

**Auditing Rights at Work in a Globalizing Economy:
The Limits of Corporate Social Responsibility**

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Abstract

Corporations have increasingly turned to voluntary, multi-stakeholder governance programs to monitor workers' rights and standards in global supply chains. This paper argues that these programs' effectiveness varies significantly depending on stakeholder involvement and issue areas under examination. Corporate-influenced programs are able to detect violations of *minimal* standards in the areas of wages, hours, and occupational safety and health violations because addressing these issues provides corporations with legitimacy and reduces the risks of uncertainty created by activist campaigns. However, these programs are less effective in ensuring workers' right to form democratic and independent unions, bargain, and strike because these rights are perceived as lessening managerial control without providing firms with significant reputational value. This argument is explored by coding and analyzing 805 factory audits of the Fair Labor Association between 2002 and 2010. This data analysis is followed by case study research on Russell Athletic in Honduras, Apple in China, and an exploration of freedom of association monitoring in Vietnam. The final section concludes and explores alternative approaches for addressing violations of workers' rights.

In January 2012, Apple became the latest major corporation to contract the services of a private labor monitoring organization to inspect the employment relations practices at one of its global suppliers, Foxconn in China. As such, Apple had joined the likes of Nike, Adidas, and Liz Claiborne which had, for well over a decade, turned to voluntary, privatized systems of workplace inspection to oversee workplace conditions at their suppliers. Today, garment and electronic factories from Vietnam to Honduras are more likely to be inspected by private social auditing firms than government workplace inspectors.

These Corporate Social Responsibility (CSR) initiatives are a response to new challenges presented by economic globalization, notably corporate efforts to oversee the operations of increasingly-complex global supply chains. As media exposés and social movement activists highlight extreme labor abuses in factories producing for well-known global brands, corporations have been pushed to monitor their employment relations practices through multi-stakeholder programs (Fung et al. 2001; 2007; Rodríguez-Garavito 2005; Seidman 2007).

Yet, the debate remains whether Corporate Social Responsibility is a step forward or a step backward for labor rights in the global economy. Some scholars argue that CSR contributes to greater respect for labor standards by providing a flexible way for corporations to take greater responsibility for the conduct of their contractors (Fung, O'Rourke, and Sabel 2001). CSR has also been seen as a mechanism to expand MNC best practices to global operations (Mosley 2011), and an effective response by corporations to a perceived market for standards (Elliott and Freeman 2003). Critics counter that CSR is, at best, a public relations ploy by corporations and,

at worst, part of a larger effort to weaken state regulation and displace labor unions (Justice 2006; Levinson 2001; Wells 2007).

This paper suggests that CSR effectiveness is partly dependent on how and whether different social actors participate in the establishment and implementation of the program.² In some CSR programs, corporations are excluded while more progressive NGOs and labor unions maintain influence. In most CSR programs, however, corporations play a significant role in program design and oversight. This paper argues that corporate influenced programs more vigorously monitor minimal labor standards in order to gain legitimacy and reduce the risks of media exposes and activists campaigns. However, they fall short when it comes to monitoring the right of workers to form independent trade unions, bargain collectively and strike --what I will refer to as freedom of association (FoA) rights—because these rights potentially weaken corporate control over their supply chains.

The distinction between FoA and other issue areas is fundamentally a difference between rights and standards. A working age of 16, a minimum wage of USD 1 per hour, and an overtime wage of 1.5 times the base wage are *standards* and can be modified at any time as a result of government decisions or stakeholder negotiations. The formation of a union, good faith collective bargaining, and withholding ones labor in order to improve terms and conditions of employment are enabling *rights*. They do not dictate outcomes but guarantee procedures that mitigate the inherent power imbalance in the employment relationship.³ The attempt by CSR programs to monitor not only standards but also rights raises questions about the interests of CSR program participants, the power relations among the participants, and the sources of their authority.

Precisely because FoA is a right and not a standard, its lack of enforcement is perhaps the most noteworthy. No doubt, there are technical reasons that complicate FoA detection and remediation. Verification of FoA rights cannot be ascertained by auditing payroll and employee records or by using the equivalent of a hand-held device that measures air quality or noise levels.⁴ There are countless ways for employers to prevent unionization, ranging from the harassment and intimidation of union activists to the offering of promotions and generous pay increases to would-be union leaders. Detecting and documenting such actions are complex tasks. Short “social audits” are particularly ineffective since the challenge is to determine if there has been a history of employer actions which, taken together, have been used to create an anti-union climate in the factory.⁵ And worker trust in the people monitoring factories is crucial and takes time to acquire.

CSR programs can remedy this problem by turning to FoA experts who employ a more appropriate verification system. Yet, it is argued here that corporate members of CSR programs will not give their full support to more effective FoA monitoring out of concern that greater compliance of FoA will lessen managerial control over supply chain operations. It is not necessary that such blockage be direct or forceful. These CSR programs depend financially on their dues-paying corporate members. And just like there is an emerging market for ethically-produced goods, so too is there a market for CSR programs. Corporations are able to quit CSR programs that are too rigorous and go elsewhere, which puts pressure on the executive staff of CSR programs to avoid actions or procedures that might lead to corporate defection. This *threat-of-defection* dynamic is present, by definition, in all *voluntary* governance programs, and is a cause for their limited effectiveness in the area of freedom of association.

CSR programs are thus vulnerable to “regulatory capture,” a term used by public choice theorists to describe the process by which interest groups “capture” the agencies designed to regulate them. The theory observes that capture is possible because interest group stakes in the policy outcome are strong while the general public’s concern is more dispersed, especially over time, as the supportive constituency focuses its energy elsewhere (Dal Bó 2006). The possibility for regulatory capture is even greater in CSR programs for several reasons. First, they lack the authority of the state to mitigate powerful corporate interest (indeed, corporate members sit directly on the executive boards of these programs). Second, most multi-stakeholder CSR programs depend economically on corporate support. Third, the proliferation of private CSR governance schemes allows corporations to threaten to leave a given program and go elsewhere if the program is not to its liking. And fourth, while there was some initial interest on the part of labor unions in participating in CSR programs, this interest declined, thus removing a major countervailing force to corporate influence.

This does not mean that corporations do whatever they please. NGO stakeholders, activist pressure, and media exposés are mitigating factors, as are corporations’ desire to increase their legitimacy and reduce the risks of reputational damage. Corporations have a strong interest in preventing embarrassing violations of minimum wage laws and basic health and safety standards. Compliance with minimal standards provides legitimacy and lessens the potential for reputational damage. Yet, a different logic holds sway when corporations face the perceived loss of control over the cost structure and operation of their supply chain as a result of strikes and pressures to increase wages and benefits via the mechanism of collective bargaining. What this suggests is that corporate-influenced programs will be more likely to effectively monitor minimal labor standards (minimum wages, hours of work, health and safety) in order to increase their legitimacy, but will be less likely to effectively monitor and remedy FoA rights since they are perceived as lessening managerial control.

In the sections that follow, I develop and probe this argument via an exploration of a corporate-influenced CSR program, the Fair Labor Association (FLA). I do so based on an original dataset I developed by coding 805 factory audits conducted by the FLA between 2002 and 2010. This dataset allows me to probe variation in detection rates by country and brand. It also allows me to examine remediation mechanisms and outcomes. And it allows me to compare and contrast auditing processes of third party complaints. Next, based on field research in Honduras and Vietnam, I explore the FLA approach to FoA violations through a company-case exploration (Russell Athletic) and a country-case exploration (Vietnam). I also analyze the FLA’s report on Apple’s supplier, Foxconn, in China.

The Evolution of CSR

The idea that businesses should take responsibility for the social impact of their operations goes back centuries. For long periods of time, corporate “social responsibility” was understood as business philanthropy and good community relations.⁶ Today’s concept of social responsibility began to develop after World War II at a time when business executives increasingly accepted that they were responsible for the consequences of their actions beyond their economic obligations to their shareholders (Carroll 1999).

Keith Davis, an early scholar of the phenomenon, argued “social responsibility begins where the law ends” (Davis 1973:313, cited in Carroll 1999: 277). That is, for Davis, the point was not to supplant the law, but rather to go beyond it. He writes: “A firm is not being socially

responsible if it merely complies with the minimum requirements of the law” (Ibid.). By building on the foundation set by law and providing additional benefits, CSR should result in improvements for workers over time. Of course, this assumes that state protections of labor rights at least will remain constant. Yet, state protections via resources dedicated to enforcement have been in flux in many countries of the world. Indeed, as Robert Reich observed while he was the U.S. Secretary of Labor, the same corporations that were promoting social responsibility were also the ones that had aggressively lobbied to weaken labor regulation.⁷

Data on the resources that the U.S. government dedicates to basic wage and hour enforcement when compared to the boom in the corporate social responsibility phenomenon reveal contrasting trends. As the budget for enforcement declined, interest in CSR escalated. Indeed, in the early 2000s, as some 1,000 multinational firms had established their own codes of conduct stipulating human rights, and social and ethical standards (Smith and Feldman 2003: 2), the number of U.S. labor inspectors declined by 26 percent.⁸ In regions like Latin America, even as labor laws improved following democratization and the end of civil wars, attention to enforcement lagged (Anner 2008). Indeed, the single most common argument used by corporations when explaining their participation in CSR programs is that they are simply filling a gap left by weak government enforcement agencies.

In 1992, Levi Strauss adopted one of the first voluntary codes of conduct for international sourcing in apparel after activists revealed that some workers making Levi Strauss products were treated as indentured servants (Jenkins 2002). More and more apparel companies began adopting their own codes as the U.S. anti-sweatshop movement gained momentum and increasingly exposed labor rights abuses in the apparel supply chain (Esbenshade 2004). At the time, many of these codes did not include monitoring or enforcement mechanisms, and often they made no reference to labor union rights, preferring to focus instead on issues like the environment, discrimination, child labor, and forced labor (Jenkins 2002). Yet, as activist pressure and media exposés escalated, codes increasingly included FoA rights in their framework. To gain greater legitimacy, some corporations began participating in multi-stakeholder CSR programs to emphasize that the programs were not wholly designed and implemented by corporate interests.

One group of scholars observing this trend referred to the benefits of a “market-based solution.” They envisioned CSR as developing into a system in which corporations are required to inform the public about their labor practices, and consumers use their purchasing power to punish bad corporations and reward good corporations (Fung, O'Rourke, and Sabel 2001: 6). The end result would be a “ratcheting up of labor standards” (Ibid.). Similarly, Elliott and Freeman suggest that firms could improve their labor standards in the global economy because there is a ‘market for standards,’ meaning that there is a consumer market for goods made while respecting basic labor standards. They write: “Increasing trade with LDCs [Least Developed Countries] naturally highlights these countries’ labor conditions and thus creates consumer pressures in advanced countries for higher standards” (Elliott and Freeman 2003: 2).

Labor unions are highly critical of most CSR initiatives, arguing that the real goal is to replace not only the state but also the union’s role in defending workers’ interests (Justice 2006). Mark Levinson notes the limits of ethical consumerism by referencing the high product demand elasticity for worker-friendly products. Consumers may buy ethically-made products, yet they will do so as long as the price does not increase too much. When prices go up, the market-based model for labor standards quickly unravels (Levinson 2001). For Don Wells, the global supply chain is simply too large and geographically dispersed for any private scheme to adequately

monitor and provide meaningful information to consumers (Wells 2007). Similarly, Gay Seidman argues that there is no substitute for strong, democratic states and effective national labor laws for improving labor standards (Seidman 2007).

This paper shares these scholars' skepticism of CSR programs, while also seeking to add more nuance to the debate. I argue that corporate-influenced programs will have a greater incentive to monitor minimal standards in order to increase their legitimacy, but they will be less enthusiastic about FoA rights since they are perceived to strengthen trade unions and lessen managerial control. Thus, I expected far greater emphasis on detecting violations of labor standards relative to labor rights. To test my argument, I first examine detection rates of labor standard violations and workers' rights violation, and I compare those data to country level-data of independent experts. Second, I examine remediation rates of violations comparing and contrasting standards and rights. My case study is the Fair Labor Association, from which I have codes 805 factory audits from 2002 through 2010. To further probe my argument, I process-trace one company case (Russell in Honduras) and one country case (Vietnam) through field research and an examination of primary documents.

Corporate-Influenced CSR Programs

When we look at the vast array of CSR programs in the global apparel industry, we see that corporate-influenced programs are most common, especially in the United States.⁹ For example, one prominent program is the Worldwide Responsible Apparel Production (WRAP). WRAP was established in 2000 with the strong influence of apparel corporations (Fransen 2012). Today, it has the support of 25 international trade associations and over 150,000 individual companies. The American Apparel & Footwear Association (AAFA) contributed USD 1.3 million to help start WRAP.¹⁰

While most CSR programs are not solely controlled by corporations, most have strong corporate influence. This raises the question of corporate capture. Scholars of public policy have long noted that regulatory mechanisms are often captured by the corporations they are designed to oversee (Dal Bó 2006; Majone 1994; Martínez Lucio and MacKenzie 2004). This is partly a result of a collective action problem. Since corporations are relatively few in numbers and consumers are large in number and dispersed, corporations are more likely to capture the processes that were established to control them. It is argued here that since CSR programs are voluntary and corporate representative sit directly on governance boards and often fund the majority of program operations, the possibilities of regulatory capture are even more pronounced in these voluntary governance schemes relative to state regulatory mechanisms.

As noted above, this does not mean that they are inefficient. Rather, their efficiency is uneven. Where corporations stand the most to gain—notably where programs increase corporate legitimacy and reduces the risks of reputational damage—CSR is more likely to detect and remediate violations of labor standards (although remediation may be partial and temporary). Where highly rigorous monitoring and remediation will hinder corporate interests—notably via the strict enforcement of workers' rights to organize, disrupt production (right to strike) and systematically leverage for increased wages and benefits (i.e., the institutionalization of collective bargaining)—CSR programs will be less efficient. This process is compounded by the perception that the public is less concerned with labor unions' rights than whether children make their clothing or whether chemicals that are potentially harmful to consumers were used in the

production process (O'Rourke 2011). That is, the perceived reputational benefits of enforcing FoA rights are assumed to be far less than enforcing child labor standards.

To test my argument, I will examine the Fair Labor Association (FLA). The FLA is one of the largest and best known CSR programs in the global apparel industry. Unlike WRAP, NGOs make up a significant portion of its board of directors, including groups that have had a long history of anti-sweatshop activism. However, as we will see ahead, the FLA board does not include labor unions, and corporate financial support covers well over half of the FLA's budget. In sum, unlike WRAP, the FLA is not a corporate *controlled* organization, but it is a strongly corporate *influenced* program.

There are three reasons for selecting the FLA as my case study: 1) Since the FLA has civil society influence, it is a harder test case for my argument than corporate-dominated programs such as WRAP; 2) The FLA is one of the largest of the CSR programs in the garment sector thus its success or failure has greater relevance than smaller programs; and 3) The FLA has perhaps the most developed system of benchmarks for freedom of association violations (Hunter and Urminsky 2003), which should further make it a hard test case for my argument. Moreover, although the FLA has not been willing to share its detailed factory audit data, it does post all of its factory audits online, which, after a tedious process of coding audits, makes an empirical analysis possible. I have coded all 805 factory audits conducted by the FLA between 2002 and 2010.

FLA: Foundation and Governance

The formation of what is now the FLA began in 1996 with a very broad array of stakeholders convened by the Clinton administration. Major corporate participants in the initial discussions included Nike, Liz Claiborne, Reebok, Patagonia, Phillips-Van Heusen, and L.L. Bean. Labor was represented by the Union of Needle trades, Industrial, and Textile Employees (UNITE) and the Retail Wholesale Department Store Union (RWDSU). A range of labor and human rights NGOs also participated.¹¹ Labor and several NGOs demanded that any industry code and monitoring scheme include a living wage, transparency of factory locations, a strict cap on working hours, and monitoring that was independent of corporate influence. The corporate response was that for any proposal to work, more brands and major retailers (such as Wal-Mart) would have to participate. And, while they (the brands at the table) were not necessarily opposed to these labor and the NGO proposals, the proposals would not be acceptable to the rest of the industry and would have to be rejected for that reason. In this instance, corporations did not use the direct threat of their defection, but rather the threat that the initiative would not grow by attracting new corporate members.

One of the biggest points of contention came when labor and NGOs attempted to incorporate a freedom of association provision. According to one labor union participant in the discussions, companies resisted inclusion of FoA rights since there were countries where it could not be enforced, notably China (Howard 1999). Following pressure from labor, companies later agreed to include FoA rights in the code, but the two sides next debated the issue of how to implement the FoA provision, particularly in countries where FoA rights were restricted by law. On June 12, labor and NGOs proposed that, if countries did not take steps to respect internationally-recognized workers' rights, then the host government should be put on notice that there could be consequences (Howard 1999). The idea was not to ban companies from doing

business in countries such as China, but rather to use the leverage presented by FLA-sanctioned production to push governments to improve respect for FoA rights. The companies fiercely resisted this approach and threatened to leave the initiative should the FoA implementation proposal went forward. As a result, it never made its way into the FLA framework. In the view of labor, while FoA rights are included in the code, the lack of a clear plan for implementation suggested enforcement of FoA rights would be curtailed.

Labor unions and the corporations soon reached an impasse. This was the critical juncture in the formation of the FLA, the moment in which it would be decided which social actor would hold sway over the future direction of this new CSR program. The corporation members made the next move. They began talks with more moderate NGOs in the civil society group. This smaller group reached an agreement on an industry-wide code of conduct and monitoring scheme on April 14, 1997. The code excluded the labor union demands for a living wage, monitoring systems independent of any corporate influence, and mechanisms that would encourage states to come into compliance with FoA rights. As might be expected, the labor union representatives were discontent with the agreement. They publicly denounced it and made clear that they wanted nothing to do with the new program. Several NGOs took the same position and walked out.

The corporations and the moderate NGOs moved forward, and in 1999, established the Fair Labor Association (FLA). The original governing board of the FLA consisted of six corporate representatives, six NGO representatives, and one mutually-agreed upon chair. Changes to the code of conduct, sourcing rules, or monitoring system would require a super-majority vote, which gives the parties veto power over any attempt to change the code or to revisit some of the proposals of the labor movement. To sustain itself, the FLA has relied on grants and the financial support of its corporate members via annual membership dues.

President and CEO of the FLA, Auret van Heerden, makes it clear that MNCs are playing a major role in the CSR program and also emphasizes that it is precisely their role in the program that makes the FLA work. This is because they use their contractual relationship with their suppliers to impose the FLA's code of conduct. For van Heerden, "That was a stroke of absolute genius, because what they did was they harnessed the power of the contract –private power—to deliver public goods." Van Heerden emphasizes the benefits of CSR over state mechanisms by noting: "Let's face it, the contract of a multinational supplier, a major brand, has much more persuasive value than the local labor law, environmental regulation, the local human rights standards."¹²

Thus, in the view of the FLA's CEO, the FLA's efforts at employment regulation are indeed strongly influenced by corporations –indeed, corporate participation is crucial to making it work. The governance structure of the FLA has, in fact, broadened over the years. As attention to sweatshop conditions in factories making collegiate apparel increased with growing student activism, the FLA expanded its Board of Directors to include university administrators, and the FLA also has received income from collegiate members seeking to ensure that apparel sold bearing their school logo was not made under sweatshop conditions. By 2011, the FLA Board of Directors had six members each from industry, colleges and universities, and non-governmental organizations (plus one general counsel).

The FLA refers to this as a "tripartite" structure (FLA 2009a: 6), in that there are three parties in the governing body. But this is not tripartism as defined by the International Labour

Organization, which consists of workers, employers, and government representatives. On the FLA board, corporations do indeed represent employers. Some 65 companies are dues-paying members of the FLA. In 2008, these FLA-member companies had 4,532 supplier factories in 83 countries with 4.2 million workers (FLA 2009a). Collegiate board members represent over 200 colleges and universities, but they clearly do not represent or act like governments. Rather, they have a financial stake in the system and, like the employers' group, they participate in order to protect their "brand" name by ensuring their products bearing school logos are made without violating internationally-recognized labor standards.

The NGO (civil society) segment is the weakest of the three. NGO board members do not represent a larger group of NGOs. They have no constituency outside themselves because all six NGO participants in the FLA are on the FLA board. The NGOs also do not directly represent workers nor are they themselves membership organizations. NGO participants at times are able to impact FLA policy and conduct in a manner that is disproportionate to their size and voting rights. For example, Lynda Yanz of the Canadian Maquila Solidarity (MSN) Network joined the FLA Board of Directors in October 2009 and has worked to improve the quality of the FLA system particularly in the area of FoA rights. The MSN has a long, activist history of campaigning for labor rights in the global apparel industry. Nonetheless, the lack of more NGO participants and, most especially, the lack of trade union participation remains a major limitation of the FLA.

Finally, the FLA is highly dependent economically on corporate support. While the FLA does not publicly release a detailed breakdown of its budget income, 990 tax forms provide an indication of the scale of its corporate support. In 2010, the FLA had a total income of USD 4.35 million. Of this, USD 161,861 was from corporate monitoring fees, USD 197,675 was from corporate workshop fees, and USD 3.7 million was from membership dues.¹³ Part of the membership dues comes from universities, but most of this income (approximately two-thirds) comes from corporations. Since fiscal year 2010, Apple joined the FLA and paid USD 250,000 in membership dues. Thus, the corporate share of the budget appears to be growing over time.

In sum, while the FLA is not a corporate-controlled organization, it is certainly corporate influenced. Corporations need some degree of monitoring and remediation in order to address problems before they become embarrassing media exposés. The exception is where compliance may increase other sorts of risks, such as threat of workplace disruption or the loss of managerial control from stronger union representation. Corporations prefer top-down solutions, rather than those resulting from strong workplace organization. They use their influence in CSR programs to this end. It is a delicate balancing act for corporations: If there is too much perceived corporate influence, the program loses legitimacy. If there is too little corporate influence, the program may run the risk of incurring real costs on corporations by empowering the workforce in their suppliers and resulting in costly collective bargaining agreements.

This leads to the expectation that we will find a greater tendency to detect and attempt to remediate labor standards violations relative to freedom of association violations. The remainder of this paper examines the evidence.

Data

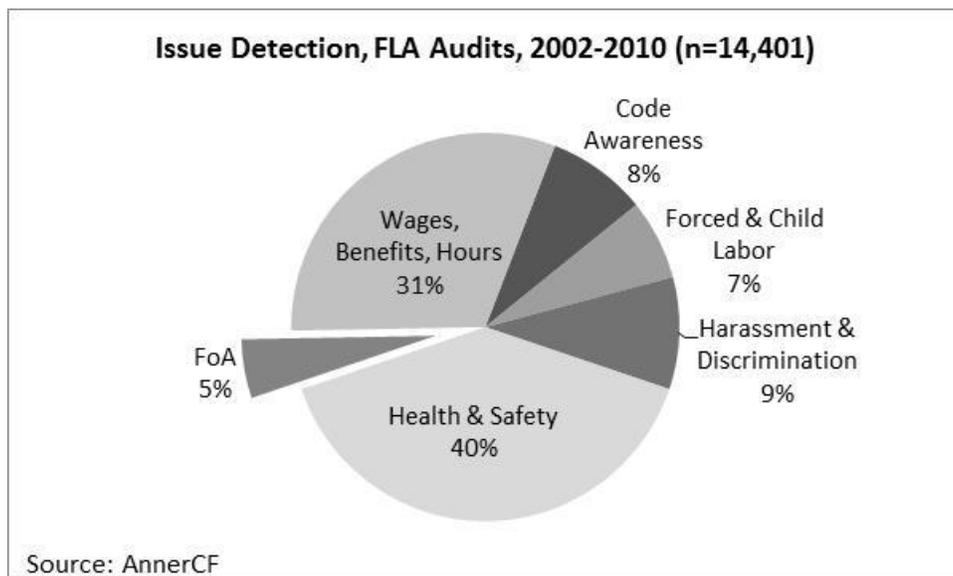
When a corporation joins the FLA, it is required to monitor its suppliers to ensure that they are in compliance with the FLA’s code of conduct. In addition, the FLA pays for the services of social auditing firms to inspect a random sample of FLA member suppliers. In a given year, the FLA may audit 120 factories, which amount to approximately 3 percent of the total number of factories producing for FLA corporate members. These audits list the violations detected and remediation measures taken. Audits do not provide the factory’s name or its exact location. They do indicate the brand for which the factory was producing and the country in which it was producing.¹⁴

To gather our data, we coded every FLA audit for code violations from 2002 through 2010.¹⁵ In many audits, there was often more than one violation in an issue area. For example, a Nike factory in Honduras in one year might have three health and safety violations, two wage and hour violations, and no child labor violations. These data were then compiled into one dataset that summarized and grouped violations by issue areas. The data also allow me to compile a country-level score based on average number of FoA violations per factory during the time period under study.

Findings

What we find is that the vast majority of FLA’s noncompliance detections were in two general issue areas: health and safety (40 percent of violations detected); and wages, benefits and hours of work (31 percent of violations). In contrast, freedom of association (FoA) violations make up only 5 percent of violations detected. This indicates that violations of labor standards are indeed much more frequently detected than violations FoA rights. Indeed, the FLA is 6.4 times more likely to detect wage, hour, and benefit violations than FoA violations, and 8 times more likely to detect health and safety violations than FoA violations. [See Figure 1.]

Figure 1



It is highly unlikely that the reason for the low detection rate of FoA violations is a result of a selection process that results in factories that are less likely to violate FoA rights than the average apparel factory in a given country for two reasons. First, if there was a rigorous selection process based on prior adherence to the FLA's code of conduct, then this should apply across all issue areas. Yet, the high detection rate for health and safety, wage, and hour violations suggests this is not the case. The only criteria that some corporations use in the selection process are child labor and forced labor (what they call, "zero tolerance" issues). FoA violations are not "zero tolerance" issues for the FLA or its member corporations. Second, if FoA violations were being used as a litmus test whereby the FLA would block sourcing to certain factories, then sourcing to countries where domestic laws curtails FoA rights should matter. What we find, however, is that sourcing to countries such as China and Vietnam has increased over time and now accounts for over 50% of all FLA member sourcing (measured in terms of employment).

It seems fair to conclude that the selection process itself does not explain why the detection of health and safety violations, or other standards, would be more prevalent than the detection of FoA violations. Why then do we find such a low detection of FoA violations? As noted above, the FLA's list of FoA benchmarks is fairly complete, and in fact is longer than the list of benchmarks for many other issue areas (see appendix). So the lack of good benchmarks cannot be the cause of the lower number of detected violations. However, a closer inspection of the data reveals that many FoA benchmark violations are never detected. To take one example, in 2004, FLA auditors did not detect a single violation of the union blacklisting benchmark in all the factories that they audited in the world. In that same year, the U.S. State Department found strong evidence of union blacklisting in apparel export zones in regions such as Central America (U.S. Department of State 2004a, 2004b).

Taking a more systematic approach, we can compare FLA FoA findings with independent sources of country-level labor rights practices. To do this, I first organized my FLA's FoA detection scores by country-years. For each year, countries were given a score that indicated the average number of FoA violations per factory audited by the FLA. I then compared this scoring with country-year level scoring by FoA experts. David Kucera of the International Labor Organization (ILO) and David Cingranelli and David Richards of Binghamton University have compiled country-specific rankings of labor practices that provide a good means of comparison.¹⁶ This allows me to calculate the correlation of my FLA country scores with country-level scores compiled by Kucera and Cingranelli-Richards (CIRI dataset).¹⁷

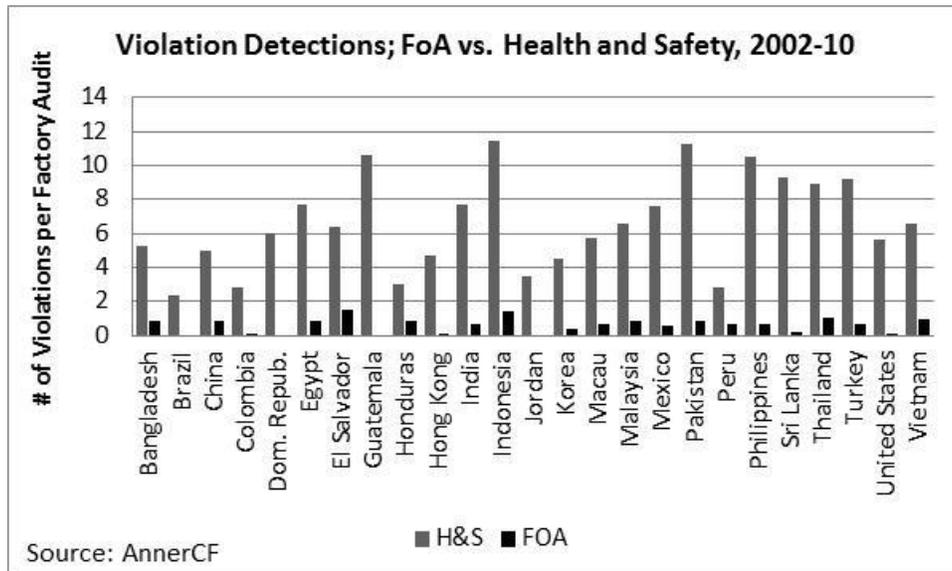
If the FLA audits adequately reflect the general context of labor rights violations in a given country, then the FLA country scores should correlate with other labor rights country scores. However, we find that the FLA country scores are weakly correlated with the Kucera and CIRI scores at well below the 0.5 level. In contrast, the Kucera and CIRI scores are more strongly correlated with each other (0.63). [See Table 1.] This suggests a further indication that the FLA might not be properly documenting FoA violations.

Table 1
Correlations of Country-Level Indicators of Labor Rights Practices

| | FLA (2002-09) | Kucera (ILO) |
|----------------|---------------|--------------|
| Kucera (ILO) | 0.16 | |
| CIRI (2002-09) | 0.31 | 0.63 |

To provide a specific example, while both the Kucera and Cingranelli/Richards (CIRI) scores put Guatemala among the most egregious labor rights violators, the FLA audit system did not detect a single FoA violation in Guatemala since the FLA began inspecting factories there (2002 to 2010). Indeed, no FoA violations were detected in Sri Lanka, Jordan, and the Dominican Republic during this same period. On average, in most factories inspected by the FLA, there was less than one FoA violation detected per factory. In contrast, if we look at FLA monitoring of a labor standards issue, health and safety (which has a comparable number of benchmarks as FoA), we find a remarkably different pattern. Here countries like Guatemala and Sri Lanka stand out for their number of violations, as do Pakistan, the Philippines, and Indonesia. Most countries average six or more violations per factory inspection in this area. [See Figure 2¹⁸.]

Figure 2

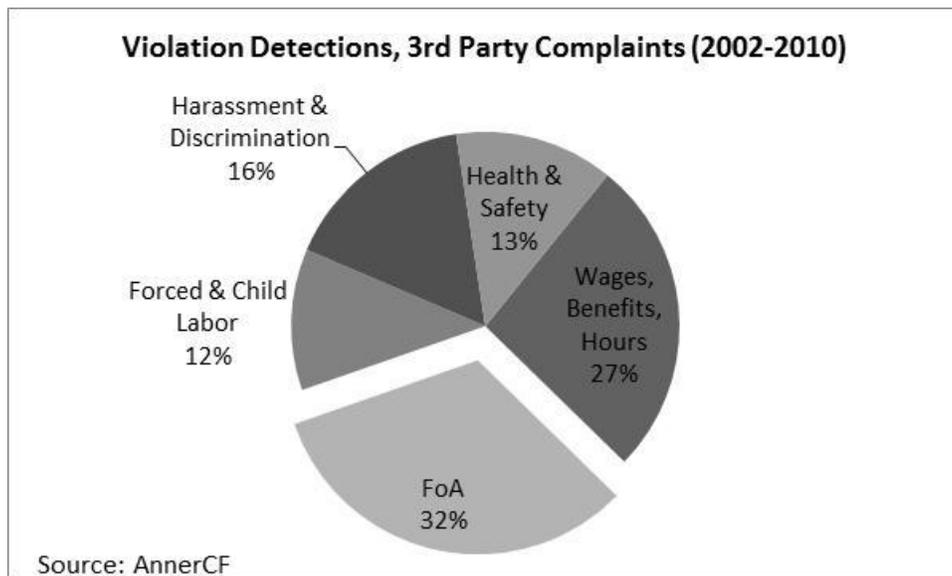


FLA Third Party Complaint Mechanism

The FLA allows persons, organizations, and companies to file third party complaints in cases where there are “persistent or serious noncompliance with the FLA Workplace Code of Conduct in a production facility used by any FLA-affiliated company” (FLA 2009a: 28). After receiving a complaint, the FLA then decides whether it merits moving forward with an investigation and may assign a commission of independent monitors to investigate allegations. These Third Party Complaints allow another means to test the quality of the FLA findings, since these are two different mechanisms for evaluating factories *within* the FLA system.

The FLA has investigated 19 third party complaints between 2002 and 2010. As with the factory audits, we have coded each one of these complaints to detect patterns of violations according to issue areas. The results of this coding exercise indicate that the single greatest issue-area in these Third Party Complaints is freedom of association, which represents 32 percent of all violations documented. This contrasts sharply with FLA audits in which only 5 percent of violations detected were FoA violations. Third Party Complaints were also far more likely to document harassment and discrimination (16 percent of violations), which was almost double the rate of FLA audits. In contrast, while occupational safety and health violations accounted for 40 percent of violations documented in FLA audits, they only represented 13 percent of violations in Third Party Complaints. [See Figure 3.]

Figure 3



The high rate of FoA violations documented in Third Party Complaints suggests that when worker representatives and their activist allies take the initiative, they are more likely to detect violations of the empowering rights embodied in FoA. Third Party Complaints are over nine times more likely to document FoA violations than FLA audits. Of course, it is likely that the high rate of FoA violations is a reflection of worker representatives’ desire to focus on this empowering right. That is, just as corporations would like to underemphasize enforcement of FoA, worker representatives and their allies most likely emphasize it. See in this light, the Third Party Complaint system balances the limitations of the audit system. Yet, the Third Party

Complaint system has one major limitation: relatively few complaints have been accepted for review over the last decade, and their numbers pale in comparison to the number of factory audits; there were 19 Third Party Complaints versus 805 audits. This suggests that the use of the FLA's Third Party Complaint system is limited in its ability to balance the FLA's auditing system.¹⁹

It is also true that Third Party Complaints come disproportionately from countries where there has been a long history of transnational activism, notably Central America and the Caribbean. These countries account for 58 percent of the total number of complaints that have been selected for review by the FLA. In contrast, there have been only three complaints from China from 2002 to 2010 and none from Vietnam, despite the fact that these countries account for over 50 percent of FLA sourcing and have notable problems in the area of FoA rights. This suggests that there are serious limitations to the Third Party Complaint system as a stand-alone mechanism for addressing FoA violations. When the Third Party Complaint system is combined with transnational activism, it is more likely to prove beneficial to workers. That is, the Third Party Complaint system presupposes some degree of worker empowerment and transnational activist ties.

Remediation

Beginning in 2007, the FLA began calculating its remediation success rate. To do this, it revisited factories where in previous years violations had been detected to determine if they were successfully resolved. This is a crucial new measure of effectiveness. Detection rates, after all, do not indicate if anything was done to address violations once they are documented. Remediation rates are thus a more direct indicator of the ultimate effectiveness of a CSR program. What we find from the FLA data is that the remediation success rate for freedom of association is the lowest remediation rate of all issue areas. In the period for which data are available, 2007-2009, some 30.67 percent of FoA violations were fully remediated.²⁰ In contrast, the remediation success rate for all other issue areas ranged from 50.33 percent to 80.67 percent, with an average remediation rate of non-FoA violations of 69.27 percent. [See Table 2.]

Table 2

| Remediation Success, FLA 2007-2009 | | |
|---|-----------|--|
| | n | Full Success + Partial Success Rate |
| Code Awareness | 112 | 59.00% |
| Forced Labor | 45 | 74.67% |
| Child Labor | 35 | 82.67% |
| Harassment/Abuse | 175 | 71.00% |
| Discrimination | 34 | 59.67% |
| Health & Safety | 503 | 77.67% |
| Freedom of Association | 55 | 30.67% |
| Wages & Benefits | 184 | 63.33% |
| Hours of Work | 154 | 50.33% |
| Overtime Compensation | 48 | 78.33% |
| Miscellaneous | 18 | 76.00% |
| Sources: FLA (2008) and FLA (2009) | | |

Why is there such a low level of remediation with FoA violations? According to the FLA, this is because FoA violations are especially complex and take a longer time to fix. Issue areas that have a straight-forward “technical” solution, such as occupational safety and health violations, have a much higher remediation rate. And occupational safety and health violations are probably the most conducive to what Locke, Amengual, and Mangla (2009) refer to as the “commitment model” in which joint problem solving, coaching and capacity building contribute to remediation.

Yet, as Locke and his collaborators suggest, the commitment model does not work well for all issue areas. Indeed, it is important to note that issue areas with a relatively high remediation rates –forced labor and child labor— reflect violations that result in the strictest penalties, if not directly by the FLA, then by the FLA corporate members through their “zero tolerance” compliance policies for these violations; suppliers that are found to use child or forced labor will face the immediate termination of their contract (FLA 2003).

FoA violations are not subject to “zero tolerance” policies. Most often, under the FLA system, the auditor’s remediation proposal involves policy development or training. Examining the remediation proposals from FLA audit reports between 2007 and 2009, we found that of the proposals for addressing the FoA violation, the remediation plan most often involved writing a policy and/or complete a training exercise. From our reading of the tracking charts, not once was there any penalty or disciplinary action taken based on a FoA violation in the period 2002-2009. [See Table 3.]

Table 3

| Remediation Proposals for FoA Violations | | |
|--|---------------------|-----|
| A. | Write a policy | 47% |
| B. | Complete a training | 27% |
| C. | Retain records | 14% |
| D. | Create a committee | 12% |

Source: AnnerCF

Policy development and training only work, however, when the violation is a result of a lack of understanding of the law or international standards. Training is not likely to work when a violation is a result of deliberate and repeated actions by the employer designed to eliminate or weaken a union. Moreover, policy development and training employers in FoA rights will not address problems resulting from state laws that curtail FoA rights. In 2010, some 55 percent of the production of FLA corporation members (measured in employment levels) is done in China and Vietnam. The FLA, as noted earlier, opposes actively encouraging states to come into compliance with international FoA standards. In sum, just like detection of violations shows considerable variation by issue area, reflecting stakeholder influence and power, so too do remediation patterns. Not only are FoA violations less likely to be detected in corporate-influenced programs, but they are also less likely to be remediated.

The Case of Russell Athletic in Honduras

While the quantitative analysis presented above points to general trends in the area of detection and remediation, a case study approach allows for a more careful exploration of the causal mechanisms behind such trends. Russell Athletic in Honduras provides an ideal case study because much has been written about it that we are able to understand not only what steps were taken, but also the justification for each step. This case study analysis draws on primary documents—notably audit reports and factory inspection reports—and on field research in Honduras in May 2010.

Russell Athletic is a subdivision of Fruit of the Loom and part of Warren Buffett's Berkshire Hathaway enterprise. In July 2008, the union and management at a Russell apparel factory in Honduras entered into a collective bargaining process. During that time, workers claimed they were subjected to harassment and threats of plant closure due to unionization (WRC 2008). By October 2008, bargaining had reached an impasse, and Russell announced it would close the plant for "economic reasons."²¹ The union, however, claimed the plant closure was due to the company's attempt to prevent collective bargaining and rid itself of the union. That is, they argued the plant closing was a violation of their freedom of association rights.

Russell is a member of the FLA, and the FLA was asked to examine the Russell case. In October 2008, the FLA hired the Cahn Group to travel to Russell's parent company, the Fruit of the Loom headquarters in Bowling Green, Kentucky to evaluate the rationale for closing the factory. The Cahn Group concluded, based on documents examined in Kentucky, that the plant was closed due to a decline in demand for fleece products. Cahn reached this conclusion in part because it was not able to find any written documentation at corporate headquarters that Russell closed the plant to rid itself of a union. Yet the Cahn Report also noted: "Additional investigation in Honduras will be required to provide more complete conclusions concerning allegations made against the company" (Cahn 2008: 7).

The FLA turned to A. & L. Group Inc. (ALGI), one of its accredited external monitors, to examine the Jerzees case in Honduras. According to the FLA: "[ALGI] monitors did not detect or gather any tangible evidence to show *beyond a shadow of doubt* that JDH has performed or encouraged actions that can be regarded as discriminatory or hostile against SITRAJERZEESH union delegates, the union federation (CGT) or any union or non-union employees." (FLA 2009b: 12, emphasis mine).²² That is, the FLA's auditors did not find evidence of a FoA violation. What this statement also indicates is that, in the FLA's system for detecting FoA violations, the burden of proof is placed on the workers and their union. The company was not required to show beyond a shadow of a doubt that the plant closing was for economic reasons. Rather, workers had to show beyond a shadow of a doubt that anti-union discrimination was the main factor motivating the closing of the plant. Yet, International Labour Organization (ILO) experts argue that, once employees provide a reasonable indication of a violation, the burden of proof should shift to the employer.²³ Thus, the FLA's decision to place the burden of proof for FoA violations on workers and not the employer goes against international standards and provides further evidence as to why FoA detection rates are low in the FLA system.

International labor activists and Honduran union representatives did not accept the ALGI finding and the FLA's endorsement of those findings. Indeed, according to the FLA, it received ten procedural challenges from labor rights organizations and the CGT labor center in Honduras

regarding the impartiality of the ALGI report (FLA 2009b). This activist pressure led the FLA to contact an ILO consultant, Adrian Goldin, to examine the case. Goldin not only verified violations of freedom of association but also harshly critiqued the methodology used by the ALGI for detecting freedom of association violations. Goldin writes: “ALGI’s report gives insufficient –almost nil—consideration to and evaluation of testimony by workers and their representatives” (Goldin 2009: 2). The ALGI focused on written documentation, not worker testimony. But Goldin emphasizes that workers, unlike employers, have neither the means nor the legal obligation to provide such documentation. Rather, worker testimonies are crucial forms of evidence.

According to Goldin, the manner in which the ALGI conducted interviews also goes against standard practices for monitoring FoA violations. Many of the workers were interviewed inside the factory, and thus not in an independent location. Interviews were conducted in groups, raising the fear that a pro-management co-worker could report and negative comments to management, and, for at least a period of time, a plant manager was present outside the door of the office where interviews were being conducted (Goldin 2009).

Goldin concludes that the ALGI report “has deficiencies and methodological wants. Thus, its conclusions lack rigor, are not based on adequately-gathered evidence and lack aptness to convince” (Goldin 2009: 20). Goldin, in direct contrast to the ALGI, finds: “The closure of the factory has been determined, at least to a significant extent, by the existence and activity of the union” (Ibid.). The FLA received the Goldin Report and reviewed it together with the Cahn Group report and the ALGI report. The FLA then concluded: “Upon review of the three third-party reports and other information at our disposal, the FLA found the economic factors to be persuasive and accepts that the decision to close JDH was principally a business matter” (FLA 2009b: 15).

In this case, it cannot be argued that the FLA system has a low detection rate of FoA violations because these are complex issues that are hard to uncover. The FLA had a report by a representative of the most established authority on labor rights, the International Labour Organization, which asserted FoA rights had been violated. The FLA chose to dismiss the findings of this top FoA authority and endorse the findings of a private, corporate social auditing firm that the FLA regularly relies on for its audits throughout the world. Moreover, the FLA chose to place the burden of proof on the workers, not the employers, which goes against accepted international practices for detecting FoA violations.

Eventually, as a result of student activist pressure, some 110 universities cut or failed to renew their contracts with Russell because they were convinced workers’ rights to organize and bargain had been violated (Anner forthcoming). This economic pressure forced the FLA to eventually rule that FoA rights had been violated. Internally, FLA board member Lynda Yanz of the Maquila Solidarity Network, put considerable pressure on the FLA. Finally, the FLA placed Russell under review, which contributed to Russell changing its conduct, re-opening the factory, recognizing the union, and bargaining in good faith. What this suggests is that FoA violations were ultimately remediated, but it took a massive student-led boycott and considerable other forms of external and internal pressure to arrive at this outcome. Remediation was not the result of the normal operating procedures of the FLA’s auditing system.

Monitoring FoA in Labor Repressive States

One of the greatest challenges for any voluntary governance mechanism that attempts to detect *and remediate* freedom of association violations involve their operations in states where FoA rights explicitly are curtailed by law. Most notably, this includes China and Vietnam. In the case of the FLA, China and Vietnam are highly relevant because over half of the workforce employed by FLA suppliers is now located in these two countries and this share has risen by 17% in the last five years, from 47% of FLA supplier production to 55%. [See Table 4.]

The FLA system references ILO conventions 87 and 98 as its main points of reference for FoA considerations. And one of the FLA's first FoA benchmark in its code of conduct states, "Workers, without distinction whatsoever, shall have the right to establish and to join organizations of their own choosing, subject only to the rules of the organization concerned, without previous authorization." [See Appendix for complete FoA benchmarks.] The next benchmark adds, "When the right to freedom of association and collective bargaining is restricted under law, employers shall not obstruct legal alternative means of workers association." What this suggests is that if workers are not allowed to form an independent union, then at least they should be able to form some type of workplace committee. Yet, the FLA's FoA benchmark (no. 18) adds, "Employers can only engage in collective bargaining with representatives of unorganized workers when no workers' organization exists." Thus, if an official, communist party labor union is present at the workplace, the "legal alternative means of workers association" are prohibited from bargaining.

Table 4

| FLA Sourcing Dynamics | | | | |
|------------------------------|---------------------|---------------------|---------------------|---------------------|
| | 2005 | | 2010 | |
| | # of Workers | % of Workers | # of Workers | % of Workers |
| China | 1,041,000 | 36% | 1,850,000 | 39% |
| Vietnam | 323,000 | 11% | 739,000 | 16% |
| Indonesia | 301,800 | 10% | 525,000 | 11% |
| Bangladesh | 82,200 | 3% | 238,000 | 5% |
| India | 113,500 | 4% | 200,000 | 4% |
| Thailand | 200,200 | 7% | 173,000 | 4% |
| Cambodia | 0 | 0% | 137,000 | 3% |
| Other | 860,300 | 30% | 790,000 | 17% |
| Total | 2,922,000 | 100% | 4,652,000 | 100% |

Sources: FLA (2006; 2011).

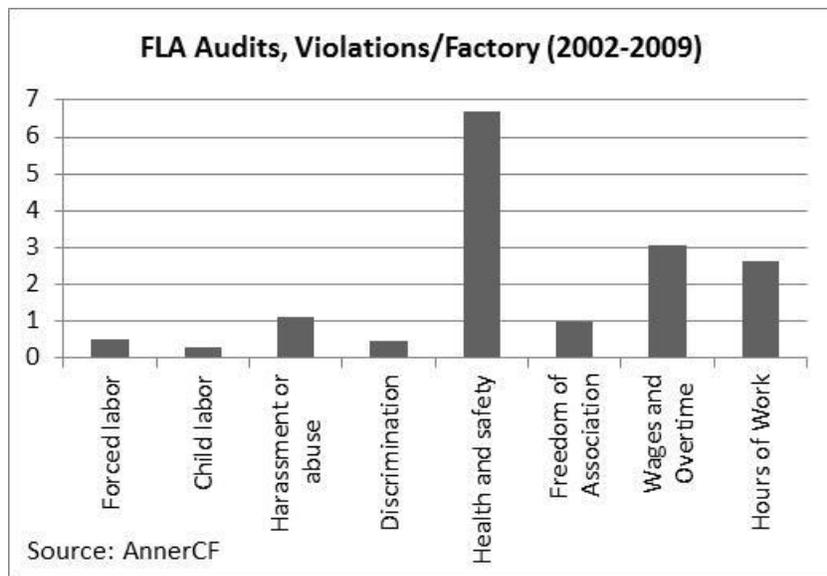
Finally, according to FoA benchmark no. 22, workers in FLA suppliers have the right to strike, by which they specify, "employers shall not impose any sanction on workers organizing or having participated in a legal strike." Put another way, employers are allowed to sanction workers participating in illegal strikes, and all strikes are effectively illegal in China (or, at least, not legally sanctioned).

Vietnam

Vietnam offers an example of the challenges of the FLA’s approach to monitoring FoA. And not only is Vietnam the second largest sourcing country for FLA corporate members, but it is also the fastest growing site for FLA sanctioned production, growing from 11% of factory employment in 2005 to 16% in 2010. Vietnam is also an important country case because, unlike China, it is covered by the ILO/World Bank’s Better Work program. Thus, it allows for a comparison between the FLA and Better Works approaches to monitoring FoA in a socialist country.

What we observe from our coding exercise of FLA audits between 2002 and 2009 is that the FLA findings for Vietnam are remarkably similar to its findings for non-socialist countries. Health and safety, wage, and overtime violations are readily detected, whereas freedom of association (right to strike, bargaining, and freely organize and conduct union tasks) score relatively low. On average, only one of the FLA’s 24 FoA benchmarks has been deemed violated per factory audit conducted in Vietnam. [See Figure 4.]

Figure 4

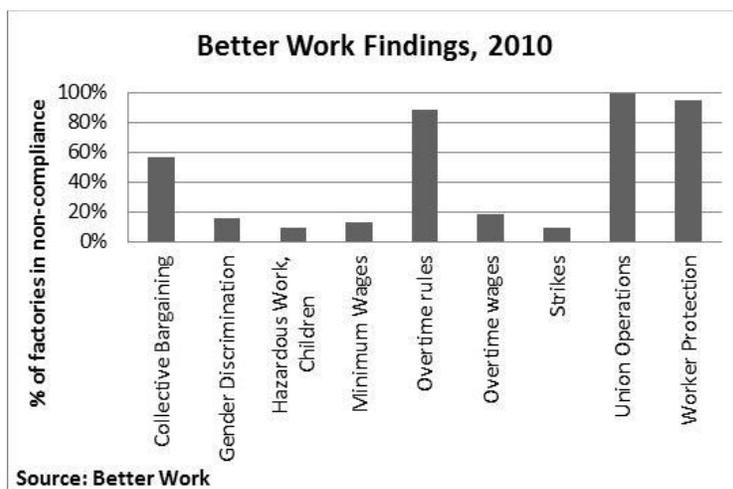


Reading through the audits, we see some cases where the FLA points out that management did not meet with the union or did not sign a collective bargaining agreement. In some audits, the FoA section is left blank. While the FLA references ILO conventions in its code of conduct, early audits routinely refer only to national and local laws. In one 2007 case, of the 24 FoA benchmarks, the auditors only found the Vietnam-based Adidas supplier to be in violations of two, FoA1 and FoA26 [See Appendix]. In the first case, the CBA was not properly registered. In the second case, the suggestion boxes in the factory had been removed for “maintenance.”

In recent years, we see the first reference to ILO standards. For example, in a 2008 audit of a Nordstrom supplier, the auditors write, “Vietnam’s legal framework is [...] not compatible with the ILO Principles on Freedom of Association and, as such, all factories in Vietnam fail to comply with the FLA Code standard on Freedom of Association.” This is followed by a *Plan of Action*, which states, “Workers should be free to join worker health and safety committees to ensure that their voices and suggestions can be shared with factory management.” (2007 Adidas audit, P. 11) A health and safety committee is thus deemed by the FLA to be an acceptable substitute for independent unionism and the right to bargain collectively and strike.

Like the FLA, Better Work conducts factory inspections that examine compliance with labor standards and rights. Better Work places much stronger emphasis on core ILO conventions. It began conducting assessments of worker rights and working conditions in apparel factories in Vietnam in December 2009.²⁴ Better Work organizes its categories of violations differently than the FLA, and it codes non-compliance distinctly, too. For example, instead of having one category for freedom of association, Better Work codes the right to strike, the right to collective bargaining, and the right to independent unionism separately. And, instead of counting the number of violations in each area per factory, Better Work simply determines if a given factory is in non-compliance in a given issue area, and then displays its findings in terms of the percentage of factories in non-compliance. [See Figure 5.]

Figure 5



Like the FLA, Better Work finds high rates of non-compliance in the areas of health and safety (worker protection) and overtime rules. Yet, unlike the FLA, Better Work documents much higher rates of non-compliance in the areas of freedom of association. 100% of factories are ranked to be in non-compliance with FoA rights in Vietnam, and some 57% of factories are in non-compliance with collective bargaining rights. Non-compliance with the right to strike is relatively low (9% of factories). This is because Vietnamese law, unlike Chinese law, legislates workers right to strike. And since official unions do not use this right, factories cannot be in non-violation of this right. The considerable numbers of strikes that do take place in Vietnam are outside the legal framework.

In sum, Better Work—which includes the active participation of the ILO and the tripartite social actors in Vietnam—appears to offer a more accurate assessment of FoA rights than the

FLA. It is still too early to determine if Better Work will be effective in addressing these problems, but by more openly acknowledging the issue, it has greater potential.

Apple and Foxconn in China

The Apple/Foxconn case in China gives us the opportunity to examine more closely the FLA's approach to FoA in a communist country. Like the Russell case, because it is such a highly publicized case in which the name and the location of the factory are revealed, we know more details of the case. For example, we know this is the factory where several workers committed suicide in 2010 and in which four workers were killed and 77 were injured in 2011 as a result of an explosion in one of the facilities. Also the procedures used and time spent conducting the audits were not normal operating practices. The FLA complete investigation report of Foxconn was 197 pages long. Most FLA audit reports are less than 16 pages in length.

The extreme media attention and activist scrutiny suggests that the FLA would be extra careful to thoroughly audit all aspects of its code of conduct. Thus, this should make the Foxconn case a harder test case for my argument. If there was one case where the FLA should have done due diligence, it was Foxconn. Nonetheless, the analysis presented above suggests that we could have anticipated two results in the FLA's Foxconn report. First, my prior analysis suggests that it would be relatively rigorous in the areas of health and safety, wages, and overtime. Second, it suggests that it would come up short in the area of freedom of association. And this is what we find. There are detailed findings on health and safety violations; we learned that 68.7% of workers interviewed suffer from neck and back pain and 40% of workers—whose average age is 23—already suffer from eye pain. We find that 43% of workers interviewed had experienced or witnessed accidents at the factory. We also learn that unscheduled overtime was paid in 30-minute increments, so that 29 minutes of overtime resulted in no pay. The FLA was able to provide clear and specific instructions for addressing these concerns.

The FLA had four major findings in the area of freedom of association: 1) The labor union at Foxconn is dominated by management; 2) Many workers do not know about the existence of the union; 3) Workers do not know about the existence of the collective bargaining agreement; and 4) The employee handbook states that workers will be fired for participating in illegal strikes [and, all strikes are considered illegal]. These are more FoA violations than the FLA had documented in other factory audits in China or Vietnam, and that is a step forward. Yet, the FLA's findings and recommendations fail to meet the most basic definition of FoA rights provided by the ILO. Perhaps more important, their recommendations do little to empower workers to collectively represent their interests vis-à-vis management.

One of its main recommendations is that the collective bargaining agreement should be distributed to all workers. Yet, the FLA also tells us that the union is dominated by management, which suggested that the collective "bargaining" agreement was not bargained between worker representatives and management, but rather is essentially a management document. The FLA also instructs Foxconn to allow a democratically elected union without management interference. And the FLA indicates that the strike clause should be removed from the handbook. However, as Foxconn management noted, the clause simply repeats what is already in China's laws. Thus, removing the clause from the handbook does not give Foxconn workers the right to strike. It merely removes an uncomfortable reference to what is the legal context in China.

The question of managers on union boards is complex. By all accounts, managers should not be factory-level union leaders. But, even in democratic elections, workers often elect managers to these positions, particularly human resource managers. Why? Of course, often there is manipulation and pressure from management to do this. But the other reason is that some workers believe that having a manager on the board will give workers certain influence that is otherwise lacking to them in the system due to their inability to strike. This is particularly true in terms of addressing everyday grievances, and it is less true when workers' issues entail demands for better wages and benefits. Thus, by ordering the removal of managers from union boards while not addressing workers' inability to strike or form an independent union will result in powerless forms of worker representation. This will allow for the continuation of managerial control, while the FLA inspection process has worked to increase Foxconn and Apple's legitimacy.

Discussion: Alternative Approaches

It has been argued here that meaningful and sustained improvement in working conditions in apparel (and consumer electronics) global supply chains are predicated on the ability of workers to establish democratic and independent unions, bargain collectively, and strike. Fundamental freedom of association rights allow workers to determine what issues need to be addressed and how they should be addressed, and affords workers the power needed to allow for meaningful bargaining. This paper has highlighted the trend for apparel and now consumer electronic corporations to increasingly rely on voluntary governance mechanisms to monitor and remediate these fundamental rights. By focusing on one of the most prominent and, by some metrics, most rigorous CSR programs, we have examined myriad problems and limitations in the area of FoA.

There are alternative approaches. Notably, the Worker Rights Consortium (WRC) was founded with the support of labor unions like UNITE that had left the FLA prior to its formation, and progressive NGOs and student groups. The most important support for the WRC has come from United Students Against Sweatshops, and the WRC has focused on collegiate apparel. The WRC strategy is to invite workers to present complaints, investigate those complaints, and then post the contents of its reports on its website. Unlike the FLA, the WRC posts the names of the factories it investigates.

What we see is that the WRC is six times more likely to find FoA violations in factories than the FLA. What these data suggest is that stakeholder participation does matter in CSR detection rates according to issue areas. While corporate influence in the FLA results in prioritizing issue areas that give corporations greater legitimacy, labor and activist influence in the WRC results in prioritizing empowering rights. What also is noticeable is that corporate-influenced programs are far more likely than labor-influenced programs to inspect factories. Between 2002 and 2010, the FLA conducted 805 factory inspections compared to 56 conducted by the WRC. That is, this corporate-influenced program is over thirteen times more likely to affect the wellbeing of workers than the labor-influenced program.

Conclusions

Since the 1990s, a range of private governance --or Corporate Social Responsibility (CSR) programs-- have emerged to monitor, investigate, audit, and remediate respect for labor standards and rights in the global apparel industry. This paper has argued that who participates in the formation and governance structures of CSR programs affects their effectiveness. Due to the concentrated power of corporations and the decision of trade unions to withdraw from CSR initiatives, many CSR programs have been influenced by corporate interests. This does not mean they are ineffective. Corporations desire legitimacy and protection from the risks of reputational damage caused by activist campaigns and media exposés. Multi-stakeholder initiatives are seen as providing more legitimacy than wholly corporate-controlled programs. And adequately addressing egregious wage, hour, and health and safety standards protects against damaging exposés. At the same time, the costs of compliance are largely shifted on to the suppliers who are encouraged to cover these costs by increasing their productivity.

Yet, the desire for legitimacy and reputational protection are mitigated by another corporate motivator: control. Corporations, to adequately plan their activities and pursue their goals, desire a strong degree of control over the dynamics of their global supply chains. The tension between legitimacy and control plays out in CSR programs. This paper argued that corporations will favor programs that enhance their legitimacy but do not hamper their control. Strong unions that are empowered to organize strikes are perceived to be disruptive to supply chains and thus debilitating to corporate control. For this reason, I expected that corporate-influenced CSR initiatives would be more focused on detecting wage, and occupational safety and health violations than freedom of association violations.

This paper focused on one of the largest corporate-influenced CSR programs in the apparel sector, the Fair Labor Association (FLA). An exhaustive coding and examination of all 805 FLA factory audits between 2002 and 2010 revealed that the FLA was far more likely to detect and remedy wage, hour, and occupational safety and health violations relative to the right to form a union, strike, and bargain collectively. Moreover, the FLA process was significantly more likely to remediate non-FoA violations than FoA violations.

Process tracing of one of the FLA's most important FoA cases, Russell Athletic in Honduras, revealed that the failure to certify a FoA rights violation was not the result of the complexity of the issue or the lack of access to FoA experts. Rather, it was the result of the FLA's decision to: 1) Put the burden of proof of FoA violations on workers; 2) Use the highest standard for burden of proof (*beyond a shadow of a doubt* criterion); and 3) Give preference to written over verbal evidence. An examination of the FLA's approach to FoA violations in Vietnam and the Foxconn inspection reveal further weaknesses in its ability to adequately address workers' right to form independent unions, bargain with real power, and strike.

As anticipated, when labor participates more directly in the CSR process, the results are significantly different. In both the FLA's Third Party Complaint system (in which worker representatives and their allies present complaints) and the labor-influenced WRC, the detection rate of FoA violations is dramatically higher than the FLA's auditing system. This is because labor-influenced processes have both an interest in defending FoA rights and have the trust of the workers needed to detect violations. The limitation of labor-influenced initiatives is their scope.

These findings suggest several policy recommendations. Increasing workers' ability to present Third Party Complaints and the FLA's willingness to accept these complaints would do

much to provide greater FoA protection. This would also entail greater transparency by the FLA in how and why it accepts some complaints and rejects others. Enhancing the size and influence of large, representative NGOs and labor groups in the CSR governance structures and daily operations would rectify imbalances in the governance board. Using an auditing system in which worker testimony is taken as legitimate evidence and where, after a *prima facie* case for a FoA violation is established by workers, the burden of proof shifts to the employer. Finally, no long-term solution of FoA violations can be found without the involvement of the state. This is because states regulate who can form unions, who can bargain collectively, and when, how, and if strikes can take place.

If CSR programs with strong corporate participation and states remain unwilling to more effectively monitor and remediate FoA violations, then labor and its allies will be more likely to seek solutions outside formal institutional processes. The campaign that targeted Russell and resulted in its boycott by over 100 universities provides one example of what that might look like. The massive strike waves affecting China and Vietnam provide another example. The irony is that one of the main impetuses for corporations to join CSR initiatives was precisely to avoid such unsavory activist campaigns and worker strikes. It seems that, in order to circumvent such actions in the future and achieve greater legitimacy, corporations will have to relinquish some of their control by ensuring that workers' rights to organize are more fully realized.

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Appendix

FLA's FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING (FOA) WORKPLACE CODE PROVISION

“Employers shall recognize and respect the right of employees to freedom of association and collective bargaining.”

Compliance Benchmarks

FOA.1 General Compliance Freedom of Association

Employers shall comply with all national laws, regulations and procedures concerning freedom of association and collective bargaining.

FOA.2 Right to Freely Associate

Workers, without distinction whatsoever, shall have the right to establish and to join organizations of their own choosing, subject only to the rules of the organization concerned, without previous authorization. The right to freedom of association begins at the time that workers seeks employment and continues through the course of employment, including eventual termination of employment, and is applicable as well to unemployed and retired workers.

FOA.3 Legal Restriction/Alternative Means

When the right to freedom of association and collective bargaining is restricted under law, employers shall not obstruct legal alternative means of workers association.

FOA.4 Anti-Union Violence/Harassment or Abuse

FOA.4.1 Employers shall not use any form of physical or psychological violence, threats, intimidation, retaliation, harassment or abuse against union representatives and workers seeking to form or join an organization of their own choosing. FOA.4.1.1 Such practices shall not be used against workers' organizations or workers participating or intending to participate in union activities, including strikes.

FOA.5 Anti-Union Discrimination/Dismissal, Other Loss of Rights, and Blacklisting

FOA.5.1 Employers shall not engage in any acts of anti-union discrimination or retaliation, i.e. shall not make any employment decisions which negatively affect workers based wholly or in part on a workers' union membership or participation in union activity, including the formation of a union, previous employment in a unionized facility, participation in collective bargaining efforts or participation in a legal strike.

FOA.5.1.1 Employment decisions include: hiring; termination; job security; job assignment; compensation; promotion; downgrading; transfer; (vocational) training; discipline; and assignment of work and conditions of work including hours of work, rest periods, and occupational safety and health measures.

FOA.5.1.2 The use of blacklists used to contravene the exercise of the right to freedom of association, for instance blacklists based on union membership or participation in union activity, also constitutes anti- union discrimination.

FOA.6 Restoration of Workers Rights/Reinstatement

Workers who have been unjustly dismissed, demoted or otherwise suffered a loss of rights and privileges at work due to an act of union discrimination shall, subject to national laws, be entitled to restoration of all the rights and privileges lost, including reinstatement, if they so desire.

FOA.7 Protection of Union Representatives

Employers shall comply with all relevant provisions where national laws provide special protection to workers or worker representatives engaged in a particular union activity (such as

union formation) or to worker representatives with a particular status (such as founding union members or current union office holders).

FOA.8 Production Shift/Workplace Closure

FOA.8.1 Employers shall not (threaten to) shift production or close a workplace site in an attempt to prevent the formation of a union, in reaction to the formation of a union, in reaction to any other legitimate exercise of the right to freedom of association and collective bargaining, including the right to strike, or in an effort to break up a union.

FOA.8.2 If a workplace is closing and there is a dispute that the closure was done to prevent or hamper the legitimate exercise of the right to freedom of association, employers shall provide proof that can be assessed by a third party to determine the validity of the reasons given for closure.

FOA.9 Severance Pay

Employers shall not offer or use severance pay in any form or under any other name as a means of contravening the right to freedom of association, including attempts to prevent or restrict union formation or union activity, including strikes.

FOA.10 Employer Interference

Employers shall refrain from any acts of interference with the formation or operation of workers' organizations, including acts which are designed to establish or promote the domination, financing or control of workers' organizations by employers.

FOA.11 Employer Interference/Constitution, Elections, Administration, Activities and Programs

Employers shall not interfere with the right of workers to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities, and to formulate their programs.

FOA.12 Employer Interference/Registration

Employers shall not attempt to influence or interfere in any way, to the detriment of workers' organizations, with government registration decisions, procedures and requirements regarding the formation of workers' organizations.

FOA.13 Employer Interference/Favoritism

FOA.13.1 Employers shall not interfere with the right to freedom of association by favoring one workers' organization over another.

FOA.13.1.1 In cases where a single union represents workers, employers shall not attempt to influence or interfere in any way in workers' ability to form other organizations that represent workers.

FOA.14 Employer Interference/Police and Military Forces

Employers shall not in any way threaten the use of or use the presence of police or military, to prevent, disrupt or break up any activities that constitute a peaceful exercise of the right to freedom of association, including union meetings, assemblies and strikes.

FOA.15 Facilities for Worker Representatives

Worker representatives shall have the facilities necessary for the proper exercise of their functions, including access to workplaces.

FOA.16 Right to Collective Bargaining/Good Faith

FOA.16.1 Employers shall recognize the rights of workers to free and voluntary collective bargaining with a view to the regulation of terms and conditions of employment by collective agreements.

FOA.16.2 Employers and worker representatives shall bargain in good faith, i.e. engage in

genuine and constructive negotiations and make every effort to reach an agreement.

FOA.17 Right to Collective Bargaining/Exclusive Bargaining and Other Recognized Unions

Employers shall bargain with any union that has been recognized by law or by agreement between the employer and that union, provided such agreement does not contravene national law, as a, or the exclusive, bargaining agent for some or all of its workers.

FOA.18 Right to Collective Bargaining/Unorganized Workers

Employers can only engage in collective bargaining with representatives of unorganized workers when no workers' organization exists.

FOA.19 Right to Collective Bargaining/Compliance with Collective Bargaining Agreement

FOA.19.1 Employers, unions and workers shall honor in good faith, for the term of the agreement, the terms of any collective bargaining agreement they have agreed to and signed.

FOA.19.2 Worker representatives and workers shall be able to raise issues regarding compliance with a collective bargaining agreement by employers without retaliation or any negative effect on their employment status.

FOA.20 Right to Collective Bargaining/Validity of Collective Bargaining Agreement

FOA.20.1 Collective bargaining agreements that have not been negotiated freely, voluntarily and in good faith shall be considered not applicable.

FOA.20.2 Provisions in collective bargaining agreements that contradict national laws, rules and procedures or offer less protection to workers than provisions of the FLA Workplace Code shall also be considered not applicable.

FOA.21 Rights of Minority Unions and their Members

Unions not recognized as a bargaining agent of some or all of the workers in a facility shall have the means for defending the occupational interests of their members, including making representations on their behalf and representing them in cases of individual grievances, within limits established by applicable law.

FOA.22 Right to Strike/Sanction for Organizing or Participating in Legal Strikes

Employers shall not impose any sanction on workers organizing or having participated in a legal strike.

FOA.23 Right to Strike/Replacement Workers

Employers shall not hire replacement workers in order to prevent or break up a legal strike or to avoid negotiating in good faith.

FOA.24 Deduction of Union Dues and Other Fees

Employers cannot deduct union membership fees or any other union fees from workers' wages without the express and written consent of individual workers, unless specified otherwise in freely negotiated and valid collective bargaining agreements.

Endnotes

¹ The author thanks Gay Seidman, Richard Locke, Michael Piore, and Miguel Martínez Lucio for comments on earlier drafts of this paper. The author also thanks Dong Fang and Katherine Cornejo for their research assistance in coding FLA factory audits. Research for this paper was supported by an Alfred P. Sloan Industry Studies Fellowship.

² Research has shown that effectiveness is also dependent on state enforcement capabilities or, more generally, the quality of governance. Where governance is strong, CSR works better. And where governance is weak, CSR – instead of filling the void—is also weak. See (Locke, Qin, and Brause 2007).

³ For the International Labour Organization (ILO), freedom of association conventions are considered so integral to proper employment relations that all member states are obliged to comply with them regardless of whether they ratified the corresponding conventions, C87 and C98.

⁴ Of course, unscrupulous companies can alter their books complicating the auditing of wages and hours, but this can be verified through worker interviews.

⁵ Respect for freedom of association and trade union rights is also largely dependent upon governments and states. Governments decide whether independent unions are allowed to exist, how much resources can be dedicated to workplace inspections, etc. CSR programs, however, are largely set up to monitor the conduct of factories and not governments and states.

⁶ It is still understood this way by many corporations. For example, when Hershey is asked about its CSR program, it refers to its support for an orphanage in Mexico.

⁷ Presentation by Robert Reich at the annual meeting of the Labor and Employment Relations Association (LERA), San Francisco, January 2-5, 2009.

⁸ United States General Accounts Office, GOA-09-962T.

⁹ European-based programs are more likely to include a few labor representatives on their boards of directors, but corporate participation remains strong.

¹⁰ <http://www.wrapcompliance.org/> (accessed September 12, 2011).

¹¹ NGO participation included the Interfaith Center on Corporate Responsibility (ICCR), the Lawyers Committee for Human Rights, the National Consumers League, the International Labor Rights Fund and the Robert F. Kennedy Memorial Center for Human Rights

¹² The FLA's CEO concludes by noting: "I hate the idea that governments are not protecting human rights around the world. [...] I've been at this for 30 years, and during that time I've seen the ability, the will, the commitment of governments to do this decline. And I don't see them making a comeback right now. So we started out thinking this was a stopgap measure. We are now thinking that in fact this is probably the start of a new way of regulating and addressing international challenges. Call it networked governance, call it what you will. The private actors – companies and NGOs—are going to have to get together to face the major challenges." Auret van Heerden, President and CEO of the Fair Labor Association, "Making global labor fair." July 2010; http://www.ted.com/talks/auret_van_heerden_making_global_labor_fair.html. (Accessed August 9, 2011).

¹³ <http://www2.guidestar.org/FinDocuments/2010/522/183/2010-522183112-07de4c88-9.pdf> (accessed March 25, 2012).

¹⁴ See <https://www.fairlabor.org/fla/go.asp?u=/pub/zTr4>.

¹⁵ The author thanks graduate student research assistants Dong Fang and Katherine Cornejo for their work in coding these audits. The coding took place between September 2009 and April 2011. It is important to note that the FLA is constantly revising audits, removing some and adding new ones, sometimes going back several years. The data presented here reflect the audits that were posted online at the time of the coding. I have titled the database "AnnerCF."

¹⁶ David Kucera codes thirty-seven evaluation criteria of trade union rights by country (Kucera 2004). The Kucera scores do not correspond to the exact period of FLA data, but the calculation is very detailed, ranging from 0.00 (worst violators) to 10.00 (best cases), and it can be expected that countries do not radically alter their freedom of association practices in a relatively short period of time. However, to control for the possibility of annual changes, I use a second dataset, the Cingranelli-Richards (CIRI) Human Rights Dataset (<http://www.humanrightsdata.org>), which are available for matching years with my FLA data (2002-2009). This dataset employs a simpler three level "workers' rights" scale --0 (worst), 1 (medium), and 2 (best). The CIRI definition of "workers' rights" focuses on freedom of association and right to collective bargaining. See: http://ciri.binghamton.edu/myciri/my_ciri_variable_definition.asp.

¹⁷ Since Kucera and CIRI rank countries with a high level of respect for labor standards with higher scores, I inverted my FLA scores so that my high scores reflected countries with low levels of FoA violations per factory.

¹⁸ There are 40 countries in our dataset. However, we have removed from the graph countries with four or fewer audits since the findings of the audits may reflect chance findings (outliers) and not reflect the general trend in the country.

¹⁹ Moreover, what is not clear from the FLA reporting system is how many Third Party Complaints are presented each year, what percentage of them are accepted, and what are the criteria for selection.

²⁰ In 2007 and 2008, the "success rate" for remediation of FoA violations was extremely low (10%) and in 2009 it was comparable to other issue areas at 72%. It will take data from additional years before we know if this is a trend. It is also important to note that the FLA counts as "successful" remediation cases that are pending or for which there is only partial remediation.

²¹ The plant ceased operations on January 30, 2009.

²² In fact, the original ALGI report noted that its monitors "did not gather any tangible evidence to show *without the benefit of a doubt* that JDH has performed or encouraged actions that can be regarded as discriminatory," (ALGI 2009: 17, emphasis mine). The FLA report appears to have added the "beyond a shadow of a doubt" language. That is, the FLA added a higher burden of proof than the original text of the ALGI report.

²³ For example, Philip Hunter and Michael Urminsky of the ILO Multinational Enterprise Programme suggest that a realistic approach would be for organizations auditing violations of freedom of association, "to obtain indicators that this may be happening –through interviews with workers or stakeholders—and then to place *upon the employer the burden* of proving that this is not the case" (Hunter and Urminsky 2003: 49, emphasis mine).

²⁴ According to Better Work, "Each assessment consists of four onsite person days and includes management interviews, union and worker interviews, document reviews, and factory observation" (Better Work Vietnam 2011: 4).