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Private regulation and labour representation: The impact of the International Finance Corporation's 'performance standards' on freedom of association and collective bargaining

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Introduction

The potential for transnational private or non-state regulation to have an impact on labour standards has been much canvassed in recent years. It has been argued that working conditions in developing economies can be improved by making supply contracts conditional on labour standards compliance or by offering access to premium price markets through product labels that certify the successful completion of a social auditing process. . The most optimistic observers see in private regulation the potential to bypass the low standards and weak enforcement mechanisms that tend to characterize labour law in developing economies, establishing clear normative expectations about and limits on corporate behaviour in contexts where the capacities of the state are no match for the economic clout of transnational corporations. Thus private regulation is a critical element in a governance regime proposed as an alternative both to the traditional state-centric system of regulation via public intergovernmental organizations and to purely market-oriented systems of corporate social responsibility, control over the normative content of which remains entirely in the hands of businesses themselves (Hassell, 2008; Meardi and Marginson, 2014).

But does the evidence give us any reason to be optimistic about the impact of private labour regulation on working conditions in developing economies? The emerging consensus is that while market incentives to improve wages and conditions of work have had a very modest positive effect on certain measurable welfare outcomes like hours of work and health and safety standards, there has been little discernible impact on the capacity of workers to pursue such improvements for themselves via collective action (AFL-CIO, 2013; Barrientos and Smith, 2007a; Egels-Zandén and Merk, 2013a; Lund-Thomsen and Lindgreen, 2014). This, despite the fact that reference to the ILO's core conventions on

freedom of association and collective bargaining rights is a ubiquitous feature of private labour standards systems.

It is tempting to conclude on this basis that the emerging system of private labour governance remains firmly in the control of employers. In the absence of any change in power relations, improvements in pay and working conditions will be limited by the financial interests of businesses. Nevertheless, the existing research suffers from two problems which may mean that this is too pessimistic a view. First, insufficient attention has been paid to the capacity of local actors to use private regulation proactively rather than waiting for some monitoring and enforcement process to take its course. Case study evidence collected by the authors (Cradden and Graz, 2015) shows that a number of trade unions in Africa have been able to make gains in terms of organization and recognition on the basis of private codes and standards of different kinds, even in the absence of any kind of formal enforcement mechanism, by using regulation as a normative reference point in campaigning for representation rights. Second, the overwhelming majority of the evidence that exists about the labour impacts of private regulation arises from small ‘n’ case studies limited to single firms or industrial sectors in particular locations. While larger scale studies do exist, we are not aware of any that permit comparisons between businesses that apply private regulation and those that do not.

Our aim in this paper, then, is to appraise the impact of private labour regulation using a broadly quantitative approach without losing sight of the fact that such schemes rely on local actors for the enforcement of their provisions. We contribute additional insights to the literature on transnational private regulation and labour standards based on an analysis of how the distinctive legal structure of private compliance initiatives conditions the possibilities for worker collective action.

Our findings arise from a case study of the labour aspects of the International Finance Corporation's (IFC) 'performance standards' system. The IFC is the private sector investment arm of the World Bank. Since 2006, it has required its clients to comply with a comprehensive system of social and environmental standards, including standards on labour and working conditions. The duty to comply is written into the loan or investment contract and failure to respect the conditions can lead to the withdrawal of finance. The characterization 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, what is rather more important is the fact that a single regulation system is applied at firm level in different national and sectoral contexts. Our study covered some 145 IFC client businesses in four world regions, drawing on a dedicated field survey that gathered information directly from workers, managers and union representatives in 55 of these enterprises. More detailed case study work was carried out in 7 enterprises and fieldwork was supplemented by interviews with IFC staff. We also relied on desk research for data made public by the IFC and other international organisations.

Our findings show that the impact of the IFC's performance standards system on collective 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.

In what follows we provide some background on the IFC's performance standards system before reviewing the existing literature on the impacts of private labour regulation. We then propose our analytic framework together with four hypotheses about the impact of IFC regulation on collective organization and action. Finally we present and discuss our findings, showing that the performance standards system has at best a marginal effect on workers' capacity to take collective action.

The IFC's Performance Standards System

The IFC describes itself as "the largest global development institution focused exclusively on the private sector in developing economies"(IFC, n.d.). Since 2006 the IFC has required its clients to comply with social and environmental 'performance standards' as a condition for the receipt of financing. 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. 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 that deal with

freedom of association and collective bargaining. The performance standards were revised in 2012, and some minor changes were made to the workers' organizations provisions. The 2012 version of these provisions is as follows:

> 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 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.
>
> In either case described [above], 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 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.

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.

Complaints

Within the PS system there are two possibilities for resolving compliance problems. First, any affected individual or group 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" (CAO, n.d.). If the complaint is not resolved satisfactorily, the second stage of the process is triggered. This involves an investigation focused not on the behaviour of the client business, but on the conduct of the IFC itself from the perspective of the due diligence it ought to have applied in supervising the client's compliance with the performance standards. 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-six complaints to be registered, it remains informal in the sense that it lacks any kind of status or established procedure.

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.

Private Compliance Initiatives and Labour Standards

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 this transnational private labour regulation (TPLR) 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. According to Anner (2012), the voluntary nature of TPLR gives rise to 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, private regulation 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. A prominent theme in the literature is the importance of distinguishing between two basic types of regulation: 'process rights' and 'outcome standards' (M. Anner, 2012; Barrientos and Smith, 2007a; J. Brudney, 2012; T. Caraway, 2006; Chan, 2013a; Egels-Zandén and Hyllman, 2007a; Egels-Zandén and Merk, 2013a; Lund-Thomsen and Lindgreen, 2014; Neumayer and Soysa, 2006)(Mark Anner, 2012; Barrientos and Smith, 2007b; J. J. Brudney, 2012; T. L. Caraway, 2006; Chan, 2013b; Egels-Zandén and Hyllman, 2007b; Egels-Zandén and Merk, 2013b; Lund-Thomsen and Lindgreen, 2014; Neumayer and de Soysa, 2006). While the former guarantee processes such as freedom of association and

other collective rights that address the structural power imbalance of employment relationship, the latter refer to substantive outcomes defining the wage labour nexus, such as minimum wages, working hours or health and safety policies.

Overall, the existing empirical research shows that while TPLR has had at least some impact on outcome standards, there has been no discernible effect on process rights. While firms may be 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 (AFL-CIO, 2013; Anner, 2012; Barrientos and Smith, 2007a; Egels-Zandén and Merk, 2013a; Fransen, 2013; Lund-Thomsen and Lindgreen, 2014). As Anner puts it, “the desire for legitimacy and reputational protection are mitigated by another corporate motivator: control” (*ibid*., p.633).

Nevertheless, there remain some optimists who believe that it is too early to dismiss the possibility that TPLR 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. 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 or to encourage the development of independent worker representation. Toffel et al's recent analysis (2015) of the results of a large number of social audit reports is even less enlightening, excluding any consideration of freedom of association and collective bargaining rights on the grounds that there is too much variation in the application of these standards across different national, cultural and industrial contexts.

Our study of the IFC performance standards system is intended to address at least some of these problems by looking at the impact of one particular private labour regulation scheme from a principally quantitative perspective, focusing on how the capacities of workers are – or are not – changed by the presence and enforcement of the regulation scheme in local contexts of action. We need in this respect to take a closer look at the legal structure of such private compliance initiatives.

The legal structure of private compliance initiatives, the decision to enforce and the role of local actors

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 non-compliant. 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.

The potential impact of PS2 on collective industrial relations at the firm level: four hypotheses

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. This reasoning points to four hypotheses about the impact of transnational private regulation schemes on the enforcement of labour standards at the firm level. Two of these 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

Our first proposition concerns 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. Our second hypothesis is 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.

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.

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.*

Data sources and methodology

With almost 2100 active and completed investment projects across the world that have been or are still subject to the requirements of the IFC performance standards, our first task was the identification of a sample of those projects. Having ruled out a stratified random sampling approach on the grounds that it led to a logistically unmanageable geographical spread of projects, we settled instead on a purposive sampling strategy. Our most basic research objectives were to ensure that we can draw some general conclusions on the basis of our specific findings, and that we have the capacity to make meaningful cross-national and cross-sectoral comparisons (following the practice of l(Locke et al., 2013). The constraints were largely pragmatic: time and the requirement for travel. We therefore set about identifying geographic units based on the following criteria:

- the presence of a set of IFC client enterprises working in a reasonable range of different industrial sectors (excluding finance)
- the presence of sufficient regional concentration of client businesses to facilitate field researcher travel
- the inclusion of countries/regions with differing levels of economic development, as measured by GDP per capita
- the inclusion of countries/regions with differing traditions of trade unionism and workplace regulation, in particular common law as opposed to civil law regimes.

An analysis in these terms indicated four geographical units that fulfilled these criteria: Brazil, Turkey, the East African Community (Kenya, Burundi, Uganda, Rwanda and Tanzania) and the neighbouring states of Gujarat and Maharashtra in India. In our four regions we now had a list of 145 target enterprises.

Researchers in each region were charged with gathering information on as many of these client businesses as possible. In the event it proved to be more difficult to get access to these businesses than we had anticipated. The businesses themselves were reluctant to talk to our researchers, still less to grant them unsupervised access to workers. The IFC declined to ask its clients directly to help us, although it did offer to write to client businesses vouching for the academic credentials of the project team. However, this offer was later rescinded without explanation. Nevertheless, our researchers were able to carry out in-person interviews with 297 workers from 53 different businesses, 34 union representatives from 30 businesses and 18 management representatives from 18 businesses. Altogether, information was gathered from 55 businesses. Our analysis, then, is based on the information made publicly available by IFC on the initial 145 businesses, plus survey data gathered in 55 of these. Our sample of 55 client businesses is clearly neither a random nor a representative sample. Nevertheless, there is little reason to believe that it is systematically skewed in such a way as to affect our overall conclusions.

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'.

In terms of data to serve as a baseline for estimating whether IFC client firms differed from non-client firms, the principal source 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.[1] 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?". 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.

Findings

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. In considering the question of density, there are two factors to bear in mind. The first is that union density

[1] See http://www.enterprisesurveys.org

scores are not normally distributed across firms and parametric statistical tests are therefore inappropriate. The second factor 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 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.

For the 75 businesses for which we were unable to find a reasonably reliable density figure we adopted a conservative interpolation strategy. In 28 of these cases, IFC information gave a clear indication that collective bargaining was going on in the business. In these cases we used 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, and for which our field researchers were unable to find a trade union contact, we simply set the union density to zero.

The 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. Our samples were split into matched subsamples of businesses in the same sector and location. So for example, IFC client businesses in the manufacturing sector in Tanzania was matched with Tanzanian manufacturing businesses for which World Bank Data is available. The matched subsamples were combined and the density scores ranked from lowest to the highest. Each rank was 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 the IFC sample will not be concentrated disproportionately in either the top or bottom

half of the combined ordering. If this is the case then the averages 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 average 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 overall union density. This finding needs to be treated with care, however. As we will see below, there is little reason to believe that higher union density in IFC clients is due to any effect of the application of the performance standards.

Conformity

Our survey data provides prima facie evidence that despite the performance standards, violations of freedom of association and collective bargaining rights are far from unusual. Workers were asked 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.

Internal change – direct effects

Unless the risk of non-conformity is thought to be negligible, IFC publishes an ‘environmental and social review summary’ (ESRS) for each client business 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 ***no*** 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%
Incidence of mitigation measures					
• 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'.[2]

Only one of our 145 businesses had been the subject of a complaint. This complaint was made through both of the available mechanisms by a national trade union on behalf of members in a business in Turkey. The complaint concerned management tactics apparently designed to ensure that the union did not pass the 50% membership threshold required for compulsory recognition. Despite CAO efforts at conciliation, management refused to recognise or even talk to the union. The CAO's ultimate solution to the complaint was to recommend that some kind of non-union 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. 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. The social dialogue council remained in operation only for a short time as the union subsequently won recognition following the decision of a large group of contract workers to join. The workers we interviewed believed that the IFC investigation had had no effect on this.

[2] 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.

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 and that it contains guarantees about freedom of association and collective bargaining. 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.

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.

Discussion

We can interpret our findings in the light of the conditions for standards enforcement that we proposed above. First is the question of *information*. The IFC's principal source of compliance 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. It is difficult to see how any claim that freedom of association rights are being respected could be sustained under these circumstances simply because, unless we assume that businesses will report their own violations to IFC, IFC cannot possibly know whether workers' rights are being respected.

The second potential problem arises around issues of *interpretation*. Even in those rare cases 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 evidence we have gathered suggests that IFC has adopted an exaggerated neutrality with respect to these rights which means that, on the one hand, it will not insist on workers being informed about these rights and, on the other, consistently defers to national law in terms of, for example, thresholds for union recognition. The mitigation measures it requires in these areas are weak and formalistic and it has even encouraged the implementation of non-union worker representative structures.

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.

The third problem is conflict of *interest*. Even where it can be established that a client is non-compliant, enforcement decisions are not made independently of any consideration of IFC's interest in maintaining the financial relationship with the client. Where the decision is made to withdraw from an investment because of unaddressed standards violations, this decision is not made public. The complaints mechanisms that exist are not transparent and no attempt is made to rule on the merits of complaints.

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 rights, despite their critical importance. This contrasts with the case of outcome standards 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 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. 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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