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### **Transnational private authority, regulatory space and workers' collective competences: Bringing local contexts and worker agency back in**

Conor Cradden, Jean-Christophe Graz

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Dr. Lionel Marquis

Université de Lausanne  
Institut d'Études Politiques, Historiques et Internationales  
Bâtiment Géopolis • 1015 Lausanne  
CH – Switzerland

Tel +41 21 692 31 30  
Fax +41 21 692 31 45  
nicole.ferrari@unil.ch  
<http://www.unil.ch/iepi>

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# **Transnational private authority, regulatory space and workers' collective competences: Bringing local contexts and worker agency back in**

Connor Cradden<sup>1</sup>

Jean-Christophe Graz<sup>2</sup>

University of Lausanne, Institut d'études politiques, historiques et internationales

## **Résumé**

L'influence de la régulation transnationale privée sur les normes du travail reste controversée. Bien que les études fournissent quelques preuves d'un effet positif sur les salaires, la santé au travail et la sécurité (outcome standards), la littérature donne peu de raison de penser que cette régulation puisse aussi avoir une influence sur la négociation collective et le dialogue social (process rights). Basée sur une recherche empirique menée en Afrique Sub-Saharienne, notre étude explore cette problématique en prenant au sérieux le contexte local ainsi que la capacité d'agir des travailleurs. Elle présente un cadre d'analyse qui met l'accent sur le potentiel des travailleurs d'agir collectivement dans l'espace régulateur des relations industrielles. Alors que la régulation transnationale privée sur les normes du travail peut incidemment améliorer l'accès des travailleurs aux espaces de régulation ainsi que leurs capacités de réclamer l'inclusion des entreprises au sein de ces espaces, elle n'a que peu d'effet sur le poids des syndicats dans des processus d'échange politique et industriel.

Mots-clefs : régulation privée transnationale; International Finance Corporation; liberté syndicale & droits d'organisation et de négociation collective

## **Abstract**

The impact of transnational private regulation on labour standards remains in dispute. While studies have provided some limited evidence of positive effects on 'outcome standards' such as wages or occupational health and safety, the literature gives little reason to believe that there has been any significant effect on 'process rights' relating primarily to collective workers' voice and social dialogue. This paper probes this assumption by bringing local contexts and worker agency more fully into the picture. It outlines an analytical framework that emphasizes workers' potential to act collectively for change in the regulatory space surrounding the employment relationship. It argues that while transnational private regulation on labour standards may marginally improve workers access to regulatory spaces and their capacity to require the inclusion of enterprises in them, it does little to increase union leverage. The findings are based on empirical research work conducted in Sub-Saharan Africa.

Keywords : transnational private regulation; International Finance Corporation; freedom of association & collective bargaining rights

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<sup>1</sup> Responsable de recherche, Géopolis, Université de Lausanne, connor.cradden@unil.ch

<sup>2</sup> Professeur ordinaire, Géopolis, Université de Lausanne, Jean-Christophe.Graz@unil.ch

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## Introduction<sup>3</sup>

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 world order (Albert and Buzan 2013; D'Aoust 2012; Kessler and Guillaume 2012; Lawson and Shilliam 2010). In order to tease out this sociological turn, we take up the pioneering reflections of scholars such as Cox (1987) and Harrod (1997) who brought production and social relations back into international relations. As Harrod argued, "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 requires the study of those fragmented areas which address the details of production relations" (1997, 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, 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) in the domain of labour standards, in particular freedom of association and collective bargaining rights, and the relation between TPR and local contexts of action.

The existing literature on private labour regulation distinguishes between substantive 'outcome standards', for example those relating to wages, occupational health and safety or hours of work, and 'process rights' relating primarily to collective worker voice and social dialogue. While studies of private regulation have provided some limited evidence of positive effects on outcome standards, the literature gives little reason to believe that TPR has significantly reinforced process rights (Anner, 2012; Barrientos and Smith, 2007; Egels-Zandén, 2007; Oka, 2009). This understanding relies on the assumption that workers' capacity to organize and take action in pursuit of improvements in wages and working conditions depends only on formal process rights relating to freedom of association and collective bargaining together with the associated compliance monitoring and enforcement procedures. Making such an assumption focuses too much attention on the technical content of regulation and the politics of its development at the transnational level. It ignores a wide range of potential connections and interactions between TPR and national regulation, informal political culture and practice and, most importantly, the existing capacity of workers' organizations to pursue their members' interests via legal, political and other institutional means.

In the attempt to bring local contexts and worker agency back into the picture, we draw upon Hancher and Moran's concept of 'regulatory space'. Hancher and Moran argue that regulation is always the outcome of competition and exchange between a range of different organizational players. As they put it, "Understanding economic

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<sup>3</sup> The authors thank the Swiss Network for International Studies for the funding of the 'Governance by Contract' project, of which this paper presents some preliminary results. For further information, please see: [http://www.snis.ch/call-projects-2012\\_3296\\_governance-contract-impact-international-finance-corporations-social-conditi](http://www.snis.ch/call-projects-2012_3296_governance-contract-impact-international-finance-corporations-social-conditi). We are also grateful for comments and suggestions made by the participants in the International Political Sociology working group of the Swiss Political Science Association annual conference, held in Berne in January 2014.

regulation ... involves understanding the terms under which organizations enter regulatory space, and defend their position within it. This is in turn heavily influenced by the prevailing general political attitudes and legal traditions existing in any community to the place of organized interests in the policy process" (1989, 278). Our analytical framework builds upon the authors' emphasis (a) on who are the participants in regulatory processes and (b) on the 'play of power', i.e. the resources and capacities that participants are able to, and may legitimately, mobilise within the regulatory space. We thus conceive workers' potential to act in terms of their 'collective competences', defined as means to act collectively for change in the regulatory space surrounding the employment relationship. Collective competences give workers an ability to pursue improvements in pay and working conditions by constituting themselves as a collective actor with the capacity to participate in and influence the outcomes of regulatory processes. We outline an analytic framework in which the impact of TPR schemes is assessed according to their effect on the legitimate use and limits of three distinct collective competences called access, inclusion and leverage.

This paper draws on two pieces of qualitative research. The first is a case study of an application of one particular TPR scheme, the International Finance Corporation's 'performance standards' system. This study concerns the Bujagali hydropower project in Uganda and is based on online data published by the IFC and interviews held in Uganda and Switzerland between July and November 2013. The second piece of research presented in the paper is a shorter report of participant observation<sup>4</sup> during a three-day meeting of officers of African construction industry trade unions. The participant observation, which also included several individual interviews with trade union officers, focused on trade union experiences with private regulation in general. Together, these two pieces of research suggest that while the process rights relating to freedom of association and collective bargaining included in TPR schemes cannot be written off as meaningless, TPR is only likely to have any real impact where workers' organizations already have the capacity and resources to pursue the interests of their members independently. In terms of collective competences, we show that while TPR may improve workers access to regulatory spaces and their capacity to require the inclusion of enterprises in them, it does little to increase union leverage.

What follows is divided into six sections. In sections one and two 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 three, we argue that explaining this phenomenon demands that we take into consideration the local regulatory context and of the capacities and resources of local actors. We introduce the concepts of regulatory space and workers collective competences in order to present an analytical framework that brings local contexts and worker agency back in the study of private labour standards. In sections four and five we present our case studies, showing how TPR may grant workers' organizations access to participation in regulatory processes, how it may enable

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<sup>4</sup> This is not intended here in the anthropological sense of the observation of the behaviour and interaction of the individuals involved, but simply to indicate that one of the authors played an active role in the meeting, presenting a research project and participating in discussions as well as conducting interviews.

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 draw some conclusions.

## **Transnational private regulation: bridging the global labour standards deficit?**

The existing system of formal intergovernmental social and environmental governance was built 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 the global economy have been put in question by the process of globalization. As Vogel (2009) points out, globalization has 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. Introducing a comprehensive volume on the international political economy of production, van der Pijl (van der Pijl 2015) puts it straightforwardly: globalization has resulted in a "world map of productive and other paid work that shows a functional differentiation between cadre functions [...] concentrated in the West as mental labour; whereas productive activity as manual labour has a much greater weight in Asia and Latin America, both developed and underdeveloped". Even the most powerful states have only limited capacity to effectively regulate the activities of transnational corporations and supply networks. Less powerful states are all the more 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, 73) and that "governments alone cannot solve all problems of transnational economic regulation" (Graz and Nölke 2008, 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, 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. Analyses identify various types. Suffice here to call to mind that the most important are investment and contract conditionality, supply chain codes of conduct, multi-stakeholder sustainability standards and industry self-regulation codes. The first three of these operate in the same way, demanding 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. They also offer the less tangible incentive of improved corporate reputation, something shared by industry self-regulation codes. 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.<sup>5</sup> 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 and Lane 2011; Anner 2012; Schrank 2013; Diller 1999; O'Rourke 2003; Stevis 2010; Locke, Rissing, and Pal 2012).

The literature on labour standards makes a clear distinction between the kind of labour standards that establish substantive minimum conditions of work, and freedom of association and collective bargaining rights. This latter pair of rights are either treated as regulatory topics that merit separate evaluation (Caraway 2006; Brudney 2012; Chan 2013; Anner 2012) or the argument is made that properly nuanced assessments of the effectiveness of private labour standards regulation demand that a distinction be drawn between substantive *outcome standards* and procedural or *process rights* (Anner 2012; Barrientos and Smith 2007; Egels-Zandén and Merk 2013). 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.

## **Freedom of association and collective bargaining rights in TPR**

The widespread inclusion of freedom of association and collective bargaining rights in private regulation systems appears at first sight to sit uneasily with 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 and McCoy 2008).

The 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

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<sup>5</sup> 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. See [www.standardsmap.org](http://www.standardsmap.org).



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 a weaker understanding of freedom of association, based on the individual negative right to associate, at the expense of 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, 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 are included in private regulation at the same time as possessing what Brudney calls "a subtly disfavoured status" within it (2012, 57). It may be the case that the process rights typically included in private regulation systems are interpreted and applied in such a way that while they increase workers ability to gain access to regulatory processes or to insist on the inclusion of employers in joint regulation, they do little to enhance collective worker leverage. As Anner puts it, "corporations will favour programs that enhance their legitimacy but do not hamper their control (Anner 2012, 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" (Barrientos and Smith 2007, 727).

## **Regulatory space: Bringing local contexts and agency back into the picture**

While Anner and Barrientos and Smith are undoubtedly right to emphasise the technical details of regulation and the attitude of corporations to its enforcement, thinking of TPR merely in terms of the way the rules are drawn helps us neither to understand the impact that it does have nor to predict that which it could potentially have in different circumstances. In this particular domain, Bartley has stressed that 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, 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, 568). Just as the return of the state in global governance has recently been scrutinised in terms of concrete practices that reconstitute the public character of new actors and processes, the impact of TPR on labour standards should be assessed from the perspective of their socially constructed and historically specific nature (Best and Gheciu 2014, 25).

The concept of ‘regulatory space’ forged by Hancher and Moran (1989) is one means of getting past the focus on the detail of regulation and its development and to introduce an appropriate emphasis on agency and on historical and contextual factors. For Hancher and Moran, the critical task is to understand the nature of the common regulatory space: “the rules of admission, the relations between occupants, and the variations introduced by differences in markets and issue arenas” (1998, 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, 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 (1998, 154). Second, and more importantly, 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” (1998, 154), 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 set. The outputs of regulatory space are therefore precisely the same kind of *outcome standards* that are established in TPR, which is to say standards that define the acceptable level of material reward for different types of work and the concrete, measurable aspects of the physical and relational context in which it takes place. While there is obviously a significant governmental input to employment regulation of this kind in the shape of the legal framework for employment including, for example, legislation on employment contracts, health and safety requirements, holidays, sick pay, discrimination and so forth, we are concerned here with regulatory processes that occur downstream from the establishment of public legal frameworks. The regulatory space surrounding the employment relationship is that within which the detail of the terms and conditions of *specific* employment contracts in *specific* businesses is determined. There are two principal possibilities that arise. Either the regulatory space exists at the enterprise level and involves the owners, managers and workers of the single business as well as any trade unions recognised by the business; or it exists above the enterprise level, regulating employment across a range of different businesses in the same region or – more frequently – industrial sector. In this second case the participants in the regulatory space are the owners and managers of multiple businesses, their representative organizations and one or more trades unions, again with members in multiple businesses.

While outcome standards represent the outputs of regulatory space, the processes and interactions by which those outputs are agreed depend on *process rights*. Again, this is intended in precisely the same sense as the term is used with respect to TPR. Process rights define who is permitted but also who is required to participate in job regulation, together with the formal 'rules of the game' applying to participants. From a workers' perspective, process rights are of critical importance because they are a key element in the constitution of 'collective competences', defined as means to act collectively for change in the regulatory space surrounding the employment relationship. They give workers the capacity to act collectively in order to improve their wages and terms and conditions of work by participating in the regulatory space surrounding the employment relationship.

The first of the competences that process rights may guarantee or underpin is workers' organizations' ability to gain *access* to regulatory space. Access is simply the ability to exist as a collective actor able to participate in regulatory processes. As such it will be affected by rights to form unions, to recruit workers, and to be recognised by employers as the legitimate representative of workers for bargaining purposes. Process rights in this area may also indirectly affect intersubjective perceptions of the respective roles and prerogatives of workers and employers, for example enhancing the perceived legitimacy and reasonableness of independent worker organization.

The second collective competence is *inclusion*. Although it is similar to access in that it is used to bring employers and workers' organizations into relation with each other within the same regulatory space, it is different in that it involves workers' organizations pulling enterprises into *existing* regulatory processes to which workers have already gained access. Inclusion is a competence of workers' organizations that already have the capacity and resources to act in certain regulatory contexts, in particular sectoral level bargaining. It refers to the ability of these organizations to insist that enterprises participate in a particular, existing regulatory space rather than remaining outside it in the attempt to maintain unilateral control over workers' terms and conditions of employment. Process rights affecting inclusion may include obligations on employers to join employers' organizations, to participate in bargaining, particularly at the sectoral level, or to apply the terms and conditions agreed in such processes. Again, formal process rights may also have an effect via their contribution to the emergence of informal norms applying to corporate behaviour, in this case the obligation to participate in existing industrial relations processes and institutions.

The third collective competence is *leverage*. Leverage refers both to workers' capacity to win arguments and to their ability to apply power within regulatory space. Processes of employment regulation are not simply power games. Rather, they involve a mix of technical and normative argument on the one hand and political and industrial pressure on the other (Cradden 2014). Leverage therefore depends on the technical capacity to construct plausible proposals and to make effective arguments in favour of them, together with the ability to force other participants to reach an agreement if required. The relevant process rights will include those that specify the circumstances under which industrial action is permissible, the types of action that may be taken, the procedural steps that have to be taken before action can go ahead, any requirements for conciliation or arbitration, the rights of employers to hire new labour to replace strikers etc. They may also include rules about the relationship between trade unions and political parties, formal participation rights for unions and employers in government policy-making and so on. Perhaps even more than access and inclusion, leverage depends not only on formally codified rights but also on informal norms and expectations about conditions under which using power to constrain employer choices and what represents a reasonable package of pay and working conditions. Outcome

standards may thus also be relevant to union leverage, as 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. Any non-compliance with these principles can be used as leverage in the hands of workers' organizations.

Having defined workers' capacity to pursue improvements in their own wages and terms and conditions in terms of collective competences, we can see that TPR may have an impact on that capacity in two ways. First, it may introduce new process rights or reinforce those that already exist by adding a market incentive for compliance. Second, it may contribute to change in intersubjective perceptions of acceptable corporate behaviour, of the legitimate scope of trade union action and employer reaction, and of what count as decent conditions of employment.

Figure 1 summarizes this analytical framework, showing the relationship between process and outcome standards in TPR and transformations of regulatory space. The principal result of the play of power in regulatory space is agreed outcome standards. Process rights determine who is entitled to participate in regulatory space and their capacity to act within it by defining collective competences or altering these to the extent that they already exist. Access is a competence that is exercised partially outside regulatory space, but which allows workers to enter and participate. Inclusion and leverage are exercised within regulatory space. Transnational private regulation affects both process rights and outcome standards, either setting new standards or altering existing norms and conventions. Change in process rights due to TPR may affect all three collective competences, but change in outcome standards will affect only leverage. The following case studies present some findings on the interplay between process rights granted by labour standards included in TPR and those three collective competences.

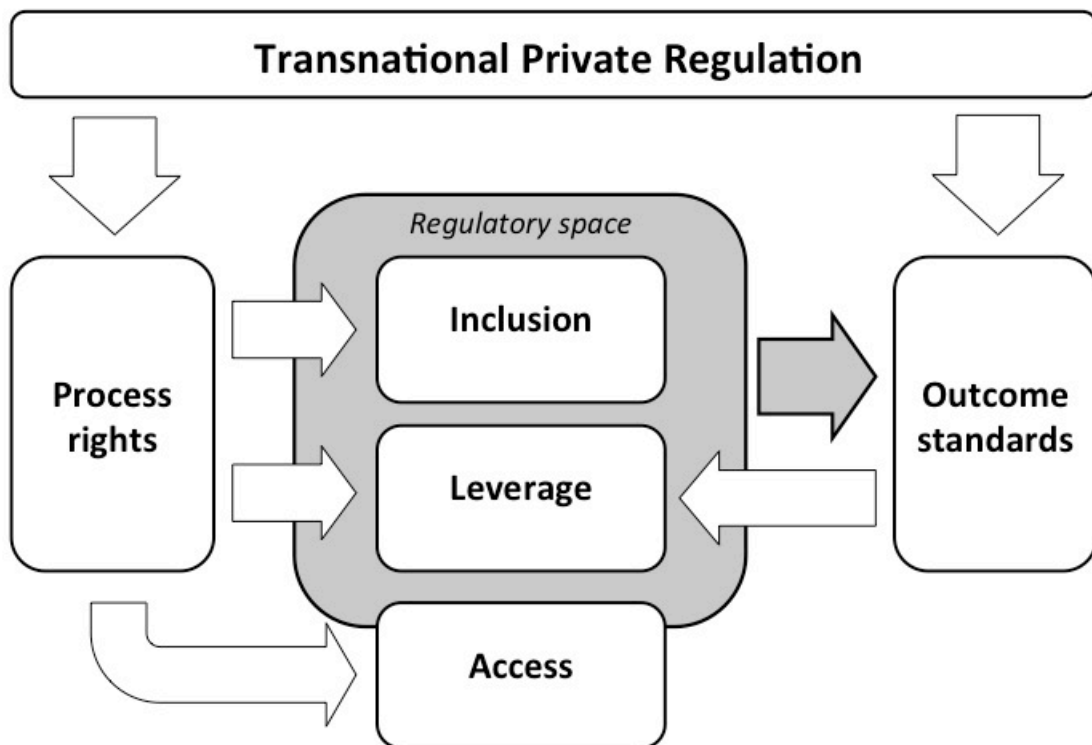


Figure 1: Transnational private regulation, workers' collective competences & employment regulation

## **Workers' collective competences during the Bujagali hydropower project**

The Bujagali hydropower project is one case in which the application of TPR had a clear impact on the ability of a trade union to gain access to a regulatory space surrounding employment relationships at the enterprise level. In what follows we will briefly discuss the TPR scheme in question, the actors involved, and how the capacity of the union to participate in employment regulation during this major construction project was affected by the process rights contained within the private regulation scheme.

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 obligation written into loan and investment contracts. In principle, an enterprise's failure to comply with the performance standards will lead to the withdrawal of the IFC's loan or investment. Performance standard 2 on labour and working conditions contains a section on workers' organizations:

"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...

[W]here 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."

The IFC was part of a consortium of public agencies and private investors that, starting in 2006, provided funding for the Bujagali hydropower project. The project involved the construction of a hydroelectric power station on the Victoria Nile river about 80 kilometres east of Kampala in Uganda. The beneficiary of the funding was an enterprise called Bujagali Energy Limited which had won a thirty-year concession to build and operate the plant from the Ugandan national electricity company. The IFC's investment of US\$130m represented around 17.5% of the total cost of the plant. At its peak, the construction project employed some 4000 workers.

The project quickly attracted the attention of the Uganda Building Workers Union (UBWU), a trade union that organizes construction and allied workers throughout Uganda with membership of around 2500. The UBWU is affiliated to the Building and Woodworkers International Union (BWI), 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. When the performance standards system was introduced in 2006, the BWI saw the

opportunity to look 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.

It is against this background that the international union took an active interest in the Bujagali project. BWI and the UBWU developed a plan to recruit workers employed on the contract and to seek recognition from the employing enterprises. In the terms we have been using here, the unions aimed to use the process rights contained in the IFC's performance standards to augment the local union's capacity to win access to the regulatory space surrounding employment on the project. Both Bujagali Energy Ltd and its principal construction contractor were initially reluctant to meet the union. The client in particular seemed to view its commitments as falling under the general heading of stakeholder relations rather than constituting a specific and separate type of relationship.

Two factors may explain the eventual agreement of the contractor to meet with UBWU and the subsequent decision to recognise the union and negotiate a collective agreement. First, the UBWU and BWI, the Labour Ministry and the responsible IFC investment officer carried out a coordinated campaign to pressure the contractor into recognising the union. According to the BWI, the IFC investment officer 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. As Murie reports (2009), the Ugandan Ministry of Labour has a generally positive attitude to the implementation of internationally compliant labour standards and the legislative environment is favourable to collective industrial relations. BWI seems to have been influential on how the labour ministry saw and understood the potential of the IFC performance standards for granting access to the regulatory space. 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). UBWU officers told us that the Labour Ministry also pressured the principal construction contractor to work with the union in this case (I1). The second factor is that the contractor in the end realized 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 around 300 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, after which an overwhelming majority of workers joined the union. It would have been difficult at this point for the employer to deny that the UBWU was the legitimate representative of its employees, not only because of the level of membership but also because it had in effect already responded positively to the union's claim for access to the regulatory space. A collective bargaining agreement was eventually signed by the union and the contractor on the 7<sup>th</sup> January 2008, marking the formal beginning of a relationship that lasted for the duration of the project (until mid-2013).

As well as increasing the union's capacity to win access to regulatory space, PS2 also seems to have augmented the union's capacity to press for the *inclusion* of other businesses in that space. In 2010 a major subcontractor engaged by the principal contractor to work on the mechanical parts of the power station started work, employing several hundred workers on the construction site. A Chinese-owned company, it was known to have opposed union recognition on a major project in neighbouring Kenya. Initially it rebuffed the union's attempts to seek recognition, at

which point the union asked both the Labour Ministry and the principal contractor to intervene, making reference to the duty of the subcontractor to bargain arising not only from Ugandan labour law but also the IFC standards, which also apply to the contractors and subcontractors of client businesses. Both the ministry and – perhaps more significantly – the principal contractor contacted the subcontractor to press for it to recognise the union, which it eventually did in August 2010. A CBA was subsequently negotiated that in effect extended to the subcontractor’s employees the same terms and conditions that applied to other workers employed on the site.

Although the IFC’s performance standards seem to have increased the union’s capacity to win access to the regulatory space and to demand the *inclusion* of the major subcontractor, the PS were of no further consequence. It is striking how little attention the IFC’s formal supervision process paid to the union and to the process of collective bargaining over the course of the project. While the responsible investment officer of the IFC had been very present at the beginning of the project, before the union gained access to the regulatory space, the officers of the UBWU told us that they had not met or heard from any member of IFC’s social and environmental compliance department at any point during the project. Neither had local union officers met or heard from either of the two consultants appointed by IFC to report on compliance. Of the ten reports produced by the consultants, 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). Accordingly, the negotiation of employment regulation took place completely out of reach of the IFC. The initial 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 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. Thus, the *leverage* that the union was able to exercise within the regulatory space over the course of the project was entirely unaffected by TPR. The union’s capacity to engage in ‘the play of power’ arose from its high membership on the project site, its expertise and political connections – helped along by ‘coaching’ from its international partner the BWI – and the process rights already existing within the national legal framework.

All in all, the influence of the performance standards system was limited to modestly increasing the existing capacities of an existing union. It would be 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 add some weight to the claims of the union to a right to be heard and to be given access to the project site, and seemed to add extra weight to the union’s efforts to pull the reluctant subcontractor into the regulatory process. Nevertheless, without the concerted efforts of the BWI and UBWU, it is 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.” (I3, 37.45). We now turn to our second illustrative case.

## **Further workers’ collective competences in the African Construction Industry**

The BWI coordinates a network of African construction industry unions, organizing an annual conference at which officers from (principally) Anglophone countries in sub-

Saharan Africa meet to discuss common problems, to share information and to discuss the development of coordinated strategies. Having been invited to attend the 2013 meeting, held in Addis Ababa, one of the authors of the paper was able to participate in the discussions and interview a number of the participating union officers.

It transpired that unions from at least four different countries have used private regulation including a Chinese industry association code of conduct and the Forestry Stewardship Council (FSC) certification standard to improve their collective competences. In Namibia, as shown below, the construction union used an industry code of conduct to increase its capacity to insist on the *inclusion* of Chinese businesses in the existing industrial relations system. Moreover, we will see that in Kenya the union used outcome standards included in FSC regulation as an external normative reference point which clearly helped increasing its *leverage* in bargaining negotiations. What seems to be consistent across the practice of different unions in different countries is the absence of any attempt to have the regulation enforced via any formal procedure. Rather it is used informally as part of a range of otherwise very traditional techniques of argument and political and industrial pressure. As in the Bujagali case, the principal regulatory points of reference for all the unions using private regulation in this way were national law and, to a lesser extent, the ILO's labour standards. This confirms that unions are not simply 'takers' of regulation, but are active participants in the regulatory space within which the rules governing the employment relationship are made. Instead of waiting for rules to be made and enforced by some third party, they participate actively in the processes of bargaining and deliberation that lead to the creation and amendment of regulation.

The construction workers' union in Namibia has used a private code of conduct as part of a strategy to bring Chinese construction contractors into the existing industrial relations system. As these businesses did not join the existing industry association and were the subject of many complaints about labour law violations, the local construction union developed a strategy to address the problem. It used political networks to lobby the office of the President, but also conducted public campaigns on the issue. This brought 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 the international union BWI, that the China International Contractors Association had produced a code of conduct for its members. Its so-called 'Guide on Social Responsibility' included an obligation to engage with workers' organizations to the extent that local law demanded it. 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). Clearly, the capacity to insist on the inclusion of the enterprise only makes sense if one has adequate leverage in the regulatory space.



For its part, the Forestry Stewardship Council in Kenya provides us a clear case of how transnational private regulation in the domain of labour standards can in a distinct context impact on workers' leverage in the regulatory space surrounding the employment relationship and more broadly the labour market. In the forestry sector, the Kenyan construction and forestry workers 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 (on FSC, see in particular: Hallström and Boström 2010, chap. 4; Pattberg 2011; Wouters 2012). 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). The FSC standard increased the union's leverage in the regulatory process, but only very modestly. Like his Namibian colleague, the union officer made it clear that while it was useful, pursuing the interests of his members turned principally on worker organization and a willingness to take industrial action. On a more general basis, this finding echoes Kloosters' analysis on the ability of local actors to use FSC standards to fulfil their own strategy relatively independently from global value chains driven by large multinational firms from the North (Klooster 2011).

To sum up, in the Bujagali hydropower project, the International Finance Corporation's performance standards systems defined the potentially legitimate participants in regulatory space as including not just the IFC, its client, the client's principal contractor and the government, but also any relevant workers' organizations and subcontractors working for principal contractor. The Uganda Building Workers' Union's capacity to demand access to regulatory space was thus enhanced by the IFC regulation. Once within regulatory space, the union was also able to pull a major subcontractor that was trying to avoid participation into the process of regulation, forcing its inclusion using political pressure augmented by the performance standards. However, when it came to the 'play of power' within regulatory space, it could only use its existing power resources and relationships to pursue the interests of its members. The regulation left its capacity for leverage unchanged. In Namibia, the construction union used private regulation to increase its capacity to demand the inclusion of foreign enterprises in a regulatory space that the union already occupied and within which it knew it had certain power resources at its disposal. The union 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. 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 using their economic weight to remain outside the system, ignoring not only the rules but also the other players. Finally, the experience of the Kenyan construction and forestry union shows how TPR can in certain circumstances increase workers' leverage not via process rights but via the establishment of externally-validated outcome standards for working conditions.

## Conclusions

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. Thinking in terms of the regulatory space surrounding the employment relationship and the workers' collective competences established in regulation at different levels 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 the limited range of our cases, the use that unions have made of TPR in Africa tends 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 the nature of enforcement mechanisms. However, it is important to note that industrial relations traditions in the three 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.

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. This brings us back to the claims arising from advocates of a sociological turn in IR/IPE. In her recent study of how international financial institutions build their authority in responding to governance failures, Best (2013, 24, 25), for instance, has strongly argued in favour of such a meso-level analysis in order to grasp "how actors and practices become connected around concrete problems and strategies ... [and thus being] more attentive to the role of knowledge-making practices". Accordingly, looking at the concrete practices of implementing labour standards in developing countries brings into view Harrod's initial contention regarding Cox's (1987) pioneer understanding of the articulation between social forces and world orders: "Thus the study of social forces require[s] the study of those fragmented areas which address the details of production relations" (Harrod 1997, 109).

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