the interaction between formal and informal institutions (Helmke and Levitsky 2004), and (3) interactions between institutions in different spheres of social and economic life (Hall and Soskice 2001; Crouch 2005). In the first dimension, formal institutions are effective if they are “resistant to transgression within certain limits” such that “deviance” from the formal rules, “does not become the convention” (Amable 2003 p. 45). Alternatively, formal institutions are ineffective if the rules that “exist on paper are widely ignored or circumvented” (Helmke and Levitsky 2004 p. 727).

Costa Rica’s *developmentalist* state with its autonomously functioning apparatus would be expected to look more like the former case with more effective formal institutions. In contrast, *predatory systems* such as the Dominican Republic would be expected to exhibit more of a tendency towards ineffective formal institution. Amable argues that changes in the formulation of

the formal rules or in their enforcement can alter respect for the rule, increasing the incidence and rationality of deviance or compliance (Amable 2003 p. 45).

Formal institutions are insufficient alone to explain labour rights outcomes. In addition to the formal institution, relevant social norms and social conventions interact with and can contribute to outcomes that either converge or diverge from the normative intent of the formal institution (Helmke and Levitsky 2004). As shown below in Table 4.1, informal institutions may complement effective formal institutions strengthening incentives to comply by filling ambiguities and gaps in the formal rules with supportive informal social norms and social conventions (Helmke and Levitsky 2004 p. 728). As shown in Box B, even in the absence of effective formal institutions, respect for labour rights is still a possible outcome if social norms and social conventions consistent with respect for labour rights substitute for the ineffective formal institutions (Helmke and Levitsky 2004 p. 729).

Similarly, the absence of respect for labour rights is a possible outcome with or without effective formal institutions. In the former case, shown in Box C, the formal institution is not openly violated and the formal rules are followed but the substantive effects of the rules are altered as a result of creative compliance, violating the spirit of the rule while complying with “the letter” of the law (Helmke and Levitsky 2004 p. 729; Amable 2003 pp. 10-11). This occurs when actors do not like the outcome generated by the formal institutions but are unable to change or openly violate it (Helmke and Levitsky 2004 p. 729). Finally, as shown in Box D, social norms and social conventions can compete with and displace ineffective formal institutions (Helmke and Levitsky 2004 p. 729).

Table 4.1

Labour Rights Outcomes	Effective Formal Institutions	Ineffective Formal Institutions
Respect	A Complementary Informal Institutions	B Substitutive Informal Institutions
Absence of Respect	C Accommodating Informal Institutions	D Competing Informal Institutions

Adapted from Helmke and Levitsky 2004

E. Institutional Complementarities and Hierarchies

Labour rights institutions – formal and informal – interact with institutions in other spheres of economic and social life and in combination affect outcomes of respect or absence of respect for labour rights. Here, notions of institutional complementarity, hierarchy and overall institutional gestalt or social embeddedness matter. Crouch’s concept of institutional complementarity is one where components of a whole compensate for each other’s deficiencies in constituting the whole, and each can be defined by what is lacking in the other in order to produce a defined whole (Crouch 2005 p. 50). Consistent with this version of complementarity, labour protection institutions prohibiting discrimination based on gender or race compensate for employment-at-will institutions, which allow employers to hire and fire any and all employees at their sole discretion.

Amable, as well as Hall and Soskice offer another concept of complementarity. Institutions cluster together and complement and reinforce one

another, making them resilient against pressures to change (Amable 2003 p. 54; Hall and Soskice 2001 p. 18). Amable argues that institutional complementarities stem from the “interdependence of institutional influences on agents’ decision-making” (Amable 2003 p. 59). In this view of institutional complementarity, the performance of each institution is affected by the existence of others that are mutually strengthening and reinforcing (Crouch 2005 p. 54). The example often given for this kind of complementarity is the mutually reinforcing effects of corporate governance and collective bargaining institutions that can lead to distinctive employment regimes. Liberal market economies more easily lend themselves to low-road employment strategies because there are few incentives to establish long-lasting reciprocal relationships with employees (Hall and Soskice 2001; Amable 2003).

When multiple institutions impact on respect for labour rights, the source of influence may well be hierarchy rather than complementarities. Crouch defined institutional hierarchy as, “a configuration in which, for a given era and society, particular institutional forms impose their logic on the institutional architecture as a whole, lending a dominant tone to the mode of regulation” (Crouch et al 2005 p. 367). Hierarchy may result from design or evolution (Crouch et al 2005 pp. 367-368). Concepts of *predatory* and *developmental* state orientations fit very well with this view of institutional hierarchy. The presence of this kind hierarchy can be seen in *neopatrimonial* systems in which dictators impose on the entire state apparatus a logic of placing all of the state’s resources and functions for their own benefit.

It is possible to envision an era in a given society in which institutions governed by one hierarchy are replaced with another. In liberal market systems

such as the United States, the 1970's era with its social attention to discrimination saw a reversal and newly enacted anti-discrimination laws trumped employment-at-will employment institutions. Nicaragua's former *neopatrimonial* hierarchy was overthrown in 1979, still retaining *predatory* characteristics but no longer retaining its former *repressive* labour market regulatory regime. All of these changes implicate fundamental changes of institutional hierarchy within and between periods of time.

Beyond complementarity and hierarchy, Crouch has argued that there is an overall institutional architecture and that the logic of a society forms a "gestalt" considered to be the general congruent shape of a set of institutions (Crouch 2005 p. 23). Nicaragua's transformation seems to contradict the idea of *predation* as a permanent gestalt. In contrast the longstanding combination of *predatory* and *repressive* regulatory regimes in El Salvador and Guatemala could conceivably be considered such a gestalt.

F. Institutional Change

There are many theories about institutional change. One theory is that path dependence prevents institutional change and maintains inertia until critical junctures – exogenous shocks – disturb institutional equilibria making new choices and alternatives available—the so-called "strong punctuated equilibrium model (Streeck and Thelen 2006 p. 1). Institutional complementarities help explain this inertia through mutual reinforcement among distinct institutions. This view of path dependence has come under increasing criticism, however, as overly deterministic, structural and functionalist (Streeck and Thelen 2006, Crouch 2005). Crouch demonstrates that actors are able to defeat such path-dependent structural limits through their efforts to (1) search actively for alternative paths,

(2) transfer past experiences gained in multiple settings and (3) to learn from other agents connected to them by networks (Crouch 2005). Additionally, Streeck and Thelen elaborate on multiple forms of gradual yet transformative change including some of which have been applied directly to the work of the International Labour Organization (Streeck and Thelen 2005; Helfer 2006)

Another argument is that failure of institutions to change may indicate the presence of “a more complex sociological embeddedness at work” (Thelen 1999 cited in Crouch 2005 p. 96). Beyond institutional complementarities, embeddedness is a kind of institutional gestalt, or “general congruent shape of sets of institutions” (Crouch 2005 p. 23). Polanyi’s concept of embeddedness refers to how markets “are always influenced by the structures of the societies within which they emerge” (Polanyi 1944, Crouch 2005 p. 14). Markets are socially embedded to the extent that market transactions serve non-economic purposes and are supported by non-economic social ties (Streeck 2001 in Crouch 2005 p. 14). In this way, institutions “inhibit immediate maximizing activity” (Crouch 2005 p. 14). Failure of labour institutions to change may indicate embeddedness in markets of a distinctly non-social character.

Since institutions are political compromise equilibriums that “circumscribe” conflict, change is possible when conflict cannot be solved within the existing institutional arrangement (Amable 2003 p. 10). According to Amable, change may take different forms such as use of “rule-circumventing strategies” or establishment of new institutional arrangements as a result of political bargaining and compromise (Amable 2003 pp. 10-11). The power and distributive struggles inside existing institutional equilibrium, as well as in establishing new equilibriums, corresponds with social movement approaches to

change. Two kinds of relevant political change processes are theorized in social movement theory—contained and transgressive – (McAdam, Tarrow and Tilly 2001). Even if gradual transformative change without exogenous shock is not possible, social movement theory has demonstrated that new collective political struggles – transgressive contention – “often grow out of constrained contention” between previously established actors within well-established institutions (McAdam, Tarrow and Tilly 2001 pp. 7-8).

The institutional side of the diagnostic tool helps with analysis of the presence or absence of respect for labour rights provides useful but limited insights. First, it reminds us that beyond struggles to change the written laws — social norms, social conventions and interactions among institutions— matter. Second, the diagnostic tool assumes that similar labour rights outcomes may result from different yet functionally equivalent institutional arrangements. (Calmfors and Drifil 1988 in Crouch 2005 p. 60). Third, the tool reminds us that it is important to anticipate and investigate what kinds of institutional arrangements encourage compliance and it cautions us to anticipate the complexity of institutional change with multiple potential sources of inertia and change. Lastly, the institutional theory side of the diagnostic tool can tell us approximately what institutions respecting labour rights look like: an outcome of respect aligned with — or at least not contravened by — rules, social norms and social conventions. What is absent in institutions theory side of the tool is a specific strategy and approach to change in order to establish new or reform existing institutions to improve respect for labour rights. For this, the diagnostic tool incorporates frameworks from compliance theories.

III. Compliance Theory Underpinning the Diagnostic Tool

A. Introduction

Concepts and frameworks from institutional theory form one half of the diagnostic tool because they are helpful in identifying and explaining labour rights outcomes as well as the obstacles to achieving respect for labour rights. The other half of the diagnostic tool is based on distinct but related concepts and frameworks from compliance theory that can help identify and explain potential solutions to obstacles preventing respect for labour rights. Compliance is a “state of conformity or identity between an actor’s behaviour and a specified rule” (Fisher 1981 p. 20; Mitchell 1994 p. 30 cited in Raustiala and Slaughter 2002 p. 539). Compliance theories provide insight into why individuals and actors from firms to nation states comply or fail to comply with rules and laws (Grossman and Zaelke 2005 p. 73). In light of the institutional understanding of the obstacles to gaining respect for labour rights, compliance theories provide insight into how such respect can be achieved through formal and informal institutional arrangements.

Theories about compliance, like institutions operate at different levels of analysis with some focused on the international level, considering why nations obey, others on the domestic level, considering why domestic actors obey, and finally others on the transnational level, considering interactions between international and domestic compliance (Grossman and Zaelke 2005). Compliance theories have been applied to diverse problems and challenges ranging from game-theoretical prisoner dilemmas (Axelrod 1986), to practical problems such as international treaties, treaties establishing the European Union, human rights law, court decisions, banking regulations, taxes, neighbourhood dispute settlements, oil

spills, air quality and why people obey speed limits or use of seatbelts. Much of the work theorizing on compliance has come from the fields of international relations (regime theories), international law (compliance theories) and regulation theory (Raustiala and Slaughter 2002; Baldwin and Cave 1999).

Compliance theories emphasise different and some theorists argue, competing, “explanatory pathways” to compliance (Koh 1997 p. 2632), and based on their orientations, link compliance strategies with different aspects of institutional components—rules and their enforcement, social conventions and social norms—(Amable 2003). March and Olson categorise compliance theories as associated with either a logic of consequences, based on enforcement and deterrence strategies, or a logic of appropriateness, based on identities and normative orientations and resulting strategies of assistance to prevent non-compliance (Grossman and Zaelke 2005 p. 74; March and Olsen 1998 p. 949).

B. Logic of Consequences Approach to Compliance

The logic of consequences approach is rationalistic and instrumentalist (Koh 1997 p. 2632). First, the “realist” version of this orientation suggests that conduct conforms to rules not through internal compulsion or rules themselves, but rather through power as it is exercised in coercive sanctions or rewards (Koh 1998 p. 634). At the international level, in the realist or neo-realist approach, a state’s compliance with a rule is a result of one of three possible situations: (1) a hegemonic state or group of states force another state to comply (2) the rule merely reflects current or expected future practice or (3) the rule resolves a problem that no state has an incentive to violate (Grossman and Zaelke 2005 p. 74). In sum, compliance results from coincidence or international power dynamics (Grossman and Zaelke 2005 p. 75).

A second strand emphasizes pathways to compliance arising from instrumentalist calculations based on actors' interests (Keohane 1988 p.387; Grossman and Zaelke 2005 p. 75). This is described as "compliance as winning long-term strategy" (Koh 1997 p. 2632). Unlike the realists, these "institutionalists" argue that states have long-term interests making compliance and prevention of short-term defections strategically advantageous (Grossman and Zaelke 2005 p. 75). The resulting "regimes" are sets of institutions in international space that establish and enforce norms or rules of the game for public and private actors (Krasner 1983 cited in Trubek et al 2000 p. 1194). The emphasis is on structure and rules (Trubek et al 2000 p. 1194). Enforcement theory originates with a similar view that costs of non-compliance in the form of punishment are critical in gaining compliance and further that increasing punishments are necessary when rules require deeper, more demanding changes in behaviour (Grossman and Zaelke 2005 p. 75; Downs et al 1996 pp. 382-383).

Both the realist and institutionalist approaches assume states are unitary actors unaffected by domestic or transnational actors and have been criticised because they ignore powerful non-state actors such as multinational corporations, multilateral institutions such as the International Monetary Fund and non-governmental organisations (Grossman and Zaelke 2005 p. 74; Trubek et al 2000 p. 1194). This shortcoming is addressed in a third rationalistic, logic of consequences approach, which disaggregates the unitary state and makes domestic actors key factors in compliance. This "liberal international theory" holds that compliance results from the convergence of domestic actors interests with international rules (Grossman and Zaelke 2005 p. 75). Domestic actors mobilize and pressure the state to adopt, implement and comply with the international rules

when they view the rules to be in their interests (Grossman and Zaelke 2005 p. 75). Liberal theories fall within the logic of appropriateness orientation as well. In the liberal Kantian version, the nature and identity of liberal states is critical in creating baseline conditions for compliance such as democracy and rule of law (Koh 1997 p. 2633; Slaughter-Burley 1993 cited in Koh 1996 p. 202). For example, liberal states tolerate mobilization of domestic interests to influence state policy in contrast to authoritarian states (Keohane 1998 p. 711).

In relation to our components of institutions, the key compliance strategy arising from logic of consequences approaches dates from Jeremy Bentham and focuses on the enforcement of rules to effectively raise the cost of non-compliance to first cancel out its potential profit and then impose additional costs through punishment (Scholz 1997 p. 253; Fisher 1981 p. 40). The self-interested preferences of actors are assumed to be “a given,” created outside and independent of compliance processes (Koh 1997 p. 2633). In domestic compliance theories, this is best characterised by Gary Becker’s work on criminal law in which potential offenders respond to both the probability of detection and the severity of punishment (Becker 1968). Mechanisms to improve compliance include increasing monitoring activities, raising penalties and formulating rules to increase the probability of conviction (Becker 1968). Deterrence theory extends Becker’s work from criminal to corporate compliance and contends that the job of enforcement agencies is to make non-compliance irrational because actors perceive that non-compliance will, in all likelihood, be detected and sanctions will be swift and certain including non-monetary penalties to reputation (Grossman and Zaelke 2005 p. 76; Kagan and Scholz 1984; Thornton, Gunningham and Kagan 2005 pp. 265-267).

C. Logic of Appropriateness Approach to Compliance

In contrast to the logic of consequences, the logic of appropriateness explains actors' behaviour in relation to their identity, sense of obligation and conception of appropriate behaviour rather than as a result of calculations and consequences (Ruggie 1998; Grossman and Zaelke 2005 p. 74; March and Olson 1998 pp. 951-952). The logic of appropriateness approach is essentially "constructivist" focusing on the "normative power of rules" and how an actor's identity and interests are shaped by shared knowledge, discourse and ideas (Koh 1997 p. 2634; Keohane 1988, Kratochwil 1989 cited in Raustiala and Slaughter 2002 p. 540). From this constructivist approach, compliance with rules is a matter of "internalized identities and norms" (Koh 1997 p. 2634; Raustiala and Slaughter 2002 p. 540). The classical origins of constructivist approaches come from Durkheim and Weber focusing on "how ideas of which individuals are carriers come to express a social force" (Durkheim cited in Ruggie 1998 p. 858). As with a logic of consequences view, there are numerous compliance theories within the logic of appropriateness orientation.

Legitimacy theory, like other constructivist approaches is process-oriented and argues that rule-making processes create clarity and fairness and thus give rules credibility and encourage compliance (Franck 1990 cited in Raustiala and Slaughter 2002 p. 541; Grossman and Zaelke 2005 p. 75). Franck, for example, argued that the rule-making process and the quality of the rules themselves create the perception of legitimacy creating a "compliance pull" (Franck 1990 cited in Raustiala and Slaughter 2002 p. 541). Chayes and Chayes argued in their process-oriented "managerialism" theory that the interaction among states in creating international commitments creates a tendency to comply with the resulting

international rules (Chayes and Chayes 1995 cited in Grossman and Zaelke 2005 p. 75). They argue that the rules generated in such international treaties are widely accepted, that states have an interest in complying with rules they participate in creating and that, as a result, compliance is efficient (Chayes and Chayes 1995 cited in Grossman and Zaelke 2005 p. 75). In this view, non-compliance is viewed as a result of time lags, limited resources, capacity or ambiguity about commitments (Chayes and Chayes 1995 cited in Grossman and Zaelke 2005 p. 75).

Domestic compliance theories based on the logic of appropriateness share many characteristics of managerialism at the international level (Grossman and Zaelke 2005 p. 77). There is a presumption that domestic actors want to comply and that social norms encouraging compliance exist and influence actors regardless of formal rules and enforcement (Grossman and Zaelke 2005 p. 77). The social norm of compliance is enhanced by a rule's "legitimacy" in terms of its fair creation and implementation (Grossman and Zaelke 2005 p. 77). In contrast to the rationalist focus on enforcement and punishment, managerial approaches in international and domestic spheres argue for non-confrontational compliance interactions and processes, such as technical assistance, transparent information sharing and dispute resolution procedures (Grossman and Zaelke 2005 p. 76).

D. Koh's Transnational Compliance Theory

The compliance side of the diagnostic tool is taken from Harold Koh who sees these various approaches to compliance as additive pathways and strategies that complement one another and can be accumulated into an effective approach to compliance. Koh's theoretical approach to compliance is three-fold. First, he argues that neither international nor domestic levels are sufficient to explain

compliance and that the transnational legal processes provide key, often overlooked dynamics to questions of compliance. Second, he argues that compliance is a result of interests, as well as identity, thereby bridging the logics of consequences and appropriateness. Finally, he describes an institutional change process or “compliance process” of interactions through which international norms may become internalized, thus becoming domestic norms (Koh 1997 p. 2634). Each of these three threads in Koh’s approach to compliance is first explained and then correlated to distinct concepts in institutional theory. In this way, Koh’s compliance framework, for purposes of the diagnostic tool, helps to identify a parallel set of solutions to the problems identified with the institutional side of the diagnostic tool.

E. Transnational Legal Processes

Koh’s compliance framework is based on transnational legal processes, which he defines as the “theory and practice of how public and private actors including nation states, international organizations, multinational enterprises, nongovernmental organizations and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret, internalize, and enforce rules of transnational law” (Koh 1997 p. 2626). Koh builds upon ideas first developed by Roger Fisher’s work on compliance through transnational processes (Koh 1997 p. 2627; Fisher 1981). Fisher emphasised the importance of (1) promoting compliance, (2) regular institutional interaction, (3) norm interpretation and (4) norm internalization in improving compliance (Fisher 1981 in Koh 1997 p. 2627).

Koh argues that transnational legal processes are often overlooked as key determinants of compliance even in work exploring political linkages and

interpenetrations between international and domestic politics (Koh 1998 p. FN 47; Putnam 1988). Further, Koh contends that the transnational level of analysis breaks down traditional dichotomies between domestic and international and between public and private realms (Koh 1996 p. 184). Rather than reject theoretical explanations for compliance at domestic and international levels of analysis, Koh maintains that they are complementary and not mutually exclusive (Koh 1997 p. 2649). Koh contends that transnational legal processes are transactional, and they highlight the dynamic processes and interactions that “transform, mutate and percolate up and down from public to private, from domestic to international and back down again” (Koh 1996 p. 184).

Koh’s transnational legal process approach is distinctly “non-statist,” giving necessary weight to non-state actors involved in transnational interactions (Koh 1996 p. 184; Keohane 2005 p. xvii). From this view, and consistent with Amable and Scharpf, not only do “interactions among transnational actors shape laws, but also... law shapes and guides future interactions” and identities among actors (Koh 1996 p. 184; Amable 2003 p. 12; Scharpf 1997 p. 39). In this way, Koh’s framework is consistent with process-oriented compliance and institutional theories and mirrors ILO Committee of Expert’s (CEACR’s) supervisory interactions with countries that ratify Conventions. Processes are “normative” in that interactions among actors result in the emergence of new rules, which are “interpreted, internalized and enforced” in an institutional equilibrium thus beginning the process all over again” (Koh 1996 p. 184; Amable 2003 p. 10; Knight 1992). For Koh, transnational legal processes are not legalistic or static but rather “foster the interactions, interpretations and internalization of global norms into domestic law” (Koh 1998 FN47). This point is supported by theorists

who note that transnational legal processes create opportunities for contention and struggle in transnational arenas, which may become sources of social regulation (Trubek et al. 2000 p. 1193).

F. Compliance based on Consequences and Appropriateness

Koh intends his approach to be a strategy for encouraging compliance (Koh 1997 p. 2655). According to his theory, there are a myriad of reasons for non-compliance and therefore multiple pathways and processes are required to achieve compliance (Koh 1997 p. 2655). Unlike a singular mechanism, Koh argues that states and actors comply with rules for a variety of reasons, including (1) being coerced into adopting and enforcing them, (2) acting out of self-interest because non-compliance is costly and irrational, (3) responding to communitarian legitimacy of the norms underpinning the rules because they are reinforced as company, community, national and international values (Koh 1998 pp. 634-635).

Koh's compliance framework incorporates both the logic of consequences and the logic of appropriateness as necessary elements to achieve compliance. He argues however, that the 'best chance of success' for gaining long-term compliance is to create circumstances in which states and actors adopt norm-based behaviours because they have internalized them into their own system of values (Koh 1998 p. 4). This is similar to March and Olsen's description of a developmental relationship between consequence- and appropriateness-based compliance in which the former changes over time to compliance based on the latter--appropriateness (March and Olsen 1998 p. 953). For Koh, the switch from consequence-based compliance to appropriateness-based compliance is an evolutionary process in which "repeated compliance gradually becomes habitual obedience" (Koh 1997 p. 2602). Koh argues that the shift that occurs in the

transition to obedience involves a shift from external (consequences) to internal (appropriateness), from instrumental reasons for compliance to normative reasons and from coercive to constitutive persuasion (Koh 1998 pp, 628-629).

According to Koh, the transition to habitual obedience results from internalizing rules through domestic social, political and legal processes (Koh 1998 pp. 634-635). Social internalization is the condition in which a norm acquires such a degree of public legitimacy that “there is widespread general obedience to it” (Koh 1997 p. 2656). Political internalization occurs when political elites accept an international norm and incorporate the norm into domestic policy (Koh 1997 pp. 2656-2657). Koh also distinguishes specific legislative internalization in which “international law norms become embedded into binding domestic legislation” (Koh 1998 p. 643). Legal internalization is the judicially triggered incorporation of an international norm into the domestic legal system via “executive action, judicial interpretation, legislative action or some combination of all three actions (Koh 1997 p. 2657; Koh 1998 p. 643). These forms of compliance internalization match institutional elements of the diagnostic tool (Table 4.3).

G. Compliance and Internalization: Actors and Processes

Social, political and legal internalization does not require “precise sequencing” but rather a set of actors and processes unfolding in four distinct phases: interaction, interpretation, internalization and obedience (Koh 1998 pp 643-644). Koh builds his compliance processes and actors upon the work of other theorists. The interaction phase involves provocations initiated by “transnational moral entrepreneurs” who “mobilize popular opinion and political support, . . . stimulate and assist in creation of like-minded organizations in other

countries, . . . elevate their objective beyond its identification with national interests...and direct efforts towards persuading foreign audiences, especially foreign elites that their objective reflects a widely shared or even universal moral sense rather than a particularistic national moral code“ (Koh 1998 p. 647; Nadelmann 1990 p. 482).

Nadelmann developed his concept of transnational moral entrepreneurs within the specific context of global prohibition regimes such as the abolition of slavery and piracy (Nadelmann 1990). Sunstein conceptualized the domestic equivalent of Nadelmann’s transnational norm entrepreneur, similarly defined as one who “can alert people to the existence of a shared complaint and can suggest a collective solution through . . . signalling their own commitment to change, creating coalitions, making defiance of the norms seem to be less costly and making compliance with new norms seem to be more beneficial” (Koh 1998 p. 647; Sunstein 1996 p. 929). Ideas about institutional entrepreneurship have expanded significantly beyond the prohibition regimes drawn upon by Koh (Dorado 2005; Crouch 2005). The motivation and creativity driving actors to “break away from scripted patterns of behaviour” vary based on “temporal orientations” (Dorado 2005 p. 388). Tarrow contends that there are different kinds of transnational actors (Tarrow 2001). Transnational “social movements” are distinguished from “institutionalized, passive and service oriented-groups” based on socially mobilized and sustained contentious interaction with power holders” (McAdam et al 2001 cited in Tarrow 2001).

Norm entrepreneurs provoke interactions with other actors. Koh highlights the efforts of norm entrepreneurs to enlist actors within the government to support and act as allies becoming “governmental norm sponsors” (Koh 1998 p.

648). As allies, the governmental norm sponsors are able to promote, inside governmental forums, the changes advocated by the norms entrepreneurs from the outside (Koh 1998 p. 648). Some governments, and intergovernmental agencies and actors within them, become themselves norm entrepreneurs (Koh 1998 p. 648). Drawing on work done by Sikkink, Koh explains that norm entrepreneurs and their governmental norm sponsors work together creating transnational issue networks along the lines of “epistemic communities” in political science terms (Koh 1998 p. 649). The transnational networks that emerge develop expertise forming epistemic communities within the issue areas in which they work (Koh 1998 p. 649).

Epistemic communities are “networks of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area” (Haas 1992 cited in Koh 1998 p. 649). Included in such communities or networks are government agencies, intergovernmental organizations, international and domestic non-governmental organizations, academics and private foundations (Koh 1998 p. 649). Transnational issue networks generate regional and global “political solutions” within their issue domains (Koh 1998 p. 649). Koh’s emphasis mirrors the work of institutional scholars interested in the concept of “leveraging,” in which actors define a project and then gain support from subsidiary actors and in tandem with the actors bargain for support and acceptance from external constituencies (DiMaggio 1982, cited in Dorado 2005 p. 390). In terms of social movement theory, Koh’s process represents the mobilization of support and acceptance based on the opportunity and likelihood that actors gain access to power (McAdam 1996 cited in Dorado 2005 p. 391).

Transnational communities necessary to Koh's compliance process also include "interpretive communities" "competent to declare both general norms of international law (e.g. treaties) and specific interpretations of those norms in particular circumstances (Koh 1998 p. 649). Through interpretation of norms in specific circumstances these communities create "law-declaring fora" and include private as well as public stages such as treaty regimes, domestic, regional, and international courts, ad hoc tribunals, domestic and regional legislatures, executive entities, commissions and non governmental organizations (Koh 1998 p. 650). To be considered an "interpretive community" an entity must be capable of "receiving a challenge to a nation's conduct, then defining, elaborating, and testing the definitions of particular norms and opining about their violation" (Koh 1998 p. 650). The ILO CEACR acts as an interpretive community in its supervisory role with countries that ratify ILO Conventions.

Responding to these interpretive communities are domestically based "bureaucratic compliance procedures" (Koh 1998 p. 651). Here, Koh argues that once a ruling has been made interpreting and applying an international rule to specific domestic circumstances, "domestic governmental institutions adopt symbolic structures, standard operating procedures, and other internal mechanisms to help maintain habitual compliance with internalized international norms" (Koh 1998 p. 652). Koh further points out the long-standing existence of domestic and inter-governmental organizations with "institutional mandates to ensure that the government's policies conform to international legal standards that have become embedded in domestic law" (Koh 1998 p. 652). The interchange between international interpretations and domestic bureaucracy produces an enmeshment of the domestic with the international as the "making and

maintenance of international law norm[s] become entrenched in domestic and legal political process” (Keohane 1992 cited in Koh 1998).

Finally, Koh argues that the creation of strong “linkages across issue areas” promotes internalization of norms since non-compliance in one area is connected with frictions and repercussions in other issues areas (Koh 1998 pp. 653-654). This further reinforces domestic bureaucracies role in developing “default patterns of compliance,” which “channel routine governmental conduct along law-compliant pathways” (David 1994 cited in Koh 1998 p. 654, FN 136). Koh argues that avoidance of such frictions provides domestic bureaucracies with “powerful institutional incentives to press their governmental leaders to adhere generally to policies of compliance over policies of violation” (Koh 1998 pp. 654-655). It is through these repeated patterns of interaction, interpretation and internalization that compliance becomes “habitual” and “self-interested” rather than coerced and externally driven (Koh 1998 p. 655). These latter two aspects of Koh’s compliance process introduce the idea that multiple institutional arrangements such as complementarities and hierarchies matter and should be anticipated and incorporated into compliance strategies (Koh 1998; Crouch 2005; Amable 2003).

In institutional terms, interactions, interpretations and resulting political, legal and social internalization processes create an homogenization in which internationally elaborated norms become domesticated norms and converge across those countries interacting in the same international and transnational environment (DiMaggio and Powell 1983; Drezner 2001; Koh 1997 p. 2625). DiMaggio and Powell identify three mechanisms closely related to Koh’s compliance theory, through which homogenization, or as they call it “isomorphic change,” occurs

(DiMaggio and Powell 1983; Koh 1998). Coercive isomorphic processes occur when formal and informal pressures including “cultural expectations” are exerted through “force, persuasion or invitation” (DiMaggio and Powell 1983 p. 150). Mimetic processes of isomorphic change involve imitation and modeling of solutions with imitation encouraged by uncertainty and ambiguity (DiMaggio and Powell 1983 p. 151). Finally, normative isomorphic processes stem from professionalization and the establishment of a collective cognitive base and legitimation of those involved in a sphere of activity such as epistemic and interpretive communities (Koh 1998; DiMaggio and Powell 1983 pp. 152-153).

IV. The Diagnostic Tool

A. Diagnostic Tool at International Level

Koh’s compliance process when joined with institutional theory creates a model upon which a diagnostic tool can be built to assess problems in labour rights implementation as well as to suggest possible interventions to improve compliance. As shown below in Table 4.2, the text of ILO Conventions define labour rights rules and represent an institutional settlement among the ILO constituents: employer organizations, worker organizations and governments. The ILO Conventions as institutional settlements can also be treated within compliance theory terms as compliance ideals and benchmarks for countries that ratify specific ILO Conventions.

Once an ILO Convention is adopted by the ILO and ratified by countries, the ILO continues to articulate its definition of the institutional settlement through its role supervising countries and interpreting the written texts of the Conventions. The meaning and content of the compliance ideals and benchmarks established by the ILO to supervise countries are based on these interpretations as well as the

written text of the Conventions. Changing interpretation and reinterpretation of the Convention texts in turn changes the compliance ideals and benchmarks embodied in the Conventions over time.

The ILO Committee of Experts (CEACR) is an interpretive community within Koh's meaning being charged with evaluating a country's compliance with the Convention obligations as written and interpreted. Their interpretive role arises as a result of their involvement in enforcement of the Conventions. The CEACR reads reports submitted by countries detailing their implementation of ratified Conventions. The country reports are evaluated by the CEACR in light of information and shadow reports provided by actors such as national trade union confederations potentially critical of the country's implementation. The CEACR also perform general surveys of ILO Conventions in which they evaluate the performance of all ILO member states regardless of their ratification of the Convention.

Through these enforcement mechanisms the CEACR evaluate the congruence between facts and conditions in the country and the compliance ideals and benchmarks in the Conventions. The institutional settlement is the compliance ideal and benchmark serving as the comparator against which the state's performance is judged. The CEACR decides what to examine and emphasize in their supervision and what judgments to make about a country's performance. Circumstances and conditions reported by countries may lead the CEACR to maintain and strengthen its articulation of the institutional settlement or alternatively abandon or modify the terms of institutional settlement via re-interpretation of the Convention or the decision not to focus on a particular aspect of compliance.

Table 4.2 Diagnostic Tool at International Level

International Level: ILO Conventions as Institutional Settlements and Compliance Benchmarks				
ILO Conventions	Description	Institutional Theory	Compliance Theory	Institutional/Compliance Changes
Text	ILO Convention texts are adopted	The Conventions text articulates an institutional settlement among ILO actors.	The Convention text establishes compliance ideals and benchmarks for countries that ratify the Convention.	The Conventions may be abandoned and/or replaced
Interpretation	Convention texts are interpreted by the ILO Committee of Experts (CEACR)	The institutional settlements articulated in texts of Conventions are further defined through interpretations by the CEACR.	The ILO incorporates its interpretations of Convention texts into compliance ideals and benchmarks for countries that ratify the Conventions.	Convention interpretations may be modified
Enforcement	Convention texts and interpretations are enforced by the ILO through supervision of countries that ratify the Convention	The institutional settlement is maintained through ILO supervision of countries that ratify the Conventions.	The CEACR identifies incongruence between domestic performance and Convention compliance ideals and benchmarks.	Enforcement through supervision evolves to address changing circumstances and conditions

B. Diagnostic Tool at Domestic Level

At the domestic level, the diagnostic tool takes as its starting point the compliance ideals and benchmarks established by the Conventions as interpreted by the CEACR. The diagnostic tool is a representation of the ingredients of institutions and compliance theory that help to identify problems implementing the compliance ideals/benchmarks as handed down by the ILO as well as to identify some possible avenues of intervention to improve compliance.

The first and second columns of table 4.3 identify and explain the domestic *obstacles* that may prevent implementing the compliance ideals and benchmarks that arise from an ILO Convention as interpreted by the CEACR. The obstacles that are identified: *text, interpretation, enforcement, informal social*

norms, informal social conventions and *other institutions* are first described in relation to their role as potential obstruction to compliance with an ILO Convention. The label “*text*” for example indicates that the text of the domestic law may be faulty because it is written poorly, failing to conform to the corresponding rules of the relevant ILO Convention.

The third column of table 4.3 explains the obstacles identified in columns one and two in relation to institutions theory. For example, the *text* based obstacle to compliance described in column two as “rules are poorly written” corresponds to the institutional theory explanation in column three that the domestic, formal institutional grammar contradicts the institutional grammar of ILO Conventions (Crawford and Ostrom 1995). As indicated in Institutional Theory Explanation (column three) a *text* problem means that the formal domestic rules are ambiguous, contradictory and/or be attached to ineffective rules governing sanctions for violations of the rule in comparison to the compliance ideal and benchmark arising from the ILO Convention as interpreted by the CEACR.

If the domestic formal institutional *rules, interpretation, enforcement, informal social norms, informal social conventions* or *other institutions* are faulty, then column four Compliance Theory Explanation provides an explanation of the fault or deficit in terms of compliance theory. For example, if formal institutional grammar is incongruent with the grammar of the ILO Convention, then column four Compliance Theory Explanation provides an explanation of the deficit in terms failure of domestic actors to internalize the substance of the ILO Convention into domestic legislation.

Column five, identifies possible interventions to bring problematic domestic institutional components into line with the compliance ideals and benchmarks arising from ILO Conventions. For example, in the case of *text* problems, the Compliance Theory Explanation (Column four) identifies the problems as related to legislative internalization of the ILO Convention. In this case, the possible intervention is to align domestic rules and sanctions with those found in the ILO Convention. In this way, legislative reform further internalizes the ILO Convention into domestic formal institutional rules and grammar.

Table 4.3 Domestic Level Diagnostic Tool

Domestic Level: ILO Conventions as Institutional Settlement and Compliance Benchmarks				
Obstacles	Description	Institutional Theory Explanation	Compliance Theory Explanation	Possible Intervention
Text	Rules are poorly written	Rules are ambiguous or contradictory - sanctions are ineffective	Legislative internalization of international rules	Align domestic <i>rules</i> and sanctions with international norms
Interpretation	Well-written rules are interpreted poorly by courts	Defections from rules are formally supported and legitimized	Judicial internalization of international rules enacted in domestic law	Align <i>interpretations</i> of domestic rules and sanctions with international norms
Enforcement	Well-written and faithfully interpreted rules are poorly enforced	Defections from rules are tolerated becoming <i>de facto</i> social conventions	Political internalization of follow through on enforcement intended by international rules	Align <i>enforcement</i> of domestic rules with international norms
Informal Social Norms	Well-written and faithfully interpreted rules are undermined by non-supportive social norms	Formal institutions are undermined by informal institutions – Actors pursue socially-legitimate behaviours counter to formal institutions	Social internalization of legitimacy of norms underlying the rules	Align <i>social norms</i> with domestic rules by enhancing the normative legitimacy of the rules
Informal Social Conventions	Well-written and faithfully interpreted and enforced rules are undermined by social conventions	Formal institutions are undermined by informal institutions- Actors pursue “expected” but not socially-approved behaviours counter to formal institutions	Social internalization of legitimacy of norms underlying the rules	Align social <i>conventions</i> with domestic rules by enhancing the normative legitimacy of the rules
Other Institutions	Well-written and faithfully interpreted and enforced rules are undermined by other institutions	Formal institutions undermine (or reinforce) each other – Institutional complementarities and hierarchies	Enmeshment and linking of issues ensuring institutional hierarchy in line with international rules	Align <i>multiple institutions</i> to create hierarchies intentionally reinforcing compliance outcomes

C. Using the Diagnostic Tool

The institutional side of the tool is on the left side of the table with headings *Obstacles*, *Text*, *Enforcement*, *Informal Social Norms*, *Informal Social Conventions* and *Other institutions* and these come from both institutions

literature as well as from evidence of employment practices in DR-CAFTA countries that violate ILO Conventions. The institutional ingredients on the left side are matched to, and anchored on the right hand side by, the corresponding compliance obligations that ILO Conventions create for states that ratify them. The content of the compliance obligations is drawn from relevant ILO Convention texts as well as by its authoritative interpretation by ILO bodies such as the Committee of Experts (See table 4.2). The right side of the table presents, from the perspective of compliance with an ILO Convention obligation, what institutions should look like if they are to be congruent with the institutional settlement at the international level embodied in ILO Conventions.

Overall, both tables represent a diagnostic tool through which domestic institutional arrangements can be systematically compared to the international institutional settlements and the compliance obligations that arise from them in the form of ILO Conventions. The tool can be used as a guide in investigating and evaluating evidence of labour rights in any particular domestic context. The left-hand institutional side of the tool helps to suggest that the investigation must account for all of the institutional components relevant to a particular labour right. The right-hand compliance side of the tool suggests that the investigation must account for all of the compliance obligations relevant to a particular labour right. The left-side institutional components are structured to match the compliance components on the right side.

By systematically using and accounting for both sides of the tool to guide an investigation of a labour right, the tool helps to diagnose specific areas and combinations of areas of discordance between the domestic institutional arrangements and international compliance obligations. Once these areas of

discordance are identified, compliance theory helps to identify possible intervention(s) to improve alignment between domestic institutions and international obligations.

The tool mirrors the interactive and interpretive processes of the CEACR in which reports and shadow reports are submitted to the Committee and form the basis of its interpretations and judgements about compliance with ILO Conventions. In the resulting CEACR Direct Requests and Individual Observations, the Committee often mentions allegations contained in shadow reports and government responses to them. Yet these interactive exchanges occur offstage and remain offstage since the CEACR does not publish the reports themselves. Given this limitation, the tool has been devised so that diagnosis may be offered using publicly available information. Even if incomplete, the tool offers a theoretically informed way to initiate debate.

The overarching goal of using the diagnostic tool is to identify obstacles and inform debates about reforms needed to achieve compliance with international labour rights. The objectives of using the tool include: (1) to analyze compliance by modeling a methodology to both mirror Koh's concepts and amplify the work done by the ILO Committee of Experts, (2) to produce meaningful diagnostic categorizations and typologies of obstacles to achieve labour rights and (3) to identify possible interventions aimed at improving respect for labour rights.

In order to replicate the process of the CEACR, use of the tool is meant to be based on a variety of perspectives on labour rights, including narrative documentary evidence from U.S. State Department Human Rights Reports and nongovernmental organisation reports from International Trade Union

Confederation (ITUC) and regional non governmental organisations such as the Asociación Servicios de Promoción Laboral (ASEPROLA). The Individual Direct Requests and Individual Observations of the CEACR are a key source of the information considered with the tool. The use of these distinctive perspectives in documentary form also reflects the interactions envisioned by Koh.

The distinct perspectives in these documents represent at least some of the collective voices in debates over decent work. The organizational authors of these documents are also actors participating in debates over international labour standards. The documents are not chosen with the expectation that each source will uncover different or unique information concerning compliance with labour rights, although that may occur. Instead, they are chosen because each contains its own interpretation and judgment of the social facts that are deemed to be relevant. These judgments include characterizing the degree of compliance with specific labour rights and whether particular problems with formal or informal institutions are relevant. In the end, the goal is not a technical debate over labour rights monitoring but a wider debate about how to involve all sectors of society toward progressively achieving compliance. Ultimately, an assessment based on these transparent documentary publicly available sources explicitly allows independent evaluators to identify where they disagree within the assessment (Moran, 2005).

The diagnostic assessment involves three interrelated steps. First, evidence of a given labour right is analyzed in relation to institutional outcomes and arrangements—formal institutional components, social norms and social conventions, and institutions from other realms of social and economic life. Second, the institutional outcomes and components are compared to compliance

criteria derived from international legal norms from the relevant ILO Convention. This allows for the identification of at least some of the complex and often multiple interactions and combinations of conditions and causal paths to observance and non-observance of work-time limits (Ragin 1987). Third, using Koh's compliance theory framework, it is possible to link institutional deficits with compliance interventions, or alternatively, to potential gaps in the compliance ideals themselves.

Two case studies were undertaken to put the diagnostic tool to work and evaluate its usefulness. One of the challenges of using the tool is that labour rights, as institutions exist at different levels of complexity. The first case study examines a relatively simple application of the tool on two forms of forced labour - obligatory overtime and trafficking. The second case study examines the more complex labour right of freedom of association. Freedom of association is not actually one labour right but rather a composite of multiple inter-related rights. The freedom of association case study represents a distinct scale and attempts to account for how the individual component rights contribute to the whole. In both cases however, the diagnostic tool is used as a guide to more deeply examine the evidence.

Chapter 5 Forced Labour Case Study

I. Introduction

A. Forced Labour as a Case a Study

This chapter presents the first case study using the analytical framework and methodology. It examines forced labour in Central America and the Dominican Republic. The case involves both theoretical and empirical aspects of the research project examining two forms of forced labour obligatory overtime and trafficking (Ragin and Becker 1992 p. 8). In answering Ragin's question, what is it a case of—the following themes apply:

(1) It is a close examination of the rules, their interpretation and enforcement along with informal social norms and conventions and influences from other realms of social life underpinning the practice of obligatory overtime

(2) It is a comparison of: (A) the institutional arrangements supporting obligatory overtime with those supporting trafficking; (B) how institutional arrangements supporting obligatory overtime are distributed among the countries by category, *developmental paternalistic* (Costa Rica), *predatory protective* (Nicaragua) and *predatory repressive* (Dominican Republic, El Salvador, Guatemala and Honduras) and (C) how obligatory overtime and trafficking practices within the countries compare to compliance obligations of the ILO Committee of Experts and Convention Nos. 29 and 105.

B. Chapter Plan

The chapter briefly discusses the origins and history of the forced labour and its prohibition. Part three presents institutional and compliance discussion on trafficking, state imposed forced labour and obligatory overtime. Each form of forced labour is presented and explained using the ILO Conventions and their authoritative interpretations by the ILO Committee of Experts on the Application

of Conventions and Recommendations (CEACR) as a benchmark.

C. Selection of Forced Labour as a Case Study

Forced labour was selected as a case study for several reasons. First, forced labour played an essential historical role in the Spanish conquest and development of Central America and the Dominican Republic. Forced labour was central to the colonizing *encomienda* system, in which Spanish colonists received tracts of land and the right to force native people to labour in return for the promise to instruct them in religion (Carozza 2003 p. 289). Use of forced labour in Colonial times was one of the contributing factors in discussion of critical junctures in Chapter 3 that help to distinguish *developmentalist* Costa Rica from the other countries categorized as *predatory*. It may also be relevant to relative labour market regulatory regimes that have evolved into the *repressive* labour market regulatory regimes in the Dominican Republic, El Salvador, Guatemala and Honduras. Finally, empirical evidence from examining DR-CAFTA countries indicated that these two forms of forced labour occur in the region and provide an opportunity to explore the compliance obligations arising from the ILO Committee of Experts and the two ILO Conventions that govern forced labour, Convention Nos. 29 and 105.

D. Research Process and Evidence for Case Study

The research process for the case study on forced labour follows the steps outlined in Chapter 2. Table 5.1 lists the specific documents from the sources used in the study.

Table 5.1 Evidence for the case came from the documents outlined below.

Forced Labour Evidence			
Countries	US State Department Human Rights Reports	NGOs	ILO Committee of Experts
Costa Rica	2006	Asociación Servicios de Promoción Laboral (2003) International Confederation of Free Trade Unions (2005)	Individual Direct Request: 1999 2000
Nicaragua	2006	Asociación Servicios de Promoción Laboral (2003) International Confederation of Free Trade Unions (2005)	Individual Direct Request: 2006 2007
Dominican Republic	2006	International Confederation of Free Trade Unions (2002)	Individual Direct Request: 2005 2007
El Salvador	2006	Asociación Servicios de Promoción Laboral (2003) International Confederation of Free Trade Unions (2005)	Individual Direct Request: 2006 (2) Individual Observation: 2006
Guatemala	2006	Asociación Servicios de Promoción Laboral (2003) International Confederation of Free Trade Unions (2005)	Individual Direct Request 2005 Individual Observation 2005
Honduras	2006	Asociación Servicios de Promoción Laboral (2003) International Confederation of Free Trade Unions (2005)	Individual Observation: 1997 2000

E. Historical and Evolving Forms of Forced Labour

From the first moments of Spanish Colonization forced labour had devastating effects on the region. Along with disease and starvation, forced labour and enslavement contributed to the deaths of 90% of the indigenous population of Central America (5.5 million people) who died during the period of conquest. Overall, Latin America's estimated population of 80 million before conquest (compared to 60 million in Europe) declined from 20% of the total world population, to 3% (Booth and Walker 1999 p. 21, Weaver 1994 p. 12).

Forced labour practices have evolved but continue in the region today. Private agents force undocumented Haitians to work on Dominican sugar cane plantations, force women, men and children to work as prostitutes or perform other non-sexual work. Employers impose obligatory overtime hours on their employees under the threat of physical harm, loss of pay or dismissal from employment. Between 20 to 25 % of all forced labour is an outcome of trafficking (ILO 2005 para 57). States retain laws allowing them to force incarcerated prisoners to work although it is sometimes unclear whether these practices continue and whether the practice would violate compliance obligations.

In 2005, the ILO Global Report on Forced Labour estimated that there were 12.3 million victims of forced labour worldwide (ILO 2005a para 46). Latin America and the Caribbean account for 1,320,000 estimated victims (ILO 2005a p. 13). State imposed forced labour in Latin America and the Caribbean accounts for 16% of the total and forced labour for commercial sexual exploitation accounts for 9% of the total (ILO 2005 para 53). Strikingly, the most dominant form of forced labour in Latin America and the Caribbean is forced labour extracted by private agents for the purpose of nonsexual economic exploitation,

which accounts for 75% of all forced labour in the region (ILO 2005a para 53).

The next section examines the occurrence of forced labour practices related to obligatory overtime and trafficking.

II. Obligatory Overtime and Trafficking as Durable Practices

A. Obligatory Overtime

Obligatory overtime and trafficking are common practices in all of the countries in the study regardless of their categorization as *developmental* or *predatory* and regardless of their *paternalistic*, *protective* or *repressive* orientation towards labour market regulation. (Table 5.2)

Table 5.2

Obligatory Overtime and Trafficking as Employment Practices		
	Obligatory Overtime	Trafficking
Developmental Paternalistic		
Costa Rica	Yes	Yes
Predatory Protective		
Nicaragua	Yes	Yes
Predatory Repressive		
Dominican Republic	Yes	Yes
El Salvador	Yes	Yes
Guatemala	Yes	Yes
Honduras	Yes	Yes

B. Where Forced Labour Occurs

1. Obligatory Overtime

Obligatory overtime is common across all of the countries in textile assembly in maquilas and also in free trade zone assembly plants (Table 5.3).

There are some surprising and notable similarities between countries in different

categories. Reports of obligatory overtime occur across as many sectors in Costa Rica and Guatemala. It is possible that obligatory overtime is outside of the realm of paternalistic labour market regulation in Costa Rica compared to other areas of regulation such as the minimum wage.

Nevertheless there are some distinctive characteristics found in at least a subsection of the predatory-repressive country category. El Salvador and Guatemala are the only countries reported to impose obligatory overtime on their own state employees. Evidence on Nicaragua is relatively silent on specific locations where obligatory overtime occurs, but the US State Department and the regional NGO concur that obligatory overtime is a common practice in many companies (USSD Nicaragua 2006 paragraph 17; ASEPROLA Nicaragua paragraph 7). A list of the specific jobs and industries in which obligatory overtime is reported to occur is in Appendix 1.1.

The distribution of obligatory overtime is presented below. It is important to note that although obligatory overtime is reported to occur in many industries and kinds of work, discussion of its institutional underpinning is confined to textile assembly in maquilas and export processing zones.

Table 5.3

Reports of Obligatory Overtime						
	General	Textile Assembly	Agriculture	Services Commercial	Public Sector	Domestic Work
Developmental Paternalistic						
Cost Rica	Yes	Yes	Yes	Yes		Yes
Predatory Protective						
Nicaragua	Yes	Yes				
Predatory Repressive						
Dominican Republic		Yes	Yes			
El Salvador		Yes		Yes	Yes	
Guatemala	Yes	Yes	Yes	Yes	Yes	
Honduras	Yes	Yes				

2. Trafficking

Trafficking of persons occurs within, to and from all of the countries without regard to country category for both commercial sexual exploitation and for non-sexual exploitation (Table 5.4). Three-quarters of all forced labour is for non-sexual economic exploitation but there is much less discussion of specific kinds of work and industry in which trafficking occurs for non-sexual exploitation (ILO 2005 a para 53). Often the evidence indicates only that it occurs, not where it occurs. (Table 5.5) In regard to trafficking for sexual exploitation there is much more detail locating its occurrence in terms of prostitution for brothels, bars, near agricultural work centres etc. As with obligatory overtime there is overlap between the country categories. Costa Rica has reports of trafficking for domestic

work and agriculture all of which also occur in *predatory repressive* countries. There was evidence of forced labour in begging, debt bondage and sex tourism in a subsection of *predatory repressive* countries. Notably, although Costa Rica has a large tourism industry, trafficking is not reported to occur there.

Table 5.4

Trafficking for Sexual and Non-sexual Exploitation		
	Commercial Sexual Exploitation/Prostitution	Non-sexual Economic Exploitation
Developmental Paternalistic		
Costa Rica	Yes	Yes
Predatory Protective		
Nicaragua	Yes	Yes
Predatory Repressive		
Dominican Republic	Yes	Yes
El Salvador	Yes	Yes
Guatemala	Yes	Yes
Honduras	Yes	Yes

Table 5.5

Reports of Trafficking							
	Un-Specified Non-Sexual	Tourism	Domestic Work	Agri- culture	Fishing	Begging	Debt
Developmental Paternalistic							
Costa Rica	Yes		Yes	Yes	Yes		
Predatory Protective							
Nicaragua	Yes						
Predatory Repressive							
Dominican Republic	Yes	Yes		Yes		Yes	
El Salvador	Yes						
Guatemala	Yes		Yes			Yes	
Honduras	Yes	Yes	Yes				Yes

C. Trafficking and Obligatory Overtime as Practices

Trafficking and obligatory overtime occur in every country. The distribution of forced labour practices indicates that being *developmental* rather than *predatory* does not insulate Costa Rica from forced labour practices. Costa Rica has trafficking for forced labour in domestic work, agriculture and fishing but not in its large tourism industry. It is possible that Costa Rica does not have sex tourism identified as a problem as it is in the Dominican Republic and Honduras because Costa Rica has less corruption and greater enforcement

capacity. All of the countries share a common employment practice of obligatory overtime in textile production.

Notably, all of the reports of obligatory overtime occur in the private not public spheres with the exception of El Salvador and Guatemala who have adopted it as an employment practice of their own.

Despite their presence as common practices, it is not clear whether the institutional arrangements supporting obligatory overtime and trafficking are similar or different either across the different forms of forced labour or across the different country categories where they occur. A closer examination of the institutional ingredients and their distribution across the countries can help in this regard.

III. Institutional Arrangements Associated with Forced Labour Practices

Obligatory overtime and trafficking for sexual and non-sexual exploitation are common practices across all of the countries. As practices, they are embedded in a web of formal and informal rules, social norms and social conventions as well as influences from other spheres of social life that help to sustain or undermine their durability as practices. To see if there are distinct institutional arrangements underpinning obligatory overtime and trafficking across the country categories it is first necessary to identify the institutional components and then examine their combination and distribution across the different categories of countries: *developmental paternalist* (Costa Rica), *predatory protectionist* (Nicaragua) and *predatory repressive* (Dominican Republic, El Salvador, Guatemala and Honduras).

A. Obligatory Overtime Rules

1. Formal Institutional Rule Ingredients

Rules are institutional statements and include: (1) designations identifying

to whom the statement applies, (2) verbs that permit, obligate or forbid, (3) the particular actions or outcomes to which the verbs apply, (4) conditions defining when, where, how and to what extent that action or outcome in question is permitted, obligatory, or forbidden and (5) the “or else” statement defining the sanctions to be imposed for not following the rule (Crawford and Ostrom 1995, p. 584). The substance of the rules on obligatory overtime and work-time limits, whether in national law or ILO Convention, can be analyzed using this institutional grammar. From the evidence of obligatory overtime, distinctive rules could be identified that are associated with the practice of imposing obligatory overtime. These rules are:

(1) *Faux rules*, in which a rule appears to limit work time but does not actually function as a limit. For example, in El Salvador the law establishes a maximum *normal* workweek of 44 hours but overtime can occur without limit as long as it is agreed to freely between sides and never mandatory (USSD para 24; ASEPROLA para 6). Other countries have *faux* normal work days and weeks but in addition have a rule that actually limits work time either by maximum hours per day or days per week or alternatively as minimum hours per day or days per week of rest.

(2) *Contradictory rules* in which a rule setting a limit is contradicted by another rule allowing employers to surpass the limit. For example in Nicaragua, one rule establishes work time limits but another grants employers flexibility to set work schedules beyond the limits (ASEPROLA N; Frey 2010 p.141);

(3) *Rules without sanctions* in which a violation of the rule entails a meaningless sanction or no sanction at all. For example, in Honduras the law provides no specific penalties for its violation (ASEPOLA H para 6);

(4) *Rules without application* occur where a rule establishes a work-time rule but fails to apply the rule to workers or employers. For example in El Salvador the law establishes that workers may only work overtime by mutual agreement but does not protect workers from employer threats to fire them for refusing to work beyond the limit (ASEPROLA ES para 7);

(5) *Rule exceptions* occur when the rule establishing work time limits is accompanied by additional rules exempting categories of workers or employers from the rule. For example, Costa Rica, and other countries allow work time beyond national limits for categories of workers such as those in transport and domestic work (ASEPROLA CR para 9; Frey 2010).

(6) *Procedural impediments* occur when the rules are applied through administrative procedures that delay or derail the application of the rule. For example Guatemalan administrative procedures are very slow and are considered exhausted if the employer fails to appear (ASEPROLA G para 16).

2. *Distribution of Obligatory Overtime Rules by Country Category*

Obligatory overtime results from multiple mechanisms associated with formal institutional rules and their grammar. Much of the discussion in the evidence is from the regional NGO and the ITUC describing the ways that rules help to facilitate the imposition of obligatory overtime. A common rule across all the categories enabling obligatory overtime practices is to exempt workers and employers from work time limits, which then affirmatively allows the imposition of overtime work.

Table 5.6

Formal Rules Supporting Obligatory Practices						
	Faux Rules	Contradictory Rules	Exceptions	No Sanction	No Application	Procedural Rules
Developmental Paternalistic Costa Rica			X			
Predatory Protectionist Nicaragua		X	X			
Predatory Repressive Dominican Republic El Salvador Guatemala Honduras	X		X X X	X X X	X	 X X

3. Discussion:

In general there are more rules facilitating obligatory overtime in the *predatory repressive* category. This is the only category in which there were procedural rule problems and inadequate or entirely missing sanctions to undermine substantive rules. In the predatory category faulty rules may reinforce each other and the logic of enabling obligatory overtime as a practice. Although obligatory overtime is common in the Dominican Republic, absolutely no problems were reported with its formal rules. There is very little to distinguish Costa Rica and Nicaragua from each other in terms of rules. Both countries have actual limits on work time.

B. Interpretation of Rules

Interpretation is an authoritative decision on whether the rule has been violated. The process often involves a challenge, for example, in an administrative or judicial proceeding, followed by a decision, defining and elaborating on the rules and their definitions in relation to particular circumstances (Koh 1998).

1. Ingredients

There were only three examples of interpretation-based influence on formal institutions that contributed to obligatory overtime practices in DR-CAFTA countries and helped to sustain its practice.

(1) *Dismissal interpretations* occur when a worker challenges his/her dismissal from employment based on a violation of work time limits and the court or administrative hearing officer decides on the dismissal and imposition of obligatory overtime.

For example, a Guatemalan court upheld the dismissal of worker for failing to show up for three days of work. The court found that the worker incurred dismissal by failing to turn up for the twenty hour shift, which the court found to be the equivalent of three full working days (CEACR 9 IO 2005 Para 9).

(2) *Pay for Overtime interpretations* occur when a worker challenges non-payment of money owed by an employer for the worker's overtime work. For example, a Salvadoran company owner was fined U.S. \$144,724.05 for retaining social security payments owed to the government on behalf of workers but the court failed to order the company to pay workers the money owed to them which continued pending in the courts. Overtime wages were not identified distinctly from other pay and benefit issues in the case (USSD ES para 17).

(3) *Obligatory overtime interpretations* occur when workers challenge the employer's right to impose obligatory overtime in excess of legal limits and judges decide whether the overtime violates the law. For example, Nicaraguan courts have allowed the extension of the workday beyond the legal limits in court decisions (ASEPROLA N para 9).

2. Distribution of Interpretation of Rules underpinning Obligatory Overtime Practices

Court decisions related to obligatory overtime are shown in Table 5.7 below

Table 5.7

Interpretation of Formal Rules Supporting Obligatory Overtime Practices			
	Legality of Dismissal for Refusal	Legality of Overtime Pay	Legality of Overtime
Developmental Paternalistic Costa Rica			
Predatory Protectionist Nicaragua			X
Predatory Repressive Dominican Republic El Salvador Guatemala Honduras	X	X	

3. Discussion

Court decisions in Nicaragua most directly support obligatory overtime practices. This is not surprising and fits Nicaragua's predatory regulatory orientation. Nicaraguan courts are famously politicized and flexible and have continued to be so since transitioning to democratic rule.

C. Enforcement

The third element of formal institutions that work with formal rules and interpretation of the rules to help to sustain the imposition of obligatory overtime is enforcement or non-enforcement of the rules by governments. The *enforcement* of a rule is the application of the corresponding sanction, which raises the cost of noncompliance by eliminating potential profit as well as imposing additional costs as punishment (Scholz 1997; Fisher 1981). Enforcement mechanisms include monitoring and penalties, such as fines and prison sentences, as well as the procedural rules through which the mechanisms are applied, which may increase or decrease the probability of conviction (Becker 1968).

1. Enforcement-based Formal Institutions

Evidence of enforcement focused on the various methods and styles of non-enforcement of rules. Varieties of non-enforcement included:

(1) *Open non-enforcement* occurs when government ministries formally and affirmatively approve company practices that violate work time and over time limits. For example in Costa Rica, the Ministry of Labour acknowledged it had granted permission to eight companies to operate workday practices that violate its laws including permanent overtime (ASEPROLA CR para 16, 17, 19).

(2) *Silent* non-enforcement occurs when the rules are not enforced by authorities but not as a stated policy choice. This is the case in every country except Costa Rica.

(3) *No Records* is a means to non-enforcement by virtue of not having evidence of violations of work time rules. The non-maintenance of records is done by companies and/or the governments. For example, Costa Rican companies do not keep records of work time making it difficult for employees to check their compliance with laws and similarly, the Ministry of Labour does not have a record keeping system to track cases of “extreme working conditions” (ASEPROLA CR para 16).

(4) *Inadequate Resources* problems occur when there is a rule-based obligation to enforce a rule but inadequate resources to allow the enforcement to occur as for example in Guatemala and El Salvador (USSD para 14 and 19). Inadequate resources can also be expressed as inadequate training. *Lack of Training* of Inspectors in which non-enforcement occurs as a result of untrained inspectors who are not capable of carrying out inspections to enforce the law. (ICFTU Para 4).

(5) *Procedural* non-enforcement problems occur when procedures take place such as hearings or mediations but those participating for the government do not fulfil their role in the proceedings. For example in Guatemala, labour inspectors sit passively in proceedings rather than propose solutions or take an active role in any way (ASEPROLA G para 19). This also occurs in Honduras where complaint procedures are slow and often fail to result in any action by the Ministry of Labour (ICFTU H para 4).

(6) *Bureaucratic* failure occurs when those charged with investigating and prosecuting violations of the rules fail to do so. For example, in Nicaragua if a worker complains to a labour inspector that she/he is required to work beyond the mandated limit, the labour inspector does not find this to be the fault of the employer (ASEPROLA N para 7). In Guatemala the Ministry of Labour does not carry out or even try to carry out investigations of piece work-based forced labour (USSD G).

(9) *Unspecified* non-enforcement occurs when a rule is not enforced but no reason or mechanism is given as in the Dominican Republic.

2. Distribution of Enforcement/Non-enforcement underpinning Obligatory Overtime Practices

The distribution of enforcement problems is presented below in Table 5.8

Table 5.8

Enforcement/ Non-Enforcement of Rules Supporting Obligatory Practices						
	Open Silent	Bureaucratic	Procedures	Training Resources	No Records	Not Specified
Developmental Paternalistic						
Costa Rica	Open				X	
Predatory Protectionist						
Nicaragua	Silent	X				X
Predatory Repressive						
Dominican Republic	Silent					X
El Salvador	Silent			X		
Guatemala	Silent	X	X			
Honduras	Silent		X	X		X

3. Discussion of Enforcement/Non-enforcement

The distribution and patterns of enforcement related problems across the categories are distinctive. Costa Rica is the only country that transparently concedes and affirmatively announces that it does not enforce its laws on obligatory overtime. Its announcement was made in relation to its championing the practice for development purposes and as support for changing and loosening the rules (ASEPROLA). Non-enforcement by absence of records does not necessarily contradict its *developmental paternalistic* orientation. There would possibly be greater pressure to uphold the rules and protect the victims if there was evidence of law breaking in Costa Rica relative to countries that are not developmentalist or paternalistic in regulatory orientation.

In the *predatory repressive* category there are also some distinctive results. Procedural hurdles in Guatemala and Honduras give the impression that enforcement procedures and steps occur but without enforcement intentions, content or result. El Salvador with the formal rules allowing obligatory overtime does not employ the same enforcement procedural hurdles as Guatemala and Honduras. The United States notes that lack of resources is an enforcement problem in EPZs in El Salvador. It's not clear, what if anything, additional resources would add, given that the law allows obligatory overtime.

Interestingly, enforcement problems related to inspectors as bureaucratic problems occur in both Guatemala and Nicaragua. Other bureaucratic problems are mentioned in the evidence related to general corruption among labour inspectors and as a result it's difficult to determine whether obligatory overtime inspection problems are different than general corruption problems in labour inspection.

Finally, as was the case with formal rules, very little is said of specific enforcement problems in the Dominican Republic. This is surprising since obligatory overtime is described as common and at times is imposed by locking workers in factories, but there is no discussion whatsoever about enforcement or non-enforcement (USSD, ASEPROLA, ICFTU). In Honduras, there is discussion of lack of effective enforcement by the Ministry of Labour but no further explanation (USSD H).

Overall, it is not surprising that obligatory overtime occurs based on the numerous flawed rules, interpretations and enforcement problems that support its sustainability as a practice. There is an implicit, and in Costa Rica's case, an explicit message in the rules, their interpretation and enforcement, that in every regulatory orientation, countries want to say that they are against obligatory overtime, or at least, want to be perceived as saying they are against obligatory overtime. Nevertheless, the formulation of the rules, their interpretation and enforcement actually facilitate the imposition of obligatory overtime albeit in different styles.

El Salvador, Guatemala and Honduras from the *predatory repressive* category rely on multiple and mutually reinforcing rules including the absence of sanctions in combination with either procedural obstacles as in the case of Guatemala and Honduras or in the case of El Salvador rules that do not require sanctions or procedures because the substance of the rule allows obligatory overtime. These rule arrangements seem solidly in line with their regulatory orientations. In keeping with its *developmental paternalistic* orientation, Costa Rica has more transparent rules with clear work time limits but so does Nicaragua, at least on paper, despite its *predatory* orientation. Court decisions in Nicaragua

also contribute to imposition of obligatory overtime. Enforcement differs between Costa Rica and all the other countries based on the openness with which Costa Rica does not enforce the rules.

The Dominican Republic is more difficult to interpret based on formal institutions because there is almost no evidence of their failings or indeed their relevance. In the case of the Dominican Republic the relevant guiding rules actually governing obligatory overtime are expressed in social conventions not on paper.

D. Informal Institutions

The second dimension of institutional analysis is the interaction between formal and informal institutions. Informal institutions include social norms and social conventions (Helmke and Levitsky 2006). Informal institutions interact with formal institutions and contribute to the observance or non-observance of work-time limits and constraints on obligatory overtime. They can contribute to observance by strengthening incentives to comply and can even substitute for deficits in ineffective formal institutions such as ambiguous substantive rules (Helmke and Levitsky 2006). Alternatively, informal institutions can undermine observance of rules prohibiting or limiting obligatory overtime by displacing formal institutions and thereby contributing to their irrelevance (Helmke and Levitsky 2006). Lastly even when formal institutions are not openly violated, informal institutions can undermine observance through, for example, creative compliance, meaning situations where actors comply with the letter of the law while violating its normative spirit (Helmke and Levitsky 2006).

E. Social Norms

Social norms are values that are observed irrespective of the behaviours of others and correspond to ideas of prudential behaviour (North 1990, p. 4; Ostrom 2005). Evidence indicates that social norms contribute to tolerance of obligatory overtime as an employment practice among DR-CAFTA countries.

1. Ingredients

(1) *Defence of Worker Exemptions*: Normative underpinnings support longer work hours for groups of employees exempted from national limits (Costa Rica, Guatemala). For example, security guards and bus drivers are said to enjoy the benefit of freedom from close supervision and this, it is argued, offsets their longer hours (Costa Rica). Domestic workers in Costa Rica enjoy in-kind benefits and are argued to be like housewives who are constantly available.

(2) *Defence of Employer Exemptions*: Sometimes the normative support for obligatory overtime through employers rather than specific categories of workers, as with social norms that support the setting of work schedules based entirely on employer needs rather than in conformity with work-time limits (El Salvador, Honduras).

(3) *Work Ethic*: (Defence of Long Work Hours) More diffusely, social norms support obligatory overtime when they invoke traditions of long work hours (Guatemala) or

(4) *Modernization*: when obligatory overtime is framed by the government to be a new and modern idea with its acceptance promoted by governments (Costa Rica, El Salvador, Honduras).

(5) *Violation Tolerance*: In addition to normative support for obligatory overtime there is also a culture of tolerance for violations of labour rights (El Salvador, Honduras).

2. Distribution of Social Norms

The distribution of social norms supporting obligatory overtime is presented below in Table 5.9

Table 5.9

Social Norms					
	Modernization	Defence of Worker Exceptions	Defence of Employer Exemptions	Work Ethic	Social Tolerance of Labour Rights Violations
Developmental Paternalistic					
Costa Rica	X	X			
Predatory Protectionist					
Nicaragua					
Predatory Repressive					
Dominican Republic					
El Salvador	X		X	X	X
Guatemala		X	X	X	
Honduras	X		X		X

3. Discussion

The startling thing about social norms underpinning support for obligatory overtime is that they are not exclusively a characteristic of *developmental* Costa Rica. *Predatory* regimes also generate a number of normative supports for

obligatory overtime practices. *Repressive* regimes also create normative justifications for employment practices rather than rely solely on rules and non-enforcement alone. Some *predatory* normative justifications overlap with *developmentalist* justifications. Costa Rica shares with El Salvador and Honduras a similar normative effort to champion obligatory overtime as a way to modernize and develop the country. Finally, the total absence of discussion of social norms in Nicaragua and the Dominican Republic is also surprising.

F. Social Conventions to Impose Obligatory Overtime

In contrast, to social norms, social conventions depend on the fact that others adhere to them as well. Bribery and corruption and violence are common examples of social conventions. *Predatory* and *neopatrimonial* states do not necessarily always enact directly into law, the despotic ruler's or elite's right to extract resources and wealth. Informal institutions, particularly social conventions are expected to be significantly more important among *predatory* than *developmental* states.

There was evidence of many different kinds of social conventions sustaining obligatory overtime practices and not a single social convention counter to its acceptance as a practice. For ease of analysis of the many varieties, they are divided here into social conventions that function as direct coercion to work obligatory overtime and indirect coercion that comes about through systems such as pay and piece rate systems. A third related area of social conventions enable employers to avoid paying overtime pay rates for overtime hours worked. They are not included here but are in Appendix 1.3.

1. Ingredients:

a. Direct Coercion

- (1) *Dismissal* of workers or threats to do so. (Dominican Republic, El Salvador, Guatemala, Honduras).
- (2) *Physical* coercion through threats of violence or locking doors (Dominican Republic, Guatemala, and Honduras).
- (3) *Economic* withholding or threatening the withholding of pay or other accumulated benefits (Dominican Republic, Guatemala).

b. Indirect Coercion

- (4) *Manipulation* of pay/piece rate and bonus systems (Dominican Republic, Guatemala and Honduras)
- (5) *Quid pro Quo*: demanding that unions accept piece rate pay systems without regard to hours worked as a condition of employer's agreement to engage in collective bargaining (Guatemala).
- (6) *Intensity*: simply maintaining very high volumes of work to create urgency with delivery deadlines (El Salvador, Honduras).
- (7) *Ignorance*: Employers simply refrain from informing employees that limits to work-time exist (Dominican Republic).
- (8) *Voluntary*: In some cases workers volunteer and even request to work beyond legislated work time limits due to poverty (El Salvador, Nicaragua).

2. Distribution of Social Conventions (Direct Coercion)

The distribution social conventions exerting direct and indirect coercion supporting obligatory overtime are presented in Tables 5.10 and 5.11 below.

Table 5.10

Social Conventions Direct Coercion			
	Physical Coercion	Dismissal (or threat)	Withhold Pay (or threat)
Developmental Paternalistic Costa Rica			
Predatory Protectionist Nicaragua			
Predatory Repressive Dominican Republic	X	X	X
El Salvador		X	
Guatemala	X	X	X
Honduras	X	X	

Table 5.11**2. Distribution of Social Conventions (Indirect Coercion)**

Social Conventions Indirect Coercion					
	Pay/Piece Rates	Work Intensity	Information	Collective Bargaining	Workers Volunteer
Developmental Paternalistic Costa Rica					
Predatory Protectionist Nicaragua					X
Predatory Repressive Dominican Republic	X		X		
El Salvador		X			X
Guatemala	X			X	
Honduras	X	X			

3. Discussion

All of the directly coercive social conventions are confined to *predatory repressive* countries and all of the countries dismiss or threaten to dismiss workers who refuse to work obligatory overtime. In addition, the Dominican Republic, Guatemala and Honduras use physical coercion. It is surprising that in El Salvador there is only evidence of dismissal as direct coercion, but perhaps other forms of direct coercion are unnecessary because more of its institutional coercion comes through rules.

Indirect coercion is also predominantly found in predatory repressive countries. The indirect form, of workers volunteering in El Salvador and

Nicaragua relates to other institutions influencing overtime in the form of poverty discussed below. Pay systems coerce overtime hours except in El Salvador, which relies on general work intensity. Guatemala was unique in term of evidence that employers condition bargaining with unions on the union's acceptance of piece rate systems that cause workers to work overtime.

G. Institutions in other Realms of Social Life

The third dimension of institutional analysis is the influence of institutions in spheres of economic and social life that are not directly related to work-time limits and constraints on obligatory overtime. Institutions in different spheres interact and reinforce each other in several ways (Amable 2003; Hall and Soskice 2001). One example is where workers in general are protected against obligatory overtime by specific institutions, but have difficulty gaining effective access to protection because citizenship institutions put them at risk of deportation if they file complaints. Another example is when one set of institutions imposes its logic on another institution.

1. Ingredients

(1) *Wage Setting*: Some institutions, such as wage setting rules, are separate but very closely related to obligatory overtime (El Salvador, Honduras, Nicaragua).

(2) *Labour Rights*: Such as freedom of association and collective bargaining influence obligatory overtime practices. (Guatemala, Honduras).

(3) *Macro policy*: At the macro economic policy level, economic development policies contribute to obligatory overtime practices through unemployment and underemployment. (El Salvador, Honduras). Also, at the international level, market institutions in which currency values fluctuate make workers' poverty wages lower still. (Honduras, Nicaragua)

(4) *Development/FDI policy*: Government policy institutions to attract foreign direct investment influence obligatory overtime by undermining formal institutions (Costa Rica, Honduras). Development policy: Similarly, international export market institutions create industry fluctuations adding to worker insecurity. Examples: Honduras, Nicaragua.

(5) *Gender and race* institutions influence are more in the background related to families and single motherhood (El Salvador) as well as racism (Dominican Republic).

2. Distribution

Indeed there is evidence that diverse sets of institutions beyond national work time limits influence obligatory overtime practices presented in Table 5.12

Table 5.12

Other Institutions					
	Wage Setting	Labour Rights	Macro Policy	Development Policy	Gender Race
Developmental Paternalistic Costa Rica				X	
Predatory Protectionist Nicaragua	X			X	
Predatory Repressive Dominican Republic					X
El Salvador	X		X		X
Guatemala		X			
Honduras	X	X	X	X	

3. Discussion

In every country, at least one institution outside of those directly governing work time is discussed as influencing its practice. Development policy related to export oriented production in textiles discussed in the evidence crosses all of the categories. In Costa Rica it is related to normative support for overtime as modernization. Development policy and connection to obligatory overtime are also evidenced in Honduras from the *predatory repressive* category. Wage policy is named as an important contributing factor in Nicaragua and two of the *predatory repressive* countries El Salvador and Honduras.

The interactions between multiple institutions may indicate an institutional hierarchy but the source of the hierarchy is not possible to determine. It is possible that neoliberal export-oriented development and structural adjustment oriented institutions impose their logic on work-time and overtime limits. This would be indicated by Costa Rica's inclusion under the rubric of development policy, in common with Nicaragua and Honduras. Structural adjustment-oriented policies (SAP) involve creating a friendlier environment for domestic and international businesses by weakening labor policy and labor policy enforcement (Abouharb & Cingranelli, 2007). Alternatively, with respect to the *predatory repressive* countries such as Honduras, obligatory overtime may be influenced by its general logic of *predation* and *repression* masked in the language of and legitimacy of neo-liberal policy.

H. Summary of Obligatory Overtime as Employment Practice

Obligatory overtime is a common employment practice across all categories of countries in the study. It is supported by rules of differing varieties that facilitate its imposition and in a few cases (Nicaragua, El Salvador and

Guatemala) further supported by judicial decisions. Enforcement problems are extensive with the worst problems occurring in *predatory repressive* Guatemala and Honduras. There is evidence that social norms support the imposition of obligatory overtime and that at least some of the social norms transcend regulatory orientation. Social norms in both *developmental paternalistic* Costa Rica and *predatory repressive* El Salvador and Honduras support obligatory overtime through defence of the practice as a modernization strategy. Also, crossing country categories are social norms supportive of exempting some workers from protections against obligatory overtime in Costa Rica and Guatemala. Institutions related to poverty and economic development were contributing factors to obligatory overtime and economic development institutions transcend regulatory orientation occurring in Costa Rica, Nicaragua and Honduras.

The most striking divide that occurs in obligatory overtime between *predatory repressive* countries on the one hand and *developmental paternalistic* Costa Rica and *predatory protective* Nicaragua is the prevalence of direct and indirect coercive social conventions. For *predatory repressive* countries a common feature is threats and actual dismissal for refusing to work overtime and physical coercion in every country except El Salvador. Indirect forms of coercion such as pay and piece rate systems were also exclusively found in *predatory repressive* systems. The only evidence of an indirectly coercive social convention in Nicaragua concerns institutions from other realms of social life. Nicaraguan workers volunteer for overtime based on their poverty. The practice of obligatory overtime in Costa Rica and Nicaragua is common and durable but not embedded in the same coercive direct and indirect social conventions.

There was a degree of variety and distinctive flavours and style among *predatory repressive* systems as well. The Dominican Republic relies almost exclusively on direct and indirect coercive social conventions with formal institutions and social norms all but irrelevant. El Salvador relies much more heavily on rules rather than social conventions (other than dismissals). Guatemala and Honduras are over-achievers relative to other *predatory repressive* countries. They have a mutually reinforcing system of dysfunctional rules including absence of sanctions, rule-based procedural and enforcement problems as well as supportive social norms and coercive social conventions.

A similar fine-grained institutional analysis is possible with other forced labour practices for the purpose of identifying and untangling the specific institutional arrangements. It is also possible to compare institutional arrangements across practices. The next section of the case study provides such a comparison between institutional arrangements in obligatory overtime and trafficking. It provides an opportunity to further examine the institutional diversity among countries but also an opportunity to see how ILO prohibitions against forced labour deal with its diverse forms.

IV. Trafficking

Trafficking of persons occurs within, to and from all of the countries without regard to country category for both commercial sexual exploitation and for non-sexual exploitation (Table 5.4). Like obligatory overtime, trafficking occurs within a web of formal and informal institutions that either support or challenge its durability as a practice. The institutional analysis that follows is not directed at identification of institutional ingredients at the same micro level as obligatory overtime but to identify patterns for comparison purposes.

A. Trafficking Rules

Unlike obligatory overtime rules, trafficking rules are not discussed in relation to their facilitating trafficking. Trafficking practices occur despite the rules not because of them. There are fewer kinds of rule-based problems with respect to trafficking and there are no common rule problems across all of the countries. When trafficking rules are criticized, it is for not being comprehensive enough. This concern is expressed for countries in every category, Costa Rica, Nicaragua and Honduras. A good example is Nicaragua, which is criticized for excluding from its law some non-sexual economically exploitive labour, some adolescents and attempted trafficking. Similarly, Costa Rican law was called problematic by the U.S. because it did not address all forms of trafficking. In the Dominican Republic, El Salvador and Guatemala there are no specific criticisms of the rules associated with trafficking but an acknowledgement that despite the rules, trafficking is a problem.

In contrast to obligatory overtime where most of the discussion of rules centres on describing their dysfunctional qualities, there is also more evidence of attempts to adjust rules to improve their efficacy with respect to trafficking. All of the countries except Guatemala are mentioned for improving the rules in some way to further challenge the practice of trafficking.

At least on paper, it appears that El Salvador and Honduras are willing to directly confront their *predatory* system's role in trafficking practices. Honduras broadened its law to cover more forms of trafficking, increased penalties and created a special category of offence for corrupt public officials who engage in trafficking. Similarly, El Salvador amended its court proceedings to increase the likelihood that perpetrators would not go free. Formerly, one judge would hear

the proceedings commonly leading to release of the accused. The law was changed to require three judges to hear the cases making clientalistic court proceedings more difficult and more transparent.

B. Interpretation of Rules

The interpretation of rules is less prominently discussed in obligatory overtime and trafficking compared to other institutional components. Obligatory overtime court decisions were discussed relative to deciding the legality of dismissing workers in Guatemala, paying workers for overtime work in El Salvador and the legality of imposing overtime work in Nicaragua. In contrast, trafficking related court decisions and legal interpretations centre on one theme only and that is whether the totality of the process leads to convictions, fines and prison sentences or alternatively acquittals. Thematically it relates to the enforcement scorecards relevant to all of the countries but specifically discussed with regard to court decisions in the *predatory* countries the Dominican Republic, El Salvador and Honduras. Judges and processes that lead to acquittals are criticized in El Salvador and Honduras and these are presented as failures of reasoning and understanding. In Honduras the problem is identified as the judiciary's failure to appreciate the complexities of trafficking practices (ITUC; USSD). El Salvador's case is interesting in its connection to social conventions discussed below. In the Salvadoran case the accused argued that he had not trafficked the young person into the country because she travelled and entered the country on her own and further that he had not profited from her prostitution.

C. Enforcement

Trafficking-related enforcement receives more extensive attention than enforcement related to obligatory overtime. For the most part, discussion of

obligatory overtime-related enforcement is limited, its absence due to bureaucratic and judicial failings or policy choice. In trafficking enforcement, El Salvador, Honduras and Nicaragua are the only countries identified for their failure to sufficiently prosecute and enforce the trafficking laws.

Ultimately, trafficking enforcement, unlike obligatory overtime, includes evaluating and keeping score of enforcement outcomes. There are success stories across the spectrum of regulatory regimes. Guatemala and the Dominican Republic are noted along with Nicaragua for successful rescues and repatriations of victims and raids of suspected trafficking establishments. The score keeping crosses all categories of countries and includes investigations, arrests, prosecutions, convictions and imposition of fines and prison sentences. Further, the score keeping metric is applied to all of the countries and so Costa Rica's successes and failures are noted as well as Nicaragua's and all of the countries in *the predatory repressive* category. Tallies and descriptions of enforcement efforts also address corrupt *predatory* systems and examples of their official role in trafficking, such as the Dominican Republic, Guatemala and Nicaragua

Beyond conviction scorecards, in contrast with obligatory overtime, there is discussion of many more facets of enforcement with regard to trafficking and these do not fall along particular country regulatory categories. For example, Costa Rica's enforcement agencies are named and their efficacy is evaluated, as are those in the Dominican Republic, El Salvador, Guatemala and Nicaragua. Part of the discussion crossing country regulatory categories includes the need to improve enforcement coordination among government agencies, which is applied to Costa Rica, as well as Nicaragua, the Dominican Republic and El Salvador.

Inadequate funding for enforcement agencies is cited as a problem in Costa Rica as well as El Salvador.

Some specific criticisms are, nevertheless, reserved for *predatory* systems. Honduras is criticized for lacking an enforcement strategy. The Dominican Republic and Nicaragua are said to lack effective enforcement targeting. Preventative campaigns and studies to analyze the problem to better inform strategies were criticisms levelled at the Dominican Republic, El Salvador, Honduras and Nicaragua. Nevertheless Nicaragua, the Dominican Republic and Honduras were recognized for improved enforcement efforts as well.

Like rules in trafficking, there was also much more discussion devoted to improvements that occurred over the previous year in enforcement of anti-trafficking laws. There were no reported improvements in the laws or enforcement of the laws to prevent obligatory overtime. Trafficking-related enforcement improvements were found across every country category. Costa Rica was lauded for its public awareness campaigns to warn potential victims along with Nicaragua and the Dominican Republic. Official and unofficial victim assistance was discussed positively in reference to every country.

Some of the improvements were found only in *predatory* systems including improved training for government officials in Nicaragua, El Salvador and Honduras and the incorporation of non-governmental organizations in enforcement efforts with the governments of Nicaragua and Guatemala. Most striking, given their repressive labour market regulatory orientation, El Salvador and Guatemala made changes in their enforcement system encourage victims to file charges by removing impediments from their procedures.

D. Informal Institutions

As with obligatory overtime, informal institutions play an important role in influencing trafficking practices by either reinforcing or displacing formal rules, interpretation and enforcement. Both social norms and social conventions are examined.

E. Social Norms

In contrast to the social norms supporting obligatory overtime there are no expressions of social norms espousing support for trafficking. In fact there is little direct discussion of social norms related to trafficking at all, beyond the fear and embarrassment of the victims due to social stigma and the role of social norms in child rearing and gender relations causing all forms of child abuse to be under reported and victims to be discriminated against once repatriated. The evidence of norms was only relevant to *predatory* countries Nicaragua, the Dominican Republic and El Salvador.

F. Social Conventions

Like obligatory overtime, social conventions are extremely important in sustaining trafficking in the countries. Discussion of trafficking related social conventions related only to trafficking for sexual exploitation however. In obligatory overtime, social conventions provide direct and indirect coercion predominantly in *predatory repressive* systems. These included directly coercive threats of dismissal and physical coercion in the Dominican Republic, Guatemala and Honduras. Indirect coercion in the form of pay and piece rate systems were also almost entirely limited to *predatory repressive* systems.

In contrast to obligatory overtime, many of the social conventions supporting trafficking are not based on coercion but rather on enticement and are

widely shared across categories of countries. There is discussion and remarkable consistency in the use of false promises of employment in a job as the means to entice a potential trafficking victim. The jobs used to entice victims ranged from work in beauty salons, factories and domestic servants. The full list of jobs and industries is listed in Appendix 1.2. The only evidence of discussion of physical coercion was in reference to El Salvador where kidnappings and other forms of force are used.

The methods of communicating the enticement tend to follow in line with a country's *predatory* regulatory orientation. The enticement communication is personal including acquaintances, friends and family members in Nicaragua, the Dominican Republic, El Salvador and Guatemala. In addition to personal relationships and direct communication, impersonal business-like forms exist through flyers, newspaper advertisements and employment agencies in El Salvador and Guatemala.

Despite common reliance on enticement and false promise of employment, trafficking practices vary sharply. Social conventions for trafficking relate to the differing nature of the organizations involved. In *predatory repressive* systems such as El Salvador and Guatemala, traffickers tend to be business owners of topless bars, brothels and employment agencies. In Guatemala these businesses are also involved in trafficking and criminal enterprises such as drug and migrant smuggling.

Given the relationship of military, oligarchic and criminal elites in El Salvador and Guatemala it's not surprising that trafficking looks more business-like and organized on a greater scale. Remarkably, El Salvador's trafficking practices involve most victims entering the country on their own in response to a

fraudulent job offer. If the person is caught, she is simply considered an illegal immigrant. If she arrives without incident, she is forced into prostitution.

In contrast, trafficking in the Dominican Republic involves many small smuggling rings and it is not clear what their connection is to the tourism industry. It is more surprising that the Dominican Republic's system is not connected to drug trafficking but there are connections to government elites. Victims pay to obtain travel documents through government agencies and forgers and the documents may be false or legitimate and are often retained by the traffickers after arrival in the destination country. Documents used for trafficking purposes include visas for public programs such as fire fighter training programs.

Corruption conventions play a central role in supporting trafficking and are not limited to predatory systems. Corruption in immigration and law enforcement are problems in Costa Rica and Nicaragua as well as the Dominican Republic and Guatemala. In Nicaragua, false immigration documents are so inexpensive that it led to a change in smuggling practices and discontinuance of stealth smuggling by boats in favour of regular transport. Similarly, immigration and national police in the Dominican Republic falsify visas and facilitate trafficking through airports or alternatively like, Guatemalan police accept bribes in money or sex in exchange for their non-interference with trafficking activities. The most startling corruption allegation concerned Nicaragua whose director of immigration was directly involved in corrupt practices including embezzling money from government repatriation funds.

In addition to facilitation, there is an allegation of involvement in trafficking and migrant smuggling by the Dominican military. Notably the only discussion of forced labour for non-sexual exploitation was the Dominican

Republic involved military and migration officials working on the border between Haiti and the Dominican Republic who were alleged by NGOs to sometimes facilitate illegal transit of undocumented Haitian workers.

Lastly, unlike obligatory overtime, in trafficking, the evidence indicates that there is recognition that social conventions affect trafficking outcomes and must be challenged. There are criticisms when formal institutions such as government enforcement efforts do not consistently or effectively challenge corruption practices. This criticism transcends country categories and is levelled against Costa Rica, Nicaragua, as well as the Dominican Republic and Honduras.

Criticisms of the obstacles to effective enforcement in trafficking, directly confront *predatory* regulatory orientations and the social conventions that arise from them. If government agencies serve the interests of traffickers, shielding them from prosecution and conviction, no matter how well connected the trafficker is, the government is criticized. This is noted when prosecutors are reluctant to pursue charges against government officials in the Dominican Republic and Honduras for example. The Dominican Republic is criticized even if prosecutions occur but are perceived as being too slow.

G. Institutions from other Realms of Social Life

As with obligatory overtime, institutions beyond those directly related to trafficking influence trafficking practices and efforts to eradicate them. Institutions contributing to the level of poverty were recognized as important in every country category and country. Trafficking and obligatory overtime are each influenced by institutions related to poverty such as unemployment, low wages, lack of food and clothing, agricultural production and pay systems and low levels of education.

Prostitution and commercial sex related institutions were also cited as relevant in every country category and country. The fact that prostitution is legal in every category including Costa Rica, Nicaragua, the Dominican Republic, Guatemala and Honduras and is at times openly or widely practiced is consistently raised by US State Department documents.

Immigration institutions influence trafficking in two ways, first they influence enforcement strategies and secondly, they influence how trafficking victims are treated. In this case there is potential contradiction in Costa Rica's *paternalistic* regulatory orientation in the sense that Costa Rica's immigration institutions provide the least protection for victims allowing their immediate deportation. In contrast *repressive* Guatemala acts in ways that seem contradictory. They provide many more immigration related supports to victims including release of children to care by non-governmental organizations. In addition, despite its legality, the Guatemalan police raids bars and immigration officials deport all the prostitutes it rounded up in the raids.

Finally, immigration institution reforms to curb illegal immigration have been credited with discontinuation of the trafficking of sugar cane workers in the Dominican Republic. At the same time, ineffective formal immigration and extradition-related institutions are blamed for facilitating trafficking in Nicaragua.

H. Summary of Trafficking as an Employment Practice

The vast majority of attention and evidence on trafficking institutions and compliance concerns prostitution-related trafficking. Despite this and consistent with ILO estimates, there is evidence of widespread trafficking for non-sexual exploitation and many but not all reports of this kind of trafficking focus on *predatory repressive* systems. Non-sexual exploitation trafficking includes

children trafficked to work as labourers or beggars in the Dominican Republic and Guatemala, trafficking related to debt bondage of women in Honduras. As indicated on Table 5.5 trafficking occurs for work in domestic work, agricultural work and in fishing and these forms transcend divisions between developmental predatory and paternalistic or repressive regulatory orientations. The extent of this aspect of trafficking is systematically ignored in the evidence even though it affects many children and adults. For example it is estimated that most Honduran children trafficked, estimated to be 20,000 or more work in households as housekeepers and child labourers (USSD H para 18).

Both trafficking and obligatory overtime are persistent and widespread practices across all of the countries in the study and examination of the institutional architecture indicates that there are significant differences between the institutional arrangements supporting each practice. In trafficking, the totality of formal institutional ingredients mutually challenge trafficking as a practice. Trafficking institutional arrangements generally challenge trafficking practices with more effective rules, judicial support or alternatively, criticism in the absence of judicial support. Better rules and judicial pressure for support are accompanied by evidence of greater effort and more dimensions of enforcement with pressure and criticisms evident in cases of enforcement failures. Informal institutions interact with trafficking in countervailing ways. There are no social norms supportive of trafficking as a practice. In support of trafficking practices there are widespread social conventions of enticement and corruption to facilitate. Poverty, prostitution and immigration institutions influence trafficking practices.

In contrast, obligatory overtime practices are supported by formal institutions that mutually reinforce its durability as a practice. Formal institutions

include inadequate rules and interpretations and these are supported by non-enforcement. Evidence of criticism for these problems is evident primarily among non-governmental organizations rather than the U.S. State department. Both social norms and social conventions are supportive of obligatory overtime practices. Coercive social conventions were almost exclusively evident in *predatory repressive* systems. Like trafficking, institutions related to poverty influence obligatory overtime practices.

Obligatory overtime and trafficking are persistent and come with different institutional arrangements supporting them or in the case of trafficking challenging them. Both practices are considered part of forced labour within the ILO Core Labour Standards Declaration of 1998 and the subject of ILO Convention Nos. 29 and 105 as well as ILO Supervision. The questions to be addressed in the next section are (1) what are the compliance obligations from the ILO on forced labour and (2) based on those obligations are countries within our categories compliant or alternatively are there compliance interventions based on Koh that should be considered.

IV. Forced Labour Prohibitions in Law

Efforts to abolish forced labour in the region began in the early 1500s from Catholic friars who were part of the order of Dominicans (Carozza 2003 p. 290). International efforts to abolish slavery began 300 years later with the 1815 Declaration Relative to the Universal Abolition of the Slave Trade. Between 1815 and 1957, 300 separate international agreements were negotiated and implemented to suppress slavery (Weissbrodt and Anti-Slavery International 2002 p. 3).

Over the years, the slavery prohibitions expanded to practices beyond traditional ownership forms of chattel slavery (Shahinian 2008 paras 5-10). Forced labour became the subject of international standard setting separate from slavery following World War One. At the time, forced labour remained a predominantly colonial phenomenon used by colonial authorities for economic development, infrastructure and in industries such as mining and agriculture (ILO 2007 para 7).

A. Forced Labour in Core Labour Standards

The Abolition of Forced labour is one of the four Core Labour Standards established by the 1998 ILO Declaration on Fundamental Principles and Rights at Work (ILO 1998a). All ILO member states are obligated by the 1998 Declaration to uphold the principles underlying the Conventions prohibiting forced labour. The prohibition against forced labour and slavery is also considered a universally accepted fundamental right (ILO 2007).

B. Forced Labour in ILO Conventions

There are two ILO Conventions addressing forced labour, Convention No. 29 (1930) and Convention 105 No. (1957). The Dominican Republic and all of the Central American countries have ratified both forced labour conventions (ILOLEX). The Conventions

...aim at guaranteeing to all human beings freedom from forced labour, irrespective of the nature of the work or the sector of activity in which it may be performed. The two instruments effectively supplement each other, and their concurrent application should contribute to the complete eradication of forced or compulsory labour in all its forms (ILO 2007 p. xi).

C. Definition of Forced Labour

Convention Nos. 29 and 105 define forced labour as, “all work or service which is exacted from any person under the menace of any penalty and for which the person has not offered themselves voluntarily” (ILO 2003b p. 34). The two elements of forced labour, lack of consent and menace of penalty are further described in Table 5.13 below.

Table 5.13

Lack of Consent (involuntary nature of) work (the “route” into forced labour)	Menace of a penalty (the means of keeping someone in forced labour)
<ul style="list-style-type: none">•Birth/descent into “slave” or bonded status•Physical abduction or kidnapping•Sale of person into ownership of another•Physical confinement in the work location – in prison or in private detention•Psychological compulsion, i.e. an order to work, backed up by a credible threat of a penalty for noncompliance•Induced indebtedness (by falsification of accounts, inflated prices, reduced value of goods or services produced, excessive interest charges etc).•Deception or false promises about types and terms of work•Withholding and non-payment of wages•Retention of identity documents or other valuable personal possessions	<ul style="list-style-type: none">•Actual presence or credible threat of•Physical violence against worker or family or close associates•Sexual violence•(Threat of) supernatural retaliation•Imprisonment or other physical confinement•Financial penalties•Denunciation to authorities (police, immigration, etc.) and deportation•Dismissal from current employment•Exclusion from future employment•Exclusion from community and social life•Removal of rights or privileges•Deprivation of food, shelter or other necessities•Shift to even worse working conditions•Loss of social status

(ILO 2005a Box 1.1 p. 6)

D. Prohibited Forms of Forced Labour

Prohibited forms of forced labour include slavery and abduction, compulsory participation in public works projects, coercive recruitment in rural

agriculture, domestic work in forced labour situations, bonded labour, trafficking in persons and some forms of prison labour (ILO 2007). Forced labour is also prohibited for purposes of economic development or as a means of political education, discrimination, labour discipline or punishment for having participated in strikes (ILO 2007). Convention No. 29 established a complete and immediate abolition of forced labour for private purposes (Maul 2007 p. 482). The ban on the use of forced labour for private purposes applies to all forms of forced labour even those such as prison labour that are otherwise allowed. The aim of banning forced labour for private purposes was to protect “workers from the consequences of the joining of forces of private economic interests and institutions of state control and discipline” (Maul 2007 p. 482).

E. Acceptable Forms of Forced Labour

Despite the broad language of these prohibitions, it is important to note that Convention Nos. 29 and 105 explicitly allow and regulate the use of forced labour, in some of its forms. Many of these exceptions and exclusion arose as part of the historical and political context in which Convention No. 29 was adopted (Maul 2007). Forced labour prohibitions do not include compulsory military service, normal civic obligations, work by prisoners who are convicted of some crimes, cases of national emergencies, and minor communal services (ILO 2007 paras 42-66). These forms of forced labour, not prohibited outright, are subject to numerous conditions and limits laid out within the conventions and CEACR authoritative interpretations. For example, prison labour is sometimes allowed and is one of the original exceptions created by Convention No. 29 but must be under the effective direction of public authorities or else prisoners must be able to freely withhold their consent to work (ILO 2007 para 98, 114).

At the time of the adoption of Convention No. 29, forced labour was predominantly a tool used by colonial powers for infrastructure, industry and development purposes (ILO 2007 para 7; Maul 2007 p. 482). Convention No 29 allowed these forced labour systems to continue over a transition period by the end of which the practice was to be prohibited. In effect, Convention No. 29 effectively preserved the ability of colonial powers to continue their forced labour systems and supervised its demise until the practices were eliminated completely (Maul 2007 p. 482).

The transition period for colonial powers is now considered terminated by the ILO but other exclusions and exemptions from the general prohibition against forced labour continue (ILO 2007). In an ILO 2007 General Survey on forced labour, the CEACR explained the Convention No. 29 right to be free from forced labour in just seven paragraphs but needed twenty-four paragraphs to explain the exceptions and conditions in which the exceptions apply (ILO 2007 paras 35-41; 42-66).

Aside from these exceptions, it is also true that unless we are independently wealthy, live in countries with well-developed and generous welfare states, we are all forced to labour. This ‘economic coercion’ is implicitly excluded from the ILO Forced Labour Conventions and ILO analysis of forced labour and the subject of much debate in its own right (Lerche 2007 p. 430).

F. Compliance Obligations of States

States that ratify Convention Nos. 29 and 105 must abstain from using forced labour and suppress the use of forced labour by others by outlawing it and by providing penalties that are “adequate” and “strictly enforced” (ILO 2003b p. 34). In general the CEACR say that they will assess compliance with the

conventions based in large part on whether formal institutions establish penal sanctions for forced labour practices, whether the provisions are easily applied in practice by the courts and whether the penalties adequately dissuade forced labour practices and are strictly applied (ILO 2007 paras 135-139).

The CEACR further notes that the State must ensure that victims of forced labour practices have access to justice (ILO 2007 para 139). Notably, the CEACR recognise that the effective application of formal rules depends upon sound functioning of authorities responsible for enforcement such as police, labour inspectors and judges (ILO CEACR 2007 para 139). Finally effective enforcement provides a de facto form of prevention because effective punishment of the guilty, acts to encourage complaints and dissuade further violations by perpetrators (ILO 2007 para 140). Notably, compliance is based not on the outcome that forced labour is eradicated. Rather, compliance requires effective formal institutions, including rules that outlaw and penalties that are adequate and strictly enforced (ILO 2007).

Table 5.14

Compliance Obligations Arising from ILO Convention Nos. 29 and 105
Abstain from using forced labour as well as to effectively suppress its use by others (ILO 2007 para135 p. 34).
(1) States must repeal legislation that might allow the State to use labour in conditions equivalent to forced labour; (2) States must not allow any form of forced labour to be imposed by third parties (3) States must establish legal safeguards to prevent de facto coercion to perform work (4) To the extent that forced labour is allowed within the Conventions, States must comply with the conditions under which this legal forced labour occurs.

(ILO 2007 para135 p. 34).

The ILO does not apply these general compliance obligations in the case of trafficking and obligatory overtime. In the former case, the ILO applies more stringent obligations and in the latter, the ILO effectively excludes obligatory overtime from consideration under the general compliance obligations. Before examining employment practices related to trafficking and obligatory to evaluate their compliance with ILO obligations, the two compliance obligation regimes are compared.

1. Obligatory Overtime

a. Background

The imposition of extra hours outside of normal daily working hours, or “obligatory overtime” is a relatively new area of consideration in the context of forced labour and the subject of numerous complaints by Central American unions

(ILO 2007 para 132, footnotes 314-316). Work hours have historically been considered a matter of working conditions under seventeen different ILO Conventions, including the Hours of Work (Industry) Convention, 1919 (No. 1), and the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30) (ILO 2007 para 133 with footnote 311).

In 1997, Turkey and Canada asked the CEACR whether obligatory overtime violates Convention 29 (ILO 1998b para 107). The CEACR clarified that obligatory overtime does not violate Convention No. 29 as long as it remains within nationally legislated limits or collectively bargained agreements (ILO 1998 para 107). When obligatory overtime remains within these limits, it amounts to “bad working conditions” rather than forced labour (ILO 2007 para 134).

b. Obligatory Overtime Compliance Obligations

According to the CEACR, when obligatory overtime extends beyond legislatively or collectively bargained limits, further inquiry is needed to determine whether or not it violates Convention 29 (ILO 2007 para 132). The CEACR identified two conditions in which obligatory overtime violates the Convention. First, forced labour violations occur when workers work in excess of nationally established limits because they fear dismissal from their job. Second, some pay systems, are based on productivity rather than time spent working and violate Convention 29 when they oblige workers to work in excess of nationally established limits as the only means to effectively earn the minimum wage. In these circumstances, the problem is not merely a matter of poor working conditions and instead amounts to forced labour in violation of Convention 29 (ILO 2007 paras 132-134). In a footnote accompanying the paragraphs on obligatory overtime, the Committee of Experts stated that conditions and limits on

overtime need to be “reasonable” and take into account “the spirit” of ILO Convention Nos. 1 and 30 in terms of their general goals (ILO 2007 p. 72 FN 312).

In sum, obligatory overtime in *predatory repressive* states is imposed through coercive means including physical confinement, psychological compulsion backed up by credible threats for noncompliance, deception, withholding of pay as well as under the menace of penalties varying from threats and physical violence, dismissal from current employment, exclusions from future employment etc. All of these elements satisfy the ILO’s general definition of forced labour and based on the general definition, compliance obligations can be discerned and faulty institutional components identified in the chapter can be identified and matched to compliance obligations using compliance tools.

However, the ILO does not apply this general forced labour compliance obligations metric to forced labour in the context of obligatory overtime. It applies a standard based on work imposed beyond national work time limits under menace of penalty for dismissal from employment or as a means to earn the minimum wage.

2. Trafficking Compliance Obligations

The ILO applies more stringent compliance obligations in trafficking than its general compliance obligations and much greater than in relation to obligatory overtime. Compliance criteria for trafficking, like the CEACR’s general compliance criteria, emphasise the importance of effective formal institutions. There are however some important differences. Unlike the general compliance criteria, the CEACR’s trafficking compliance criteria elaborate in considerable detail what states must do to ensure effective formal institutions to combat

trafficking. Also, the CEACR enmeshes its Convention 29 trafficking compliance criteria with other international human rights treaties and in the process creates higher compliance standards for trafficking than for other forced labour practices.

The enmeshment with other human rights instruments starts with defining trafficking by relying on the Palermo Protocol, also known as the International Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Trafficking involves the recruitment, transport, transfer, harbouring or receipt of a person by such means as threat or use of force or other forms of coercion, of abduction, of fraud or deception for the purpose of exploitation. Exploitation includes the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (Protocol Article 3(a)). The ILO notes that there is global momentum towards establishing trafficking as a criminal offence (ILO 2005a para 23).

The Palermo Protocol also influences how the CEACR frames compliance criteria with respect to trafficking. CEACR compliance criteria for trafficking are extensive and encompass both what is expected and what is not. For example, it is not required that national law criminalize prostitution in order to be in compliance with Convention 29 (ILO 2007 para 78). Trafficking is to be a criminal offence under both Convention 29 and the Palermo Protocol according to the CEACR but States may enact criminal penalties either in criminal statutes or by establishing specific trafficking laws (ILO 2007 para 80).

In comparison to obligatory overtime, the CEACR brings elements of the Palermo Protocol to expand and deepen compliance criteria for trafficking. The CEACR expansively defines the means of coercion encompassed in trafficking to include the threat or use of force, abduction, fraud, deception, the abuse of power or a position of vulnerability and the presence of these elements exclude the validity of voluntary consent by the victim (ILO 2007 para 79). Where children are victims of trafficking, the crime can be established with or without the use of coercive or deceitful measures (ILO 2007 para 79).

Compliance criteria are expanded to include prevention of trafficking and establishment of national plans to combat trafficking via the Palermo Protocol (ILO 2007 para 82). According to the CEACR, these preventative measures are essential for the efficient eradication of trafficking and therefore contribute to the suppression of forced labour as required by Convention 29. In addition to having national action plans, the CEACR notes that their application in practice is also of interest to the committee in assessing compliance (ILO 2007 para 82).

In a similar vein, the CEACR includes in its compliance criteria the effectiveness of criminal penalties for trafficking (ILO 2007 para 84). The Committee notes that compliance with Convention 29 requires that States analyze and solve the difficulties in the enforcement of national laws that jeopardize actual enforcement and implementation of penalties for trafficking (ILO 2007 para 84). Compliance criteria and expectations extend to labour inspectors who must monitor workplaces and take measures to ensure that the conditions of work prescribed by law are respected (ILO 2007 para 84). Police must be able to identify victims and perpetrators and “take corrective measures” (ILO 2007 para 84).

Compliance criteria for effective institutions extend to the performance of the judiciary, key in providing efficient prosecution and strict application of penal sanctions (ILO 2007 para 84). The Committee asked states about measures they had taken to strengthen the active investigation of organized crime with regard to trafficking (ILO 2007 para 84). The Committee was particularly concerned that states apply adequate material and human resources to law enforcement agencies, training of law enforcement and labour inspection staff, immigration and police vice squads.

Another area of compliance with respect to trafficking, and absent in obligatory overtime, is the protection of victims and witnesses. This is required by Convention 29 as well as the Palermo Protocol and requires that states adopt legislation or other appropriate measures that permit victims of trafficking to remain within national territory (ILO 2007 para 83). The ILO particularly requested information of ratifying states as to the measure they have taken to encourage victims to turn to authorities (ILO 2007 para 83). Preventative measures include research, information, mass media campaigns and social and economic initiatives (ILO 2007 FN 182).

Three other novel aspects of compliance criteria are relevant to trafficking compared to other forms of forced labour. First, the CEACR sought information from States about their involvement in international cooperation efforts to combat trafficking. Second, the Committee sought information about cooperation between employers' and workers' organisations as well as non-governmental organisations engaged in protection of human rights within States directed at combating trafficking noting the vital role played by social partners (ILO 2007 para 84). Finally, CEACR compliance criteria are results oriented with the

committee requesting information on prosecutions, judicial proceedings initiated against alleged traffickers as well as information on convictions obtained, along with penalties imposed (ILO 2007 para 84).

In sum, the CEACR assesses compliance with the conventions based in large part on whether formal institutions establish penal sanctions for forced labour practices, whether the provisions are easily applied in practice by the courts and whether the penalties adequately dissuade forced labour practices and are strictly applied (ILO 2007 paras 135-139). The CEACR further notes that the State must ensure that victims of forced labour practices have access to justice (ILO 2007 para 139). Notably, the CEACR recognise that the effective application of formal rules depends upon the sound functioning of authorities responsible for enforcement such as police, labour inspectors and judges (ILO CEACR 2007 para 139). Finally compliance also has a preventative aspect.

In place of the simple two-step compliance test for obligatory overtime, trafficking compliance criteria are much more detailed in outlining conditions in which a state's formal institutions will be considered compliant:

Effectiveness of Rules

- Make trafficking a criminal offence
- Consider victim consent invalid where there is coercion, threats or use of force, abduction, fraud, abuse of power or position of vulnerability.
- Consider evidence of coercion, fraud, or deception unnecessary to establish that children are victims of trafficking.

Effectiveness of Enforcement and Interpretation of rules:

- Implement effective criminal penalties
- Analyze and solve difficulties in enforcing national laws that jeopardize actual enforcement.
- Evaluate implementation of penalties by analyzing the role of labour inspectors, police and the judiciary.
- Provide adequate training and material and human resources for enforcement agencies

- Indicate enforcement results including prosecutions and judicial proceedings initiated as well as convictions obtained along with penalties imposed.
- Protect victims including allowing victims to remain in the national territory and States must take measures and report the measures taken to encourage victims to turn to the authorities.

Enhance the Legitimacy of Anti-Trafficking Measures:

- Take preventative measures including research, information, mass media campaigns and social and economic initiatives
- Participate in international cooperation efforts to combat trafficking
- Seek the cooperation and participation of employers' and workers' groups as well as non-governmental organisations engaged in the protection of human rights.

G. Applying the Compliance Obligations to Overtime Compliance

With lowered standards by the ILO, only countries that impose obligatory overtime in excess of national limits and threaten or dismiss workers from employment for their refusal or where it is imposed as a means to earn the minimum wage are not meeting the compliance obligations set out by the ILO.

Despite ineffective formal institutions and routine disregard for national work time and overtime limits, Nicaragua appears to be compliant with Convention No. 29 based on the lack of evidence of the social convention of dismissing and threatening to dismiss workers for refusing to work obligatory overtime. Costa Rica is also compliant base on this compliance obligation. Strictly speaking there would be no interventions required based on their compliance with the ILO obligations.

The examination of obligatory overtime practices at the beginning of the chapter indicates that every *predatory repressive* system, with the possible exception of El Salvador is not meeting its compliance obligations as set out by the ILO Committee of Experts. El Salvador, perversely, is technically compliant because it has no national work time limit. Not surprisingly work time limits in

Guatemala and Honduras establish many exceptions and it is not always easy to determine if there is a limit and to whom the limit applies (Frey 2010).

Nevertheless all of the predatory repressive countries either dismiss workers or have obligatory overtime as a means to earn the minimum wage. Examining the employment practices underpinning obligatory overtime practices, *Legislative* interventions could be considered to

- add sanctions for violations of overtime rules
- remove contradictions in rules
- apply rules to employers and workers
- add rules prohibiting dismissals for refusal to work overtime
- clarify exemptions from national work time limits, to
- change procedural defaults so that employer non-participation does not benefit employer
- improve rules and sanctions against dismissal for refusing to work obligatory

Given the strength of social conventions contributing to obligatory overtime practices, *legislative* interventions could be targeted directly at relevant social conventions such as

- physical and verbal abuse
- locking doors
- pay systems

Judicial interventions are necessary to

- implement the substantive overtime and worktime rules
- support procedural rules congruent with substantive rules
- apply sanctions
- provide enforceable accountability standards to state agencies

Social interventions are necessary to

- enhance the norms underlying the legitimacy of overtime limits
- challenge and replace tolerance for labour rights violations with norms consistent with respect for labour rights.

Koh's argument is that in the circumstances presented by countries in the *predatory repressive* category, multiple and mutually reinforcing compliance interventions are necessary. Compliance interventions must also enhance negative and positive incentives across institutions. In light of this, it is questionable whether compliance interventions narrowly aimed at work time and overtime institutions alone can bring about compliance even with the meagre Convention No. 29 compliance obligations for overtime.

Compliance interventions must also confront and challenge institutional hierarchies that undermine compliance. Neoliberal structural adjustment policy-oriented institutions even in *developmental paternalistic* systems interfere with labour rights compliance because they make compliance irrational. If competitive advantage is sacrificed by compliance with work time limits then, compliance becomes costly and is counter to the interests of employers. Structural adjustment policy-oriented institutions encourage actors to champion norms that undermine the legitimacy of labour rights. Rather than enmesh institutions across spheres of social life with labour rights institutions, neoliberal structural adjustment policies enmesh labour institutions in their logic. Neoliberal structural adjustment policy oriented institutions are also layered with predatory and repressive regulatory institutions in the Dominican Republic, El Salvador, Guatemala and Honduras.

Evidence from DR-CAFTA countries indicates that coercion to work obligatory overtime arises from multiple institutional influences. These include coercion as a result of unemployment, underemployment and poverty. Coercion also results from nonenforcement of obligatory overtime rules as a means to attract foreign direct investment. All of these direct and indirect forms of

coercion are excluded from CEACR compliance obligations. Notably, there are ILO Conventions related to unemployment, freedom of association and minimum wage setting, for example, but they are not made part of the general compliance criteria for obligatory overtime

V. Conclusion

The ILO imposes different obligations on states for two different forms of forced labour (obligatory overtime and trafficking) even though all forms of forced labour including these are lumped into one by the ILO in its discourse on forced labour as one of the four Core Labour Standards. The ILO's application of relatively more stringent standards in the case of trafficking, were generally met with greater efforts on the part of DR-CAFTA countries to meet them. The difference in ILO obligations and difference in State efforts to meet the obligations may relate to whether the ILO is seeking to regulate relations between employers and employees in the case of obligatory overtime or criminals in the case of trafficking. Overall my conclusion from the case was that, at least with respect to forced labour, after States ratify the conventions, the ILO continues to create and re-create its regulatory obligations as employment practices evolve.

Chapter 6 Freedom of Association Case Study

I. Introduction

A. Background Freedom of Association Case Study

The case study attempts an analysis of the rights to freedom of association and collective bargaining in Central America and the Dominican Republic and is done with a different approach than the case study on forced labour. From the outset, it is important to recognize that freedom of association is a composite right made up of many inter-related rights unlike the relatively simple examination of obligatory overtime and trafficking in the prior chapter. It is also different from other labour rights because the exercise of the right freedom of association dislodges legal workplace arrangements where there are no unions or collective bargaining. In Central America and the Dominican Republic, workplaces without unions and bargaining are established as the default condition and only modified by the exercise of association and bargaining rights. In this non-union default setting, employers exercise the power to decide pay and other work rules within the bounds of market conditions and state regulations. Freedom of association and rights to collective bargaining provide a set of rules to enable workers to move from the default non-union, non-bargaining workplace to a workplace with unions and collective bargaining. In this latter condition, state regulations and market conditions still retain influence but workers collectively through their organization also engage with employers in determining workplace pay and other rules.

The transition from default employer control to shared control through unions and collective bargaining entails the exercise of multiple inter-related and inter-dependent rights with many linked components (Appendix 2.1). The chain and its links can be thought of in terms of the procession of activities that workers in Central America, the Dominican Republic and elsewhere must accomplish to

exercise the right to freedom of association and collective bargaining. These include: (1) organizing workers to support the founding of a union, (2) gaining formal recognition of the union from the employer and the government, (3) establishing union leadership, (4) developing and implementing the union's program (5) negotiating terms and conditions of employment, (6) organizing protests and strikes if necessary (7) enforcing collective agreements once they exist, and (8) engaging in politics and social dialogue to influence policy. Separately and taken together the components help or prevent unions from coming into existence in the first place, enhance or diminish the impact of unions once they exist and help or hinder unions from going out of existence once established. This is a much more complex labour right to examine than obligatory overtime and trafficking and requires a different approach to applying the diagnostic tool.

Almost twenty years ago, Roy Adams (1992) examined regulation of unions and collective bargaining and noted that government policy varies according to its regulatory objective, ranging from "suppression to toleration and encouragement" (Adams 1992 p. 273). Adams goes on to analyze possible determinants and explanations of variation. This variation in regulatory objectives is curious in light of the common legal foundation for freedom of association and collective bargaining.

The rights to freedom of association and collective bargaining are among the human rights found in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, as well as regional treaties and ILO Conventions. There are eight ILO Conventions on freedom of association and collective bargaining (ILOLEX). Two of these Conventions, Nos. 87 and 98,

were incorporated into the 1998 ILO Declaration of Fundamental Principles and Rights at Work. Their inclusion in the 1998 Declaration signals that they are considered fundamental human rights, and all ILO member states are obligated to uphold the principles underlying the rights even if they have not formally ratified the two conventions. Convention Nos. 87 and 98 have been ratified by all of the Central American countries and the Dominican Republic. These two ILO Conventions and their interpretation by the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA) serve as the benchmark in this chapter for institutional analysis.

In practice, workers in the Dominican Republic and Central America face severe resistance and obstacles when they attempt to exercise association and collective bargaining rights. Given the relationship between power and institutional settlements, this is not surprising (Gross 2010 p.9; Knight 1992). Worker organizing and bargaining alters the balance of power and distributional outcomes between employers and workers. Institutions governing freedom of association therefore influence the distribution of power and resources in the workplace and are themselves established through conflict and political compromise (Knight 1992; Berg and Kucera 2008). Worker collective organization also alters the balance of power within political systems (Gross 2010 p. 9). In many national contexts employers and governments favor institutional settlements that make it more difficult for workers to gain and exercise power. For example, in Guatemala an ILO Technical Mission concluded:

the basis of the Guatemalan problem in the field of freedom of association and collective bargaining lies in the existence of a labour law system which, in both substantive and procedural terms, prevents and raises obstacles to the appropriate development of

B. Chapter Plan

This chapter analyzes the institutional arrangements related to freedom of association, drawing attention to the particular ways institutions, intended and unintended, prevent workers from exercising association and collective bargaining rights. In particular, with so many interrelated rights, the question arises whether some of them are more important than others and further whether there are meaningful differences among Central American countries and the Dominican Republic in the effective exercise of association and bargaining rights. In other words, are there meaningful differences in terms of regulatory objectives in Adams' framework of repression, tolerance and encouragement? Further, how are regulatory objectives expressed in country-specific institutional arrangements? These questions were inspired in part by the puzzle of converging Cingranelli-Richards scores discussed in Chapter 2.

After this introduction, part two of the chapter outlines how ILO Convention Nos. 87 and 98 came into existence and explains general compliance benchmarks of the conventions, part three briefly discusses the historical background on freedom of association and trade unions in Central America and Dominican Republic to provide context for the comparative institutional assessment. Part four presents a comparative institutional analysis of DR-CAFTA countries on anti-union discrimination and part five discusses compliance issues and Adams' categorizations.

C. Selection Freedom of Association as a Case

As outlined in chapter 2, Research Process, Freedom of Association and Right to Collective bargaining was selected because of its central place in my own

curiosity based on my experiences working with immigrant janitors in a union context. Also, examining institutions of freedom of association has the potential for lending greater understanding to the underlying dynamics I examined with CIRI worker rights scores converging among countries that had historically been very diverse. Lastly, because there are so many elements involved in freedom of association, the case study provided an opportunity to work at different scales within the case. At one scale there is a closer examination of one element, anti-union discrimination but there is also an opportunity to examine freedom of association at a systems level.

D. Research Process and Evidence

The research process for the case study on forced labour involved the inter-related steps outlined in chapter 2. The documentary evidence and sources used in the case study is listed below on Table 6.1.

Table 6.1

Freedom of Association Evidence			
Countries	US State Department Human Rights Reports	NGOs	ILO Committee of Experts
Costa Rica	2009	International Trade Union Confederation 2009	Individual Observation Convention No. 87, 2008, Convention No. 98, 2009
Nicaragua	2009	International Trade Union Confederation 2009	Individual Observation Convention No. 87, 2009, Convention No. 98, 2009

Dominican Republic	2009	International Trade Union Confederation 2009	Individual Observation Convention No. 87, 2008, Convention No. 98, 2008
El Salvador	2009	International Trade Union Confederation 2009	Individual Direct Request, Convention No. 87 2009, Convention No. 98 2009
Guatemala	2009	International Trade Union Confederation 2009	Individual Observation Convention No. 87 2009, Convention No. 98 2009
Honduras	2009	International Trade Union Confederation 2009	Individual Observation: Convention No. 87 2008, Convention No. 98 2008

II. ILO Law on Freedom of Association

A. History of Freedom of Association at the ILO

From its earliest moments the ILO has both relied upon and been the site of intense struggle over freedom of association, so much so that its first convention dealing with the issue, Right of Association (Agriculture) Convention, 1921 (No. 11) only provided that if the right came to exist in an ILO Convention, it would be extended to agricultural workers (Dunning 1998 p. 157; Swepton 1998 p. 170). Multiple attempts to place freedom of association and even questionnaires on the subject, on the annual conference agenda failed until after the Second World War (Dunning 1998 pp. 157-158; Morse 1950 p. 413). At the first International Labour Conference following the end of the war in 1944,

member states approved the Declaration of Philadelphia, which affirmed the ILO's commitment to freedom of association and the right of collective bargaining (Dunning 1998 pp. 158-159). This was in part possible because of organized labour's respect from governments such as the UK for "maintaining industrial morale" during the war (Dunning 1998 p. 158).

The creation of an ILO Convention on freedom of association may not have been possible without the Cold War. In November 1945 the ILO became one of the UN's specialized agencies (Dunning 1998 p. 159). In 1947 the United Nations Economic and Social Council (ECOSOC) received rival proposals to address trade union rights and freedom of association. Non-socialist countries supported an American Federation of Labor (AFL) proposal to refer the matter of trade union rights to the ILO as a UN specialized agency for it to determine appropriate action (Dunning 1998 pp 159-169; ILO 1948 pp. 576-578). Arguing that the ILO could not be trusted because it allowed the participation of employers, a block of socialist countries supported a World Federation of Trade Unions (WFTU) proposal to establish a UN based system including five clauses protecting trade union rights and a UN based Trade Union Committee to investigate and recommend to ECOSOC appropriate measures for violations (Dunning 1998 p. 159; Morse 1950 p. 413).

ECOSOC voted 15-3 to refer the matter to the ILO, averting what would have been a devastating loss for the ILO, but also went beyond the simple hands-off referral in line with the AFL proposal (Dunning 1998 p. 160). The ECOSOC resolution recognized the principles of freedom of association and requested from the ILO "an early report on action taken" at its next session (Dunning 1998 p. 160). In effect, the referral pressured the ILO to resolve the longstanding

disagreements among constituents and establish a freedom of association convention (Dunning 1998 pp. 160-161). The ILO's first step was a resolution presented to the 30th International Labour Conference in 1947 that had been crafted by a high-level committee. In the drafting process, the Employer's Committee proposed unsuccessfully that the resolution's provision of a "right to join" associations should be amended to include "the right not to join" (Dunning 1998 p. 161). Despite defeat of their proposed amendment, the employers joined with other constituents voting unanimously to support the resolution and move ahead towards a freedom of association convention at its next (31st) annual conference (Dunning 1998 p. 161).

These developments were reported back to the ECOSOC, which held another series of discussions and in effect helped to keep pressure on the ILO in three ways. First, the Commission gave its own recognition of the principles in the ILO resolution and requested the ILO to continue in its efforts to adopt conventions dealing with freedom of association (Dunning 1998 p. 161). Second, ECOSOC maintained its own competence over issues of freedom of association saying it awaited a report from the UN Commission on Human Rights on those aspects of freedom of association that would be appropriately included as part of the Universal Declaration of Human Rights (UDHR) (Dunning 1998 p. 161). Finally, ECOSOC referred the ILO resolution and report to the UN General Assembly which provoked additional discussion and led to the adoption of a UN resolution recognizing the principles of freedom of association and recommending the ILO "pursue urgently, in collaboration with the United Nations, the study of the control of machinery to protect trade union rights and freedom of association" (UN 1947b pp. 959-1018 cited in Dunning 1998 p. 161).

The International Labour Office prepared a draft of Convention 87, which was then discussed by another high-level ILO Committee prior to the 31st International Labour Conference. The committee members were “undoubtedly influenced by the powerful support of the General Assembly” (Dunning 1998 p. 162). The Employer’s Committee did not reintroduce their ‘right not to associate’ amendment (Dunning 1998 p. 162). The Committee and subsequently the Labour Conference adopted Convention 87 with no substantial changes and placed a further Convention on the Right to Organize and Collective Bargaining (Convention 98) on the agenda for its next session (Dunning 1998 pp. 162-163). Convention 98 was adopted at the 32nd International Labour Conference (Macklem 2005 p. 65).

The collaboration between ECOSOC and ILO continued after Conventions 87 and 98 were adopted and led to the creation of two special procedures for the protection of freedom of association (ILO 2006 p. 2). They are the Fact-Finding and Conciliation Commission on Freedom of Association and the Freedom of Association Committee (CFA) (ILO 2006 p. 2). The Fact-Finding and Conciliation Commission is composed of independent experts who are authorized to investigate and seek adjustments of difficulties by agreement with governments but has only been used six times since it was established in 1950 (ILO 2006 p. 2). The Committee on Freedom of Association is a tripartite body established in 1951, which meets three times a year to examine complaints submitted to it under the special procedure (ILO 2006 p. 2).

After adoption of ILO Conventions 87 and 98, the United Nations General Assembly, ECOSOC and its Commission on Human Rights continued to elaborate freedom of association rights. These efforts coincided with the Cold

War, which increasingly divided nations and actors such as trade union confederations (Morsink for e.g.). Conflicts over the inclusion of freedom of association played out differently in each arena resulting in differences in its framing (Swepston 1998 pp. 171-172). Different framings of freedom of association continued to emerge even after the Universal Declaration of Human Rights was adopted 10 December 1948, when provisions in the Declaration were negotiated into international treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social and Cultural Rights (ICESCR) (Swepston 1998 p. 172). Yet there was also recognition in the treaties of their connection with and potential impact on ILO Convention 87 and both treaties guarantee that they will not undercut protections within ILO Convention 87 (Swepston 1998 p. 172).

B. ILO Convention Nos. 87 and 98

Convention Nos. 87 and 98 constitute the institutional settlement at the international level over the rules governing freedom of association, and therefore, serve well as compliance benchmarks for a cross-country comparative analysis. The Conventions were forged through interaction and contention between the ILO and the UN, as well as among the three ILO constituents: employer, union and government representatives (Dunning 1998 pp 159-169). Convention 87, adopted in 1948, (Appendix 2.2) sets out the rights of workers and employers to establish and join organizations of their own choosing, to draw up constitutions, to elect their own leaders, to organize their administration, to formulate programs and to establish federations and confederations (Convention 87 articles 2, 3, 5, 6 ILOLEX). The Convention commits governments to refrain from interfering or restricting the lawful exercise of association rights in general and specifically

prohibits using administrative authority to dissolve worker or employer organizations or make employer and worker organizations subject to conditions that restrict their rights (Article 6, 7 ILOLEX).

In addition to refraining from interference, governments must undertake to give effect to the association rights outlined in the Convention and “take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise” (Article 11). The Convention obliges worker and employer organizations to “respect the law of the land” and governments to ensure that the law of the land does not impair the guarantees in the Convention (article 8). Convention 87 allows governments to exclude in whole, or in part, the police and armed forces from rights in the Convention (Article 9). In sum, Convention 87’s regulatory objective is to establish tolerance for the exercise of association rights for all workers except police and the armed forces.

Convention 98, adopted in 1949, (Appendix 2.2) was intended to supplement and complete Convention 87 guarantees (Morse 1950 p. 414; ILO 1994 para 199; ILO 1948 p. 586). Convention 98 establishes the right of workers to adequate protection against acts of anti-union discrimination, particularly conditioning employment on non-membership in a union or dismissing or otherwise engaging in prejudicial treatment of workers because of union membership or union activity outside of working time (or within working time by consent of the employer) (article 2). Convention 98 also establishes the rights of worker and employer organizations to adequate protection against acts of interference by each other (Article 2(1)). The Convention defines interference to include acts designed to promote or support the establishment of worker organizations with the object of placing them under employer domination through

financial or other means (Article 2(2)).

Convention 98 does not specify the means required to secure the substantive rights it aims to protect. Instead, the Convention provides that ensuring respect for the rights to organize “shall be established, where necessary,” with “machinery appropriate to national conditions” (Article 3). In addition, despite the Convention’s title, the “Right to Organise and Collective Bargaining,” the text of the Convention does not explicitly establish collective bargaining as a right. Instead, the Convention provides that “when necessary” states will undertake “measures appropriate to national conditions” to “encourage and promote the full development and utilization of machinery for voluntary negotiation” (Article 4). At the time of its adoption, the Director-General of the ILO explained that Convention 98 provides that “as far as necessary and appropriate, governments will take steps to encourage negotiations between employers’ and workers’ organizations (Morse 1950 p. 414).

As in the case of Convention 87, Convention 98 allows states to decide whether to exclude the armed forces and police from its protections (Convention 87 Article 9; Convention 98 Article 5 ILOLEX). Convention 98 did not, however, “deal with the position of public servants engaged in the administration of the State” or “prejudice their rights or status” (Convention 98 Article 6 ILOLEX). ILO Convention No. 151, adopted in 1978, applies the rights found in Convention 98 to public servants (ILOLEX). On its face, the regulatory objective of Convention 98 is orientated towards both tolerance and encouragement. Establishing tolerance of association rights can be seen in the Convention’s aim to explicitly protect workers (except for police, armed forces and public servants) against acts of anti-union discrimination and similarly, to protect worker and

employer organizations (except for police, armed forces and public servants) from interference. The regulatory objective of encouragement can be seen in the Convention's treatment of collective bargaining for workers and employers who are not police, armed forces or public servants.

C. Authoritative Interpretations of Convention Nos. 87 and 98

The meaning of conventions is not restricted to their explicit provisions but is also subject to interpretation. There are two ILO committees authorized to interpret Convention Nos. 87 and 98 thereby defining the contours of State obligations under the Conventions. The ILO Committee on Freedom of Association (CFA) is a tripartite committee, with employer, union and government representation and it receives complaints alleging violations of the Conventions. These special procedure complaints may be filed by governments or organizations of workers and employers without regard to a country's ratification of the Conventions or even if it is not a member of the ILO as long as it is a member of the UN (ILO 2006 p. 2). The CFA handled 2500 complaints in its first fifty years (ILO 2006 p. 3).

The decisions of the CFA are published and collected in digests and provide a "body of principles" on freedom of association and collective bargaining based on the ILO Constitution and ILO Conventions, as well as non-binding Recommendations and Resolutions (ILO 2006 p. 3). The CFA maintains that the value of this body of principles is that it comes from a highly regarded tripartite body and is based on complex, real-life allegations of violations throughout the world. It has "acquired recognized authority" at national and international levels (ILO 2006 p. 3).

The other body responsible for authoritative interpretations of the

Conventions is the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR). The CEACR interprets the conventions through supervision of state parties as well as through General Surveys. The CEACR has done extensive work on freedom of association. At the time the ILO Declaration of Fundamental Rights was adopted in 1998, the ILO Governing Body had made more frequent requests of the CEACR to undertake general surveys on freedom of association and collective bargaining than on any other group of conventions (Dunning 1998 p. 164). General surveys on Convention Nos. 87 and 98 were done in 1956, 1957, 1959, 1973 and 1983 before the sixth and final general survey was completed in 1994 (ILO 1994 para 2).

CFA and CEACR interpretations of Convention Nos. 87 and 98 have significantly expanded on the meaning and applications of the Conventions and therefore the institutional settlement governing freedom of association. Where a subject is not explicitly covered in the text of the conventions, the CFA and CEACR draw on various sources to make authoritative decisions about it. For example, although the right to collective bargaining is not explicitly provided in ILO Convention 98, the CEACR and CFA have decided that the ILO Constitution, Declaration of Philadelphia, and Convention 87 infer the right to collective bargaining for workers in general (Macklem 2005 p. 71; ILO 2008b para 167). Similarly, the right to strike is not specifically included in ILO Convention Nos. 87 or 98 but has been inferred by the CEACR in the context of the right of unions to formulate their programs in full freedom, and the CEACR has developed jurisprudence defining a narrow scope of exclusions from the right to strike for workers who provide essential services within the Committee's strict definition (Servais 1984 pp. 777-778; ILO 2006 paras 520-676). These

interpretations have broadened the scope of association related activities for which “tolerance” is the regulatory objective and narrowed the exclusions in which repression of association rights is allowed.

CFA and CEACR interpretations of Convention Nos. 87 and 98 also clarify obligations when there are contradictions between the Conventions as in the case of the inclusion of public servants in Convention 87 and their exclusion from Convention No. 98. Over the years, the CEACR interpretation has significantly narrowed the public servant exclusion from Convention No. 98 (ILO 1994 para 200 for example). First, the CEACR interprets Conventions 87 and 98 together rather than as unrelated singular conventions (ILO 2006 paras 1061-1064). According to the CEACR, interpreting the two Conventions together, certain categories of public servants, including those in confidential positions may be excluded from Convention 98 protections against anti-union discrimination and the right to collective bargaining but this does not diminish or contradict their rights to association protected under Convention 87 (ILO 1994 para 199; ILO 2006 para 1062). Here again, the CEACR interpretations have the effect of narrowing exclusions from association rights and bargaining rights.

Interpretations of Convention Nos. 87 and 98 also bear upon the rights of trade unions and their members beyond the workplace and employment relationship, in other realms of social life, such as politics. The CFA has upheld the right of trade union organizations to “pursue lawful activities,” including political activities and relations and found that governments may not impose “general prohibitions” on political activities (ILO 2006 paras 495, 500, 503). Yet the CFA has also found that such political activity is not a general right but rather a right to be exercised specifically for the defense of union and occupational

interests and must advance economic and social objectives (ILO 2006 paras 495, 497, 498). Union political activity should not go beyond these “true functions by promoting essentially political interests” (ILO 2006 para 502).

The CFA further explains, “It is only in so far as trade union organizations do not allow their occupational demands to assume a clearly political aspect that they can legitimately claim that there should be no interference in their activities” (ILO 2006 para 505). The rationale for these limits is to maintain trade union independence from political parties and governments so that unions function freely and are “sheltered from political vicissitudes” (ILO 2006 para 497). Concern over relations between trade unions and political parties was evident during the Cold War and directed at socialist governments and unions (ILO 2006 para 506 for example). The regulatory objective here seems to have been to establish a qualified tolerance to union/worker involvement in political activity as long as it remains within acceptable non-revolutionary bounds.

The rights to freedom of association and collective bargaining were established first by compromise between employer, union and government representatives within the ILO leading to the adoption of the conventions and subsequently by their interpretations by the CEACR and CFA. These evolving standards are disseminated through published digests of compiled and updated decisions of the CFA and by general surveys undertaken by the CEACR. The standards are also applied by the CEACR in supervising state parties compliance with the conventions and by the CFA in cases alleging violations of association rights. The conventions and their interpretations provide a regulatory model with overlapping objectives of tolerance and encouragement of association and collective bargaining rights. With the exception of narrowly defined segments of

the workforce, police and armed forces, and in the case of Convention 98, public servants, repression of association and collective bargaining rights is not allowed.

III. Regional Context

A. Historical Basis of Union Development in the Region

Unions in the Dominican Republic and Central America share with other countries in the region a similar historical pattern of union-state-market relations. In general, most Latin American governments preferred to directly legislate substantive employment protections such as hours of work, overtime, vacation and non-wage benefits because of their hostility towards unions and their desire for workers to rely on the state rather than unions for protection (Cook 2006 p. 105). The reason underlying this preference for direct regulation was political. Radical ideologies found among trade union activists challenged the state's authority and so labour laws were developed to protect workers but at the same time to establish a powerful presence of the state in labour relations (Cook 2006 p. 105). The state's concern for its power and control extended to regulating union activities such as union formation, strikes and collective negotiations (Bronstein 1995; Bronstein 1997 cited in Cook 2006 p. 105). Collective rights in general were restricted and frequently violated (Cook 2006 p. 105).

Critical junctures or historic decisional moments distinguished divergent trajectories of union-state-market relations among the countries in this study as discussed in Chapter 3. Using Standing's (1991) ideal typologies of state roles in labour market regulation, the countries in this study are grouped, based on their regulatory orientations:

Costa Rica is categorized as *paternalistic* and is expected to emphasize labour market regulations and processes in which regulations come about through state decisions based on values of elites or as attempts to co-opt segments of the working class rather than negotiation and sharing of power.

Nicaragua is categorized as **protective** and is expected to emphasize regulation of labour markets through negotiations with worker organizations with resulting regulations reflecting acceptance of collective worker voice and balance of power. To Standing's (1991) definition, I have also incorporated Nicaragua into this category because of its absence of repressive regulations

Dominican Republic, El Salvador, Guatemala, Honduras are categorized as **repressive** and labour market regulations are expected to largely repress and limit collective action on the part of workers.

A country's belonging to one of the three different groupings or categories is expected to be directly relevant to their respective treatment of freedom of association and right to collective bargaining. In addition to the labour market regulatory dimension, a country's overall orientation towards regulation is expected to influence its treatment of freedom of association and right to collective bargaining (Evans 1995). In this dimension there are two ideal type divisions among the countries (Evans 1995) that could influence freedom of association. These are *predatory* and *developmental* state orientation.

Costa Rica is considered a **developmental state** because of its relatively well-functioning and centrally coordinated bureaucratic structure. In contrast to predatory states, Costa Rica's agencies are autonomous even though they are connected to different organizations and groups.

The Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua are considered **predatory states** because their state bureaucracies have more of a tendency to be a market and profit oriented endeavor. Access to state functions and services is directed at those who can pay in money or power. All five of the countries have strong histories of neopatrimonial forms of predation with dictators establishing state apparatus to serve and enrich themselves.

Based on these typologies, Costa Rica is expected to prefer direct regulation over collective bargaining but also because of its developmental nature, to have the capacity to establish rules and enforce them whatever its policy is toward collective bargaining. In Adams' schema, it's not clear whether Costa Rica will also tend towards tolerance or repression but it would not be expected to be encouraging of worker organization and collective bargaining.

In the case of Nicaragua, there are two tendencies at work based on applying Evans' and Standing's typologies. Nicaragua should be much less repressive towards worker organization than all of the other countries. In fact, in Adams schema, Nicaragua would be expected to be encouraging of trade union organization and bargaining. What is not clear however is how much institutional capacity Nicaragua has to actually implement union encouraging policies given its predatory regulatory orientation. Another reason to expect Nicaragua to behave differently in its treatment of trade unions is the critical role unions played in mobilizing support for the Sandinistas before during and after the 1979 Revolution that removed its neopatrimonial dictator Somoza.

The Nicaraguan labor movement closely aligned itself in relation to and in support of the successful Sandinista movement (Roberts 2007 p. 118). The same or similar relationship of a national union movement to a winning revolutionary party or even just a ruling party has not occurred among any of the other countries. No other countries in the study have relied on mobilizing unions and their members. This union-party relationship also represents at least a partial break from traditional *predatory* practices into the realm of ideas and policy programs rather than pure corruption. It's important to qualify that this shift does

not indicate that corruption and predation disappeared but rather that a new logic counter to predation became possible and even viable.

There is support for identifying the union role in politics as a key institutional hierarchy by Roberts (2007). Roberts argues that in cases such as Nicaragua, reliance on *labour-mobilizing* requires a regulatory objective of *encouragement*, producing stronger labour movements because they were embedded in larger labour-party blocs (Roberts 2007 p. 120). Roberts does not identify the specific institutional mechanisms, of encouragement but rather, that union movements in *labour-mobilizing* systems tended to have higher union densities and greater degrees of organizational concentration in larger national confederations (Roberts 2007 p. 118). Peak density during the import substitution era for example in Nicaragua measured 37.3% compared to 15.4% in Costa Rica, 17% in the Dominican Republic and 8.5% in Honduras (Roberts 2007 p. 119).

The third category of the Dominican Republic, El Salvador, Guatemala and Honduras are expected to be labour repressing rather than mobilizing of trade union organization and collective bargaining. It is not clear if or how their predatory orientations will affect their styles of union repression. Also, Honduran unions have enjoyed some at least partial incorporation into the political/elite system as evidenced in Chapter 3 and so it's possible that although all these countries are generally repressive there could be differences in degree of repression as well as styles.

IV. Comparative Institutional Analysis

A. Introduction

Based on these institutional hierarchies and Adams' framework three different groupings of DR-CAFTA countries emerge with respect to union-state-market relations based on *regulatory orientation in the labour market, state*

capacity or regulation and institutions governing *union roles in politics*. These are Nicaragua, expected to be *encouraging*, Costa Rica, expected to be *tolerant* and Dominican Republic, El Salvador, Guatemala and Honduras expected to be *repressive*.

Institutional tools and frameworks can be applied at different scales ranging from finely focusing on one right to broad based analysis of the configuration as a whole (Ostrom 2005 p. 11). According to Ostrom, analysis can be done and explanations sought at multiple levels (Ostrom 2005 p. 12). A major challenge in institutional analysis is deciding which level of analysis is most appropriate to explain a particular obstacle. Table 6.2 lists different dimensions of institutional analysis related to freedom of association.

Table 6.2

Freedom of Association		
A. Institutions that prevent workers from effectively organizing into unions in the first place:	B. Institutions that control unions or limit their impact once they exist	C. Institutions that threaten union existence
1. Violence 2. Limitations of civil liberties 3. Anti-union discrimination 4. Exclusion of workers from association rights 5. Minimum member requirements 6. Union registration and recognition procedures 7. Alternatives to unions 8. Threats and actual closures, re-incorporations	1. Violence 2. Limitations of civil liberties 3. Anti-union discrimination 4. Restrictions on election of union officials 5. Limits on the collective bargaining subjects and outcomes 6. Exclusion of workers from collective bargaining 7. Limitations on strikes	1. Violence 2. Limitations of civil liberties 3. Anti-union discrimination 4. De-registration procedures 5. Minimum membership requirements 6. Delays and refusals by employers to bargain 7. Unaddressed violations of collective bargaining agreements 8. Threats and actual closures, re-incorporations

B. Distinctive Institutional Outcomes

Among Central American countries and the Dominican Republic, Nicaragua is startlingly different than its neighbors and tolerant and can even be characterized in Adams' regulatory objective as *encouraging* of association and bargaining rights relative to its neighbours. Although the second poorest country in Latin America, Nicaragua is the only DR-CAFTA country characterized in 2009 as having experienced steady growth in collective bargaining and the registration of unions (ITUC N 2009 p. 1). Nicaraguan unions play an important political role in policymaking and political elections, and most public sector conflict with unions is based on political rivalries and policy conflicts among parties rather than anti-union sentiment (USSD N 2009 p. 14; p. 15). Violence in Nicaragua is reported in conjunction with worker mobilizations in strikes precipitating confrontations between the government and striking workers. Yet, violence, as in the case of a transportation strike in May of 2008, did not prevent eventual union victory in the dispute (USSD N 2009 p. 15). Bertelsmann reported in 2010 that half of Nicaragua's workforce is organized including significant parts of the agriculture sector (Bertelsmann 2010 p.8).

C. Anti-Union Discrimination Compliance Obligations

1. Introduction

Anti-union discrimination is "one of the most serious violations of freedom of association" with the potential to "jeopardize the very existence of trade unions" (ILO Digest 2006 p. 155 quoting 331st Report, Case No. 2169 para 639). In recent years there has been a surge in complaints of anti-union discrimination at ILO supervisory bodies (ILO 2008 para 41). Compliance benchmarks regarding anti-union discrimination, like all aspects of freedom of association and the right to collective bargaining, are established through CEACR

regular supervision and General Surveys of Convention 98 as well as through decisions rendered by the Freedom of Association Committee and the Fact-Finding and Conciliation Commission on Freedom of Association (ILO 1994 para 13). Together these bodies and their decisions constitute a “veritable international law on freedom of association” (ILO 1994 para 13). Specific compliance criteria exist with reference to anti-union discrimination.

Anti-union discrimination is composed of two necessary elements. The first is an underlying anti-union motivation and the second is an “actual restriction on the exercise of freedom of association” (Bartolomei de la Cruz 1976 pp. 9). The forms of anti-union discrimination are both individual and collective (Bartolomei de la Cruz 1976 pp. 5-6). One form of discrimination involves the employer either ending or preventing an employment relationship from occurring through: (1) non-employment by refusal to hire or reinstate, or by closure or transfer of the employer’s facility, for example, (2) dismissal and (3) blacklisting of trade union members, supporters, leaders and activists (Bartolomei de la Cruz 1976 pp. 5-6). A second form of discrimination leaves intact the employment relationship but makes the union members, supporters, leaders or activists subject to less favourable conditions of employment through transfer, suspension, disciplinary penalties, allocation of work tasks, denial of promotion etc (Bartolomei de la Cruz 1976 pp. 6).

2. Compliance Criteria Related to Anti-Union Discrimination

The compliance benchmarks on anti-union discrimination appear very straightforward and unambiguous—reminiscent of the style of trafficking compliance benchmarks. No person should be subjected to discrimination or prejudice with regard to employment because of legitimate trade union activities

or membership whether past or present (ILO 2006 paras 770-772). Protections against anti-discriminatory acts apply equally to members and former and current trade union leaders (ILO 2006 para 775). The protections apply, even if the employer does not recognize the trade union as representing a majority of the employees (ILO 2006 para 776). Further, Convention 98 protections against anti-union discrimination are continuous from the time of recruitment and the period of employment and include the time of the “work termination” (ILO 2006 paras 771, 786, 787, 788; ILO 1994 para 210).

a. Hiring and Blacklisting

The Committee views “blacklisting” of trade union officials or members to be a serious threat to the free exercise of trade union rights and governments should take stringent measures to combat such practices (ILO 2006 para 803; ILO 1994 para 211). Because there are many practical difficulties in proving anti-union discrimination particularly in the context of blacklisting, employees with past trade union membership or activities should be informed about the information held on them and given a chance to challenge it (ILO 2006 para 782). Legislation should allow the possibility to appeal against discrimination in hiring, i.e. even before the workers can be qualified as an “employee” (ILO 2006 para 784).

b. Dismissal

The dismissal of workers on grounds of trade union membership or activity violates the principles of freedom of association (ILO 2006 para 789). Violations of freedom of association also include dismissals of union leaders in conjunction with subcontracting, even where employees such as public servants are hired subject to free appointment and removal, such removal should not be motivated by trade union functions or activities, compulsory retirement when

imposed as a result of legitimate trade union activities (ILO 2006 paras 789-793). Protections against dismissal for anti-union discrimination include using the pretext of economic necessity, staff reduction and corporate restructuring (ILO 2006 paras 795-797). Administrative procedures, even when bipartite do not afford sufficient protection against anti-union discrimination when they allow grounds for dismissal based on ‘lack of harmony in the working relationship’ (ILO 2006 para 798).

c. Conditions at Work

Discriminatory acts cover more than hiring and dismissal but also include any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker (ILO 2006 para 781). Acts that are considered discriminatory under Convention 98 protections include not only hiring and dismissal but also any discriminatory measures during employment, in particular transfers, downgrading and other acts that are prejudicial to the worker (ILO 2006 para 718). Acts that are counter to the protection against anti-union discrimination include the non-renewal of a contract for anti-union reasons, acts of harassment and intimidation, granting bonuses to non-union workers and excluding workers who are union members during periods of collective conflict, demotions, frequent transfers, relocation, deprivations or restrictions of all kinds such as remuneration, social benefits, vocational training and more subtle attacks which may be the outcome of omissions (ILO 2006 paras 785-788; ILO 1994 para 212).

d. Fuller Protection of Trade Union Leaders and Representatives:

The general principles of protection from the acts of anti-union discrimination above cover “all persons” by reason of membership or legitimate

union activities (ILO 2006 paras 770-772). However, compliance guidelines also provide for additional measures to be taken to ensure fuller protection for leaders and delegates and members of trade union against discriminatory acts (ILO 2006 para 773). This is for two reasons. First protection against anti-union discrimination is particularly desirable in the case of union officials because in order to perform their functions in full independence, they should have a guarantee that they will not be prejudiced on account of the mandate, which they hold from their trade unions (ILO 2006 para 799). Second, the CEACR has found that additional protection of union leaders and officials helps to ensure that effect is given to the fundamental principle that organizations have the right to elect their representatives in full freedom (ILO 2006 para 799). This overlaps with protections provided by Convention 135 and Recommendation 143 (ILO 1994 para 208).

e. Time period for Fuller Protection of Trade Union Leaders

The CEACR has pointed out that one way of ensuring protection of trade union officials is to provide that they will not be dismissed, either during or for a certain period following their term in office except for serious misconduct (ILO 2006 para 804). This additional protection of trade union officials does not however, imply that leaders are conferred with immunity against dismissal irrespective of circumstances (ILO 2006 para 801). There are numerous cases delineating legitimate dismissals of union officials such as for absence from work without employer permission and using paid time, personnel and facilities without employer permission for carrying out trade union activities (ILO 2006 paras 805, 809). In cases where dismissal of trade union leaders is allowed without indicating the motivation for the dismissal, the committee has indicated that

appeal procedures need to be made available to the union officials (ILO 2006 para 807). In cases where there were a large number of trade union leaders dismissed, the Committee considered that it would be “particularly desirable for the government to carry out an inquiry in order to establish the true reasons for the measures taken” (ILO 2006 para 812).

3. Compliance Criteria Related to Anti-Union Discrimination Not Included

a. Exclusions

The substantive protections against anti-union discrimination contain a significant exception because they apply only to private sector employees. Public sector employees are protected under equivalent provisions of Convention 151, not incorporated into the 1998 Declaration of Fundamental Principles and Rights at Work (ILO 1994 para 203). Higher-level public servants are excluded from protection under both Conventions if they are “directly employed in the administration of the State,” as distinct from other employees employed by the government, by public enterprises or by autonomous public institutions (ILO 1994 para 200).

b. No Requirement for Specific Substantive or Procedural Rules

Convention 98 does not specify the substantive or procedural regulations that states should enact in order to guarantee protection from anti-union discrimination. Instead the protection can take various forms adapted to national contexts as long as it prevents or effectively redresses anti-union discrimination (ILO 1994 para 214). In fact substantive regulations protecting against anti-union discrimination appear to be optional altogether. Governments undertaking to guarantee freedom of association with appropriate measures should “when necessary” accompany them with measures, which include the protection of workers against anti-union discrimination in employment (ILO 2006 para 814).

4. The Challenge of Communicating Compliance Criteria When the Convention Explicitly Requires Nothing Specific

Perhaps as a result of the Convention's limitation of not specifying what if any formal institutions need to be in place, the CEACR communicates compliance obligations in three different ways in an effort to elaborate on how states should legislate and implement protections against anti-union discrimination. First, the CEACR and Committee on Freedom of Association discuss some aspects of implementation in ways that give the appearance of compliance obligations even though they are not actually found in the Convention. Second, they use an alternative tactic of defining circumstances and situations that do not satisfy compliance obligations. Lastly, they define 'best practices' that meet or exceed compliance obligations that they would like to encourage.

a. Compliance Criteria on Implementation

Implementation-related compliance obligations pronounced by the CEACR include that legislation should have:

1. **Explicit Remedies and Penalties:** for acts of anti-union discrimination in order to ensure the effective application of the Convention (ILO 2006 para 813). Legislation must make provisions for appeals and establish sufficiently dissuasive sanctions against acts of anti-union discrimination to ensure the practical application of Articles 1 and 2 of the Convention (ILO 2006 para 822). It is important to forbid and penalize in practice all acts of anti-union discrimination in respect of employment and the persons responsible for such acts should be punished (ILO 2006 paras 771-772). The Committee has recalled the need to ensure by specific provisions accompanied by civil remedies and penal sanctions the protection of workers against acts of anti-union discrimination at the hands of the employer (ILO 2006 para 824).

2. **Compensation:** Compensation must compensate victims of anti-union discrimination fully, both in financial and in occupational terms for the prejudice suffered (ILO 1994 para 219).

3. **Reinstatement:** The remedy of reinstatement should be available to those who are victims of anti union discrimination and governments should amend legislation so that workers dismissed for exercise of trade union rights can be reinstated (ILO 2006 paras 837-840; 842).

4. **Compensation in Lieu of Reinstatement:** When reinstatement is impossible: compensation for anti-union dismissal should be higher than that prescribed for other kinds of dismissal (ILO 1994 para 221). The amount should be reviewed periodically and not established in absolute figures but rather drafted in a way to retain their dissuasive effect (ILO 1994 para 221). In the 2006 Digest, “if considerable time has elapsed and it is not practicable to reinstate the worker, the government should take steps to ensure that the worker receives full compensation without delay (ILO 2006 para 841, 843). The best solution in general is the reinstatement of the worker to his post with payment of unpaid wages and maintenance of acquired rights (ILO 1994 para 219).

5. **Burden of Proof:** The Committee has recognized that one of the main difficulties of anti-union discrimination cases is that the burden of proof is placed on workers and may constitute an insurmountable obstacle (ILO 1994 para 217). Legislation or practice should provide ways to remedy the difficulty by for example shifting the burden of proof from the worker to the employer or establishing a presumption in favour of the worker as has been enacted by several countries (ILO 1994 para 217).

6. **Enforcement:** There are also expectations about the procedures to enforce anti-union discrimination. Where cases of alleged anti-union discrimination are involved, the competent authorities should initiate an inquiry immediately and take suitable measures to remedy any effects of the anti-union discrimination brought to their attention (ILO 2006 para 835). Additionally, governments should take the necessary measures to enable labour inspectors to enter freely without previous notice any workplace including cases relating to anti-union discrimination (ILO 2006 para 834).

7. **National Procedures:** The government must ensure that complaints of anti-union discrimination are examined in a framework of national procedures, which should be prompt, impartial and considered as such by the parties concerned (ILO 2006 paras 817, 820, 826, 827, 828, 829, 835; ILO 1994 para 216).

b. Implementation Conditions that do not Meet Compliance Expectations

1. **Lengthy Procedures:** The longer it takes for procedures to be completed, the more difficult it becomes for the competent body to issue a fair and proper relief since the situation complained of has often been changed irreversibly, people may have been transferred, etc to a point where it becomes impossible to order adequate redress or come back to the status quo (ILO 2006 para 821).

2. **Absence of Effective Prohibition through Inadequate Procedures and Sanctions:** The basic regulations that exist in the national legislation prohibiting acts of anti-union discrimination are inadequate when they are not accompanied by procedures to ensure that effective prohibition against such acts is guaranteed (ILO 2006 para 818). The committee considers that legislation that allows the employer to terminate the employment of a worker on condition that he pay the compensation provided for by law in all cases of unjustified dismissal, when the

real motive is his trade union membership or activity, is inadequate under the terms of Article 1 of the Convention and the most appropriate measure is reinstatement (ILO 1994 para 220).

c. Implementation that Meets or Exceeds Compliance Criteria (Best Practices)

Finally, comments by the CEACR and CFA also indicate a number of practices that are allowed and even encouraged but not required in implementing protections against anti-union discrimination.

1. **Preventative Procedures:** Legislation that establishes preventative machinery requiring that a decision by independent public authorities be taken before union officials can be dismissed (ILO 1994 para 215; ILO 2006 para 831).

2. **Establishing a system** in which it is compulsory for each employer to prove that the motive for dismissing employees is not related to union activities (ILO 2006 para 831). 3. **Severe fines** in the case of dismissals, administrative orders to reinstate dismissed workers and the possibility of closing down the enterprise does not infringe on Convention 98 (ILO 2006 para 825).

D. Anti-Union Discrimination Distinctive Differences:

Based on overall institutional outcomes, Nicaragua appears to have a very different *encouraging* orientation towards unions and collective bargaining. Nevertheless, Nicaragua shares some common institutional obstacles to freedom of association with other DR-CAFTA countries that are *repressive* or barely *tolerant* of unions. Anti-union discrimination in the private sector is one common obstacle. Across DR-CAFTA countries, anti-union discrimination usually takes the form of threats, harassment, verbal and physical abuse, dismissals from jobs and blacklisting to prevent union leaders and supporters from being hired by

another employer. Anti-union discrimination perpetrated by employers is the most pervasive means to prevent unions from forming, to control unions once they exist and to pressure unions to go out of existence across all of the DR-CAFTA countries.

Formal laws create institutional obstacles by design across DR-CAFTA countries. Nicaraguan law protects only nine union executive board members from anti-union discrimination, while leaving other workers unprotected (ITUC N). Additionally, the law in Nicaragua provides a lengthy two-step process for reinstatement proceedings in cases of anti-union dismissal (USSD N). The law makes it illegal for employers to fire workers for their union activity but nevertheless allows it to occur if employers agree to pay twice the normal severance pay required by law (ITUC N). These formal rules help bolster informal social conventions perpetrated by private sector employers such as harassment, financial incentives to leave the union, anti-union dismissals, blacklisting, canceling employment contracts of workers who organize and flexibilization of employment contracts especially in tourism and telecommunications (USSD N; ITUC N). These formal institutions are very similar to those of other DR-CAFTA countries regardless of whether they are in the developmental paternalistic category (Costa Rica) or *predatory-repressive* (Dominican Republic, El Salvador, Guatemala and Honduras).

Two factors differentiate Nicaragua and help to counter the effects of anti-union discrimination relative to other DR-CAFTA countries. First, there is evidence that workers do not rely solely on the state to protect them from anti-union discrimination and sometimes strike after illegal firings (USSD N). Second, there are numerous instances in which the government orders reinstatement of

workers despite the law and intervenes on behalf of unions and workers after firings (USSD N). Anti-union animus is plentiful in the private sector and formal institutions are inadequate but as noted by the ITUC, the Nicaraguan government has made relatively more efforts to intervene in support of unions (ITUC N 2009).

In Honduras there is also evidence that unions do not always rely on formal rules and procedures governing anti-union discrimination. The example in the evidence occurs very differently in Honduras than in Nicaragua. In Honduras there were reported occasional strikes after employers dismissed union leaders and activists and further that the protests and strikes sometime lead to reinstatement of workers without any legal or administrative procedures (USSD H p. 9, ITUC H p. 2). In Honduras, unlike Nicaragua, the government does not intercede to support dismissed or striking workers (ITUC H p. 2). There was evidence that in at least one successful protest and strike, the Honduran union won by making the government's complicity with the company a focal point and occupied the ministry of labour offices in protest (ITUC H p. 2).

Common formal institutional shortcomings among countries do not necessarily dictate the same outcome overall. Arguably, categorical differences do indeed matter in terms of respect for freedom of association and rights to collective bargaining in Central America and the Dominican Republic even when a narrow set of formal institutions appear to be very similar. It is possible that Robert's concept of *labour-mobilizing* indicates that the political role of unions in Nicaragua creates values and norms convergent with respect for association rights (Helmke and Levitsky 2006 p. 14). These norms may contribute to Nicaragua's movement away from its past orientation of *repressiveness* towards *encouragement* and *protection*. In this case, new norms substitute for inadequate

formal institutions by infusing them with meaning and leading to an opposite outcome than the formal institution alone would dictate (Helmke and Levitsky 2006 p. 14). One explanation is that, in Koh's terms, 'political internalization' of the value of freedom of association and unions, has occurred in Nicaragua and influences outcomes more than formal institutions. This political internalization exists in the context of Nicaragua's *labour-mobilizing* relationship between unions and political parties.

In contrast, there is an example from Honduras in which a union uses a very similar strategy to get out from under dysfunctional and repressive formal institutions. In addition, the Honduran union must confront the state's repressive intentions. In Honduras the union must overcome the formal institutions and the government. The social conventions and norms infuse the formal rules further eroding their protective value.

E. Distinctive Institutional Configurations

Taking together the components of freedom of association an overall institutional "configuration" emerges showing significant differences between Nicaragua and *developmental paternalistic* Costa Rica and *predatory repressive* Dominican Republic, El Salvador Guatemala and Honduras). At this configurational level, freedom of association in Nicaragua can be characterized as a situation in which workers are vulnerable to anti-union discrimination and the state focuses its efforts to control unions by limiting union rights to strike. What is noticeable in Nicaragua and consistent with Standing's labour market regulatory regime ideal type, is the absence of formal institutional components present in other countries to prevent workers from organizing in the first place and to control unions once they exist. This is not to say that there are not institutional problems, especially informal ones in Nicaragua. Once unions exist, informal

social conventions by employers continue to play a role in controlling and encouraging unions to go out of existence. These include continued anti-union discrimination, financial incentives to leave the union (ITUC N), routine stalling tactics before engaging in collective bargaining, routine violations of collective bargaining agreements once they exist and threats and actual closures of union facilities (USSD N).

Nevertheless, in contrast to the *developmental paternalistic* and *predatory repressive* counterparts, there is evidence of fewer legislated obstacles to organizing in Nicaragua compared to all the other countries. Nicaragua is the only country in which there was evidence of effective dismantling of legislated obstacles to organizing by for example side-stepping complicit labour ministry personnel and decentralizing union registration procedures (ITUC N). There is also an absence of compliance criticisms from the ILO CEACR towards Nicaragua in stark contrast to its neighbors. In contrast to Nicaragua's relatively quick dismantling of obstacles to union registration for example, there is a pervasive and repetitive pattern of interactions between the ILO and the other countries. The compliance interactions invariably involve, the ILO identifying a compliance short-coming preventing workers from being able to organize into unions in the first place and expressing its hope that the country's tripartite body will engage in social dialogue and recommend legislation, with technical assistance from the ILO if necessary, and that the country's legislature will adopt the recommended legislation with all due speed thus addressing the shortcoming.

Occasionally as in the case of Costa Rica, the government expresses its "readiness and will to resolve" the problem and its commitment to tripartite dialogue and ILO technical assistance (ILO 2008 CEACR CR 87 p. 2). For its

part, the ILO CEACR note later in the same Individual Observation to Costa Rica, an allegation from Costa Rican labour organization, SITEPP that Costa Rica's unionization rate is only 2.5% and that "the (government's) commitments made to the ILO over many years relating to draft legislation submitted to the Legislative Assembly have only been vain promises (ILO 2008 CEACR CR 87 p. 3). Responding to the government's stated commitment, the union's allegations and lack of change in Costa Rican legislation concludes:

The Committee emphasizes once again that the matters pending raise important issues relating to the application of the Convention. Taking into account the various ILO missions that have visited the country over the years and the gravity of the problems, it hopes to be in a position to note substantial progress in the near future in both law and practice. The Committee requests the Government to keep it informed in this respect (ILO 2008 CEACR CR pp. 3-4).

Nicaragua's is a very different picture than the ones that emerge in the case of *developmental paternalistic* Costa Rica, and *predatory repressive* countries. They all share with Nicaragua a central problem of worker vulnerability to anti-union discrimination and control of strikes albeit with different institutional flavours. What is layered with the anti-union discrimination and control of strikes varies by country. In Costa Rica, the main obstacle preventing workers from effectively organizing into unions, in addition to anti-union discrimination, is the widespread support and reliance on employer dominated Solidarity Associations (Solidarismo) as an alternative to independent trade unions (ILO CR; USSD CR; ITUC CR). Solidarismo was founded and based in the Costa Rican Catholic Church and was a merging of ideas of Catholic social justice with market-oriented ideology (ASEPROLA CR).

In the case of Costa Rica in addition to anti-union discrimination, there is positive discrimination in favour of Solidarismo. The law requires 12 members in

order to form an independent trade union but only 3 to form a solidarity association (ITUC CR). Employers recognize non-union worker committees and create direct agreements with them. Other DR-CAFTA countries share the social convention of employer efforts to establish employer dominated and employer friendly worker organizations, but Costa Rica is unique in the extent to which it has taken this course and its efforts to ascribe normative legitimacy to it.

The other component of Costa Rica's configurational picture revolves around a more pervasive effort to control what public sector unions do in terms of collective bargaining. (ILO CR; USSD CR; ITUC CR). Rather than exclude public sector workers from collective bargaining altogether as many *predatory repressive* systems do, Costa Rica exercises control over the outcome of collective bargaining through judicial rulings striking negotiated clauses in public sector agreements because they are unreasonable or disproportionately benefit public employees (ILO CR; USSD CR; ITUC CR).

Predatory repressive systems such as the Dominican Republic, El Salvador, Guatemala and Honduras, place more and deeper obstacles to prevent association rights and collective bargaining and more and deeper controls on union strikes than Nicaragua. They also use but place less emphasis on normatively legitimate alternatives to unions. All of the predatory repressive countries are more violent than Nicaragua or Costa Rica.

Like obligatory overtime, informal social conventions such as violence and threats of violence play a much more central role in *predatory states*. In the Dominican Republic evidence includes cases of physical punishment by withholding water, imposing HIV testing and covert intimidation of union activists (USSD DR) and violently breaking up unions by physically removing

union activists from workplaces (ITUC DR). Honduras presents the picture of increasing reliance on violence to suppress unions with four deaths, and numerous threats and detention by employers of trade unionists (ILO H; USSD H; ITUC H). In contrast to Nicaragua where laws are reportedly reformed to make association rights easier to exercise, Honduras is enacting laws to increase penalties for protesters blocking roads and streets (ITUC H). Opinion is not universal about Honduras however with the USSD blaming violence on “nefarious elements in the labour movement or mafia” not employers or the government (USSD H).

All of the predatory repressive countries emphasize preventing workers from organizing by excluding workers through various means from association and collective bargaining rights. Honduras excludes many public service employees, firms with less than 30 workers, security guards and some agricultural workers from association rights (ILO H; USSD H; ITUC H). Many Honduran public employees who are allowed to organize are not allowed to engage in collective bargaining and if allowed to engage in collective bargaining, the subject matters are restricted (ITUC H). Similarly, the Dominican Republic excludes categories of civil service and autonomous municipal agencies or alternatively establishes higher thresholds of membership before association rights are recognized (ILO DR).

Consistent with its performance on overtime and trafficking, the Dominican Republic is closest to Nicaragua with respect to the absence of formal institutional barriers. The Dominican Republic relies on social conventions and so its formal rules are very closely aligned with ILO standards establishing default rules facilitating the registration unions. In the Dominican Republic, if a union registration petition is not rejected within a specific timeframe, union registration

is deemed to be automatic (USSD DR; ITUC DR). In contrast to Nicaragua however, there are more exclusions of public sector civil service and municipal employees (ILO DR).

The worst configuration for purposes of rights to freedom of association, tracks with Guatemala and El Salvador. As with obligatory overtime, each country uses multiple mutually reinforcing formal and informal institutional components to maintain repression. The labour movements in Guatemala and El Salvador evidence strong vestiges of *neopatrimonial* pasts. Guatemala's labour movement represents a small stubborn holdout resisting an institutional system designed to eradicate it through violence, absence of legal protections, inadequate sanctions and ever-evolving company strategies at union avoidance, including fraudulent bankruptcy and reincorporation. The totality of these strategies results in impunity for violations of trade union rights (USSD G 2009 p. 17). Additionally, this is not just private sector behaviour.

El Salvador and Guatemala have more institutional arrangements to prevent unions from forming in the first place and more energetically prevent public sector unions from forming. For example, other *predatory repressive* countries tend to emphasize either excluding public sector workers from rights to association such as in Honduras or alternatively registration procedures to create obstacles for those in the private sector with rights to associate from actually forming unions as in the Dominican Republic. In contrast El Salvador and Guatemala do both very strongly. El Salvador exempts many categories of public employees from association rights in contradiction to Convention No. 87 and 98. Guatemala participates in avoidance of unions by, for example, establishing

commercial contracts with state employees and then arguing that as a result they are not employees with rights to organize or bargain (ITUC G 2009 p. 1).

A finer grained analysis within categories would also highlight differences between even the worst extremes of El Salvador and Guatemala in how each country establishes effective obstacles to trade union activity. For example, compared to Guatemala, El Salvador relies more on formal rules rather than informal violence to suppress worker efforts to organize and engage in collective bargaining. This is consistent with El Salvador's approach to obligatory overtime as well. In contrast, violence is the prevalent and effective social convention to repress unions across all three configurational functions in Guatemala (ILO G; USSD G 2009; ITUC G 2009). Yet violence is not isolated to Guatemala and or countries in the predatory repressive category. Violence is more prevalent as an informal social convention used against Honduran and Dominican unions than it is in Costa Rica. In Nicaragua, violence, when it is briefly discussed, occurs in the context of a strike battle only (USSD N 2009).

V. Politics and Compliance

The regulatory orientation that seems to matter most for purposes of freedom of association is Nicaragua's labour market regulatory regime as *protective* in conjunction with its near total absence of repressiveness in regulating union formation. Nicaragua appears to overcome some of its *predatory* regulatory orientation by substituting for inadequate formal institutions in anti-union discrimination with the political will to act in contradiction to the formal institutions making for a very different outcome in Nicaragua relative to other countries. Also Nicaragua retains fewer formal institutions to prevent workers from organizing and to control unions once they exist. Finally, Nicaragua acts relatively quickly on its own to remove obstacles to worker organizing without

resorting to lengthy tripartite dialogue that does not lead to legislative reform for many years as occurs in Costa Rica.

The predatory repressive category's relevance is supported by evidence of more extreme and thorough institutions to make it difficult for workers to exercise association rights. There were nevertheless some distinctions within the group. There are many fewer formal institutional obstacles in place in the Dominican Republic compared to all of the other predatory repressive countries. It is at the level of social conventions that their similarity with other predatory repressive countries becomes clear.

The ILO CEACR engages in compliance dialogue with DR-CAFTA countries in supervising Convention Nos. 87 and 98. This compliance dialogue cycle as described in the case of Costa Rica is illustrative of the absence of recognition of a role for politics and power in ILO compliance. The ILO encourages countries to engage in tripartite dialogue assuming that dialogue will lead to consensus and consensus will lead to legislation that will also be adopted by consensus as a logical way to make a labor relations system work in compliance with the Conventions. As pointed out by the Costa Rican trade union comment to the ILO, tripartite dialogue is itself a potential tool to prevent or at least delay compliance related reforms.

The ILO CEACR compliance criteria on politics were inspired by the cold war and there is no evidence of ILO criticisms of DR-CAFTA countries based on politics despite the fact that for example, El Salvador prohibits trade unions from taking part in political activities (ITUC 2009 ES p. 1). Similar prohibitions may well exist in other DR-CAFTA countries but the ITUC, USSD or ILO do not consistently track or comment on them.

Chapter 7 Conclusions and Final Thoughts

I. Recapitulation of Research Project

A. Projects Goals and Purpose

The purpose of the project was to develop a diagnostic tool: (1) to understand and frame labour rights as institutional employment practices; (2) to enable systematic comparison of these employment practices to relevant compliance obligations in ILO Conventions, and (3) to help identify and suggest areas for possible interventions to improve congruence between domestic employment practices and ILO obligations as well as possible shortcomings and contradictions within the ILO Conventions themselves.

The tool aims to change the debate on labour standards by fully integrating into the discussion formal rules and their grammar, informal social norms and informal social conventions that undermine or bolster the formal rules. It also calls for examining rules from other realms of social life that while not directly related to a particular labour right nevertheless have an impact. In effect, the goal of using the diagnostic tool is to prevent narrowly viewing and engaging in conflict over reforming the formal institutional grammar without examining the informal institutions as so often occurs. In the process, the potential is created to demand holistic “institutional arrangements” that comply with and improve upon internationally recognized norms.

B. Research Process

The idea for this research grew from my experience working in Boston with immigrant janitors from Central America and Dominican Republic. This experience led me to recognise that labour rights violations are not aberrations from an employment system but rather an integral component of the system. The research process was to first understand the historical/political context of the

societies and employment systems from which the immigrant janitors had come through in-depth country studies. The second step was to search for theoretical concepts to make sense of labour rights violations as an integral part of an employment system rather than as an aberration. The third part of the process was to integrate the concepts to create the diagnostic tool to guide examination of real cases of labour rights violations. The process of arriving at the diagnostic tool was also based on examining existing labour standards monitoring methodologies and informed by historical knowledge of the countries and the region gained through the research process. The fourth and final step was to apply the tool to forced obligatory overtime, trafficking and freedom of association and collective bargaining. In each case I examined publicly available evidence and analyzed the evidence along institutional lines based on the tool: evidence about formal rules, their interpretation and enforcement as well as evidence of informal social norms and informal social conventions and influences from other realms of social life. I also noted how the country's implementation of the right was characterized and how the institutional elements compared to the compliance obligations and dimensions of internalisation and possible interventions to improve implementation of the right.

C. Theoretical Basis for the Diagnostic Tool

The diagnostic tool (Tables 4.2 and 4.3) is based on integrating institutions theory from political economy and compliance theory from international law. The institutions theory used in the tool applies comparative employment systems concepts to problems of labour rights (Hall and Soskice 2001; Schmidt 2002; Helmke and Levitsky 2006). Using this approach, labour rights violations, like corporate governance and educational systems, can be viewed as interrelated

practices embedded in a web of formal and informal rules governing employment within a society.

The compliance side of the tool incorporates Harold Koh's compliance theory (Koh 1997; Koh 1998). Koh argues that international legal norms such as ILO Conventions become domesticated through multiple processes that internalize the international legal norms into formal domestic law, interpretations and enforcement as well as through supportive social norms and social conventions.

D. Selection of Countries

The Dominican Republic and five Central American countries (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua) were selected to be included in the study. They were selected first because of my own experience working with union members from the region working as janitors in Boston. In addition, the countries share a common history and culture. The countries also share many similar social and employment institutions. For example, they have a common bureaucratic architecture for enforcing labour rights, including a labour ministries and labour courts (USTR 2005). In addition, all the countries have ratified all four of the ILO conventions that were included in the ILO 1998 Declaration of Fundamental Principles and Rights at Work as Core Labour Standards (CLS). Yet there are also important differences among the countries, including levels of income, human development and more importantly labour rights outcomes.

Another key reason for selecting the countries was also their inclusion in a relatively new trade agreement, DR-CAFTA. DR-CAFTA replaced an earlier trade-related labour rights enforcement regime in the U.S. Generalized System of

Preferences (GSP). In the GSP system a country could lose access to U.S. markets for non-compliance with certain labour rights loosely similar to CLS. Activists have argued that DR-CAFTA is detrimental to improving enforcement and gaining compliance with labour rights. At the crossroads of the ILO Core Labour Standard (CLS) initiative and a new trade regime there continues to be great controversy about whether respect for labour rights is improving or worsening in the region (WOLA 2009 p. 7).

For the purpose of facilitating cross-national comparisons, I used a framework to categorize countries depending on their capacity for institutional action (Evan 1995) and labour market regulatory regime (Standing 1991). Based on these guides, I re-examined and updated my country studies as well as similar work done by Itzigsohn (2000) attempting a similar kind of comparison between Costa Rica and the Dominican Republic. Three groupings of the countries emerged to facilitate comparison in the cases. The evidence on labour rights in all the countries was all drawn from publicly available information from the ILO, non-governmental organizations and the U.S. State Department Human Rights Reports. The results from using the tool on this information is not meant to be “the whole story” but rather to initiate debate based on analysis of the evidence.

E. Selection of Labour Rights

Labour rights vary in complexity and scope. Some labour rights are relatively straightforward in terms of their institutional grammar while others, such as the right to freedom of association have multiple components. For this reason, two case studies were undertaken to use the tool. The first case study was relatively simple examination of two forms of forced labour, obligatory overtime and trafficking. The second case study applied the diagnostic tool at a different

scale and scope on the many inter-related component rights making up freedom of association.

Both case studies were based upon evidence of compliance and non-compliance with ILO Conventions. I selected Conventions underlying two of the four Core Labour Standards (CLS): (1) the abolition of forced labour and (2) freedom of association and the right to collective bargaining. The CLS were selected for the research because they are universally applicable. They are comparable across the countries and there is adequate evidence for purposes of the inquiry. Relevant ILO Conventions underlying the CLS were used rather than the CLS themselves to overcome some of the shortcomings of the CLS such as their de-linking of the “standards” from binding international “legal rights.”

Conventions, as adopted by the ILO, represent institutional settlements at the international level governing specific labour rights (Table 4.2). These Conventions also provide an authoritative and comparative metric to use as compliance benchmarks enabling cross-national comparison and analysis. In this way, international labour rights are the central focal point for comparisons and analysis. Nevertheless, at the same time, the diagnostic tool is intended to be respectful of institutional diversity. In other words, it is expected that there may be many recipes to compliance with international labour rights just as there are may be many recipes to non-compliance.

II. Summary of Findings

A. Forced Labour Case Study

The use of the diagnostic tool in the case study on forced labour was useful in three different distinct areas. First, at the micro level, the diagnostic tool was useful in identifying varieties of formal institutional ingredients associated

with obligatory overtime and trafficking and how these ingredients were distributed across the countries. For example, there are fewer problems with formal institutional rules in Costa Rica and the Dominican Republic (Table 5.6) as compared to the other countries with regard to obligatory overtime. This suggests that interventions to better align domestic law with the international norms are more relevant in Nicaragua, El Salvador, Guatemala and Honduras. At the same time, further interventions are required in all of the countries to deal with the varieties of rules that create exceptions to prohibitions on obligatory overtime (Table 5.6). Additionally, the tool helped to identify stark differences among the countries with respect to styles of non-enforcement of the formal rules. Costa Rica embraces non-enforcement of obligatory overtime rules as an open policy in contrast to the silent non-enforcement styles of the other countries. Thus, enhanced ILO attention and supervision of non-enforcement could be a possible intervention in Nicaragua, The Dominican Republic, El Salvador, Guatemala and Honduras (Table 5.8).

Another area at the micro level in which the tool was useful was in uncovering patterns and interactions between formal and informal institutions, and these in turn were matched to possible interventions to improve compliance. Costa Rica's open non-enforcement of formal limits on obligatory overtime was supported by the government's efforts to legitimize obligatory overtime as a means to further development (Table 5.9). El Salvador, Guatemala and Honduras also evidenced efforts to affirm informal social norms supportive of obligatory overtime practices by employers. As a result, in all these cases, the tool indicated a possible intervention would be enhanced ILO attention and supervision

challenging government's for actively supporting norms undermining prohibitions against obligatory overtime.

The tool also helped to identify distinctive informal institutional patterns such as social conventions of physical coercion, threats and the withholding of pay among employers in the Dominican Republic, El Salvador, Guatemala and Honduras. In fact, in the case of the Dominican Republic interventions to improve compliance centre entirely on the strong role that social conventions play in eroding formal institutions (Tables 5.10 and 5.11). On the other hand there was no such evidence in Costa Rica and Nicaragua (Tables 5.10 and 5.11).

The second area in which the tool was useful was as a guide to uncover important inconsistencies in ILO and ILO Conventions. Forced labour is one of the ILO 1998 Core Labour Standards (CLS), and all countries are required to uphold the principles underlying the standards based solely on their membership in the ILO regardless of their ratification of the ILO conventions. Forced labour takes different forms including forced obligatory overtime, prison labour and trafficking for sexual and non-sexual economic exploitation. The case study on forced labour in the form obligatory overtime revealed some deep contradictions in the notion of core labour standards.

Employers impose obligatory overtime on workers in the Dominican Republic, El Salvador, Guatemala and Honduras and the evidence indicates extensive use of both direct and indirect forms of coercion that violate ILO general standards on forced labour. However, as a result of the ILO Committee of Experts interpretation, the ILO obligatory overtime standards are tied to national work time limits. The perverse result is that no matter how coercive or violent, obligatory overtime can only amount to forced labour if there also a violation of a

non-core labour standard in the form of a national limit on work time under ILO Convention Nos. 1 or 30. Countries with no work-time limits at all cannot be said to have imposed obligatory overtime in violation of forced labour standards. Nevertheless, the forms of direct and indirect coercion exerted on workers do not comply with ILO general compliance obligations on Forced Labour as established by the Committee of Experts (Tables 5.13 and 5.14).

Another contradiction and inconsistency was identified using the tool in the case study on obligatory overtime and trafficking by identifying the fact that the ILO applies far stricter compliance standards and achieves higher compliance efforts from DR-CAFTA countries on trafficking. Unlike obligatory overtime and freedom of association, countries are more willing to admit they have problems with trafficking and do not argue against the merits of its eradication or work to facilitate its continuation. Perhaps in the case of *predatory repressive* countries like El Salvador and Guatemala, their better performance on eradication of trafficking as compared to obligatory overtime and freedom of association, arises from their comfort and familiarity with the police-like enforcement regime required to fight trafficking.

Finally, using the tool to guide analysis of forced labour institutions and compliance provided some possible indications of the ILO's programmatic shifts over time. The case study demonstrated that the ILO is more effective in its regulation of matters outside of traditional employment relationships such as trafficking compared to traditional employment problems such as obligatory overtime. Notably, with trafficking the violators tend to be viewed as "criminals" rather than as "employer organizations." Arguably, the ILO's greater effectiveness in this realm relative to obligatory overtime and freedom of

association is a function of the strengths and limits of the ILO's tripartite structure of employer, worker and states. It is possible that the ILO is able to be more effective when the social partners share a consensus about a problem to be addressed through the ILO supervisory machinery. The ILO's relative success on trafficking fits well with the ILO's recent turn towards its decent work agenda and its emphasis on non-traditional forms of employment, poverty and development.

B. Freedom of Association Case Study

Freedom of association with its multiple inter-related facets presented an opportunity for using the tool at a different scale than the forced labour case, which closely focused on two aspects (obligatory overtime and trafficking) of one right. Like forced labour, one part of the freedom of association case study focused on one right – the right to be free from anti-union discrimination. The institutional and compliance analysis from the tool showed that all the countries have similarly dismal formal and informal institutions with respect to Convention No. 98 protections against anti-union discrimination. Nevertheless, Nicaragua performed better than any of the other countries on protecting workers against anti-union discrimination because the government acts and intervenes on behalf of workers demanding their reinstatement despite the lack of formal institutional basis for doing so.

This case study also explored labour institutions and compliance at a different scale. In this application, the component rights and compliance obligations making up freedom of association were combined into an overall institutional characterization based on Roy Adams's regulatory characterisations. In other words, institutional arrangements and compliance obligations encompassing the totality of the component rights were combined and matched to

an overall effect of *suppression, toleration or encouragement* of trade union and association rights in Convention Nos. 87 and 98.

Adams's model of regulatory objectives of *repression, tolerance and encouragement* was a useful metric to categorize overall regulatory configurations on freedom of association (1992). Establishing tolerance of trade union organizing and collective bargaining is often thought of as an exercise in forbearance—deliberately not intervening so as to leave workers free without penalty or retaliation to organize. Remarkably, however, in using the tool, the evidence indicates that, if a country has an objective of establishing tolerance for association and collective bargaining in the private sector, it must actively intervene rather than exercise forbearance. This is exactly what Nicaragua does when it demands that private employers reinstate workers who were fired for union activity despite the total absence of a legal requirement for reinstatement.

Surprisingly, trade union rights are better established in Nicaragua than in much better developed Costa Rica. In Costa Rica's case, *paternalistic* labour market regulations act to mitigate its fundamental opposition to unions and regulation resulting from negotiation. As with forced labour, Costa Rica is confident in espousing social norms to bolster its regulatory decisions and orientation. The government actively supports non-conflictual solidarity associations as substitutes for unions. Solidarity associations are closer to its consensus model of class relations. In addition to highlighting differences between regulatory ideal types, this case study also highlighted that even within the same type, each country has its own particular institutional styles and flavours. For example, El Salvador and Guatemala are both extremely repressive and actively hostile toward union and association rights but El Salvador relies more

heavily on establishing formal institutional obstacles while Guatemala relies more heavily on informal social conventions of violence towards trade union activists.

This case also highlighted the role of the ILO in expanding rights under the Conventions to make up for perceived shortcomings and ambivalence at the time of institutional settlement when the Conventions were adopted. The ambivalence toward association rights in the Conventions is not surprising in light of the ILO tripartite structure. The ILO is governed by government, employer and union representatives that make up each member country's tripartite group. A key difference between forced labour and freedom of association Conventions as institutional settlements among the social partners is that the forced labour Conventions commit states to end their own practice of it. In contrast, governments took great pains to exempt themselves from the obligations and their employees from the rights arising from Convention No. 98 on the Right to Organise and Collective Bargaining.

The tool also helped to distinguish Nicaragua's performance relative to the other countries on the particularly important right of unions to engage in political activities and relations. Unlike all the other countries, Nicaragua's trade unions are an integral part of the political landscape and valued for their ability to effectively mobilize votes and action. They have been politically aligned with the Sandinista since the 1979 Revolution. As a result, Nicaraguan unions experience many fewer institutional obstacles to association rights compared to the other countries. Arguably, the useful role that unions play in politics also contributes to informal social norms and informal social conventions supportive of association and union rights relative to the other countries.

Despite the importance of union rights to engage in politics as an essential institutional ingredient, the case study demonstrated that the role of politics is largely absent from ILO supervision of Convention Nos. 87 and 98. In fact, the ILO takes an apolitical approach to regulating freedom of association. It encourages bureaucratic processes and procedures that seem to imply that politics do not matter. When it identifies obstacles to freedom of association in the rules and processes governing it, the ILO again takes an apolitical view of social dialogue by asking the partners to “fix” the problem.

Also, the ILO Committee of Experts and the Committee on Freedom of Association take a narrow view of the right of trade unions and union members to engage in politics for general political reasons. Arguably, their view is narrower than the civil and political rights of trade union organizations under the International Covenant on Civil and Political Rights. Among all the evidence in the case study on freedom of association, the ILO did not once raise a concern about the rights of unions to engage in politics despite the fact that according to unions and non-governmental organisations, some of the countries in the study prohibit unions from engaging in any political activity whatsoever. This prohibition is a violation of obligations under the Conventions but the ILO Committee of Experts simply fails to address it.

In sum, the evidence from the case of freedom of association indicated that politics matter in terms of Nicaragua’s dismantling of its former repressive regime. While Costa Rica and other DR-CAFTA countries often affirm their commitment to do as the ILO asks and find consensus through social dialogue, Nicaragua acted and dismantled its repressive institutional obstacles to association rights. The key difference in this regard is that unions in Nicaragua have an

integral role in party politics. Unions are useful in maintaining power as they mobilize workers and useful in preventing the return of the former repressive system. Even the liberal's return to power in the 1990s did not result in a total reversal back to its former *repressive* system.

C. Evaluation and Direction of Further Research

One promising outcome of the research is that it has been well received by scholars in the field. The theoretical framework was peer reviewed and published in *Advances in Industrial and Labor Relations* (Frey 2010). The diagnostic tool based on the framework was also published in an ILO book *Regulating for Decent Work* (Frey 2011). The review process for both publications resulted in improvement to the research project. The project goal, analytical tool and methods also benefited from the feedback of David Cingranelli, Roy Adams and Janice Bellace, the U.S. member of the ILO Committee of Experts.

The project presented a number of interesting insights. At the micro level – such as trafficking, obligatory overtime or anti-union discrimination – the tool usefully identified many institutional ingredients and thereby exposed patterns within and between the countries. Once identified, the shortcomings have the potential to have political effects within the country and in the supervision process of the Committee of Experts. For example, with regard to obligatory overtime, coercive social conventions overrode formal laws in the Dominican Republic. Nevertheless, since the texts of the Dominican laws comply with ILO standards, the informal social conventions undermining the laws are largely overlooked.

Yet with respect to freedom of association, the examination of only one right, anti-union discrimination, would have been misleading in isolation without consideration of other aspects of freedom of association. Nicaragua shares with

all of the other countries ineffective formal institutions on anti-union discrimination, however, has a remarkably different outcome overall. This is revealed by examination of the right of unions to participate in politics, which is unique to Nicaragua. Accordingly, the study usefully showed the value of using the institutional analysis at multiple levels. It would be helpful, however, to systematize the data analysis and facilitate the process of scaling up and down to different levels of analysis.

The results of the case studies are not intended to be generalizable beyond the countries in the comparison. History and contextual foundations matter, and the countries are particular in relation to their geography, economies, history and the significant role of the United States. While the case studies themselves are not generalizable, the diagnostic tool can be applied more widely to provide insight into other labour rights, countries and contexts. One idea for further application would be to examine one right, such as work time limits, in one country over a longer period of time. Also, given the important role of politics in realizing rights to freedom of association, I would like to use the tool to examine the history of the Committee of Experts supervising freedom of association Conventions through the Cold War period.

Another positive aspect of the research project was its close examination and framing of ILO Conventions as institutional settlements. In debates about international labour standards, the contents of ILO Conventions are often taken for granted as ahistorical fact. Viewing ILO Conventions in terms of institutional components highlights the historical and political conflicts within the ILO and their influence on the eventual content of the standards. ILO Conventions understood as institutional compromises helps to reveal the distributional and

power effects. Additionally, comparing the ILO Convention benchmarks to social reality highlights contradictions and shortcomings in the standards themselves. As the freedom of association case study demonstrates, the Cold War period had a tremendous effect on the formulation of labour standards that continues to influence the application of the standards today, decades after the end of the Cold War. It is also clear from the research that the area of union role in politics governed by ILO Convention Nos. 87 and 98 has been largely overlooked since the end of the Cold War.

The project also shows that labour standards need not be an area of debate isolated from the actual work and study of employment relations and social science. Labour standards have the potential to contribute to the field of international comparative employment relations. International labour standards can be conceptualized and framed in very specific and meaningful ways, and can usefully serve as a common metric for purposes of comparison across industries, countries and time periods. Using labour standards as authoritative norms for purposes of creating common benchmarks also helps to legitimize the labour standards. When social scientists compare labour practices across countries on the basis of social and economic conditions while ignoring labour standards in law, in effect they contribute to undermining the relevance and legitimacy of these standards whether they do so intentionally or not. In contrast lawyers and legal academics have often ignored the social and economic context while focusing formulation, interpretation of labour standards in law. The research project demonstrates that the puzzle of labour standards compliance actually creates a rich agenda for interdisciplinary work across law and social sciences.

The project also has helped to explain why labour standards are difficult to establish and to improve. Countries may choose to formally adopt the labour standards found in ILO Conventions because of coercion from other countries or for other instrumental purposes. Under these conditions, Koh's internalization process is expected to be incomplete or alternatively not to occur at all. Koh's compliance theory helps to explain how labour standards fail to influence labour outcomes. If labour standards are viewed as detrimental to development, then resisting their legitimacy, enactment and enforcement is logical. As Engerman pointed out policy changes implementing labour standards flow from changes in attitude, rhetoric and political power (Engerman 2003 p. 11).

Lastly, a personal measure of the project's usefulness is that it has fundamentally changed how I think about my work in the labour movement. I now organize and represent mostly public sector workers including teachers, paraprofessional educators, cafeteria workers, secretaries, librarians and also some professors in higher education. The tool helps me to examine aspects of my work at a micro institutional level. For example, it encourages me to attend to and try to influence the informal institutional elements as well as the formal institutional grammar I negotiate into local collective bargaining agreements.

The tool also helps me to remember the concentric institutional arrangements within which my work is done. The diagnostic tool has helped me to interpret and account for the varieties of ways that state and national anti-union legislative initiatives play out in my school districts and libraries. I recognize aspects of phenomena that I found in the cases in my current labour work. For example, the institutional settlements around new anti-union laws in my own state of Massachusetts have a poor, contradictory institutional grammar that rivals any

of the contradictory laws I found in El Salvador or Honduras. Also, in communities where I represent workers, I find myself actively searching for local contexts in which the union can become an integral and useful part of the community. In one of the towns for which I am responsible, the union played a critical role in a local initiative to increase taxes for example. Our success in the campaign altered attitudes and relationships between our union's leadership and the school's management.

The gap between widely accepted legal obligations and their persistent violation presents a compelling challenge. Many methodologies such as Cingranelli-Richards and the ILO's decent work indicators are effective in exposing the existence of the gap. The diagnostic tool developed in this project is intended as a step forward in understanding the multiple and complex factors that contribute to the gap in an effort to guide multiple mutually reinforcing interventions necessary to realize labour rights.

Bibliography

- Abdallah, L.A. (2007) 'Solidarismo: Nuevo Referente "Laboral" Del Libre Comercio', ASEPROLA and Coordinadora Latinoamericana de Sindicatos Bananeros.
- Abouharb, M. Rodwan and Cingranelli, David (2007) Human Rights and Structural Adjustment. Cambridge: Cambridge University Press.
- Adams, R.J. (1992) Regulating Unions and Collective Bargaining: A Global, Historical Analysis of Determinants and Consequences' Comparative Labor Law Journal, 14:272.
- Agunias D. (2006) 'Remittance Trends in Central America', Migration Information Source, Migration Policy Institute: www.migrationinformation.org (accessed July 19, 2006).
- Alston, P. (2004) 'Core Labour Standards and the Transformation of the International Labour Rights Regime', EJIL vol. 15 No.3 457-521.
- Alston, P (2005) 'Facing Up to the Complexities of the ILO's Core Labour Standards Agenda', Center for Human Rights and Global Justice Working Paper, Economic, Social and Cultural Rights Series, Number 4, New York: NYU School of Law.
- Amable, B. (2003) The Diversity of Modern Capitalism. Oxford: Oxford University Press.
- American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) (2005) 'The Real Record on Workers' Rights in Central America', Washington D.C.: AFL-CIO, available at: <http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/CAFTABook.pdf>.
- Anderson C (1992) "Towards a Theory of Latin American Politics," in Wiarda, H (ed) Politics and Social Change in Latin America: Still a Distinct Tradition?, Boulder Colorado: Westview Press.
- Aragón, J (2003) 'El Caso de Guatemala', Las Organizaciones Sindicales Centroamericanas Como Actores Del Sistema de Relaciones Laborales, Organización Internacional de Trabajo.
- Asociación Servicios de Promoción Laboral (ASEPROLA) (2004a). An examination of six basic labor rights in Honduras. Number 3, San Jose Costa Rica. (ASEPROLA H).
- Asociación Servicios de Promoción Laboral (ASEPROLA) (2004b). An examination of six basic labor rights in Nicaragua. Number 4, San Jose Costa Rica. (ASEPROLA N).

Asociación Servicios de Promoción Laboral (ASEPROLA) (2004c). Un Vistazo por 6 derechos laborales básicos en Honduras. Numero 3 colección anti-flexibilidad, San Jose Costa Rica. (ASEPROLA H).

Asociación Servicios de Promoción Laboral (ASEPROLA) (2004d). Un Vistazo por 6 derechos laborales básicos en Nicaragua. Numero 4 colección anti-flexibilidad, San Jose Costa Rica. (ASEPROLA N).

Asociación Servicios de Promoción Laboral (ASEPROLA), Fundación de Estudios para la Aplicación del Derecho (FESPAD) (2004), 'Un Vistazo por 6 derechos laborales básicos en El Salvador,' Numero w colección anti-flexibilidad, San Jose Costa Rica.

Axelrod, R. (1986) 'An Evolutionary Approach to Norms', the American Political Science Review, 80(4): 1095-1111.

Baena Ricardo et al. Case, Preliminary Objections, Judgement of November 18, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 61 (1999) at <http://www1.umn.edu/humanrts/iahcr/C/61-ing.html>

Baker, M.B. (2005) 'No Country Left Behind: The Exporting of U.S. Legal Norms Under the Guise of Economic Integration,' Emory International Law Review: Vol. 19:1321-1382.

Baldwin, R. and Cave, M. (1999) Understanding Regulation: Theory, Strategy and Practice, Oxford: Oxford University Press.

Bales, K (2005) 'International Labor Standards: Quality of Information and Measures of Progress in Combating Forced Labor', Comparative Labor Law & Policy Journal Vol. 24 pp. 321-364.

Batolomei de la Cruz, H.G. (1976) Protection against anti-union discrimination, Geneva: International Labour Office.

Beachy, B (2006) 'Targeting Nicaraguans' Stomachs The U.S.'s 11th-hour Elections Meddling', CommonDreams.org: www.commondreams.org

Becker, G. S. (1968). Crime and punishment: An economic approach. Journal of Political Economy, 76(2), 169-217.

Berg, J., & Kucera, D. (2008). In defence of labour market institutions: Cultivating justice in the developing world. Houndmills, Basingstoke, Hampshire and Geneva: Palgrave MacMillan and International Labour Organization.

Bertelsmann Stiftung (2009) Bertelsmann Transformation Index 2010 Country Reports, available at <http://www.bertelsmann-transformation-index.de/en/>

Bertelsmann Transformation Index (2006) <http://www.bertelsmann-transformation-index.de/11.0.html?&L=1>

- Black, M. (1962) *Models and Metaphors*. Ithaca: Cornell University Press.
- Böhning, W.R. (2003) 'Gaps in Basic Workers Rights: Measuring International Adherence to and Implementation of The Organization's Values with Public ILO Data', Geneva: International Labour Office.
- Booth, J and Walker T, (1999) *Understanding Central America*, 3rd Edition, Boulder Colorado: Westview Press.
- Bronstein, A.S. (1995) 'Societal Change and Industrial Relations in Latin America: Trends and Prospects,' *International Labour Review* 134:2:163-186.
- Bronstein, A.S. (1997) 'Labour Law Reform in Latin America: Between State Protection and Flexibility', *International Labour Review* 136:1:5-26.
- Brown, D.K. (2001) 'Labor Standards: Where Do They Belong on the International Trade Agenda?', *Journal of Economic Perspectives*, Vol. 15 No. 3, pp 89-112.
- Browne, J., Deakin, S. and Wilkerson, F. (2002) 'Capabilities, Social Rights and European Market Integration', ESRC Centre for Business Research Working Paper 253, University of Cambridge cited in Lee & McCann 2008, *supra* note 2, p.47 FN 57.
- Bulmer-Thomas, V, (1987) *The Political Economy of Central America Since 1920*, Cambridge England: Cambridge University Press.
- Butler, I (2004) "Recent Advisory Opinions and Contentious Cases of the Inter-American Court of Human Rights", *Human Rights Law Review* 4:1 pp. 125-150.
- Calmfors, L. and Drifil, J. (1988) 'Bargaining Structure, Corporatism and Macroeconomic Performance', *Economic Policy* 3(6): 13-61.
- Carozza, P.G. (2003) 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights,' *Human Rights Quarterly* 25 (2003)281-313.
- Castro, R. C. (2003) 'Legal, Political, and Practical Obstacles to Compliance with the Costa Rican Labor Code', Consulting Group for ASEPROLA .
- Cavallaro, J.L. & Schaffer, E.J. (2004) 'Less as More: Rethinking Supranational Litigation of Economic and Social Rights in the Americas', *Hastings Law Journal* 56: 217.
- Central Intelligence Agency (CIA) *World fact book*. Available at <http://www.cia.gov/library/publications/the-world-factbook/> AU :11.
- Chayes, A. and Chayes, A.H. (1995) *The New Sovereignty: Compliance with International Regulatory Agreements*, Cambridge & London: Harvard University Press.

- Cingranelli, D.L. and Richards, D.L. (CIRI) (2004a) 'The Cingranelli-Richards (CIRI) Human Rights Database Coder Manual at <http://ciri.binghamton.edu/index.asp>
- Cingranelli, D.L. and Richards, D.L. (CIRI 2010) Human Rights Dataset available at: <http://ciri.binghamton.edu/>
- Commons, J.R. [1924] (1968) *Legal Foundations of Capitalism*. Madison: University of Wisconsin Press.
- Compa, L. (2005) 'Assessing Assessments: A Survey of Efforts to Measure Countries' Compliance with Freedom of Association Standards', *Comparative Labor Law and Policy Journal* 24:2 pp. 283-320
- Committee on Economic, Social and Cultural Rights (CESCR) (2007) 'Concluding Observations of the CESCR: El Salvador, E/C/.12/SLV/CO/2, 27 June 2007.
- Conservation International (2011) <http://www.biodiversityhotspots.org/xp/Hotspots/mesoamerica/Pages/biodiversity.aspx>, last accessed June 11, 2011.
- Cook, M. L. (2006) 'Movimientos obreros y por los derechos humanos en América Latina: convergencia, divergencia y consecuencias para la promoción de los derechos económicos, sociales y culturales'. En *Derechos económicos, sociales y culturales en América Latina: del invento a la herramienta*. A. E. Yamin, dir. México, D.F.: Plaza y Valdés/CRDI, 103-123.
- Corby, S. (1986) 'Limitations on Freedom of Association in the Civil Service and the I.L.O.'s Response', 15 *Indus. L.J.* 161 pp. 161-172.
- Crawford, S. E. S., & Ostrom, E. (1995). A grammar of institutions. *American Political Science Review*, 89(3), 582–600.
- Crouch, C. (2005) *Capitalist Diversity and Change: Recombinant Governance and Institutional Entrepreneurs*. Oxford: Oxford University Press.
- Crouch, C., Streeck, W., Boyer, R., Amable, B., Hall, P.A. and Jackson, G. (2005) 'Dialogue on Institutional Complementarity and Political Economy', *Socio-Economic Review* Volume 3 pp. 359-382.
- Dahl, R.A. (1998) *On Democracy*, New Haven: Yale University.
- David, P.A. (1994) 'Why are Institutions the 'Carriers of History'? Path Dependence and the Evolution of Conventions, Organizations and Institutions,' *Structural Change and Economic Dynamics* 5: 205-220.

DiMaggio, P.J. (1982) 'Cultural Entrepreneurship in Nineteenth-Century Boston: The Creation of an Organizational Base for High Culture in America', *Media, Culture & Society*, 4(1): 33-50.

DiMaggio, P.J. and Powell, W.W. (1983) 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields', *American Sociological Review*, 48(2): 147-160.

Dorado, S. (2005) 'Institutional Entrepreneurship, Partaking, and Convening', *Organization Studies*, 26(3): 385-414.

Douglas, W.A., Ferguson, J.P. & Klett, E (2004) 'An Effective Confluence of Forces in Support of Workers' Rights: ILO Standards, US Trade Laws, Unions, and NGOs', *Human Rights Quarterly* 26 pp. 273-299.

Downs, G.W., Rocke, D.M. and Barsoom, P.N. (1996) 'Is the Good News about Compliance Good News about Cooperation?', *International Organization*, 50(3): pp. 379-406.

Drezner, D.W. (2001) 'Globalization and Policy Convergence', *International Studies Review*, 3(1): pp. 53-78.

Dunning, H. (1998) 'The Origins of Convention 87 on Freedom of Association and the Right to Organize', *International Labour Review*, Vol. 137, No. 2, pp. 149-167.

Durkheim, E. (1933) [1893] *The Division of Labor in Society*, G. Simpson (trans.), New York: Macmillan.

Easthope, G (1974) *A History of Social Research Methods*. London: Longman.

Economist Intelligence Unit. *Country Profile (2006) Costa Rica* (London: The Economist Intelligence Unit Limited).

Economist Intelligence Unit. *Country Report (2005) Costa Rica* (London: The Economist Intelligence Unit Limited).

Economist Intelligence Unit. *Country Profile (2005) El Salvador* (London: The Economist Intelligence Unit Limited).

Economist Intelligence Unit. *Country Profile (2004) Guatemala* (London: The Economist Intelligence Unit Limited).

Economist Intelligence Unit. *Country Report (2005) Guatemala* (London: The Economist Intelligence Unit Limited).

Economist Intelligence Unit. *Country Profile (2005) Honduras* (London: The Economist Intelligence Unit Limited).

Economist Intelligence Unit. Country Report (2005) Honduras (London: The Economist Intelligence Unit Limited).

Eliot, K.A. and Freeman, R. B. (2003) Can Labor Standards Improve Under Globalization? Washington D.C.: Institute for Economics

Engerman, S.L. (2003) 'The History and Political Economy of International Labor Standards', in Basu, K., Horn, H., Román, L. & Shapiro, J. (Eds), International Labor Standards: History, Theory and Policy Options, Malden Massachusetts: Blackwell Publishing Ltd.

Espinal, R. (1987) 'Labor, Politics, and Industrialization in the Dominican Republic', Working Paper #96.

Europa Regional Surveys of the World: South America, Central America and the Caribbean (2005). London: Taylor and Francis.

Evans, P. (1995) Embedded Autonomy: States & Industrial Transformation. Princeton: Princeton University Press.

Feinberg, R (2009) 'Responsible Labor in Central America: Three Policy Proposals', Conference Paper, Development Challenges in the Hemisphere Task Force, June 19, 2009.

Finnemore, M. (1996) National Interest in International Society, Ithaca: Cornell University Press.

Fisher, R. (1981). Improving compliance with international law. Charlottesville: University Press of Virginia.

Franck, T.M. (1988) 'Legitimacy in the International System', American Journal of International Law, 82(4): 705-59.

Fredman, S (2002) Discrimination Law, Oxford: Oxford University Press

Fredman, S. (2006) 'Transformation or Dilution: Fundamental Rights in the EU Social Space', European Law Journal. 12(1): 41-60

Freeman, M. (2008) 'Human Rights: Advocates, sceptics, problems – A view from political theory.' Paper presented to the Oxford Centre for Socio-Legal Studies, 13 October 2008.

Frey, D. (2009) 'A Diagnostic Methodology for Regulating Decent Work,' Paper presented at the Regulating for Decent Work Conference, ILO, Geneva, 8–10 July 2009.

Frey, D. (2010) 'An Institutional Approach to Labor-Related Human Rights Compliance: A Case of Forced Labor in Nicaragua and Honduras', in Lewin, D, Kaufman, B.E. and Gollan, P.J. (eds) Advances in Industrial and Labor Relations, Volume 17, Bingley, UK: Emerald Group Publishing.

Frey, D. (2011) 'A Diagnostic Methodology for Regulating Decent Work', in Lee, S. and McCann, D. (eds) *Regulating for Decent Work: New Directions in Labour Market Regulation*. Geneva: International Labour Office and Houndmills, Basingstoke, Hampshire UK: Palgrave Macmillan.

Frundt, H.J. (1998) *Trade Conditions and Labor Rights: U.S. Initiatives, Dominican and Central American Responses*. Gainesville: University Press of Florida.

Fudge, J. (2007) 'The New Discourse of Labour Rights: From Social to Fundamental Rights?', *Comparative Labor Law and Policy Journal*, 29(1): 1-49.

Galeano, E (1973) *Open Veins of Latin America: Five Centuries of the Pillage of a Continent*, New York, New York: Monthly Review Press

Galligan, D., & Sandler, D. (2004) *Implementing human rights*. In: S. Holliday & P. Schmidt (Eds), *Human rights brought home: Socio-legal perspectives on human rights in the national context*. Portland, OR: Hart Publishing

Ganz, J.S. (1971) *Rules: A Systematic Study*. Paris: Mouton

George, A. L. & Bennet, A (2005) *Case Studies and Theory Development in the Social Sciences*. Cambridge, MA: MIT Press.

Ghandi, P.R. (1995) *International Human Rights Documents 2nd Edition*, London: Blackstone Press Limited

Griffin, G, Nyland, C. & O'Rourke, A. (2003) 'Trade Unions and the Trade-Labour Rights Link: A North-South Union Divide?', *The International Journal of Comparative Labour Law and Industrial Relations*, Volume 19/4, pp. 469-494.

Groves, L (2004) 'Implementing ILO Child Labour Convention 182: lessons from Honduras', *Development and Practice* Volume 14, Numbers 1 & 2.

Gross, J.A. (2010) *A Shameful Business: The Case of Human Rights in the American Workplace*, Ithaca: Cornell University Press.

Grossman, D. and Zaelke, D. (2005) 'An Introduction to Theories of Why States and Firms Do (And Do Not) Comply with Law', *Seventh International Conference on Environmental Compliance and Enforcement*, International Network for Environmental Compliance and Enforcement (INECE), Conference Proceedings Volume 1 available at:
<http://www.inece.org/conference/7/vol1/index.html>

Haas, P.M. (1992) 'Introduction: Epistemic Communities and International Policy Coordination', *International Organization* 46(1): 1-35.

Hall, P. and Soskice, D. (2001) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*. Oxford: Oxford University Press

- Hartlyn, J. (1998) *The Struggle for Democratic Politics in the Dominican Republic*. Chapel Hill: University of North Carolina Press
- Helfer, L.R. (2006) 'Understanding Change in International Organizations: Globalization and Innovation at the ILO', *Vanderbilt Law Review* 59:649
- Helmke, G. and Levitsky, S. (2004) "Informal Institutions and Comparative Politics: A Research Agenda", *Perspectives on Politics*, 2(4): 725-740.
- Helmke, G., & Levitsky, S. (Eds). (2006). *Informal institutions and democracy: Lessons from Latin America*. Baltimore: The John Hopkins University Press.
- Hensman, R. (2001) "World trade and workers' rights: In search of an international position" in Waterman, P. and Wills, J. (eds) *Place, Space and the New Labour Internationalism*, Oxford: Blackwell.
- Hepple, B. (2003) 'Rights at Work', Discussion Paper DP/147/2003 Geneva: International Institute for Labour Studies.
- Heritage Foundation (2006) 'Index of Economic Freedom' <http://www.heritage.org/research/features/index/countries.cff>
- Hilton, M (2005) 'Introduction', *Comparative Labor Law & Policy Journal*, Volume 24:281.
- Hodgson, G.M. (2006) 'What Are Institutions', *Journal of Economic Issues* XL(1): 1-25.
- Howell, C. (2005) *Trade Unions and the State*. Princeton: Princeton University Press.
- Human Rights Watch (HRW) (2004) 'CAFTA's Weak Labor Rights Protections: Why the Present Accord Should be Opposed, A Human Rights Watch Briefing Paper' available at: <http://www.hrw.org/en/reports/2004/03/10/caftas-weak-labor-rights-protections-why-present-accord-should-be-opposed>
- Hyman R (2001) *Understanding European Trade Unionism: Between Market, Class & Society*, London: Sage
- Inter-American Commission on Human Rights (IACHR), Organization of American States Report on the situation of Human Rights in the Dominican Republic, OEA/Ser.L/V/II.104, 7 October 1999
- Inter-American Development Bank (IDB) (2004) 'Sending Money Home: Remittance to Latin America and Caribbean', Multilateral Investment Fund.
- Inter-American Development Bank Multilateral Investment Fund (2005) 'Remittances 2005: Transforming Labor Markets and Promoting Financial

Democracy, Statistical Comparison' available at
<http://www.iadb.org/mif/v2/remittancesstudies.html>

Inter-American Dialogue (2004) 'All in the Family: Latin America's Most Important International Financial Flow, Report of the Inter-American Dialogue Task Force on Remittances available at:
<http://www.thedialogue.org/publications/default.asp>

International Confederation of Free Trade Unions. (2005). Reports on core labour standards in the countries applying for the GSP-Plus. (ICFTU GSP Plus). Available at www.icftu.org/www/PDF/GSP.pdf

International Labour Organization. ILOLEX. Available at
<http://www.ilo.org/ilolex/english/>

International Labour Organization. Working time database. Available at
<http://www.ilo.org/travaildatabase4>

International Labour Organisation (ILO) (1948) 'The ILO and the Problem of Freedom of Association and Industrial Relations', International Labour Review, Vol, 58, No. 5.

International Labour Organisation (ILO) (1994) 'General Survey: Freedom of Association and Collective Bargaining', 81st Session, Report III Part 4B. Geneva: International Labour Office.

International Labour Organisation (ILO) (1998 a) 'ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 86th Session.' available at
<http://www.ilo.org/public/english/standards/deci/declaration/index.htm>.

International Labour Organization (1998b). General Report of the Committee of Experts on the Application of Conventions and Recommendations, 1998. Available at <http://www.ilo.org/ilolex/english/ceacrrpsq.htm>

International Labour Organisation (ILO) (2000a) 'Freedom of Association: A Users Guide: Standards, Principles and Procedures of the International Labour Organization', Geneva: International Labour Office.

International Labour Organisation (ILO) (2000b) 'Your Voice at Work', Global Report, Geneva: International Labour Office.

International Labour Organization. (2003a). Fundamental principles and rights at work: A labour law study – Dominican Republic. Geneva: International Labour Office.

International Labour Organization. (2003b). Fundamental rights at work and international labour standards. Geneva: ILO.

International Labour Organization. (2005a). A global alliance against forced

labour. Global report under the follow-up to the ILO declaration on fundamental principles and rights at work. Geneva: International Labour Office.

International Labour Organization. (2005b). Hours of work: From fixed to flexible? Report III (Part 1B), General survey of the reports concerning the hours of work industry convention, 1919 (No. 1) and the hours of work (commerce and offices) Convention, 1930 (No. 30). International Labour Conference, 93rd session, International Labour Office, Geneva.

International Labour Organisation (ILO) (2006) 'Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO', Fifth (revised) Edition, Geneva: International Labour Office.

International Labour Organization (ILO) (2007a) 'Baseline Report for the ILO Verification of White Paper Recommendations Central America and the Dominican Republic', International Labour Office: San Jose, Costa Rica.

International Labour Organization. (2007b). Eradication of forced labour: Report III (Part B), General survey concerning the forced labour convention 1930 (No. 29) and the Abolition of Forced Labour Convention 1957 (No. 105). International Labour Office, Geneva.

International Labour Organisation (ILO) (2008a) Working Conditions Laws 2006-2007: A Global Review. Geneva: ILO.

International Labour Organisation (ILO) (2008b) 'Freedom of Association in Practice: Lessons Learned.' Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 97th Session, Report I(B), Geneva: International Labour Office.

International Labour Organization. (2009). The cost of coercion. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 98th session, Report I(B). International Labour Office, Geneva.

International Labour Organization (ILO) (2010) 'Verification Report on the Implementation of the White Paper Recommendations, Period: August 2009 – January 2010, Central America and the Dominican Republic', San Jose, Costa Rica: International Labor Office available at: www.oit.or.cr/verificacion

International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations (CEACR) (1997) Individual Observation concerning Convention no. 29 Honduras, ILOLEX. Available at <http://www.iol.org/ilolex>

International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations (CEACR) (2000) Individual Observation concerning Convention no. 29 Honduras, ILOLEX. Available at <http://www.iol.org/ilolex>

International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations (CEACR) (2005) Individual Observation concerning Convention no. 29 Guatemala, ILOLEX. Available at <http://www.iol.org/ilolex>

International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations (CEACR) (2006) Individual Direct Request concerning Convention no. 105 Nicaragua, ILOLEX. Available at <http://www.iol.org/ilolex>

International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations (CEACR) (2007) Individual Direct Request concerning Convention no. 29 Nicaragua, ILOLEX. Available at <http://www.iol.org/ilolex>

International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations (CEACR) (2008) Individual Observation concerning Convention no. 87 Guatemala, ILOLEX. Available at <http://www.iol.org/ilolex>

International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations (CEACR) (2008) Individual Observation concerning Convention no. 87 Costa Rica, ILOLEX. Available at <http://www.iol.org/ilolex>

International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations (CEACR) (2008) Individual Observation concerning Convention no. 87 Honduras, ILOLEX. Available at <http://www.iol.org/ilolex>

International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations (CEACR) (2009) Individual Direct Request concerning Convention no. 29 Honduras, ILOLEX. Available at <http://www.iol.org/ilolex>

International Labour Organization, Committee of Experts on the Application of Conventions and Recommendations (CEACR) (2010) Individual Observation concerning Hours of Work (Industry) Convention, 1919 (No. 1) Guatemala (ratification: 1988) Published: 2010 available at: <http://www.ilo.org/ilolex>

International Labor Rights Fund (ILRF), Asociación Servicios de Promoción Laboral (ASEPROLA) (ILRF/ASEPROLA) (2004) ‘Petition to Review Costa Rica’s Country Eligibility under the Generalized System of Preferences (GSP) for Violation of Internationally Recognized Workers’ Rights’, International Labor Rights Fund: Washington, DC, Asociación Servicios de Promoción Laboral: San José, Costa Rica

International Trade Union Confederation (ITUC) (2008) ‘Annual Survey of Trade Union Rights Violations’ El Salvador.

International Trade Union Confederation (ITUC) (2008) 'Annual Survey of Trade Union Rights Violations' Guatemala.

International Trade Union Confederation (ITUC) (2009) 'Annual Survey of Trade Union Rights Violations' Costa Rica.

International Trade Union Confederation (ITUC) (2009) 'Annual Survey of Trade Union Rights Violations' Dominican Republic.

International Trade Union Confederation (ITUC) (2009) 'Annual Survey of Trade Union Rights Violations' El Salvador.

International Trade Union Confederation (ITUC) (2009) 'Annual Survey of Trade Union Rights Violations' Guatemala.

International Trade Union Confederation (ITUC) (2009) 'Annual Survey of Trade Union Rights Violations' Honduras.

International Trade Union Confederation (ITUC) (2009) 'Annual Survey of Trade Union Rights Violations' Nicaragua.

Itzigsohn, J. (2000) *Developing Poverty: The State, Labor Market Deregulation, and the Informal Economy in Costa Rica and the Dominican Republic*.

Kagan, R.A., and Sholz, J.T. (1984) 'The Criminology of the Corporation and Regulatory Enforcement Styles', in Hawkins, K and J. M. Thomas, J.M. (eds) *Enforcing Regulation*, Boston: Kluwer-Nijhoff.

Keohane, R.O. (1988) 'International Institutions: Two Approaches', *International Studies Quarterly*, 32: 379-96.

Keohane, R.O. (1992) 'Compliance with International Commitments: Politics Within a Framework of Law', 86th Annual Meeting, American Society of International Law Proceedings 176 (2, 7, 9).

Keohane, R.O. (1998) 'When Does International Law Come Home?' *Houston Law Review* 35:699.

Keohane, R.O. (2005) *After Hegemony: Cooperation and Discord in the World Political Economy*, Princeton and Oxford: Princeton University Press.

Koh, H. (1996) 'The 1994 Roscoe Pound Lecture: Transnational Legal Process', *Nebraska Law Review* 75:181

Koh, H. (1997). *Why do nations obey international law?* *Yale Law Journal*, 106, 2599.

Koh, H.H. (1998) "The 1998 Frankel Lecture: Bringing International Law Home" *Houston Law Review* 35:623

- Knight, J. (1992). *Institutions and social conflict*. Cambridge: Cambridge University Press.
- Kratochwil, F.V. (1989) *Rules, Norms and Decisions on the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*. Cambridge: Cambridge University Press.
- Krasner, S.D. (ed) (1983) *International Regimes*, Ithaca, NY: Cornell University Press.
- Landman, T (2006) *Studying Human Rights*, New York, Oxford: Routledge
- Langille, B A (2005) 'Core Labour Rights – The True Story (Reply to Alston)', *The European Journal of International Law* Volume 16, Number 3 409-437
- Lee, S., McCann, D and Messenger, J.C. (2008) *Working Time Around the World: Trends in Working Hours, Laws and Policies in a Global Comparative Perspective*, London and New York: Routledge.
- Lee, S. & McCann, D. (2008) 'Measuring Labour Market Institutions: Conceptual and Methodological Questions on Working Hours Rigidity', in Berg, J. & Kucera, D. (eds). *In Defence of Labour Market Institutions: Cultivating Justice in the Developing World*, Geneva: International Labour Organization, Houndmills, Basingstoke, Hampshire and New York, New York: Palgrave MacMillan 2008 p. 47.
- Lerche, J. (2007). A global alliance against forced labour? Unfree labour, Neo-liberal globalization and the international labour organization. *Journal of Agrarian Change*, 7(4), 425–452.
- Levitt, P (2001) *The Transnational Villagers*. Berkley and Los Angeles: University of California Press
- Lieberson, S (1992) 'Small N's and big conclusions: an examination of the reasoning in comparative studies based on a small number of cases', in Ragin, C.C. & Becker, H.S. (eds) *What is a Case? Exploring the Foundations of Social Inquiry*, Cambridge: Cambridge University Press.
- Lizin, A.M. (2003) United Nations (UN) Independent Expert on Human Rights and Extreme Poverty (2003) 'Addendum, Mission to the Dominican Republic', Commission on Human Rights, Fifty-ninth Session, Item 10 of the provisional agenda, E/CN.4/2003/52/Add.1, <http://www.ohchr.org/english/issues/poverty/expert/visits.htm>
- Lukes, S. (2005). *Power: A radical view* (2nd ed.). New York: Palgrave Macmillan in Association with the British Sociological Association.
- Macklem, P. (2005) 'The Right to Bargain Collectively in International Law: Workers' Right, Human Right, International Right?' in Alston, P. (ed) *Labour Rights as Human Rights*, Oxford: Oxford University Press.

- Mahler, S.J., (2000) 'Migration and Transnational Issues: Recent Trends and Prospects for 2020', Hamburg: Istitut fur Iberoamerika-Kunde 2000.
- Maguid, A.M. (1999) 'Los esfuerzos de las poblaciones: las migraciones en Centroamérica ', in Estado de la región en desarrollo humano sostenible, pp 359-384, San Jose, Costa Rica: Editorama, S.A.
- Macías, R C & Cruz, J M (2004) 'The Political Culture of Democracy in El Salvador, Perceptions and Realities of the Salvadoran Population', in Seligson, M.A. (ed) 'The Latin American Public Opinion Project (LAPOP)', Nashville Tennessee: Vanderbilt University.
- Mantzavinos, C., North, D.C. and Shariq, S. (2004) 'Learning, Institutions and Economic Performance', *Perspectives on Politics* 2(1): 75-84.
- March, J.G. and Olsen, J.P. (1998) 'The Institutional Dynamics of International Political Orders', *Int'l Org.*, 52(4): 949-954.
- Maul, D. R. (2007). The international labour organization and the struggle against forced labour from 1919 to the present. *Labor History*, 48(4), 477–500.
- Maupin, F. (2005a) 'Is the ILO Effective in Upholding Workers' Rights?: Reflections from the Myanmar Experience', in Alston, P. (Ed) *Labour Rights as Human Rights*, Oxford: Oxford University Press
- Maupin F. (2005b) Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights', *European Journal of International Law*, Vol. 16 pp. 439-465
- McAdam, D. (1996) 'Conceptual Origins, Current Problems, Future Directions', in McAdam, D., McCarthy, J.D. and Zald, M.N. (eds) *Comparative Perspectives on Social Movements*, Cambridge: CUP.
- McAdam, D., Tarrow, S. and Tilly, C. (2001) *Dynamics of Contention*. Cambridge: Cambridge University Press.
- Mershon, C. A. (1994). Expectations and informal rules in coalition formation. *Comparative Political Studies*, 27(1), 40–79.
- Mills, M., van de Bund, G. & de Bruijin, J. (2006) 'Comparative Research: Persistent Problems and Promising Solutions', *International Sociology*, Vol. 21(5) pp. 619-631
- Mishel, L., Bernstein, J. & Boushey, H. (2003) *The State of Working America 2002-2003*, Cornell: ILR Press.
- Mitchell, R.B. (1994) *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance*. Cambridge, MA: MIT Press.

- Moran, T.H. (2005) 'Monitoring Compliance with International Labor Standards: How Can the Process Be Improved, and What Are the Implications for Inserting Labor Standards into the WTO?', *Journal of Business Ethics* 59:147-153.
- Morse, D.A. (1950) 'ILO Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and Bargain Collectively', *Industrial and Labor Relations Review*, 3:3:413-420.
- Morsink, J. (1999) *The Universal Declaration of Human Rights: Origins, Drafting & Intent*, Philadelphia: University of Pennsylvania Press.
- Nadelmann, E.A. (1990) 'Global Prohibition Regimes: The Evolution of Norms in International Society', *International Organization*, 44:4 pp. 479-526.
- National Research Council. (2004). *Monitoring International Labor Standards: Techniques and Sources of Information*. Committee on Monitoring International Labor Standards. Center for Education, Division of Behavioral and Social Sciences and Education and Policy and Global Affairs Division. Washington, DC: The National Academies Press.
- North, D. C. (1990). *Institutions, institutional change and economic performance*. Cambridge: Cambridge University Press.
- Organization of American States, (OAS) 2006 Treaty Ratifications, http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/DIL/treaties_and_agreements.htm
- Organization of American States (OAS) Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador" available at: <http://www.oas.org/juridico/english/treaties/a-52.html>
- Ostrom, E. (2005). *Understanding institutional diversity*. Princeton: Princeton University Press.
- Ostrom, V. (1980) 'Artisanship and Artifact', *Public Administration Review* 40(4): 404-17.
- Pagnattaro, M.A. (2006) 'Leveling the Playing Field: Labor Provisions in CAFTA' *Fordham International Law Journal* 29: 386-446
- Palley, T.I. (2004) 'The economic case for international labor standards', *Cambridge Journal of Economics*, Vol. 28 No. 1 pp. 21-36.
- Perez-Brignoli, H., (1989) *A Brief History of Central America*. (Berkeley: University of California Press.
- Poe, S.C., Carey, S.C. & Vazquez, T.C. (2001) 'How are These Pictures Different? A Quantitative Comparison of the US State Department and Amnesty

International Human Rights Reports, 1976–1995’, *Human Rights Quarterly* 23 (2001) pp. 650–677.

Polanyi, K. (1944) *The Great Transformation*. Boston: Beacon Press.

Przeworski, A. & Teune, H. (1970) *The Logic of Comparative Social Inquiry*, New York: Wiley

Putnam, R.D. (1988) ‘Diplomacy and Domestic Politics: The Logic of Two-Level Games’, *International Organization* 42(3): 427-460.

Ragin, C.C. (1987) *The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies*, Berkeley California: University of California Press

Ragin, C.C. and Becker, H.S. (1992) *What is a Case?*, Cambridge: Cambridge University Press.

Raustiala, K. and Slaughter, A.M. (2002) ‘International Law, International Relations and Compliance’, in Carlsnaes, W., Risse, T. and Simmons, B.A. (eds) 2002 *Handbook of International Relations*. London, Thousand Oaks, Calif: Sage.

Reckziegel, M, Stenner, W, Thiele W and Treger, G (1999) *Pocket Atlas of the World*, Hauppauge, New York: Barron’s Educational Series, Inc.

Rihoux, B (2006) ‘Qualitative Comparative Analysis (QCA) and Related Systematic Comparative Methods: Recent Advances and Remaining Challenges for Social Science Research’, *International Sociology* 21(5) pp. 679-706

Ritualo, A.R., Castro, C.L. & Gormly, S. (2005) ‘Measuring Child Labor: Implications for Policy and Program Design’, *Comparative Labor Law and Policy* 24:2 pp. 401-434.

Roberts, K.M. (2007) ‘The Crisis of Labor Politics in Latin America: Parties and Labor Movements during the Transition to Neoliberalism’, *International Labor and Working-Class History*, Vol. 72, No. 1, pp. 116-133.

Ruggie, J.G. (1998) ‘What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge’, *International Organization*, 52(4): 855-885.

Sáinz, J. (1999) *From the Finca to the Maquila: Labor and Capitalist Development in Central America*. (Boulder Colorado: Westview Press).

Samper, M (1994) “Los paisajes sociales del café: Reflexiones comparadas,” in Perez-Brignoli and Samper, M (eds) *Tierra, café y sociedad: Ensayos sobre la historia agraria centroamericana*. San José: FLACSO

Saxe, M.G. & Cullell, J.V. (2002) ‘State of the Region Report on Sustainable Human Development in Central America’, United Nations Development Program (UNDP) <http://www.estadonacion.or.cr/InfoRegion/english1/ing-01b.html>

Scharpf, F.W. (1997) *Games Real Actors Play: Actor-centered Institutionalism in Policy Research*, Boulder Colorado: Westview Press.

Schmidt, V.A. (2002) *The Futures of European Capitalism*. Oxford: Oxford University Press.

Scholz, J. T. (1997). Enforcement policy and corporate misconduct: The changing perspective of deterrence theory. *Law and Contemporary Problems*, 60(3), 253–268.

Sen, A. (2000) *Development as Freedom*, New York: Random House.

Servais, J.M. (1977) ‘Anti-union discrimination in the field of employment’, *International Labour Review*, Vol, 115, No. 3, pp. 293-303.

Servais, J.M. (1984) ‘ILO Standards on Freedom of Association and their Implementation’, *International Labour Review*, Vol. 123, No. 6, pp. 765-781.

Shahinian, G. (2008) ‘Report of the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences,’ United Nations Human Rights Council, Ninth Session, A/HRC/9/20, 28 July 2008.

Singh, A. & Zammit, A. (2004) ‘Labour Standards and the ‘Race to the Bottom’: Rethinking Globalization and Workers’ Rights From Developmental and Solidaristic Perspectives’, *Oxford Review of Economic Policy*, Vol. 20 No. 1 pp. 85-104.

Slaughter-Burley, A. (1993) *International Law and International Relations Theory: A Dual Agenda*, *American Journal of International Law* 87:205.

Stahler-Sholk, R (1995) ‘The Dog that Didn’t Bark: Labor Autonomy and Economic Adjustment in Nicaragua under the Sandinista and UNO Governments’, *Comparative Politics* 28:1 pp. 77-102.

Standing, G. (1991) “Structural Adjustment and Labor Market Policies.” In Standing, G. and Tokman, V. (eds) *Towards Social Adjustment: Labour Market Issues in Structural Adjustment*. Geneva: ILO.

Streeck, W. and Thelen, K. (eds) (2005) *Beyond Continuity: Institutional Change in Advanced Political Economies*. Oxford: Oxford University Press

Stop CAFTA Coalition, (2006) ‘Monitoring report: DR-CAFTA in Year One: A report by the Stop CAFTA Coalition, available at: www.stopcafta.org

Sunstein, C.R. (1996) ‘Social Norms and Social Roles’, *Columbia Law Review*, 96(4): 903-968.

Swepston, L. (1998) 'Human Rights Law and Freedom of Association: Development through ILO Supervision', *International Labour Review*, Vol. 137, No. 2., pp. 169-194.

Tarrow, S. (2001) 'Transnational Politics: Contention and Institutions in International Politics', *Annual Review of Political Science*, 4(1): 1-20.

Teubner, G. (1987) 'Juridification: Concepts, Aspects, Limits, Solutions', in Teubner, G. (ed) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*. Berlin: Walter de Gruyter.

Thelen, K. (1999) 'Historical Institutionalism in Comparative Perspective', *Annual Review of Political Science*, 2:369-404.

Thomas, C (2005) 'Information Sources and Measures of International Labor Standards on Employment Discrimination', *Comparative Labor Law and Policy Journal* 24:2 pp. 365-400.

Thornton, D., Gunningham, N.E. and Kagan, R.A. (2005) 'General Deterrence and Corporate Environmental Behaviour', *Law & Policy*, 27(2): 262-288.

Trubek, D.M., Mosher, J. and Rothstein, J.S. (2000) 'Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks', *Law & Social Inquiry*, 25(4): pp. 1187-1211.

United Nations Office of the High Commissioner for Human Rights (OHCHR) Treaty Body Database at:
<http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet>

United Nations Development Program (UNDP) (2002) 'Segundo Informe Sobre Desarrollo Humano En Centro America y Panama',

United Nations Development Program Regional Divides, available at <http://www.estadonacion.or.cr/InforRegion/english1/ing-0ld.html> accessed 10 November 2006.

United Nations Vienna Declaration and Programme of Action. (1993) A/CONF 157/23, 12 July. Available at:
[http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)

United States Army Corp of Engineers (1998) Water Resources Assessment of El Salvador available at:
http://docs.google.com/viewer?a=v&q=cache:AuNsbR37LhcJ:www.sam.usace.army.mil/en/wra/ElSalvador/El%2520Salvador%2520WRA%2520English.pdf+contaminated+water+in+el+salvador&hl=en&gl=us&pid=bl&srcid=ADGEESjWiGjnA6OOJpNzHtiKj5ghB_zxvVWBxpoDu3yNXYtJDVGMncdwncsavDewkfp1A4mD-kG39G142n4ILrJtkKCvgozE8XW72tRh17niWYPihZB2ub-tpP5hg1-8It-nyu-D-8IH&sig=AHIEtbRGLD4AEnf_3zeicu7_GxzSyi7eFQ

United States Census. (1999) Internet website.
<http://www.census.gov/population/www/documentation/twps0029/tab03.html>

United States Census. (2000) Internet website.
<http://www.atmosfear.ro/population/www/socdemo/foreign/ppl-145.html>

United States Department of State, Bureau of Democracy, Human Rights and Labor (U.S. State Department) (2003) Country Reports on Human Rights Practices: Dominican Republic.

United States Department of State, Bureau of Democracy, Human Rights and Labor (2004) Country Reports on Human Rights Practices: Honduras.

United States Department of State, Bureau of Democracy, Human Rights and Labor (U.S. State Department) (2006) Country Reports on Human Rights Practices: El Salvador.

United States Department of State, Bureau of Democracy, Human Rights and Labor (2006) Country Reports on Human Rights Practices: Guatemala.

United States Department of State, Bureau of Democracy, Human Rights and Labor (U.S. State Department) (2007) Country Reports on Human Rights Practices: Dominican Republic.

United States Department of State, Bureau of Democracy, Human Rights and Labor (U.S. State Department) (2007a). Country Reports on Human Rights Practices: Honduras. (USSD H).

United States Department of State, Bureau of Democracy, Human Rights and Labor (U.S. State Department) (2007b). Country Reports on Human Rights Practices: Nicaragua. (USSD N).

United States Department of State, Bureau of Democracy, Human Rights and Labor (U.S. State Department) (2009). Country Reports on Human Rights Practices: Costa Rica. (USSD 2009 CR).

United States Department of State, Bureau of Democracy, Human Rights and Labor (U.S. State Department) (2009). Country Reports on Human Rights Practices: Dominican Republic. (USSD 2009 DR).

United States Department of State, Bureau of Democracy, Human Rights and Labor (U.S. State Department) (2009). Country Reports on Human Rights Practices: El Salvador. (USSD 2009 ES).

United States Department of State, Bureau of Democracy, Human Rights and Labor (U.S. State Department). (2009). Country Reports on Human Rights Practices: Guatemala. (USSD 2009 G).

United States Department of State, Bureau of Democracy, Human Rights and Labor (U.S. State Department). (2009). Country Reports on Human Rights

Practices: Honduras. (USSD 2009 H).

United States Department of State, Bureau of Democracy, Human Rights and Labor (U.S. State Department). (2009). Country Reports on Human Rights Practices: Nicaragua. (USSD 2009 N).

United States INS Office of Policy and Planning (200?) Estimates of the Unauthorized Immigrant Population Residing in the United States 1990 to 2000.

United States Trade Representative (USTR) (2004), 'CAFTA-DR (Dominican Republic-Central America FTA)', available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text>

United States Trade Representative (USTR) (2005) 'CAFTA Labor Rights Report: Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua.'

Van Roozendaal, G. (2002) Trade Unions and Global Governance: The Debate on a Social Clause, London & New York: Continnum.

Vargas-Cullell, J. & Rosero-Bixby, L. (2004) 'The Political Culture of Democracy in Costa Rica, 2004', in Selgison, M.A. (ed) 'A Study of the Latin America Public Opinion Project (LAPOP)' Nashville Tennessee: Vanderbilt University

Verma, A. (2003) 'Global Labour Standards: Can We Get from Here to There?', The International Journal of Comparative Labour Law and Industrial Relations, Volume 19/4, pp. 515-534.

Vilas, C.M. (2000) 'Neoliberalism in Central America', in Walker, T. W & Armony, A.C. (eds) Repression, Resistance and Democratic Transition in Central America, Wilmington DE: Scholarly Resources Inc.

The Washington Office on Latin America (WOLA) & U.S. Labor Education in the Americas Project (US\LEAP) (WOLA/US/LEAP) (2005), 'Petition to Remove Guatemala from the List of Beneficiary Developing Countries Under the Generalized System of Preferences ("GSP") and from the List of Beneficiary Countries Under the Caribbean Basin Economic Recovery Act ("CBI")', www.wola.org/economic/gsp_petition_june_2005.pdf

Washington Office on Latin America (WOLA) (2009) 'DR-CAFTA and Workers' Rights: Moving from Paper to Practice', available at: http://www.wola.org/index.php?option=com_content&task=viewp&id=944&Itemid=33

Weaver, F.S. (1994) Inside the Volcano: The History and Political Economy of Central America. Boulder Colorado: Westview Press.

Weissbrodt, D., & Anti-Slavery International. (2002). Abolishing slavery and its

contemporary forms. Office of the United Nations High Commissioner for Human Rights, New York, and United Nations, Geneva.

Wick, I. (2005) Workers' tool or PR ploy? A guide to codes of international labour practice, 4th Revised Edition, Friedrich-Ebert-Stiftung / Bonn, Germany: SÜDWIND Institut für Ökonomie und Ökumene / Siegburg, Germany 2005

Wilson, R. J., and Perlin, J. (2003) "The Inter-American Human Rights System: Activities from Late 2000 through October 2002" American University International Law Review, 19:651.

Whisnant, D (1995) Rascally Signs in Sacred Places: The Politics of Culture in Nicaragua. Chapel Hill North Carolina: University of North Carolina Press.
Working Group of Vice Ministers Responsible for Trade and Labor in the Countries of Central America and the Dominican Republic, (2005) the Labor Dimension in Central America and the Dominican Republic.

Ziegler, J (2006) Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food' Addendum on Mission to Guatemala submitted to the UN Commission on Human Rights, E/CN.4/2006/44/Add.1

Appendix 1

Chapter 5 Forced Labour

Appendix 1.1

Obligatory Overtime by Job or Industry

CR from evidence

Domestic Work

Ag exports

Maquilas

Companies in General

Bus drivers

Taxi Drivers

Nicaragua

Employers in general

Companies

People

FTZ (textiles)

Dominican Republic

Maquilas (textiles)

Common practice (textiles?)

Sugar (ag)

El Salvador

Textiles

Financial Sector

Banking

Private Security Guards

Public Transport Drivers (govt)

Commercial (retail?)

Guatemala

Men

Women

Justices of the Peace (public sector)

Employers in general

Textiles

Public Water Workers

National Civil Police

Category 029 public sector sub contracted employees

Production targets and piece rates in factories

Bananas

Ranches

In agriculture as condition of bargaining with trade union

Administrators (supervisors?) in Agriculture

Honduras

Textiles

Employers in General

Appendix 1.2

Jobs used to entice people into trafficking

Costa Rica

Unspecified

Dominican Republic

Unspecified

El Salvador

Beauty Salons

Gyms

Factories

Domestic servants, maids

Models

Guatemala

Beauty Salons

Cafeterias

Domestic servants, maids

Honduras

Waitresses

Nicaragua

Domestic servants, maids

Nannies

Waitresses

Appendix 1.3

Related social Conventions to free employers from work time limits and obligations to pay for overtime hours worked

- (1) *Corruption*: When workers lodge complaints, corruption among labour inspectors, labour courts and employers interfere with enforcement (El Salvador). Government officials also simply ignore violations (El Salvador).
- (2) *Bogus Bonus*: Employers set extremely high production quotas requiring overtime and do not pay bonuses unless the quota is met (Honduras).
- (3) *Wage theft*: Employers improperly pay or fail to pay workers at all for their overtime hours until workers file formal complaints (Costa Rica).
- (4) *Wage theft with threat of Dismissal for Complaint*: In other cases, when workers complain of unpaid or improperly paid wages, employers threaten to fire or withhold accumulated pay and benefits (Guatemala). Even when formal complaints are filed, employers may refuse to provide information on pay and work-time to courts (Guatemala).
- (5) *Time off*: Employers offer time off rather than overtime pay for obligatory overtime hours (El Salvador, Nicaragua, Honduras).

Appendix 1.4 National Work Time Limits

Work time limits in DR-CAFTA countries are established in national laws through a combination of mechanisms such as defining normal work time, the work time before overtime pay must be paid, limits on overtime hours/days or alternatively based on rules governing minimum daily and/or weekly rest that workers are entitled to (Lee, McCann and Messenger 2007 p. 18). There are myriad rules and exceptions governing the establishment of national work time limits (Chart below). As indicated in institutional arrangements underpinning obligatory overtime, El Salvador has no work time limit and if all of the allowable exceptions are applied, arguably, Guatemala and Honduras also lack national work time limits for at least some categories of workers.

National Work Time Limits in DR-CAFTA Countries						
	CR	DR	ES	G	H	N
Normal Work Day & Week	8/48	8/44	8/44	8/48	8/44	8/48
Exceptions to Normal Work Day & Week	Yes	Yes	Yes	Yes	Yes	Yes
Weekly Rest	1 day for every 6 days worked	36 hours per week	1 day	1 day every 5 or 6 days worked	1 day for every 6 days worked	1 day for every 6 days worked
Exceptions to Weekly Rest	No	Yes	Yes	Yes	Yes	Yes
Limit on Overtime	12 hours in a day including regular and overtime	80 hours in a trimester	None	12 hours in a day including regular and overtime	12 hours in a day including regular and overtime for six days per week	3 hours in a day and 9 hours in a week
Exceptions to Overtime limit	Yes	No	NA	No	Yes	No
Overall Work Time Limit	48 hours weekly,	44 hours weekly + 80 hours overtime in a trimester	None	48-84 hours per week depending on exceptions	72 hours per week 12 hours per day, 6 days weekly	57 hours weekly
Bottom Line Limit	48 hours	44 hours per week + 80 hours in trimester	None	48-84 hours depending on exceptions	72 hours or no limit with exceptions	57 hours

(ILO Working Time Database)

Appendix 1.5

Ratification by DR-CAFTA Countries of Selected ILO Work Time Conventions

Convention	Costa Rica	Dominican Republic	El Salvador	Guatemala	Honduras	Nicaragua
No. 1 Hours of Work Industry	Yes	Yes	No	Yes	No	Yes
No. 30 Hours of Work Commerce	No	No	No	Yes	No	Yes
No. 14 Weekly Rest	Yes	No	No	Yes	Yes	Yes

ILOLEX

Appendix 2

Chapter 6 Freedom of Association Appendix

Appendix 2.1

Categories of Rights Related to Freedom of Association and Right to Collective Bargaining (ILO 2006)

Category 1: Trade Union Rights and Civil Liberties

General principles
Right to life security and the physical and moral integrity of the person
Arrest and detention of trade unionist
Preventative Detention
Detention during a state of emergency
System of education through labour
Internment in psychiatric hospitals
Freedom of movement
Rights of assembly and demonstration
Freedom of opinion and expression
Freedom of speech at the International Labour Conference
Protection against disclosure of information on trade union membership activities
Protection of trade union premises and property
Guarantee of due process of law
Special bodies and summary procedures
Bringing Charges and sentencing of trade unionists to imprisonment
State of emergency and the exercise of trade union rights
Questions of a political nature affecting trade union rights

Category 2: Right of workers and employers, without distinction whatsoever, to establish and to join organization

General principles
Distinctions based on race, political opinion or nationality
Distinctions based on occupational categories (A-T)
Other distinctions

Category 3: Right of workers and employers to establish organizations without previous authorization

Requirement of previous authorization
Legal formalities for the establishment of organizations
Requirements for the establishment of organizations (minimum number of members etc.)
Registration of organizations

Category 4: Right of workers and employers to establish and join organizations of their own choosing

General principles

Trade union unity and pluralism
Freedom of choice of trade union structure
Sanctions imposed for attempting to establish organizations
Favouritism or discrimination in respect of particular organizations
Admissible privileges for most representative unions
Right to join organizations freely
Union security clauses

Category 5: Right of organizations to draw up their own constitutions and rules

Legislation on the subject and interference by the authorities
Model constitutions
Racial discrimination
Relations between first-level trade unions and higher-level organizations

Category 6: Right of organizations to elect their representatives in full freedom

General principles
Electoral procedures
Eligibility conditions (A-H)
Obligation to participate in ballots
Intervention by the authorities in trade union elections
Challenges to trade union elections
Removal of executive committees and the placing of trade unions under control

Category 7: Right of organizations to organize their administration

General principles
Internal administration of organizations
Control over the internal activities of organizations
Financial administration of organizations (A-C)

Category 8: Right of organizations to freely organize their activities and to formulate their programs

General principles
Political activities and relations
Other activities of trade unions organizations (protest activities, sit-ins, public demonstrations etc)

Category 9: Right to strike

Importance of the right to strike and its legitimate exercise
Objective of the strike (strikes on economic and social issues, political strikes, solidarity strikes, etc.)
Types of strike action
Prerequisites
Recourse to compulsory arbitration

Cases in which strikes may be restricted or even prohibited with compensatory guarantees (A-D)
Situations in which a minimum service may be imposed to guarantee the safety of persons and equipment (minimum safety service)
Situation and conditions under which a minimum operational service could be required
Examples of when the Committee has considered that the conditions were met for requiring a minimum operational service
Non-compliance with a minimum service
Responsibility for declaring a strike illegal
Back-to-work orders, the hiring of workers during a strike, requisitioning orders
Interference by the authorities during the course of the strike
Pickets
Wage deductions
Sanctions (A-D)
Discrimination in favour of non-strikers
Closure of enterprises in the event of a strike

Category 10: Dissolution and suspensions of organizations

General principles
Voluntary dissolution
Dissolution on account of insufficient membership
Dissolution and suspension by administrative authority
Cancellation of registration or trade union status
Dissolution by legislative measures
Reasons for dissolution
Intervention by the judicial authorities
Use made of the assets of organizations that are dissolved (A-B)

Category 11: Right of employers' and workers' organizations to establish federations and confederations and to affiliate with international organizations of employers and workers

Establishment of federations and confederations
Affiliation with federations and confederations
Rights of federations and confederations
Affiliation with international organizations of workers and employers (A-C)
Participation in ILO meetings

Category 12: Protection against anti-union discrimination

General principles
Workers protected
Forms of discrimination (A-D)
Trade union leaders and representatives (A-C)
Need for rapid and effective protection
Reinstatement of trade unionists in their jobs
Discrimination against employers

Category 13: Protection against acts of interference

General principles

Solidarist or other associations (A-B)

Category 14: Collective Bargaining

The right to bargain collectively – General principles

Workers covered by collective bargaining

Subjects covered by collective bargaining

The principle of free and voluntary negotiation

Mechanisms to facilitate collective bargaining

The principle of bargaining in good faith

Collective bargaining with representatives of non-unionized workers

Recognition of the most representative organizations

Determination of the trade union(s) entitled to negotiate

Rights of minority unions

Determination of employers' organization entitled to negotiate

Representation of organizations in the collective bargaining process

Level of bargaining

Restrictions on the principle of free and voluntary bargaining (A-B (a-i))

Time limits for bargaining

Duration of collective agreements

Extension of collective agreements

Relationship between individual employment contracts and collective agreements

Incentives to workers to give up the right to collective bargaining

Relationship between ILO Conventions

Category 15: Consultation with organizations of workers and employers

General principles

Consultation during the preparation and application of legislation

Consultation and employment flexibility

Consultation processes of restructuring, rationalization and staff reduction

Consultation concerning the bargaining process

Consultations on the redistribution of the assets of trade unions which have been dissolved

Category 16: Participation of organizations of workers and employers in various bodies and procedures

Category 17: Facilities for workers' representatives

General principles

Collection of dues

Access to management

Access to the workplace

Free time accorded to workers' representatives

Facilities on plantations

Category 18: Conflicts within the trade union movement

Appendix 2.2 Comparison of the rights and protections along with procedures and exclusions provided in Conventions 87 and 98

Convention 87	Convention 98
<p>Substantive Protections and Rights</p> <ul style="list-style-type: none"> • The right without distinction whatsoever to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorization (Article 2; Also applies to federations and confederations in Article 6) • The right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. (Article 3 (1)). • have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers (Article 5) • public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof. (Article 3(2); Also applies to federations and confederations (Article 6). • Organisations shall not be liable to be dissolved or suspended by administrative authority. (Article 4; Also applies to federations and confederations Article 6) • The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of Articles 2, 3 and 4 	<p>Substantive Protections and Rights</p> <ul style="list-style-type: none"> • Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment (Article 1). • Such protection shall apply more particularly in respect of acts calculated to--(a) make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership; (b) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or, with the consent of the employer, within working hours (Article 1(2 a, b). • Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration (Article 2(1). • In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article (Article 2(2).

hereof (Article 7)

In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land (Article 8(1)).

The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention (Article 8(2)).

Procedures for implementing substantive Rights and protections

- Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.
- Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise (Article 11).

Exclusions from protections/rights

- The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations (Article 9(1)).
- In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not

Procedures for implementing substantive Rights and protections

- Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles (Article 3).
- Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements (Article 4).

Exclusions from protections/rights

- The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations (Article 5(1)).
- In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not

<p>be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention (Article 9(2)).</p> <p>Definitions:</p> <p>In this Convention the term <i>organisation</i> means any organisation of workers or of employers for furthering and defending the interests of workers or of employers (Article 10).</p>	<p>be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention (Article 5(2)).</p> <ul style="list-style-type: none"> • This Convention does not deal with the position of public servants engaged in the administration of the State, nor shall it be construed as prejudicing their rights or status in any way (Article 6)
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