

Transnational private authority and the participation of workers' organizations in the regulatory space surrounding the employment relationship

WORK IN PROGRESS; COMMENTS WELCOME

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Introduction¹

This paper is one among a number of recent attempts by critical international relations scholars to develop a more integrated, sociologically informed approach to understanding the creation and transformation of the world order. While a number of different streams of research in this vein have emerged over the last two decades or so, we follow the attempts made by pioneering international political economy scholars such as Cox (1987) and Harrod (1997) to bring production and social relations back into international relations. As Harrod argues, “If world orders start with production, which produces social forces, then globally dominant social forces would come from globally dominant production patterns. Thus the study of social forces required the study of those fragmented areas which address the details of production relations” (1997, p.109). This is what Harrod calls ‘joining the two IRs’, which is to say industrial relations and international relations, thereby creating “an international political economy which would be more than just a perception of some economists who had discovered power, or some Marxists automatically extending domestically derived concepts to the global plane” (1997, p.110).

Our focus in this paper, then, is on the social forces that shape daily socio-economic life and the degree to which those forces are affected by global material and intersubjective relations. It is from this standpoint that we assess the much-discussed question of the concrete impact of transnational private regulation (TPR) and its potential to transform local contexts of action.

Existing scholarship differs on the question of where to situate such voluntary standards on a spectrum of regulatory effectiveness running from ‘meaningless corporate public relations exercise’ at one end to ‘significant support for workers’ rights’ at the other. While there is some limited evidence that TPR may have an effect on substantive outcome standards relating, for example, to occupational health and safety or hours of work (Anner 2012; Barrientos & Smith 2007; Egels-Zandén 2007; OKA 2009), the literature gives little reason to

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believe that TPR has significantly reinforced process rights relating to collective worker voice and participation in the day-to-day regulation of employment relationships. The social relations that give rise to poor working conditions at the bottom end of global supply chains appear to be unchanged by TPR.

It is tempting to analyse these findings in terms of regulatory capture. Since participation in TPR schemes is by definition voluntary, their impact relies on corporations choosing to participate. This in turn gives corporations significant control over the content of TPR. One possible – and popular – interpretation of the existing evidence is that this control extends to ensuring that within TPR schemes, those collective process rights that could give workers the ability to challenge unilateral corporate control over supply chain costs and organization are weak. At the same time, however, this interpretation depends on the supposition that the only relevant factor in the development of worker voice and participation is TPR and the formal compliance monitoring and enforcement procedures that accompany it. It ignores not only the interaction of TPR with national regulation but also the existing capacity of workers organizations to pursue their members' interests via legal, political and other institutional means.

In this paper we use examples of trade union action in Africa to illustrate how the potential of transnational private regulation (TPR) to enhance worker voice and participation in developing countries cannot be evaluated solely on the basis of an assessment of whether the technical content of such schemes reflects 'corporate capture' as against some more reasonable balance among the different interests involved. Rather, it is critical to understand how local actors mobilise the social and political resources that TPR potentially provides and the conditions under which such mobilisation represents an effective tool to pursue workers' interests. We argue that Hancher and Moran's concept of 'regulatory space' (Hancher & Moran 1998) provides a useful conceptual structure for this exercise. Hancher and Moran introduce the concept precisely to challenge the simple dichotomy of, on the one hand, regulatory processes properly focused on the pursuit of the public interest, and, on the other, those that have been subject to capture by private interests. They argue instead that regulation is always the outcome of competition and exchange between a range of different organizational players, directing our attention (a) towards routine understandings of who should participate in regulatory processes and (b) towards what they call the 'play of power', which is to say the resources and capacities that participants are able to, and may legitimately, mobilise within the regulatory space.

Our African examples show that TPR potentially has three transformative effects on the regulatory space surrounding the employment relationship. First of all, it may grant workers' organizations **access** to regulatory space, establishing their legitimacy as actors within it and, by extension, the legitimacy of their use of economic and social power. Second, it may allow workers organizations to insist on the **inclusion** of transnational corporations in existing local regulatory spaces they already occupy and within which they have the capacity and resources to act. Third, it may provide workers' organizations with political **leverage** to use within regulatory space by establishing externally-validated normative reference points with respect to substantive labour standards.

While our findings suggest that the process rights relating to freedom of association and collective bargaining that are included within TPR schemes cannot be written off as meaningless, we also argue that TPR is only likely to have any impact where workers' organizations already have or can be helped to develop the capacity and resources to pursue the interests of their members independently.

The case study evidence we present arises from the 'Governance by Contract' project, which was established at the University of Lausanne to assess the impact on collective industrial relations of one prominent investment conditionality scheme, the International Finance Corporation's 'Performance Standards' system. The main aim of the project is to assess the impact of the standard on labour and working conditions on the degree to which the employees of its client businesses join or form independent workers' organizations; and, where workers' organizations exist, what impact the performance standards have had on the nature and degree of social dialogue – collective consultation and collective bargaining – that takes place within client businesses. This assessment will be based principally on survey research which at the time of writing is still under way.

However, qualitative field research for the project that was carried out in the summer and autumn of 2013 brought to light some interesting information about the ways in which trade union actors in Africa have used not only the performance standards but also other types of TPR. We found that as well as the performance standards system, the certification requirements of the Forestry Stewardship Council and the China International Contractors Association 'Guide to Social Responsibility for Chinese International Contractors' have been used as means to pursue the interests of union members. The case study on the Bujagali Hydropower project and the shorter research notes that follow are based on accounts given by national and international trade union officers and workplace representatives. Interviews were carried out in Switzerland, Ethiopia and Uganda between July and November 2013.

What follows is divided into 5 sections. In sections 1 and 2 we discuss the literature on transnational private regulation and, more specifically, research that considers whether TPR may be an effective means of improving labour standards in the most weakly-regulated parts of global production networks. Having recognised the importance of distinguishing between outcome standards and process rights, we ask why the widespread inclusion of the process rights of freedom of association and collective bargaining in TPR schemes appears to have had little or no effect on the capacity of workers' organizations to challenge unilateral management authority in setting the terms and conditions of the employment relationship. In section 3, we argue that explaining this phenomenon in terms of 'regulatory capture' of TPR by corporations is inadequate because it excludes any consideration of the local regulatory context and of the capacities and resources of local actors. We introduce the concept of regulatory space as a means of accommodating these elements. In sections 4 and 5 we present some case studies that illustrate the utility of the concept of regulatory space, showing how TPR may grant workers' organizations access to participation in regulatory processes, how it may enable them to demand the inclusion of employers in regulatory processes and how it

may provide them with some additional leverage in the pursuit of members' interests. Finally, in section 6 we discuss the case studies and draw some conclusions.

1. Transnational private regulation: bridging the global labour standards deficit?

The existing system of formal intergovernmental social and environmental governance was constructed on the assumption that national governments have strong incentives to enact and adequately enforce legislation that conforms with norms established via intergovernmental negotiation and enshrined in treaties and international organizations. However, scholars in international relations, comparative and global political economy share the assumption that theories of the international system, the state and of the global economy have been put in question by the process of globalization. As Vogel (2009) argues, globalization is primarily to do with the structure of the real economy: the locus of manufacturing has shifted from developed to developing countries; and the production and supply networks of global firms increasingly transcend national boundaries. Even the most powerful states have only limited capacity to effectively regulate the activities of transnational corporations, and less powerful states are severely restricted in imposing rules on economic actors, whether domestic or foreign. A perception has therefore emerged that there is “a structural imbalance between the size and power of global firms and markets and the capacity and/or willingness of governments to adequately regulate them” (Vogel 2009, p.73) and that “governments alone cannot solve all problems of transnational economic regulation” (Graz & Nölke 2007, p.3). Hale and Held put the point even more emphatically: “The traditional tools of interstate cooperation – intergovernmental organizations and treaties – have ... proven inadequate” in the face of globalization and rapidly increasing interdependence (2011, p.3).

The existence of such a ‘governance deficit’ (Newell 2001) has been used as a means to explain the emergence of a range of new forms of transnational ‘civil’, ‘non-state’ or simply ‘private’ regulation. For convenience we will refer to these forms of regulation as transnational private regulation or TPR. The principal categories of TPR appear to be investment conditionality, supply chain codes of conduct, multi-stakeholder sustainability standards and industry self-regulation codes. The first three of these categories of TPR operate in fundamentally the same way in the sense that they demand certifiable conformity with a set of rules and standards in return for some kind of market incentive, be it finance, export contracts or access to premium-price markets. Committing to any of these types of regulation also offers the less tangible incentive of improved corporate reputation or legitimacy, something which is also offered by the industry self-regulation code. Industry codes differ from other types of private regulation, however, in that they rarely possess any kind of compliance monitoring and evaluation system and offer no measurable financial or market access incentive.

Regardless of their sectoral focus, which may be anything from fish farming to the mining of precious stones, and their principal regulatory emphasis, which can include social objectives like the elimination of child labour, environmental objectives like the prevention of pollution or some combination of both, a large majority of TPR schemes include work and labour

rights conditions.² A great deal of research and analysis now exists on this topic and there is a correspondingly wide range of opinions as to the effectiveness and scalability of these privatised and semi-privatised alternatives to the more established forms of public transnational labour standards regulation (see for example Brudney 2012; Bulut & Lane 2010; Anner 2012; Schrank 2013; Diller 1999; O'Rourke 2003; Dimitris 2010; Locke et al. 2012).

Research into TPR has emphasised the importance of distinguishing between different issue areas when assessing the potential take-up and impact of regulation (Risse-Kappen 1995; Graz & Nölke 2007). It would be surprising, for example, to find widely used, effective TPR schemes in which regulation was focused on the redistribution of revenue towards employees. Potential users of such schemes have a very direct perspective on their material interests and are unlikely to voluntarily accept significant losses as a result of their participation – although they may be willing to accept limited and controlled losses in return for market advantage, as Anner (2012) and Barrientos and Smith (2007) show. We would instead expect strongly redistributive regulation to remain the territory of governments or intergovernmental organizations that have the administrative and enforcement capacity to guarantee compliance. On the other hand, it would be much less surprising to see TPR gaining reach and importance in areas such as the internet or banking and insurance supervision where public institutions may lack the knowledge to ensure that compulsory state regulation follows the pace of technical innovation.

In the literature on labour standards within TPR we find that a distinction in terms of issue areas has been drawn between freedom of association and collective bargaining rights and other labour standards. Either they are treated as regulatory topics that merit separate evaluation (Caraway 2006; Brudney 2012; Chan 2013; Anner 2012) or the argument is made that properly nuanced evaluations of the effectiveness of private labour standards regulation demand that a distinction be drawn between substantive outcome *standards* and process or procedural *rights* (Anner 2012; Barrientos & Smith 2007). While the former category includes rules that specify pay, holiday entitlement, benefits in kind, the provision of safety equipment etc., the latter 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.

The distinction between outcome standards and process rights is all the more important to the extent that the market and corporate reputation incentives attached to TPR seem to have a differential effect on the two areas. Both Anner and Barrientos & Smith have found that while TPR seems to have had some effect on outcome standards, it has so far done little to reinforce workers' rights to voice and participation. And yet, the participation of workers in setting and monitoring corporate compliance with outcome standards would seem to be essential if TSR is to cover more than small minority of workers in global production networks. Quite apart from a range of critical considerations to do with ensuring that

² Systematic information on TPR is difficult to find, particularly information about supply chain codes of conduct, but of the 124 voluntary standards systems listed on the International Trade Centre's 'Standards Map' database, 77 list 'Work and Labour rights' as a main social sustainability theme.

workers' material interests as well as their subjective interpretations and experiences of the employment relationship are taken into account in regulation, the importance of implicating workers directly in compliance monitoring is simply a question of scale. As Wells points out (2009, p.569), there are somewhere between two and three hundred thousand export factories in the garment industry alone, and more than a million small workshops, but adequate monitoring of the supply chains even of the small proportion of retailers covered by the principal codes of conduct in the apparel industry is already well beyond the capacity of the NGOs involved. In short, to the extent that TPR relies on purely external compliance monitoring it is, to use Watanatada and Mak's term (2011), simply not 'scalable'. As things stand, it seems very unlikely that TPR can ever bridge the global labour standards deficit.

2. Freedom of association rights in TPR: on paper, but not in practice?

At the same time as it appears to be ineffective, the widespread inclusion of freedom of association and collective bargaining rights in private regulation systems stands out as a significant departure from the neoliberal approaches to the economy and industrial organization that have dominated public policy for most of the last 30 years. One of the major effects of these approaches has been the routine exclusion of workers' organizations from regulatory processes on the grounds that they introduce inappropriate 'political' motives into what ought to be purely technical approaches to decision-making. Workers' organizations are frequently perceived as illegitimate third parties to what should be a direct market relationship between employers and individual workers. The influence of neoliberal policy has been particularly strong in international governance. The belief that individual and collective labour rights represent a brake on economic development persisted within the international financial institutions until at least the early 2000s, giving rise to approaches to aid and investment conditionality that significantly limited the capacity of workers and worker' organizations to participate in the regulation of the labour market and the employment relationship (Hagen 2003; Caraway 2006; ITUC 2011; Bakvis & McCoy 2008).

The apparently paradoxical inclusion of freedom of association and collective bargaining rights in private regulation that major corporations voluntarily choose to respect has been encouraged by two factors. The first of these has been the successful 'repackaging' of certain of the International Labour Organization's conventions in the shape of the 1998 Declaration on Fundamental Principles and Rights at Work. The Declaration identified four principles defining a universal minimum acceptable standard for working relationships, together with two 'core' conventions by which each of these principles was to be put into practice. In first place on the list of fundamental principles and rights is freedom of association and the effective recognition of the right to collective bargaining. The others are the rather more media-friendly elimination of forced labour, abolition of child labour and elimination of discrimination at work. In packaging these principles together and declaring that all member states were obliged to put them into practice regardless of whether they had ratified the associated conventions, the ILO produced a short set of simple and universally applicable norms that had the stamp of approval not only of almost every government in the world (only around 10 states are not members of the ILO) but also of trade unions and employers' representatives. From the moment the Declaration was agreed it became much more difficult to cherry-pick among the conventions for a comfortable or convenient set of norms and

openly arguing against freedom of association and collective bargaining became considerably more difficult.

The second factor has been the gradually increasing emphasis on one component of freedom of association, the individual negative right to associate, at the expense of its other component, the positive collective right to be heard and to participate in the regulation of the employment relationship (Caraway 2006). It is a relatively straightforward matter for an employer to avoid active deterrence of union membership or union activity among its workforce. By contrast, many employers are unwilling to “face the perceived loss of control over the cost structure and operation of their supply chain as a result of strikes and pressures to increase wages and benefits via the mechanism of collective bargaining” (Anner 2012, p.612). In the context of evolving TPR, the meaning of freedom of association has arguably narrowed to exclude those aspects that potentially put into question the right of managers to make unilateral decisions about the terms and conditions of work.

These two factors may explain why freedom of association provisions continue to be included in private regulation at the same time as possessing what Brudney calls “a subtly disfavoured status” within it (2012, p.57). It may be the case, as both Anner (2012) and Barrientos and Smith (2007) conclude, that the process rights typically included in private regulation systems are interpreted and applied in such a way that they do little to enhance worker voice and participation because to do so would be to threaten corporate control over supply chain costs and organization. As Anner puts it, “corporations will favour programs that enhance their legitimacy but do not hamper their control (2012, p.633). According to Barrientos and Smith, “buyers and retailers prioritise commercial imperatives and take a technocratic approach to code compliance which does little to challenge embedded social relations or business practices that undermine labour standards in global production systems.” (2007, p.727)

It seems, then, as if the impact of TPR is being limited by something like regulatory capture by corporations. Although such regulation is not without some material benefits for workers in terms of outcome standards, it is drawn in such a way as to leave the existing balance of power between workers and their employers largely unchanged. Typically, TPR schemes do little or nothing to limit unilateral managerial control over the terms and conditions of the employment relationship.

3. Do process rights in TPR really have no impact? Bringing local contexts and worker agency back in

However, thinking of TPR merely in terms of the way the rules are drawn, from ‘captive corporate PR exercise’ at one end of the spectrum to ‘effective labour regulation’ at the other, helps us to understand neither the impact that it does have or that which it could potentially have in different circumstances. As Bartley puts it, approaches that emphasise the technical aspects of regulation imply that “making transnational standards effective is merely a matter of getting the rules and incentives right (especially for participating firms). In addition, it is typically presumed that implementation in one place is essentially the same as in another. Lost in this formulation is a rich conception of social context – in particular, a sense of the deeply political character of the standards being discussed or the locally situated and socially

constructed character of compliance” (2011, p.522). Perhaps most importantly, technical approaches ignore the agency of local actors, leading to what Wells characterises as a “misunderstanding of the significance of the roles that Southern workers and their local allies play in promoting labour standards improvements at the point of production.” (2009, p.568)

This brings us to Hancher and Moran (1998), who introduce the concept of ‘regulatory space’ precisely in order to go beyond what they see as the rather sterile debate on the extent to which economic regulation is the outcome of a pure process of public authority rather than being subject to ‘capture’, thereby reflecting the private interests of a dominant few. Certainly, questions about who participates in and benefits from regulation are important and “explaining the complex and shifting relationships between and within organizations at the heart of economic regulation is the key to understanding the nature of the activity. But little can be gained by depicting the relationship in the dichotomous language of public authority versus private interests” (p.152). For Hancher and Moran, the critical task is “to understand the nature of this shared space: the rules of admission, the relations between occupants, and the variations introduced by differences in markets and issue arenas” (p.153). For our purposes, this means attempting to understand how transnational private regulation affects the local or national space surrounding the regulation of the individual and collective aspects of the employment relationship.

Hancher and Moran draw our attention to two implications of the concept of regulatory space. First of all, it demands that we examine the ‘play of power’: the outcomes of struggles between players competing for advantage within the regulatory arena, the resources used in those struggles and the distribution of resources between different players (p.154). Second, and for Hancher and Moran more important, the idea of a defined space within which regulation is made “encourages us not only to examine relations between those who enjoy inclusion, but also to examine the characteristics of the excluded” (p154), together with the circumstances under which they might be able to enter the regulatory space and defend a position within it.

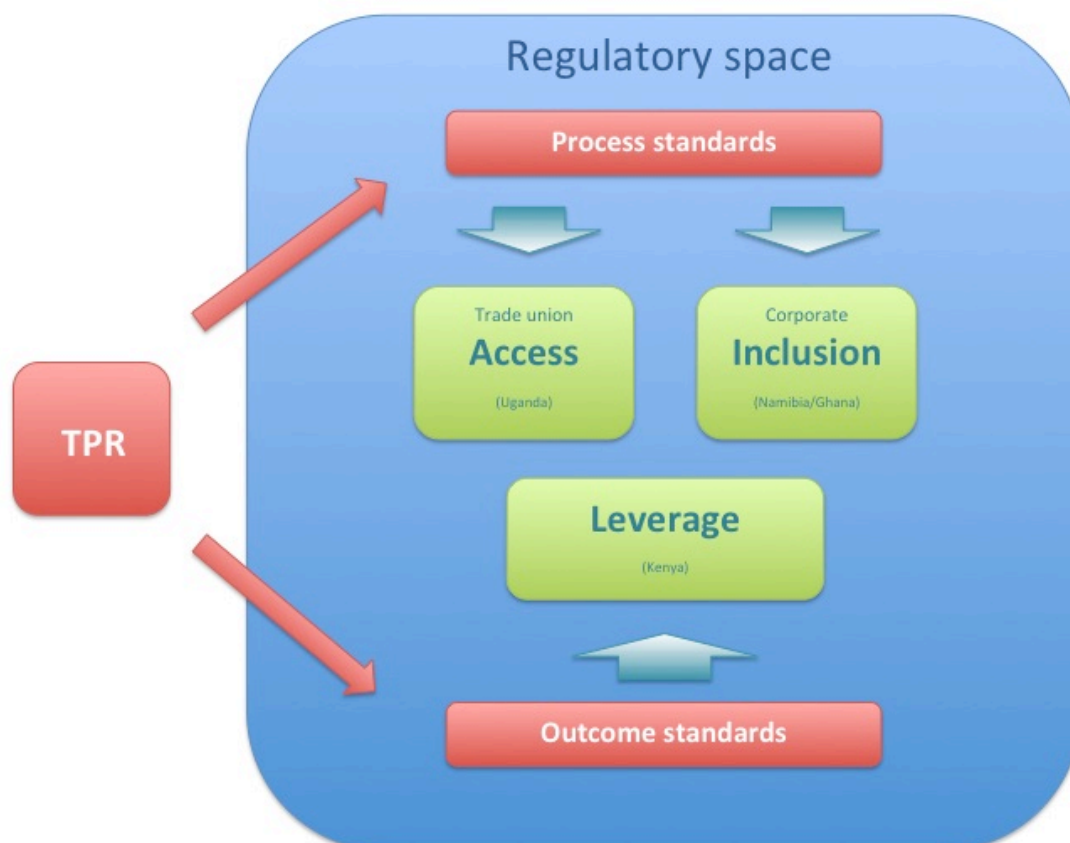
With respect to labour standards, the relevant regulatory space encompasses the processes by which the terms and conditions of the employment relationship are defined. The outputs of this space are principally *outcome standards* that define the material rewards of work and the concrete, measurable aspects of the physical and relational context in which it takes place. They concern pay, hours of work, job definitions, the provision of safety equipment, benefits in kind, holiday entitlement, access to healthcare and so on.

By contrast, *process rights* define who is permitted but also who is required to participate in regulatory space, together with the ‘rules of the game’ applying to participants. They define, first of all, union **access** to regulatory space: the conditions under which workers are permitted to act collectively to pursue their common interests and are entitled to be recognised by employers as representing the interests of workers in the process of setting outcome standards. Second, process rights may define conditions of compulsory employer **inclusion** in regulatory space: the circumstances under which employers are required to participate in existing institutional processes involving the establishment and review of outcome standards. Third, process rights also define acceptable types of **leverage**: the kinds

of industrial and political pressure that can legitimately be mobilised by different types of organization, whether in order to press a claim for access to regulatory space, to insist upon the inclusion and participation of other organizations in regulatory space, or in pursuit of the establishment of specific outcome standards. We should note, however, that the potential for exercising leverage in regulatory space depends on a wide range of social, economic and cultural factors and certainly does not depend entirely on formal process rights.

TPR may have an impact on local action contexts by introducing new process rights or reinforcing those that already exist by adding a market incentive for compliance. For our purposes, the direct effect on outcome standards of a corporate commitment to respect TPR is of less interest. It may well be the case that TPR schemes specify particular outcome standards that must be respected, but even where this leads directly to improvements in the material conditions of work, it has no necessary impact on the underlying social relations. Outcome standards in TPR may, however, have an indirect effect on the available leverage in the sense that they establish externally-validated benchmarks that provide workers' organizations with a claim over those employers that fail to respect them.

Figure 1 illustrates our theoretical scheme, showing the relationship between process and outcomes standards in TPR and transformations in regulatory space.



In the case studies that follow we will see how unions in the construction and forestry sectors in Africa have been able to use TPR in order to pursue claims for access and inclusion and as an additional means of leverage in regulatory processes.

4. The Bujagali Hydropower Project: trade unions claiming access to regulatory space

The Building and Woodworkers International Union (BWI) is the global federation of trade unions organizing workers in the construction and wood and forestry sectors. Since the late 1990s, BWI has been working for the inclusion of labour standards clauses in public contracts, including contracts issued by international financial institutions like the multilateral and regional development banks. BWI officers were closely involved in wider international union efforts to persuade the World Bank in particular that its unwillingness to accept that collective industrial relations is compatible with economic success was both technically mistaken and normatively unacceptable. After the Bank publicly withdrew its objections to collective IR in the early 2000s, a BWI officer working on secondment within the Bank developed and presented detailed recommendations for the inclusion of labour standards clauses in World Bank construction contracts and advised the International Finance Corporation (IFC) on the development of the labour aspects of its performance standards system (Murie 2009).

The IFC is the World Bank's private sector lending and investment arm. It is a major player in development finance, accounting for approximately one third of all finance provided to private enterprises in the developing world by development finance institutions, with a total of US\$148 billion invested in 4372 enterprises (International Finance Corporation 2011). Although as part of the World Bank Group the IFC is a public intergovernmental organization, it operates on a commercial basis, competing for investment and loan business with other national and international financial institutions. Since 2006, the IFC has required its clients to comply with a series of 8 'performance standards' (commonly known as PS1 to PS8) designed to ensure that IFC clients operate in a socially and environmentally sustainable way. Compliance with the performance standards is a contractual obligation which is written into loan and investment agreements, hence the name of the research project.

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.

When the performance standards system was introduced in 2006, the BWI looked for a 'test' case, searching the IFC's public information database for a major investment project in the construction sector where there was the potential to organize a significant number of workers. The Bujagali hydropower project, involving the construction of a major hydroelectric power station on the Victoria Nile river about 80 kilometres east of Kampala in Uganda, seemed to be a good fit. BWI had a good relationship with its local affiliate, the Uganda Building Workers Union (UBWU), which although small (2500 members) was nevertheless effective, with experienced professional officers and good contacts in government (Murie 2009). It had also successfully organised a road construction project undertaken by the European construction contractor that would be leading the construction work on the power plant. A decision was taken to take an active interest in the project and a work plan was drawn up in

collaboration with UBWU. A period of intense activity over about 8 months starting in the spring of 2007 ended with the signing of a collective bargaining agreement between UBWU and the principal contractor on the 7th January 2008. This agreement marked the formal beginning of a successful bargaining relationship between the principal contractor and the UBWU that lasted for the duration of the project, which was largely complete by late 2012. The terms and conditions set out in the CBA were exemplary for the region and sector and were improved in 2 further agreements. Membership density was very high with around 3000 members among the 4000 workers employed on the project at its peak. Worker representatives interviewed on the site reported that there had been no strike action or sabotage taken against the main contractor over the whole course of the project, and that although problems had arisen these were dealt with by discussion and negotiation (I12; I13). The representatives also reported that the accident rate had been consistently low, with only two fatalities during the project and these in a car accident rather than directly related to construction work. They emphasised that an important early factor in the development of the relationship between management and the union was the agreement of non-discriminatory recruitment practices. The project managers were largely expatriates and “were not really aware of the sensitivities” (I3, 18:56)³ in terms of the regional and ethnic origin of workers. On the other hand, they were “very happy to have the union giving them a steer” (I3, 19:00). The result, in the words of one union representative, was that when it came to recruitment “there was no favour... what they [the contractor] were considering is the skills” (I12, 6:15). The question that interests us here is to what extent the existence of the IFC’s performance standards system and the associated surveillance procedures were influential in the establishment and subsequent conduct of the relationship between UBWU and the Bujagali construction contractor. The answer is that there seems to have been some effect at the beginning of the relationship, but that once the relationship was established the PS had no further impact.

There are a number of observations we can make. First of all, BWI and UBWU kept in close touch with the Labour ministry, which made it clear from the outset that it was in favour of the union’s participation in the project. As Murie reports (2009, p.9), the Ugandan Ministry of Labour, although lacking resources, has a generally positive attitude to the implementation of internationally compliant labour standards and the legislative environment is favourable to collective industrial relations. BWI also seems to have been influential on how the labour ministry saw and understood the potential of the IFC PS. According to a BWI officer involved in meetings with the ministry about the project, the labour minister came to accept that “Yes you’ve got the legislation, but having these contractual obligations on top regarding social aspects, this was mutually reinforcing, it was a mechanism to actually implement laws.” (I3, 25.30).

A second point to bear in mind is that the IFC investment officer responsible for the Bujagali project was a strong believer in the performance standards approach and recognised the value that collective bargaining relationships could have for the client and the contractors. UBWU

³ Where the comments of interviewees are cited verbatim, the figure in brackets indicates the point in the recording at which the statement was made.

officers reported that they believed his putting pressure on the contractor was instrumental in their getting initial access to the site and opportunities to talk to the workers (11). However, there was no further contact with this IFC official after July 2007. It is not clear why he ceased to respond to communications.

Third, both the client (the private company granted the concession to develop the project and the direct beneficiary of the IFC's financing) and its principal construction contractor were initially reluctant to meet the union. The client in particular seemed to view its commitments with respect to workers organizations under the terms of the PS as falling under the general heading of stakeholder relations rather than constituting a specific and separate type of relationship. However, it seems that pressure from the IFC investment officer responsible for the project eventually led to the client agreeing to meet the union. Despite the client being ultimately responsible for the implementation of the performance standards, it remained reluctant to facilitate contact with the contractor.

Fourth, the agreement of the contractor to meet with UBWU and the subsequent decision to recognise the union and negotiate a collective agreement seems to have been the result of two factors. First of all, the UBWU and BWI, the Labour Ministry and the responsible IFC investment officer carried out what amounted to a coordinated campaign to pressure the contractor into recognising the union. The second factor seems to have been a gradual realization on the part of the contractor – encouraged by contact between project managers and colleagues in the same business who had worked with UBWU on the road construction project – that there were significant bottom-line advantages to working with the union. A critical event in this learning process came at a point at which project managers found that there were two to three hundred people camped outside the gates of the project site looking for work. At this point they turned to the UBWU for help communicating with the job-seekers. This seems to have been an important turning point in the relationship between union and management. After this, the key development was the agreement of the contractor to allow the union onto the site and to hold an open mass meeting with workers in the autumn of 2007. This meeting was highly successful, and the overwhelming majority of the 300 or so workers employed at that point joined the union.

The success of the bargaining relationship in terms of the content of the collective agreements seems to have been a combination of support and training from BWI and the contractor's willingness to accept the existing CBA from the road construction project as a point of departure.

Beyond what actually did happen and the relationships that did develop, it is interesting to note what did *not* happen. Over the course of the project, the IFC's formal supervision process ignored the union entirely. While the responsible investment officer had been very present at the beginning of the project, before the union won recognition from the principal contractor, the officers of the UBWU told us that they had not met or heard from the member of IFC's social and environmental compliance department who was responsible for monitoring the project. Neither had they met or heard from either of the two members of the panel of social and environmental experts appointed by IFC to report on compliance. Of the ten reports produced by the panel, none mention the union or the collective bargaining

relationship. One of the two members of the panel confirmed in an interview that he and his colleague indeed had not had any contact with union representatives in the course of their work (I4).

In sum, then, the influence of the PS system was fairly limited. It would be very difficult to argue that the collective bargaining relationship between the contractor and the UBWU would not have existed without it. On the other hand, it did seem to add some weight to the claims of the union to a right to be heard and to be given access to the project site. Nevertheless, without the work of the BWI and UBWU, it seems unlikely that any collective employment relationship would have existed. As a BWI officer put it to us,

“Really, it’s just a door-opener, the standards... all those standards do is allow the union to get in. After that it’s down to collective bargaining. Yes, you have some basic [substantive] standards there [in PS2] but that’s not really what you’re looking at. You’re looking at what’s the going rate for that kind of work, you’re looking at working hours, you’re looking at time off and what you can negotiate in the way of benefits” (I3, 37.45)

It is clear that the project’s exemplary industrial relations record was nothing at all to do with IFC. Indeed, IFC as an institution seemed to go out of its way to avoid even recognising that the collective bargaining relationship existed. The CBA was negotiated using the well-established practice of taking another current agreement in the same sector as an initial basis for negotiations. The principal regulatory reference point was not the performance standards system but Ugandan labour law, and on the rare occasions when issues arose that proved difficult to resolve around the table, the union’s high levels of membership and effective organization meant that industrial pressure could be applied in search of an agreement. No complaint was ever made to the IFC about the behaviour of the contractor.

5. Other standards systems in East Africa: Inclusion and Leverage

Interviews with a small number of union officers working elsewhere Africa suggests that other types of private standards system have allowed trade unions to insist on the inclusion of transnational corporations in existing industrial relations machinery and have given unions some additional leverage in bargaining.

China International Contractors’ Association ‘Guide on Social Responsibility’ in southern Africa

The construction workers’ union in one southern African country has used a private code of conduct as part of a strategy to bring Chinese construction contractors into the existing industrial relations system. These contractors did not join the existing industry association and were the subject of many complaints about labour law violations. The construction union developed a strategy to address the problem, using political networks to lobby the office of the President, but also conducting public campaigns on the issue. This campaign seems to have brought some results in the shape of action against certain companies by the Ministry of Labour and a public instruction from the Chinese ambassador to Chinese businesses to respect national law.

However, the most concrete results came after the discovery, via contacts with other construction unions also affiliated to BWI, that the China International Contractors

Association had produced a code of conduct for its members that included an obligation to engage with workers' organizations to the extent that local law demanded it (see annexe). Knowing that many of the Chinese construction companies operating in the country were state owned, the construction union went to three companies known also to be members of the industry association and said, as a union official put it to us, "why are you not complying [with your own code]? Your government is telling you to comply" (I7, 11:20). The same official told us that not only did this result in more or less immediate improvements in labour law compliance, it also led to certain companies approaching the union seeking to open discussions about recognition. The official was clear that being able to refer to the code was useful: "Of course now we know the information [about the code]. We did not know before. We were fighting in the air." (I7, 11:45). At the same time as she recognised the value of the code of conduct however, she insisted that political action and lobbying, participation in national tripartite institutions and – most importantly – industrial action remained the core elements of union effectiveness. "At the end of the day if you are fighting and you are toothless nobody's listening to you" (I7, 16:30).

Political pressure in west Africa

The experience of one construction industry union in west Africa is somewhat different in that it has not up to now used private regulation to pursue its objectives. However, its situation and strategy is very similar to that of our southern African union in that its aim is to bring major Chinese enterprises into the ambit of the existing industrial relations system by persuading them either to join an existing construction employers' association or to form one of their own. Union officers had met with the Chinese embassy in an effort to increase the pressure on the major enterprises to do this, one result being that the embassy publicly stated its intention to take action against Chinese enterprises that did not respect national labour law. The construction union officer we interviewed was very optimistic about the possibility of using the Guide to Social Responsibility as a means of further increasing the pressure on Chinese contractors to participate in the national industrial relations system.

Forestry Stewardship Council in east Africa

An east African construction and forestry workers union has used private standards in a different way again but, as with the unions we spoke to in Uganda and southern Africa, the standard is used as a normative point of reference within existing processes of deliberation and political exchange and not as a means of making claims against non-compliant enterprises. In the forestry sector the union engages in industry-level bargaining that includes both large and small enterprises. While many of the larger enterprises have won certification from the Forestry Stewardship Council, one of the major sustainability labelling systems for wood and paper products, the smaller enterprises are much less likely to be FSC certified. Rather than trying to persuade enterprises to seek certification or seeking to report violations by those enterprises that are certified, the union uses the principles and standards in the FSC system as a means to ground the reasonableness of bargaining claims. As one union officer we spoke to put it, "we have borrowed from [the FSC standard] on many occasions to advance our case when we are negotiating... I use that agreement as an eye-opener" (I11, 6:05). Like his southern African colleague, however, this officer made it clear that while the

FSC standard was useful, pursuing the interests of his members turned principally on organization and a willingness to take industrial action.

6. Discussion & conclusion

The Bujagali hydropower project shows how the IFC performance standards systems in effect defined the legitimate participants in the regulation of employment relationships arising from the project as including not just the IFC, its client, the client's principal contractor, the local community and the government, but also the Uganda Building Workers' Union. The UBWU and BWI were able to insist on their right to participate in employment regulation alongside the other groups. Once the union was granted access to the regulatory space, it was able – very successfully – to use its existing power resources and relationships to pursue the interests of its members. Perhaps the most important thing to bear in mind is that the IFC regulation and its compliance monitoring procedures seems to have had no effect whatsoever on these resources or on the capacity of the union to mobilise them.

In southern and western Africa we see a different picture. Construction union strategy in both of these countries involves demanding the inclusion and participation of foreign enterprises in a regulatory space that the unions already occupied and within which they knew they had certain power resources at their disposal. The southern African building workers union we spoke to used the China International Contractors' Association code guide to add to the pressure on major contractors to respect the established rules of national industrial relations that was already coming from government and the Chinese embassy. The result was that contractors not only improved their compliance with existing regulation, but, in approaching the union to open discussion on recognition, signalled their willingness to participate in the existing regulatory space rather than maintaining their previous position, which was in effect to use their economic weight to remain outside the system, ignoring not only the rules but also the other players.

By contrast, transnational private regulation appears overall to have little impact on the basic capacity of workers' organizations to apply power within the regulatory space. As Hancher and Moran suggest, this capacity is influenced principally by "the legal tradition and by a wide range of social, economic and cultural factors" (p.165). These are largely untouched by TPR except perhaps where regulation increases the perceived legitimacy of unions as participants in regulatory processes. Nevertheless, private standards may in some cases augment the power of workers' organizations a little more tangibly to the extent that they provide an externally validated normative point of reference for the substantive claims of workers' organizations. It may be difficult for employers and governments to contest the standards and rights in question either because they have already explicitly stated their agreement or because there is wide recognition that the regulation expresses valid principles. The principles set out in industry codes, multistakeholder certification standards and investment conditionality will in many cases have an a priori legitimacy within the regulation game that means that any non-compliance with these principles can be used as leverage in the hands of workers' organizations. This was the experience of the east African union that used FSC regulation as 'an eye-opener' in bargaining with forestry companies.

The possibilities for the transformation of local contexts of action that we have identified – union access, employer inclusion and bargaining leverage – suggest that both the outcome standards and the process rights established in the labour standards clauses of TPR schemes may in certain cases help to augment worker voice and participation. We have argued that the capture argument is inadequate not because TPR has made any significant impact on the social relations that give rise to working conditions, but because it significantly underplays the opportunities that TPR offers to workers in developing countries. It ignores both the interaction between transnational and national regulation and the existing capacities and resources of local actors. By contrast, thinking in terms of the regulatory space surrounding the employment relationship draws our attention to how TPR might grant unions access to that space where they had previously been excluded; how it might permit them to demand the inclusion of other actors in a space they already occupy; and how it might provide supplementary leverage or bargaining chips that increase unions’ capacity to pursue their members’ interests within it. Perhaps even more importantly, it also highlights the limits of TPR by acknowledging that participation in regulatory space demands organizational capacities and resources that TPR rarely if ever supplies.

Although it would be hazardous to generalise on the basis of such a limited range of cases, our findings with respect to the use that unions have made of TPR in Africa tend to suggest that while private labour standards are not totally ineffective, the capacities and resources of local actors may be significantly more important in the determination of outcomes than the technical detail of labour clauses or even the nature of enforcement mechanisms. However, it is important to note that industrial relations traditions in all four national contexts we looked at is *voluntarist*: whether workers have or do not have collective representation depends on workers forming or joining unions and on the union subsequently claiming the right to be recognised by the employer as their representative. The culture and practice of trade union organization is closely focused on pro-actively organizing workers and demanding access to regulatory space. In different national industrial relations contexts, for example those in which collective worker representation is mandated or centralized, the structure of regulatory space, the ‘rules’ that determine access to it and the acceptable means of acting within it may be very different. In these cases it would be wholly unsurprising if TPR had a different effect or was used in different ways.

Finally, we cannot discount the possibility that labour clauses within TPR may begin to include stronger collective process rights. The revised ‘Hired Labour’ standard recently introduced by Fairtrade International, for example, requires non-unionised employers to demonstrate that workers have actively and consciously rejected the possibility of collective representation via a trade union. In effect, instead of obliging a union to demonstrate that it has sufficient membership to claim to be representative of workers, the burden of proof is shifted to employers who are required to show that workers do *not* wish to be unionised. A priori, this new standard has considerably greater potential to lead to increased levels of worker voice and participation than the overwhelming majority of TPR schemes.

Further research in this field will need to take a more systematic approach to the different elements of the regulatory picture, taking into account the technical content of regulation and enforcement mechanisms, the industrial relations context and the capacities and resources

available to local actors. In this way we can begin to understand the dynamics of regulatory space and the capacity of transnational private regulation to transform the social and economic relations that have led to the shockingly poor outcome standards still to be found at the end of global supply chains.

Annexe: TPR texts on workers' organizations

International Finance Corporation performance standard 2

9. 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 alternative means for workers to express their grievances and protect their rights regarding working conditions and terms of employment.

10. In either case described in paragraph 9, 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. Clients will engage with such worker representatives. Worker organizations are expected to fairly represent the workers in the workforce.

China International Contractors' Association Guide on Social Responsibility

HR20 Establish employer-employee negotiation mechanisms in accordance with local laws and practices, and support employees' participation in management.

HR21 Respect employees, establish two-way communication channels and mechanisms between the enterprise and employees and learn and respond to employees' expectations and claims.

FSC Draft Standard for east African country

4.2 Forest management should meet or exceed all applicable laws and/or regulations covering health and safety of employees and their families.

4.2.1 The forest owner or manager provides employees with information about the remuneration and benefits due to employees.

4.2.2 The forest owner or manager provides training on occupational safety for the employees and provides information on potential health risks for all forest operations.

4.2.3 The forest owner or manager shall ensure all workers have all appropriate safety equipment and clothing such as helmets and boots.

4.2.4 The forest owner or manager keeps records of accidents and demonstrates a good record of safety.

4.2.5 The forest owner or manager has ascertained the risk to workers of particular tasks and equipment and taken all reasonable measures to reduce or eliminate such risks.

4.2.6 Forest workers have access to appropriate health facilities.

4.3 The rights of workers to organize and voluntarily negotiate with their employers shall be guaranteed as outlined in Conventions 87 and 98 of the International Labour Organization (ILO).

4.3.1 The forest owner or forest manager shall provide information to the employers' membership about the employees' rights in regard to membership in labour unions.

4.3.2 The rights of workers to organise and voluntarily negotiate through unions or other worker representative groups as defined above and in the relevant national legislation are recognised.

4.3.3 All relevant labour code/regulations that include prohibition of child labour are applied.

4.3.4 Wages and social benefits are comparable to national norms.

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