

## Governance by Contract?

# The impact of the International Finance Corporation's Social Conditionality on Worker Organization and Social Dialogue

## Working Paper

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### 1. Introduction

This paper explores the effect of transnational private regulation on labour standards through the lens of a study of the International Finance Corporation's 'performance standards' system. A broad and diverse range of studies exists on the challenges of promoting decent work and improved labour standards in developing countries. While it has been argued that transnational private regulation systems like corporate codes of conduct and multistakeholder sustainability standards have the potential to improve employee welfare, little consensus exists on their effectiveness. There seem to be two reasons why drawing firm conclusions about transnational private labour regulation (TPLR) is difficult. First, existing scholarship on both sides of the argument is largely based on qualitative case studies of small numbers of businesses or of single industries in particular countries or regions. Generalization on the basis of these studies is difficult. Second, the literature does not systematically take into account the fact that the existing capacity of local actors, particularly trade unions, to enforce or encourage the enforcement of TPLR is a critical intervening variable that conditions the impact of transnational regulation on employee welfare outcomes. The picture is complicated further by the fact that a large majority of TPLR schemes include guarantees of freedom of association and collective bargaining rights that potentially increase the capacity of workers to act collectively. Taken together, these two factors suggest that a realistic global evaluation of the potential of TPLR to improve the lives of workers in developing economies demands not only a broadly quantitative research strategy that allows a wider range of cases to be taken into consideration, but also a better understanding of the degree to which the enforcement of transnational private regulation schemes relies on local actors, and workers in particular.

This approach is consistent with the recent sociological turn in international relations and international political economy. Although work in these fields varies considerably in its theoretical background and its conclusions with respect to reorienting the focus of enquiry in future studies of contemporary life, there is a broad consensus that a proper understanding of the power of transnational private regulation schemes requires the study of the concrete practices by which social forces are implicated in the enforcement of such schemes. From this view, compliance with TPLR should be understood as locally and socially constructed. As Wells underlines, this would therefore be useless to assess labour standards without fully taking into account "the roles that Southern workers and their local allies play in promoting labour standards improvements at the point of production" (Wells 2009, p.568).

In this paper we present the results of a study designed from the perspective of this international political sociology. The study attempts to get one step closer to a realistic global evaluation of

TPLR by using a principally quantitative approach to assess the impact of one prominent private regulation scheme on the ability of workers to act collectively at firm level. The International Finance Corporation's 'Performance Standards' system is particularly appropriate as a subject for a research project of this type because, unusually, it is applied in the same form across a wide range of industrial sectors and in a large number of different countries. The study covered 145 IFC client businesses in eight countries across three continents. It drew on information made publicly available by the IFC, on interviews with a range of informants including IFC staff, officers of global union federations and of national and local trade union organizations, and on survey responses from managers, union representatives and workers in a total of 55 IFC client businesses.

Our findings show that the impact of the IFC's performance standards system on worker agency is marginal at best. While IFC client businesses are more likely to be unionised than similar non-client businesses, no reason was found to believe that this was a result of the application of the scheme. In those very few cases where change could be causally linked to the standards, the effect depended on the presence of workers' organizations that already had the capacity to take effective action. No cases were found in which the emergence of worker organization or the introduction of collective bargaining could be linked to unilateral employer efforts to comply with the performance standards or action taken by IFC to enforce compliance. The study also uncovered prima facie evidence of breaches of freedom of association rights occurring in a significant minority of the businesses surveyed with no apparent reaction from IFC. Perhaps the most striking finding was that ninety five percent of the workers interviewed reported that they were unaware of their employers' commitment to respect the performance standards' provisions on workers' organizations.

The paper begins with a review of the literature on the impact of private regulation on the capacity of workers to act collectively in pursuit of improvements in their own conditions of employment. This is followed by a brief discussion of the contractually based legal structure typical of transnational private regulation. The paper goes on to describe the IFC's performance standards system and the associated compliance monitoring and evaluation process before proposing four hypotheses about the impact of the standards on the behaviour of client businesses and the expected 'knock-on' effect on union membership and social dialogue. After a short examination of the most important methodological issues confronted in the project, the paper considers each hypothesis on the basis of the evidence gathered. The paper discusses these results before drawing some concluding remarks on the implications and limitations of the research. While generalization on the basis of this relatively small-scale study of a single regulation scheme is obviously hazardous, we suggest that the failure of the IFC scheme to have any significant impact on worker agency may be due to the contractual legal structure which is such that the supposed beneficiaries of private regulation have no direct capacity to make claims for the enforcement of their 'rights'. Whether or not rights are ultimately enforced via the contractual mechanisms depends on the attitudes and intentions of, and power relations between, the different participants in regulatory space.

## 2. Literature review: The impact of private regulation on the 'collective capacity' of workers

Within the literature on the impact of supply chain codes of conduct, investment conditionality, and multistakeholder product certification schemes there is a range of views about the potential of non-state regulation to durably improve the condition of workers. A significant number of authors have argued that there is little reason to believe that these voluntary codes and standards schemes will lead to a transformation of the social relations underpinning production. Authors in this stream of the literature believe that the voluntary nature of private regulation gives rise to what Anner (2012) calls a 'threat-of-defection dynamic': as long as firms have some influence over the design of regulation schemes via the leverage that arises from their ability to choose *not* to participate, TPLR will only ever change enterprise behaviour within limits set by the enterprises themselves.

Where these limits are to be found depends in part on the nature of the regulation itself. In this respect a distinction needs to be drawn between freedom of association and collective bargaining rights and other, more substantive labour standards. This distinction is frequently drawn in the existing literature. Either freedom of association and collective bargaining rights are treated as meriting separate evaluation (Anner, 2012; Brudney, 2012; Caraway, 2006; Chan, 2013); or the argument is made that a properly nuanced evaluation of the effectiveness of private labour standards regulation demands that we consider substantive ‘outcome standards’ and procedural or ‘process rights’ separately (Barrientos and Smith, 2007; Egels-Zandén and Hyllman, 2007; Neumayer and Soysa, 2006). While the category of outcome standards includes rules that specify pay, holiday entitlement, benefits in kind, the provision of safety equipment and so on, the category of process rights encompasses rules that provide workers with rights to voice and participation in the organizational and supra-organizational processes by which outcome standards are set and compliance with them is reviewed.

Having drawn this distinction we can see that there are two (mutually compatible) possible outcomes of TPLR. On the one hand, improvements to pay and conditions of work may come about as the result of direct, unilateral employer action intended to bring workplace practice into line with outcome standards set in private regulation schemes. Alternatively – or in addition – TPLR may change the type of collective worker action that is possible in practice by changing the industrial relations process rights that workers enjoy. This in turn may lead to a situation in which improvements in employment conditions come about because workers acting collectively have the will and the capacity to demand them. Many researchers believe that this is the more critical potential outcome. As Brudney puts it, "codes can be effectively monitored and enforced only when workers play an active internal role... But unless corporate suppliers make an unequivocal commitment to respect freedom of association, very few workers will ever play that role." (2012, p. 15).

Overall, the existing empirical research shows that while TPLR has had at least some impact on outcome standards, there has in fact been no discernible effect on process rights. It has been found that while firms are often prepared to make modest improvements to working conditions to win the business of reputation-sensitive buyers or access to premium price markets, they remain unwilling to accept any significant increase in the capacity of workers to influence management decisions about employment conditions and the organization of work (Anner, 2012; Barrientos and Smith, 2007; Egels-Zandén and Merk, 2013; Fransen, 2013). As Anner puts it, “the desire for legitimacy and reputational protection are mitigated by another corporate motivator: control” (*ibid.*, p.633).

Despite the pessimism of many researchers, there remain some optimists who believe that it is too early to dismiss the possibility that private labour regulation could ultimately increase the capacity of workers to take collective action in pursuit of improvements in their own working conditions. These authors believe that a proper assessment of the question demands that the research focus shift away from rules and compliance mechanisms in themselves towards the impact in practice of regulation systems on the conditions that promote worker agency or, as we call it, workers’ ‘collective capacity’. They believe that taking account of the *interaction* between transnational codes and standards, the local institutional context and the capacities of local actors shows that in certain circumstances private regulation *can* affect the ability of workers on the ground to organize and take action in pursuit of improvements in working conditions (Cradden and Graz, 2015; Nelson et al., 2005; Riisgaard, 2009; Selwyn, 2013; Taylor, 2012; Wells, 2009).

As things stand, it is not clear whether there are better grounds for optimism or pessimism. The research that currently exists on both sides of the argument is largely based on qualitative case studies of small numbers of businesses or of single industries in particular countries or regions. Generalisation, then, is very difficult. While some cross-national comparative research does exist (Locke et al., 2013; Riisgaard, 2009), it is limited in its sectoral and geographical scope. Anner’s

analysis (2012) of more than 800 Fair Labour Association audits is a notable exception to these tendencies, but it focuses on the *potential* of FLA audit procedures to detect evidence of the violation of process standards rather than on the actual effectiveness of regulation schemes as a means to clear a space for the development of independent worker representation.

### 3. The Legal structure of private compliance initiatives, the decision to enforce and the role of local actors

Like other types of private regulation, the IFC's performance standards system does not give workers any new rights. Although it places a duty on employers to respect certain rules and standards with respect to their workforce, that duty derives from a private commercial contract and is owed to the IFC, not the workers themselves. Only the IFC can make a claim for the performance of the contract and it is free to enforce its regulation or not as it chooses. The freedom of private regulators to enforce or not enforce according to whatever rules and procedures they choose to follow has certain implications for research into regulatory impact. First, it is critical to understand the circumstances in which a regulator will choose to take action. Second, in the absence of independent complaints procedures and effective remedies, the potential for workers to make gains from the regulation is principally a question of their capacity to take political or industrial action (a) to pressure regulators into taking action and/or (b) to pressure employers to respect the normative commitments they have taken on in participating in the regulation scheme. This implies a further question, which is the extent to which the rules that regulators unilaterally choose to enforce are likely to create or increase worker capacity to take collective action of this kind. In the first instance, then, rather than being the outcome of an independent judicial or arbitration process that can be triggered by worker complaints, compliance enforcement depends on the regulator's awareness of standards violations and on its willingness to take action to seek redress. Three conditions for enforcement follow from this.

The first condition is *information*: if a regulator is to take enforcement action it obviously has to be aware that some alleged violation has taken place. Information may come from pro-active compliance monitoring activity or via direct communication from those affected by the alleged violation.

The second condition concerns the interpretation of the standards. Whether or not enforcement action is taken depends on the regulator accepting that the client is noncompliant. In the case of freedom of association and collective bargaining rights, what counts as compliance is likely to be contested as, despite the claims of those proposing the global labour governance thesis, there is no international consensus even about the basic logic of protecting these rights.

The third condition for enforcement is a perception on the part of the regulator that it is in its *interest* to take steps to enforce. Even where it can be established that a participant is non-compliant, this is not the beginning and end of the decision. From the perspective of private regulators, the application of enforcement measures is not free of costs. Aside from the possibility of deterring potential new participants, too rigorous an approach to enforcement may ultimately lead to a loss of business. On the other hand, a failure to enforce the standards in the face of serious and publicly evident non-compliance will damage the credibility and reputation of the regulator, a process that is clearly susceptible to being influenced by labour organization campaigns. From the regulator's perspective there is therefore a balance to be struck in terms of enforcement that will vary depending on the participant and the financial, social and political context of its activity.

With respect to IFC, all of this means that a balanced overall assessment of the impact of the performance standards system demands that we consider not just the IFC's attitude and practices with respect to information, interpretation and interest, but also workers' capacity to intervene in each of these areas together with any evidence that that capacity has been increased as a result of

the presence or application of the standards. In practice this means that our primary interest is in the impact of the regulation on collective industrial relations at the firm level.

#### 4. The IFC's performance standards system

The IFC is the single most important provider of development finance aimed at the private sector, accounting for approximately one third of all finance provided to private enterprises in the developing world by development finance institutions (International Finance Corporation, 2011), whether in the form of loans, equity funding, investment guarantees or other types of funding. The capacity to grant or not grant financing together with the long-term relationship with the client that results from the provision of funds gives the IFC a range of powerful levers that can be used to influence the behaviour of the enterprises in question. Since 2006 the IFC has systematically required its clients to comply with social and environmental performance standards as a condition for the receipt of financing (International Finance Corporation, 2006a, 2006b; Warner, 2006). The adoption of this enterprise-level conditionality approach was the result of several years of intense engagement with other international organizations, notably the International Labour Organization, and pressure from the international environmental and labour movements (Caraway, 2006; Hagen, 2003; ITUC, 2011). At the time of its introduction, the IFC performance standards system was described as “the new international benchmark standard for environmental and social performance of the private sector in developing countries” (Warner, 2006). The characterisation of the IFC's system as *private* regulation could be contested on the grounds that IFC is a public intergovernmental organization rather than a private actor. However, as the standards conditionality applies to firms rather than states, and as these firms have a choice about whether to seek finance from IFC, which competes with other lenders, its status as a public organization is relevant only to the extent that there is a certain prestige attached to becoming an IFC client. For our purposes, the most interesting aspect of the IFC scheme is that, while most supply chain codes of conduct and labelling/certification schemes are specific to particular industries, specific countries or even both, the performance standards system was designed to apply in any sectoral context and does not vary depending on the country in which it is applied.

##### The standards

There are eight performance standards (commonly known as PS1 to PS8) designed to ensure that IFC clients operate in a socially and environmentally sustainable way. Performance standard 1 or PS1 is a ‘process’ standard and deals with the management of social and environmental risks. The substantive performance standards (numbers 2 to 8) against which social and environmental risks must be assessed cover: labour and working conditions; pollution prevention and abatement; community health; safety and security; land acquisition and involuntary resettlement; biodiversity conservation and sustainable natural resource management; indigenous peoples and cultural heritage.

The standard dealing with labour and working conditions (PS2) is largely derived from the ILO's ‘core conventions’, which is to say the eight conventions identified in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. In this project we are concerned specifically with the ‘Workers’ Organizations’ provisions of PS2 which, deal with freedom of association and collective bargaining. The performance standards were revised in 2012, and some changes were made to the workers’ organizations provisions. The paragraphs below show the original provisions, with the modifications made in 2012 in brackets.

9 [13]. In countries where national law recognizes workers’ rights to form and to join workers’ organizations of their choosing without interference and to bargain collectively, the client will comply with national law. Where national law substantially restricts workers’ organizations, the client will enable ~~enable~~ will not restrict workers from developing] alternative means for workers to express their grievances and protect their rights regarding

working conditions and terms of employment. [The client should not seek to influence or control these mechanisms].

10 [14]. In either case described in paragraph 9 [13], and where national law is silent, the client will not discourage workers from forming or joining workers' organizations of their choosing or from bargaining collectively, and will not discriminate or retaliate against workers who participate, or seek to participate, in such organizations and bargain collectively [~~bargain collectively~~ collective bargaining]. Clients will engage with such worker representatives [and provide them with information needed for meaningful negotiation in a timely manner]. Worker organizations are expected to fairly represent the workers in the workforce.

### The IFC risk assessment process

Once an application for funding has been made by a business, there are four stages that a project must pass before being funded. The first three of these (Early Review, Investment Appraisal and Investment Review) involve IFC staff members only and the final stage (Board Review and Approval) involves the IFC's Board of Directors. In the pre-board-level stages of the review process, a key factor in decision-making is the degree to which the project presents social and environmental risks and impacts and the likelihood that the potential client "can be expected to undertake the project in a manner consistent with the performance standards" (International Finance Corporation, 2012a, p. 14).

It is important to understand that if a potential client is not already in conformity with the performance standards, this is not necessarily an obstacle to its being granted financing by IFC. Interviews with senior staff show that for IFC, what counts is the willingness of a business to bring its operations into conformity and the likelihood that appropriate mitigation measures can be agreed and put into place.

IFC staff categorize projects into high, medium and low risk categories (categories A, B and C, respectively). The risk categorization is based in turn on an employer self-assessment in which the measures required, if any, to bring the business into conformity with all relevant national regulation as well as the substantive performance standards (numbers 2 to 8) are identified. In cases where "local communities may be affected by risks or adverse impacts from a project" (International Finance Corporation, 2012b, p. 18) this self-assessment must include consultation with the community. If the assessment identifies mitigation measures that need to be taken in order to bring the business into conformity with the required standards, an 'Action Plan' must be prepared which sets out these measures. In the event that a business is taken on as an IFC client, it "is required to disclose its Action Plan in advance of project implementation to affected communities and stakeholders, and provide updates throughout the life of the project as mitigation measures are adjusted and upgraded, reflecting the feedback from the affected communities" (International Finance Corporation, 2012b, p. 16).

The risk categorization also determines the requirements for environmental and social disclosure. For all projects scheduled for Board level review, a 'Summary of Investment Information' (SII) document is made available, but only for projects classed as categories A or B is there any requirement for the disclosure of environmental and social information, which takes the form of an 'Environmental and Social Review Summary' (ESRS). The SII includes the project's risk categorization, basic financial and project information and the contact details of the client business. The ESRS includes a description of the project risks based on the environmental and social risk assessment, the rationale for the categorization (A or B) and the key measures that have been or will be put in place to mitigate risks and impacts.

## What counts as a ‘risk’ under the PS2 provisions on workers’ organizations?

Interviews with senior IFC environment and social compliance staff found that the organization maintains what it believes to be a neutral posture with respect to collective industrial relations. In the words of a senior officer, the IFC is “agnostic” about unionisation. The IFC’s internal oversight body, known as the office of the Compliance Advisor Ombudsman (CAO), confirms that this is the prevalent understanding of freedom of association within the organization: “the CAO’s role is neither to promote unionization of the workforce, nor to discourage it. Rather, CAO expects that workers are able to choose freely whether or not to join a union, without fear of reprisals, in line with applicable national law and IFC’s PS2” (CAO, 2012, p. 6). Even in cases where there is recent experience of unionization and collective bargaining, IFC will not require businesses to consider recognising a union where this is not required by local labour law. It is unwilling to insist even that businesses meet and talk with unrecognized unions even where a very significant minority of employees are union members (CAO, 2012).

In terms of written materials, there are two relevant IFC source documents, the Guidance Notes on the performance standards and the IFC Labor Toolkit, that may indicate what compliance with the PS2 provisions is understood to involve. The former document (International Finance Corporation, 2012c) is a general aid to the interpretation of the performance standards, while the latter “aims to assist environmental and social specialists at IFC to assess the risk of likely issues under PS2 in relation to projects, to assess compliance and then to determine likely action points that need to be taken in relation to non-compliances” (International Finance Corporation, 2008, p. 1). Not surprisingly, in both of these documents, reference is made to the requirement for employers to avoid intimidation or punishment of workers on account of union membership or activity, and there is some emphasis on avoiding any practices that could be interpreted as attempts to undermine the independence or credibility of recognized unions. However, both documents are notably silent on the questions (a) of the circumstances under which it is reasonable for a business to recognize a union and whether or not actively resisting recognition is compatible with PS2 and (b) what constitutes reasonable employer behaviour in reaction to approaches from existing trade unions wishing to organize in their workplaces.

Nevertheless, if the employees of a particular enterprise should choose to unionize, paragraph 10[14] of PS2 seems to place a duty on employers to respond positively to any subsequent request to regulate working conditions via collective bargaining, at least in those cases where national law is silent on the question of union recognition and the duty to bargain. Paragraph 9 also places a clear duty on employers to ensure that there is some means of worker representation, even if national legislation means that this cannot take the formal form of a trade union.

## Complaints

The performance standards system does not itself include a formal complaints mechanism directly accessible to workers. However, there are two possibilities for resolving problems. First, workers, whether individually or collectively, can file a complaint with the Office of the Compliance Advisor Ombudsman (CAO), which describes itself as the IFC’s “independent recourse mechanism”. The CAO process has two stages. In the first stage, the Ombudsman will investigate a complaint and will attempt to broker a solution between complainant and the IFC client. It will not, however, “make a judgment about the merits of a complaint, nor does it impose solutions or find fault.”<sup>1</sup> If the complaint is not resolved satisfactorily, the second stage of the process is triggered. Depending on the outcome of an initial investigation, an independent audit may be conducted. Perhaps oddly, this involves not an investigation focused on the behaviour of the client business, but an audit of the conduct of the IFC itself from the perspective of the due diligence it ought to have applied in

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<sup>1</sup> <http://www.cao-ombudsman.org/howwework/filecomplaint/>

supervising the client's compliance with the performance standards. What is under assessment, therefore, is whether it was reasonable for the IFC to conclude that the performance standards were being respected. This is rather different from an assessment of whether the client business was actually in compliance with the social and environmental commitments it had signed up to.

The second possibility for redress of grievances is to use a mechanism established via negotiation between IFC and the Global Unions – a body made up of the International Trade Union Confederation, nine global union federations and the Trade Union Advisory Committee of the OECD. This is an internet-based communications mechanism that allows trade unions to register complaints simultaneously with IFC and the Global Unions which are then followed up by both organizations working together. While this mechanism has enabled around thirty complaints to be registered, it remains informal in the sense that it lacks any kind of status or established procedure. Neither does it appear to be included in the website index page of the 'Sustainability' section of the IFC website, nor linked to from any other page on the site.

## 5. The potential impact of PS2 on collective industrial relations at the firm level

The difficulty with evaluating the impact of freedom of association and collective bargaining rights provisions is that even where these rights are being perfectly respected, we would not *necessarily* expect that workers will choose to join or form unions or demand to bargain collectively. The absence of collective industrial relations does not in itself entitle us to conclude that workers' rights are being violated. However, workers' choices about whether or not to pursue collective industrial relations are not made in isolation from the political and regulatory environment or the attitude and behaviour of their employers. While workers are likely to appreciate the potential benefits of taking collective action, they have to balance this against any perceived risk of employer resistance or reprisal and the available possibilities for legal and political redress should this occur. Only if employers are perceived by workers as being open to the possibility of introducing collective industrial relations, or if there is an easily accessible and effective legal remedy for any likely employer resistance or reprisal, will workers be free to evaluate the potential benefits of collective industrial relations from a purely pragmatic standpoint.

The very fact that the IFC feels that it is necessary to include protections for independent worker organization in its standards system means that it recognises a risk that its actual and potential client businesses may take illegitimate steps to deter unionization or to resist participation in collective bargaining, and that legal remedies for workers may be inaccessible or ineffective. If there is a risk of this kind, then there is a corresponding probability that an underlying workers' preference for collective industrial relations is not being satisfied in a certain proportion of cases.

If the PS2 provisions on workers' organizations are effective, we would expect to find that this probability is significantly reduced across the population of IFC client businesses and, as a consequence, that the incidence of collective industrial relations is higher on average in these businesses than in similar non-client businesses. More precisely, we would expect to find higher levels of unionization and collective bargaining among IFC client businesses as a result of the application of the performance standards system for one or more of the following reasons:

- (a) IFC may have a greater tendency to select as clients those businesses that already behave in a manner compatible with the standards
- (b) businesses may change their behaviour after becoming clients in response to IFC requirements, abandoning practices that deter unionization and collective bargaining
- (c) businesses' commitment to respect PS2 may lower the perceived risk of taking collective action (even where there is no concrete change in management behaviour)

- (d) the performance standards system may provide workers with a remedy for non-compliant employer behaviour.

## 6. Hypotheses about the impact of the performance standards

We can propose four hypotheses about the impact of transnational private regulation schemes on the enforcement of labour standards at the firm level. These hypotheses aim to evaluate the direct and indirect effects of the performance standards. Two hypotheses relate to the overall state of freedom of association and collective bargaining rights, and two relate to change in response to the performance standards.

### External differentiation

To probe the impact of the performance standards used by the IFC, it is critical to determine whether any observed difference in the incidence of collective industrial relations is due to IFC's selection criteria rather than any change in management attitude or practice arising subsequently to becoming an IFC client, including action taken in response to complaints from workers. We thus need to assess whether IFC client businesses are in fact different from similar non-client businesses in terms of any relevant indicators relating to collective industrial relations. On the basis of the argument set out above we can propose the following hypothesis:

- H1 There is a significant difference between IFC client businesses and other firms in the same industrial sector and region with respect to one or more indicators of social dialogue.*

### Conformity

The second issue is simply the conformity of IFC client businesses with the workers' organizations paragraphs in PS2. The performance standards system is such that the fact of accession to the status of IFC client means that a business has either been deemed to be in conformity with the performance standards already, or that it is in conformity except in those areas specifically mentioned in any action plan as the target of risk mitigation measures. Given that this is the case, and taking account of any mitigation measures that may yet to be implemented, our second hypothesis as follows:

- H2 IFC client businesses are free of any significant violations either of the relevant national law or of the principle of freedom of association as set out in the workers' organizations paragraphs of PS2 and in the accompanying guidance notes.*

### Internal change : direct effects

Our third area of interest is the effect of action taken in response to explicit IFC requirements. As we saw above, whether the IFC actively *requires* clients to take any concrete action in response to the performance standards depends critically on the assessment of environmental and social risk carried out as part of the evaluation of each project proposal. In cases where risks related to labour and working conditions have been identified in the risk assessment process – in other words, a lack of conformity with the workers' organizations paragraphs of the performance standards – client businesses will be required to take action to mitigate these risks and the agreed mitigation measures will be subject to ongoing monitoring and evaluation. Similarly, if complaints are made by workers' organizations and upheld by IFC, this will give rise to further mitigation requirements. This gives rise to our third hypothesis:

- H3 In cases where mitigation measures concerning worker organizations or social dialogue are included in an action plan, or in cases where complaints have been made by workers' organizations, upheld by IFC and corrective measures specified, we would expect to find evidence of change coherent with these measures.*

### Internal change : indirect effects

Our final area of interest is the indirect effect of businesses' adherence to the performance standards. The existence of the performance standards gives a certain legitimacy to workers' organizations and to processes of social dialogue. On the assumption that the content of the performance standards is widely known – an assumption that demands empirical confirmation – the performance standards system may in itself provide an impetus for industrial relations change by reducing the perceived risk of taking collective action. In this sense PS2 is akin to the kind of non-legislative government action in support of collective employment relationships discussed by Howe (2012). As Howe suggests, however, the effect of this kind of action is very difficult to measure, but this certainly does not mean it is unimportant. It has been argued, for example, that the withdrawal of longstanding non-legislative support for collective bargaining and unionisation was a significant factor in the decline of the British trade union movement (Cradden, 2014; Howell, 2007).

The possibility that the mere existence of PS2 may prompt a greater demand for unionisation among workers and a greater willingness among employers to accept it gives rise to our fourth hypothesis:

*H4 Even in those client businesses where IFC has not asked for specific measures to be taken relating to freedom of association and collective bargaining rights, we would nevertheless expect to find evidence of change in one or more indicators of social dialogue.*

### 7. Methodology : social dialogue indicators in IFC client businesses and elsewhere

An obvious place to look for a meaningful indicator of workers' collective capacity to take action is that group of statistics the International Labour Office (ILO) calls 'social dialogue indicators'. There are four of these: trade union density, collective bargaining coverage, days lost to strikes, and membership of employers' associations (International Labour Office, 2011). The importance of these indicators in characterizing labour market structures and processes and cross-national variations in these areas is undeniable. On the basis of social dialogue indicators, for example, Korpi's power resources approach (2006a) and Hall and Soskice's varieties of capitalism (2001) have both made significant contributions to the field.

Not all of the social dialogue indicators are appropriate for our purposes. Membership of employers' associations is relevant only where bargaining takes place above the level of the enterprise and in any case is a measure of employer rather than worker collective organization. The number of days lost to strikes does not necessarily correlate with the existence of stable and effective collective organization among workers. Strikers are not necessarily union members and strikes may reflect political as much as industrial goals.

This leaves collective bargaining coverage and trade union membership density. Collective bargaining coverage – the percentage of workers whose terms and conditions of work are set via negotiation between employers and unions – is a telling indicator of union influence, but is a statistic that makes sense only at the level of states or industrial sectors. Nevertheless, we could argue that a firm-level analogue is simply the presence or absence of collective bargaining in the workplace.

Trade union density is widely accepted as representing an effective proxy for trade union power (Aidt and Tzannatos, 2008; Ebbinghaus and Visser, 2000; Hayter and Stoevska, 2011; Kenworthy and Kittel, 2003; Traxler et al., 2001). Nevertheless, as a measure of the influence of organized labour, the level of union membership has to be understood in relation to its local context and is not directly comparable across national or sectoral boundaries. In order to be able to compare firm-level measures of density across different institutional contexts, union density has to be stated *in relation*

to the norm for businesses of a comparable size in the country or region and industrial sector in question. This in turn demands accurate baseline data about union density at the firm level.

Despite the consensus on the value of density as an indicator of union organization and influence, the unevenness of the availability and accuracy of data puts narrow limits on its applicability even in OECD countries, to say nothing of less developed economies. Variations in data collection procedures, sources and measures merely complicate the picture (Hayter and Stoevska, 2011; International Labour Office, 2012, 2011; Lawrence and Ishikawa, 2005). The problems are such that many of those working in the field have questioned the relevance of comparative political economy approaches in research with a transnational dimension that includes developing economies (Bruff and Ebbenau, 2014; Korpi, 2006b; Myant and Drahokoupil, 2011; Schneider, 2009). While these criticisms are entirely valid, if the impact of regulation is measured at the firm level at least some of the problems encountered at more aggregated levels of analysis can be avoided.

There are three main sources for trade union membership data: state and union administrative records, labour force surveys (Bland, 1999) and establishment (company or workplace) surveys. Administrative records like membership figures declared in union registration procedures are of interest because of their low cost and high coverage (Pember, 1998). However, they are not collected specifically for statistical purposes and are highly politicized, frequently being intentionally over- or under-estimated (Senén Gonzalez et al., 2009; Visser, 2006, 1991). A further disadvantage is that data can only very rarely be disaggregated so as to provide firm-level figures. From the perspective of those seeking national or sectoral data, labour force surveys are very much to be preferred as a source of data on union membership on the assumption that they are carried out using adequate sampling techniques. They avoid in particular the danger that membership numbers will be over- or understated for political reasons. Nevertheless, they are expensive to conduct and demand a high level of technical competence. While they may permit the calculation of average density figures by industrial sector and business size, they still cannot be disaggregated to the firm level.

For our purposes, the data of most interest is that arising from establishment surveys. This is the only kind of data that can be disaggregated to the firm level and is hence the only data that can be used to calculate the variance of firm-level density scores. Nevertheless, figures from labour force surveys and administrative records provide a useful check on the reliability of establishment survey data.

The principal supplier of cross-nationally comparable firm-level data on businesses in developing economies is the World Bank Group, which has been conducting establishment surveys since the 1990s. The Bank's Enterprise Surveys website now claims to provide data on 130,000 firms in 135 countries.<sup>2</sup> Data is collected by private contractors in face-to-face structured interviews with business owners and senior managers for the main survey and up to 10 individual employees for the related employee survey (where this is included). Firms are selected according to a stratified sampling methodology (World Bank, 2009). The coverage of labour and employment issues in these surveys is limited, but up until around 2008-2009 they consistently included the simple question "What percentage of your workforce is currently unionized?". Where employees are interviewed they are asked "Are you a member of a trade union?". More recent surveys generally exclude these questions, although the 2011 survey of Rwanda is an exception in this respect. The surveys do not, however, include any questions about the incidence of collective bargaining.

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<sup>2</sup> See <http://www.enterprisesurveys.org>

The outcome variables we aimed to measure for each IFC client business were all related to workers' collective capacity to take action in pursuit of improvements in employment conditions. In order to simplify the task of measurement, we assumed that workers *will* choose to organize collectively if they believe that the consequences of so doing will not be negative. The greater the level of workers' collective capacity, the more extensive and sophisticated collective organization will be in practice. This means that we used the actual level of collective organization observed at the firm level as a proxy for collective capacity.

Our research strategy was to proceed via a 'triangulation' of opinions on the same subjects from three different types of respondent: ordinary workers, union representatives and managers. To this end, the research team developed three separate but linked questionnaires. Certain questions were included in all questionnaires, with appropriate variations in phrasing, while others were specific to each type of respondent. The questionnaires were designed to permit the most realistic possible assessment of the reality of freedom of association within each enterprise and to allow us to relate that situation to action taken in response to IFC's performance standards, if any. About one third of the questions were written specifically with a view to understanding the concrete effect of the application of the IFC performance standards framework. The rest were drawn from two established sources, the UK's Workplace Employee Relations Survey and the joint IFC-ILO Better Work Programme's 'compliance assessment tool'. The questions were grouped into five areas depending on whether they are intended to collect information on: the level of knowledge about the IFC and its performance standards among employees of IFC client businesses and the degree to which union representatives and managers have taken action specifically in response to the standards; the presence of active unions and levels of union membership in the workplace together with the attitudes of management and workers towards unions; on whether any unions are recognised by management for representation and bargaining purposes; and on the degree to which social dialogue – collective bargaining and consultation – takes place within the workplace.

## 8. Findings

In this section of the paper we discuss each of our four hypotheses in turn in the light of the information we were able to gather from our analysis of IFC sources and our own survey data.

### External differentiation

With regard to the evaluation of whether IFC client businesses are different from similar non-client businesses we are only able to consider union density as there is a lack of baseline firm level data about the incidence of collective bargaining. That having been said, we can report that there seems to be a collective bargaining agreement in place in 49 out of the 145 businesses in our sample. We also have direct evidence that there is no collective bargaining in 31 businesses. We were unable to determine whether there was any bargaining in the remaining 65, although we are aware that there are union members in at least 6 of these businesses.

With respect to the question of density, whether or not there is a systematic difference between the level of union density in IFC client and non-client businesses looks like it ought to be a matter of averages. As long as there is some way of identifying the size, industrial sector and location of each business for which a figure exists, average density and variance can be calculated for each sub-sample. With these statistics in hand the significance of any difference in membership density between IFC client businesses and the regional and sectoral norm could in principle be assessed. However, there are two reasons this approach has to be ruled out. The first and more important is that union density scores are not normally distributed and parametric statistical tests are therefore inappropriate. The second reason is data quality. The World Bank firm-level data we have available about union density is for the most part based on employer estimates and takes the form of a single percentage figure with no information about the basis of calculation. We do not know, for example, whether part-time workers, workers on temporary contracts or agency workers are included. It

would be impossible to use this kind of data as the basis for calculating robust cross-nationally comparable sectoral, regional or national average levels of union density.

Nevertheless, it would be unreasonable to assume that firm-level employer estimates of union membership tell us nothing at all. Where an employer reports 100% union membership this is almost guaranteed to be wrong, but it still says something important about relationships within the business work. The figure can be interpreted as an opinion about how important and present trade unions are in a firm that is closer to an ordinal than an interval measurement. From this perspective, a reported 100% union membership is higher than 50% membership, but the ‘higherness’ is what counts rather than the 50 percentage point difference. Interpreting the management-reported density figures in this way implies the need to use a statistical analysis based on the rank ordering of data. Such nonparametric analyses do not take into account the size of the interval between each measurement, only their relation to each other. Conveniently, they do not require data to be normally distributed and are thus doubly appropriate (DeGroot and Schervish, 2012; Sprent and Smeeton, 2000).

In our case, we need to compare two samples of trade union density scores – IFC client businesses and businesses surveyed by the World Bank – with a view to determining the likelihood that they are drawn from the same population. Our survey research combined with the IFC’s publicly available information allowed us to estimate a density figure with reasonable confidence for 71 out of the 145 businesses in our original target group. Most figures were simply stated by management in the information provided to IFC. In some cases the density figure was calculated on the basis of a number of union members stated by managers or union representatives and the figure for the number of employees given to IFC by the business. This density data was combined in a single database with data extracted from the latest available World Bank Enterprise Survey for each country that included a question to managers about union density. The first step is to split our samples into matched subsamples of businesses in the same sector and location. So for example, IFC client businesses in the manufacturing sector in Tanzania would be matched with Tanzanian manufacturing businesses for which World Bank Data is available. The second step is to combine the matched subsamples and rank the density scores from the lowest to the highest. Each rank can be expressed as a percentile, making it comparable with rank scores from other subsamples.

If the IFC and non-IFC samples are drawn from the same population – which is to say, there is neither a selection nor a treatment effect on union density – the percentile ranks from one sample will not be concentrated disproportionately in either the top or bottom half of the combined ordering. If this is the case, and if the groups are the same size, then the sum of the ranks in each group will be more or less equal. If the samples are in fact from different populations, i.e. if one set of scores is systematically higher or lower than the other, the sum of the rankings in each group will be significantly different. The Wilcoxon Rank Sum test (also known as the Mann Whitney U test -- see Sprent and Smeeton, 2000, pp. 147–153), the nonparametric equivalent of a t-test for independent samples, is a means of determining whether any difference between the sums of ranks is significant. It includes a means of compensating for unequal sample sizes. In our case the test shows a highly significant ( $p < 0.01$ ) difference between IFC and non-IFC client businesses, with the IFC businesses having higher union density. It is interesting to note the value of the non-parametric approach: if we calculate simple averages and variance there appears to be no significant difference between the groups. The average union density for IFC client businesses is slightly higher at 23% as opposed to 20.5%, but this difference is not statistically significant. A simple inspection of table 1 below, however, shows that there are indeed some major differences between IFC client and non-client businesses. The table shows the percentage of IFC client and non-client businesses whose union density scores fall into each interval.

The significance of the difference between the level of union membership in IFC and non-IFC clients persists even if we attempt to interpolate density values for the 75 businesses for which we

were unable to find a reasonably reliable density figure. Among these, there were 28 in which IFC information gave a clear indication that collective bargaining was going on in the business. In these cases we can use the average union density figure for the sector and region. In the remaining 47 businesses, in which no mention is made in any source of information of union membership or collective bargaining, we can set the union density to zero. These interpolations are, of course, wholly unjustifiable from a statistical standpoint, and have the effect of significantly increasing the proportion of enterprises in which union density is zero. Nevertheless, repeating the calculation using these adjusted figures is a useful indication that the difference between the two groups reflects a substantive distinguishing feature of IFC client businesses.

**Table 1: trade union density in IFC and non-IFC businesses**

Density	Not IFC client	IFC Client
0%	69.2%	50.7%
1%-33%	8.0%	19.2%
34%-66%	5.1%	17.8%
67%-100%	17.8%	12.3%
Total	100.0%	100.0%

### Conformity

Our survey data provides prima facie evidence that despite the performance standards, violations of these rights are, if not commonplace or systematic, then at least not unusual. 297 workers employed in 55 businesses answered our questions about management attitudes to trade unions and whether they knew of any circumstances in which union membership or activity had been punished or non-membership rewarded.

- 73 workers employed in 25 different businesses reported that their employer was opposed to unionization. This represents 33.8% of responses other than ‘don’t know’. 51 workers responded that their employer was in favour of unionization and 93 that it was neutral on the issue.
- 42 workers employed in 17 different enterprises reported that they knew of cases in which employees had been punished or threatened for union membership or activities. This represents 22% of all workers responding either yes or no to this question rather than ‘don’t know’. When asked to specify what kind of reprisals workers had suffered, 24 respondents reported that they knew of cases of firing, 5 reported demotion, denial of promotion or obligatory transfer to an inferior post while 10 reported other types of harassment or intimidation.
- 20 workers employed in 9 different businesses reported that they knew of cases in which workers had been rewarded for not taking up union membership or not engaging in union activities. This represents 12.3% of all workers responding either yes or no to this question rather than ‘don’t know’. When asked to specify what kind of rewards workers had been given, 13 respondents reported that they knew of cases of promotion, 7 knew of wage increases and 2 of transfers to better positions.
- 50 workers employed in 13 different businesses reported that they knew of cases in which their employer had taken some kind of action to prevent workers from participating in strikes
- Overall, 71 workers in 22 businesses reported one or more of the three types of violation. A violation was reported by an average of 55% of workers in each business where at least one worker reported a violation.

We have more information on two cases in Turkey and another two in Kenya.

### *Turkey*

Within the last five years in Turkey, two complaints have been made to the IFC's internal oversight office, the Compliance Advisor Ombudsman (CAO). The CAO has published reports on these two cases, and we were able to talk with workers and union representatives in one of the businesses involved. Both complaints had been made by a trade union seeking recognition.

In the case of Assan Aluminium, the union claimed that a range of management tactics, notably firings of union members, was artificially keeping membership under the 50% threshold required to make recognition obligatory. Certain production plants belonging to the business had historically been unionized and others not. At some point a system of management-appointed worker representatives was established in a plant which had been unionized in the past but in which union membership had fallen below the threshold at which the business was legally required to recognise the union and engage in collective bargaining.<sup>3</sup> Although it is not explicitly stated in the available documentation, we can assume that the business at this point derecognised the union. The ESRS for the project states that the system of management-appointed representatives, presumably put into place after derecognition, should be replaced with a system in which representatives are elected. The business also makes the usual commitment to ensuring that freedom of association was included in its HR policy, but adds that "the revised Human Resources Policy will be explained to [the] workforce through a program of training designed to raise awareness of the rights and responsibilities imposed on both the Company and employees by the Human Resources Policy".<sup>4</sup>

In the second case, involving an automotive parts business called Standard Profil, the business had been the subject of a trade union complaint that IFC was failing properly to enforce the PS2 provisions with respect to workers' organizations, again focused mainly on tactics designed to ensure that the union did not pass the 50% membership threshold required for compulsory recognition. One of the business's plants had been unionized for several years in the 1990s, but management had derecognised the union after membership fell below 50%. According the workers we spoke to this was due to the dismissal of union members. The workers reported that there had been a series of labour court cases that had found that continuing dismissals of groups of 20-30 workers at a time were linked to union membership, but that the business had simply paid the fines imposed by the court and refused to reinstate the workers concerned, thus maintaining the level of union membership at less than 50%.

In its report on the Standard Profil case, the CAO noted that it was a 'shortcoming' that the business's continuing refusal to talk to the union on the grounds that it had not met the legal criteria for compulsory recognition meant that its attempts to resolve the situation could not directly involve the complainant. Just to give one example of what this meant in practice, the business refused to allow the union to see the results of a labour standards audit commissioned by the CAO (CAO, 2012, p. 6).

In the face of management's continuing refusal to talk to or meet the union, the CAO recommended that some kind of worker representative structure be set up. This was known as 'the social dialogue council'. The CAO report states that there were elections for the 60 people who sat on this council, but the workers we spoke to believed that those involved were appointed by management. The workers made it very clear that they believed this social dialogue mechanism had little credibility

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<sup>3</sup> In Turkey the threshold is 50% of the permanent workforce.

<sup>4</sup> ESRS, project 26648. There are notable similarities between the pattern of events in this case and that in another Turkish client business at which we were able to interview workers and union representatives. See below, section 2.

within the plant and that it was a distraction from the unionisation effort. One worker expressed the view that it was so transparently a sham that it actually contributed to unionisation. When asked whether IFC/CAO had ever spoken to ordinary workers, the response was that they had only spoken to members of the social dialogue council.

### *Kenya*

Trade union officers in Kenya drew our attention to two further examples of freedom of association violations in IFC client businesses. The power workers union reported their experience of trying to claim recognition in a new power plant on the outskirts of Nairobi. After the plant went into operation, the union recruited around 25 members from a total staff complement of 60. However, the union's approach to the management of the plant to discuss the possibility of recognition was met with a refusal. Union officers were not allowed into the power plant and management continues to turn down the union's requests for a meeting.

The hotel and education staff workers' union reported a case in which the union successfully recruited more than 50% of the non-teaching staff at a private school in the late 1990s and were subsequently awarded recognition. However, the school management resisted the union's efforts to negotiate a collective bargaining agreement and within a year of recognition having been awarded most of the union members at the school had been dismissed for a variety of reasons. Since then, despite the union's recognition remaining legally valid, management has continued to refuse to meet with the union and continuing efforts to recruit workers have been unsuccessful.

### *What counts as compliance?*

On the basis of our survey data, the hypothesis that there will be no significant violations of the performance standards provisions on workers' organizations has to be rejected. Certainly, the claims made by the workers' we interviewed are uncorroborated, but it seems very unlikely that all or a majority of them are false or mistaken. However, it is clear that there are some unresolved issues surrounding the interpretation of what respect for freedom of association means in practice. In both of the cases in Kenya, for example, the unions believed that the businesses in question were not behaving properly despite their on-paper compliance with the law on recognition. Yet, the reaction of the CAO to the Turkish complaints suggests that for IFC, compliance with the letter of national law is the factor that ultimately determines whether any sanctions will be taken in response to claims about breaches of the performance standards on workers' organizations. We will discuss this issue further below.

### *Internal change – direct effects*

For each client business classed as risk category A or B, the IFC publishes an 'environmental and social review summary' (ESRS) which is a resumé of the results of the compliance review carried out either by IFC internal experts or consultants hired specifically for the task. The ESRS sets out the performance standards identified as applicable during the review together with the measures that the client has agreed will be taken to mitigate any problems with compliance. For each of the 135 enterprises in our sample for which an ESRS has been published, we coded the mitigation measures specified with respect to PS2 (excluding occupational health and safety measures) according to seven non-mutually-exclusive possible actions. Table 2 sets out these actions together with their incidence in each region.

As the table shows, by some way the most common mitigation measure is the development or updating of a formal human resource management policy, by which the IFC means a set of written procedures accessible to all employees that set out the principles of management the business will follow, the basic terms and conditions of employment and the practices and procedures that will be applied with respect to recruitment, maternity leave, training and so forth. The next most frequently

mentioned measure is the establishment of a formal grievance redress procedure. Together, the formalization of HR policy and the establishment of grievance procedures make up 70% of the PS2-related mitigation measures we were able to identify (not including measures related to occupational health and safety).

**Table 2: PS2-related mitigation measures**

	Brazil	EAC	India	Turkey	Total
Total number of client businesses in each country	42	32	40	32	146
No ESRS (risk category C project)	6	1	2	1	10
Number of businesses in which <b>no</b> PS2-related mitigation measures are specified (excluding OHS)	20	21	18	13	72
Number of businesses in which PS2-related mitigation measures are specified (excluding OHS)	16	10	20	18	64
Percentage of businesses in each region in which PS2-related mitigation measures are specified	38.1%	31.3%	50%	56.3%	43.8%
<b>Incidence of mitigation measures</b>					
• Formal written human resources policies/procedures/practices to be developed or reviewed and brought into line with PS2 where necessary	12	8	13	10	43
• Freedom of association and collective bargaining rights to be incorporated into formal HR policy	4	0	1	5	10
• Formal employee grievance redress procedure to be established or reviewed and brought into line with PS2 where necessary	9	2	8	4	23
• Extension of normal HR practices to include contractor or temporary employees or correction of other differences of treatment between directly and indirectly employed workers	1	1	3	0	5
• HR policies/procedures/practices to be communicated (or communicated more effectively) to employees	4	1	3	1	9
• Information specifically about freedom of association and collective bargaining rights to be communicated (or communicated more effectively) to employees	2	0	0	1	3
• Non-union elected employee representative structures to be established or reviewed and brought into line with PS2 where necessary	0	0	0	2	2
Average number of PS2 mitigation measures per business	2.00	1.40	1.40	1.28	1.48

There are only ten businesses (out of a total of 64 where any measures are specified) for which mitigation measures contain some explicit reference to freedom of association and collective bargaining rights. One of these businesses recognized a union and took part in collective bargaining, and another reported that there were union members present in its workforce but that it did not recognize any unions. The others were not unionized. For all ten businesses, the inclusion of freedom of association and collective bargaining rights in written, PS2-compliant HR policies is specified. In three cases, businesses also committed themselves to informing workers about these rights, for example via the provision of information in local languages.

In only two cases was any more specific action required. One (non-unionized) business committed itself to correcting an unspecified difference in treatment between white- and blue-collar staff with respect to freedom of association and collective bargaining rights. Another business reported that ‘historic anti-union activity’ had been alleged, but claimed that a third party audit had found ‘no evidence of suppression of freedom of association’.<sup>5</sup>

One further case merits some attention, although freedom of association and collective bargaining rights are not specifically mentioned in the ESRS. In this case, the business committed itself to

<sup>5</sup> ESRS, project 26648. The reference to ‘historic allegations of anti-union activity’ is in fact a reference to a CAO investigation of a complaint made by the metal-working union during the initial environmental and social review. More details of this case are given below in section (b) on violations on freedom of association.

organising the election of workers who will act as ‘liaisons’ with the existing worker representative, who is a “qualified professional, hired and appointed by management”.<sup>6</sup> It is also reported that one specific IFC requirement is that a system of elected worker representatives be established in a plant in Jordan: “In order to further improve worker-management communication, ensure any grievances rise quickly to management attention and to help ensure transparency in workers’-management relationship, [the business] will ensure that all workers’ representatives are freely chosen by the workers through a voting system. [The business] in consultation with IFC will establish clear responsibilities and describe the main function of a workers’ representative in order for workers to better understand the scope of the function. Training will be provided accordingly.”<sup>7</sup>

### *Implementation of mitigation measures*

Our analysis of mitigation measures shows that with respect to freedom of association and collective bargaining, IFC is willing to demand only a very narrow range of concrete changes from its clients, and this only infrequently. We were surprised to find that of the 145 businesses we looked at, only 10 were asked to take any action and of these, seven were merely required to include a commitment to respecting the provisions on workers’ organizations in a written human resources policy. As none of the businesses required to take measures were among the 18 where we were able to interview a management representative, we have no information about whether the required measures were actually taken. Nevertheless, it seems safe to assume that they were, given the minimal commitment of resources involved and the fact that in most cases the measure were limited to the level of policy statements and did not specify any changes in practice. However, the fact that a commitment to respect freedom of association and collective bargaining rights is included in a formal written HR policy tells us nothing about the concrete practices of a business. Similarly, knowing that certain IFC clients had indeed taken steps to inform their employees of their commitment to respect freedom of association would tell us nothing about whether that communication was effective in the sense of increasing employee awareness of their rights, still less whether that increased awareness led to increased union membership or the establishment of collective bargaining.

In the sole case where an allegation of anti-union activity is mentioned in an ESRS, the business in question denies the allegation, referring to the findings of a third party audit. If we assume nevertheless that the mitigation measures specified in this case are a response to that allegation, the move from an appointed to an elected system of non-union worker representation in a plant that has historically been unionized represents at best only a very small step in the direction of greater freedom of association. At worst, the persistence of non-union representation, even where representatives are elected, could be seen as a continuing obstacle in the way of freedom of association, especially considering that in this case the role and function of workers’ representatives appears to be unilaterally defined by the business (in consultation with IFC).

### *Action in response to complaints*

The information we have available about IFC’s actions in response to complaints is inevitably incomplete as the IFC itself does not disclose any information about standards compliance and enforcement over the course of each investment project. All that is disclosed is the environmental and social action plan (if one is agreed). No information is made available about whether and what action is taken to implement ESAPs. IFC turned down our request to accompany social and environmental compliance staff on supervision visits.

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<sup>6</sup> ESRS, project 26376.

<sup>7</sup> ESRS, project 26376.

However, if a complaint is made to the office of the Compliance Advisor Ombudsman and if a decision is made to investigate it, that complaint is made public and information on the case is posted on the CAO website. As of January 2015, information on 130 separate complaints made about a total of 74 investment projects was available on this site. Of these complaints, four involved freedom of association issues. Three of these were registered by trade unions and a fourth by a group of labour NGOs. One further complaint was made by a trade union, but this was about labour issues that did not include freedom of association. Of the freedom of association cases, two have been closed, a third is awaiting the publication of the CAO report and the fourth is currently ongoing.

Given the range of subjects that the performance standards cover, the figure of 4 complaints out of 130 whose subject was freedom of association is perhaps not so surprising. On the other hand, however, that only four formal complaints were made arising from almost 1000 non-financial sector projects funded by IFC since the performance standards system was introduced (see below, annexe on data & methodology) does not square with our survey finding of freedom of association violations reported in 22 out of 55 businesses. Even if we assume that the three cases that made it as far as a formal complaint represent the worst cases, it still suggests that there is a level of casual anti-unionism in a significant number of businesses that the IFC's performance standards system is doing nothing to address. We will see in a moment that one of the most likely reasons for this is simply that IFC never hears about this behaviour because most workers are unaware that their employer has committed itself to respecting the performance standards.

The ITUC mechanism has given rise to 36 complaints between 2004 and 2014. ITUC was able to provide us with summary information about the first 26 of these. Within this group of complaints, 20 included complaints of violations of freedom of association and collective bargaining rights. Three complaints went on to be investigated by the CAO. The two CAO cases that are now closed were the Assan Aluminium and Standard Profil cases that we discussed above. Of the twenty freedom of association complaints, two involved businesses that folded before any investment was finally made, IFC decided not to proceed with its investment in three cases, two cases finished with the establishment of union recognition and the agreement of a collective bargaining agreement, eight led to some sort of mitigation measures related to freedom of association that stopped short of union recognition, three gave rise to no change at all, and the results of two were unknown at the time the document on which this information is based was produced.

The ITUC itself believes that although the performance standards system is no cure-all, it has drawn certain 'lines in the sand' that have been useful reference points for union campaigns. According to Peter Bakvis,<sup>8</sup> Director of the ITUC/Global Unions Washington DC office, the complaints mechanism has helped unions to articulate and communicate complaints about IFC client businesses. Although unions have not been satisfied with IFC's response to some of their complaints, on a number of occasions the mechanism has contributed to a resolution of problems, particularly in the arena of freedom of association. Ongoing informal contacts between IFC and ITUC have also permitted the early identification and avoidance of potentially problematic situations.

### Internal change – indirect effects

The data we have collected does not offer the possibility of considering the indirect effects hypothesis simply because it shows that the content of the performance standards system is *not* widely known. Just 18% of the workers interviewed were aware that the IFC had invested in their business and only 6% (18 workers out of 297) knew that the performance standards system exists

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<sup>8</sup> Personal communication, 25th March 2015.  
Governing by Contract

and that it contains guarantees about freedom of association and collective bargaining. (It is interesting to note that five of these eighteen workers were employed in a business that had been the subject of a complaint and in which the CAO had required that the business provide information about the performance standards to workers.) With such a small proportion of workers aware of the performance standards and their content as it relates to workers' organizations, it would be wholly unrealistic to expect there to be any kind of effect on the perceived legitimacy of unionization and collective bargaining.

What is more, of the eight businesses where at least one worker reported being aware of the employer's commitment to respect freedom of association and collective bargaining, five are already unionised with active collective bargaining. Union officers were rather more aware of the performance standards, with 10 out of 33 respondents (30%) reporting some knowledge the PS requirements. However only two of these officers dealt with workplaces that were not already unionised. Notably, none reported having been given information about the performance standards by the business itself.

It may be the case that management attitudes change independently of worker pressure in response to a declaration of adherence to the performance standards. If this is the case, workers may notice a change in attitude regardless of whether they are aware of the performance standards. The workers we surveyed were asked whether they thought the attitude of management in their workplace to trade unionism had changed over the last 3 to 5 years. 227 workers gave a response other than 'Don't know'. Of these, 28 reported that managers in their workplace had recently become more favourable to trade unionism. However, 29 reported that managers had recently become less favourable.

## 9. Discussion

In this paper we have looked at four possible areas in which the performance standards and IFC's supervision process might have had an impact on industrial relations processes in client businesses. We considered the evidence of IFC interventions on union density, on restraining violations of freedom of association and collective bargaining rights, on supporting mitigation measures and complaints procedures, as well as the extent to which the performance standards system is likely to have indirect effects on union membership and social dialogue via its impact on the industrial relations climate or atmosphere.

At first glance, our finding suggests a positive effect on union density, as IFC client businesses scores on average higher than similar non-client businesses. However, this needs to be interpreted with extreme care. Our analysis of the PS2-related mitigation measures clearly suggests that the likelihood of IFC requiring its clients to take any kind of action that will promote or encourage unionization is extremely small. Even in those cases where some kind of action was required it remained largely on the level of written policy or, in three cases, the provision of information. The single case in which some kind of action was demanded with respect to worker representative structures seemed as likely to create obstacles to unionization as to encourage it. We also know that only 6% of the workers we interviewed were aware that their employer had committed itself to respecting the performance standards on workers' organizations.

Yet, union officers did report some modest gains from the application of the PS. As we found in several cases we examined in Africa (Cradden & Graz 2014), these gains were driven by existing trade unions acting entirely on their own initiative. Three officers (all in Brazil) reported that they had been able to use the performance standards to make some small gains in the context of their existing relationship with an employer. In two cases, workers' rights to attend union meetings without penalty had been improved, and in one case reference to the performance standards had given the union more leverage in negotiations. In the single case of which we are aware in which a

union was recognised subsequent to an IFC investment in an existing business – Standard Profil in Turkey – there is little evidence that the performance standards were a factor. As we saw above, the CAO was unwilling even to insist that the business meet with the union, and according to union representatives the main reason that recognition was won was the unexpected decision of a large group of short-term contract workers to join the union en masse, which pushed membership securely over the required 50% threshold.

In short, given the absence of IFC compliance requirements beyond respect for labour law according to local practice, and the low level of awareness among workers and their representatives that their employer had committed itself to respecting transnational standards on freedom of association and collective bargaining rights, there is no good reason to believe that becoming an IFC client will have any significant effect on unionization. We conclude from this that the apparently higher level of union membership among IFC clients than in similar non-client businesses must be due to the IFC client selection process rather than to any change in practices related to IFC supervision of performance standards compliance.

Our second finding is that the performance standards and IFC's supervision system have been notably ineffective in preventing anti-union activity by managers, with a significant minority of workers reporting a range of violations of freedom of association and collective bargaining rights. 71 workers (24%) in 22 separate businesses reported some kind of violation, whether reprisals for union membership or activity, rewards for avoiding union activities or attempts at strikebreaking.

Third, we have the question of mitigation measures and complaints. To the very limited extent that the mitigation measures IFC demands concern freedom of association and collective bargaining rights, the requirements for action are overwhelmingly to do with formal management systems rather than the outcomes of those systems for employees. What seems to count for the IFC is the ability to point to evidence that businesses take the relevant labour standards into account in their approach to management without having to take a view on whether employee welfare is thereby improved in any tangible way. The mitigation measures specified are intended to ensure that that evidence is available and as such are arguably for the benefit of the IFC rather than that of workers. While we are unable to say whether or not change coherent with IFC's requirements took place in the businesses in question, our analysis of the available ESRS shows that even had we been able to confirm compliance with the measures, we would still have been unable to say whether this had led to any change in levels of union membership, organization and recognition.

Our fourth finding relates to our indirect effects hypothesis. In the absence of any knowledge of the performance standards among workers – we found that 94% workers were unaware of the performance standards – any change to the industrial relations climate is obviously very unlikely. There was also little evidence of any consistent change in employer behaviour, with roughly equal numbers of workers reporting an improved and a worsened management attitude to unionisation.

### **The contractual structure of private labour governance**

This study fills a gap in the existing literature by examining the impact of a single transnational private regulation scheme across a number of national and sectoral contexts. Our findings suggest that the impact of the performance standards system on industrial relations is at best marginal. In our view, this lack of impact can be traced to the contractual structure which is the legal basis for the 'rights' extended to workers by the IFC rules. This is all the more important as this contractual structure applies to every major type of transnational private regulation.

There are two variants of this structure. In one variant, commercial contracts creating supply chain or investment relationships include clauses creating an obligation on a supplier or investment client to respect certain standards and to allow the other contracting party – the lead firm or investor –

access to business premises and records for the purposes of the monitoring and evaluation of compliance. This is precisely what happens in the IFC case: compliance with the performance standards is a contractual duty of the client. The second variant of the legal structure underpinning private regulation involves the licensing of rights to make claims about standards compliance and to use logos and other marketing materials. In this case, the commercial contract is that which makes the right of an enterprise to use the logo of the regulation scheme on its packaging and to make compliance claims conditional on the satisfactory completion of some kind of social and/or environmental audit.

As distinct from rights directly enforceable against an employer by employees and their organizations, labour regulation in both variants is based on rights belonging to a third party – the lead firm, the investor or the operator of the labelling scheme – that has no legal relationship with the workers who are intended to benefit from the enforcement of those rights. It is entirely up to third party, in our case the IFC, whether or not to enforce the contractual conditions in question. Although it is workers whose rights are ostensibly protected by the performance standards, they are not parties to the private contract that provides the legal means by which compliance is enforced. The parties are the IFC and the client business. It is therefore up to the IFC to decide whether or not the contractual clauses that oblige the client to respect the performance standards are being respected and, if not, whether and what action to take to enforce compliance. Rather than being the outcome of an independent judicial or arbitration process that can be triggered by worker complaints, compliance enforcement depends on the IFC's awareness of standards violations and on its willingness to take action to seek redress.

This gives rise to certain problems. First is the question of *information*. Workers may simply not be aware that their employer has signed a contract that commits it to respect certain of their rights. If this is the case – as our study found with 95% of the workers interviewed – there is no reason why they would attempt to seek redress from the IFC for any rights violations. While the IFC monitors compliance and in principle could become aware of standards violations independently of workers, its principal source of information is the client business itself. The study found little evidence of any regular or systematic consultation of workers or unions as part of the IFC supervision process. Except in a limited number of cases, client businesses did not inform workers of their rights under the performance standards system.

The second potential problem arises around issues of *interpretation*. Even where workers or unions are aware of the performance standards and seek to persuade IFC to take action against a non-compliant client, whether or not this occurs depends on IFC accepting that the client is non-compliant. This in turn depends on the way in which respect for freedom of association and collective bargaining rights is understood by IFC. The study found that IFC takes a highly legalistic view of the performance standards' requirement that clients should 'engage' with unions where these are present. A number of cases emerged where client businesses refused to recognise or even talk with unions until the membership threshold for compulsory recognition (usually 50% of employees) had been passed. IFC took no action in these cases, even where membership levels were approaching the threshold measure and there was prima facie evidence of active dissuasion of union membership by management. The IFC's exaggerated neutrality about unionization seems to be based on the assumption that employers have no *duty* to respect workers' preferences with respect to union organization and collective bargaining beyond the letter of their legal obligations. The consequence is a situation in which unions remain formally invisible within IFC compliance procedures until the point at which they are made visible by compulsory recognition. However, violations of freedom of association and collective bargaining rights frequently concern precisely the issues of recognition and derecognition, notably management actions designed either to prevent a union winning recognition or to create the conditions under which a recognized union can lawfully be derecognized. The IFC's interpretation of the workers' organizations provisions in the

performance standards is such that it is unwilling to gainsay local labour law when it comes to trade union recognition, regardless of any objective difficulties there may be with content and enforcement. It has scrupulously avoided adopting any *substantive* definition of what constitutes reasonable employer behaviour in the face of employee demands for unionization or complaints about the violation of freedom of association rights. In this sense, it is not applying a transnational standard but merely insisting on the application of the letter of national law as determined via national judicial procedures.

The third problem is conflict of *interest*. Even where it can be established that a client is non-compliant, the IFC's decision about whether to take measures to enforce the performance standards is taken from the perspective of the value of the investment contract as a whole. Within the IFC's internal procedures there is no attempt to separate the social and environmental aspects of risk management from the financial aspects. Compliance enforcement decisions are not made independently of any consideration of IFC's interest in maintaining the financial relationship with the client. The final decision to withdraw from an investment is not made by the IFC's social and environmental compliance experts, but by investment officers whose role is focused principally on finance. Where the decision is made to withdraw from an investment because of unaddressed standards violations, this decision is not made public. Rather, any reference to the client is simply removed from the IFC's publicly accessible project database. Interviews with IFC staff suggest that this practice has been adopted to ensure that the enforcement of the performance standards does not become a reason for potential clients to look elsewhere for finance.

## 10. Conclusion

In this paper we have engaged with the controversial issue of the potential effect of transnational private regulation schemes in the domain of labour standards. The study reported in the paper suggests that the International Finance Corporation's 'Performance Standards' system has at best a marginal effect on workers' capacity to take collective action. While these empirical findings cannot be generalised to other private regulation schemes, they confirm earlier findings suggesting that transnational private labour regulation has a poor record on process rights such as freedom of association and collective bargaining guarantees, despite their critical importance. This contrasts with the case of outcome standards, for example those dealing with pay, holiday entitlements or safety requirements, where TPLR seems to have established a modest record of improvement.

We argued that the lack of impact of transnational private labour regulation schemes can be explained to some extent by the legal structure of the contract engaging the parties concerned. The weakness of this 'governance by contract' lies in the fact that compliance enforcement depends on a third party's willingness to take action to enforce contractual conditions that have some bearing on relations between workers and employers. In the case of the performance standards system, the IFC's capacity to decide whether or not to enforce its contractual rights against its clients is almost unlimited, with no precise template for standards compliance and no independent process for the evaluation of claims of non-compliance. There is remarkably little scope for workers to take action *within* the regulatory structure.

This raises the question of power. From the workers' perspective, the enforcement of IFC labour standards is a question of political organization and action rather than of triggering a process of regulatory intervention. Whether or not the public normative commitment involved in agreeing to comply with the standards results in a change of management attitude or behaviour depends on the capacity of workers (a) to collect information about standards violations and to communicate this to the IFC; (b) to establish that what they interpret as standards violations are indeed violations; and, above all, (c) to create the kind of political and industrial pressure that would outweigh the IFC's commercial and reputational interest in *not* sanctioning its existing clients. The study identified a small number of cases where workers and unions had the capacity to do some or all of these things.

However, in the particular case of freedom of association and collective bargaining, the rights supposedly guaranteed by the standards are precisely those that provide workers with the capacities that make political action possible. The study showed that the IFC takes few if any proactive steps to enforce these rights and uncovered no case in which the performance standards contributed to the organization of a previously unorganized workforce without the intervention of an existing union. When it comes to the enforcement of freedom of association rights, workers who are not already well organized are caught in a ‘catch 22’: they need to *already* possess the collective capacity to take political action in order to enforce the rights that would give them that capacity.

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