

Private regulation and trade union rights:

Why codes of conduct have limited impact on trade union rights

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Abstract Codes of conduct are the main tools to privately regulate worker rights in global value chains. Scholars have shown that while codes may improve *outcome* standards (such as occupational health and safety), they have had limited impact on *process* rights (such as freedom of association and collective bargaining). Scholars have, though, only provided vague or general explanations for this empirical finding. We address this shortcoming by providing a holistic and detailed explanation, and argue that codes, in their current form, have limited impact on trade union rights due to (i) buyers paying lip service to trade union rights, (ii) workers being treated as passive objects of regulation in codes of conduct, (iii) auditing being unable to detect and remediate violations of trade union rights, (iv) codes emphasizing parallel means of organizing, (v) suppliers having limited incentives for compliance, and (vi) codes being unable to open up space for union organizing when leveraged in grassroots struggles. Our arguments suggest that there is no quick fix for codes' limited impact on trade union rights, and that codes, in their current form, have limited potential to improve trade union rights. We conclude by discussing ways in which codes of conduct, and private regulation of worker rights more generally, could be transformed to more effectively address trade union rights.

Keywords Codes of conduct, collective bargaining, freedom of association, labor practice, private regulation, right to organize, supplier relationships, trade union rights, worker rights

Introduction

Following offshoring and outsourcing of production from Europe and the United States, labor organizations have attempted to hold multinational corporations responsible for working conditions in global value chains. They have done so by exposing substandard working conditions in terms of, for example, verbal and physical abuse, dangerous working conditions, and subminimum wages, and the suppression of labor unions in the global apparel, footwear, and electronics industries (Merk 2011; Rodríguez-Garavito 2005; Seidman 2007). Companies have responded to these challenges by adopting codes of conduct and conducting auditing, leading to the emergence of regulatory systems in the private sphere (Bartley 2007; Riisgaard and Hammer 2011).

The merits of this private regulation of worker rights are highly debated. On the positive side, scholars have shown that codes may improve occupational health and safety, working hours, and other *outcome standards* (Egels-Zandén 2013; Frenkel 2001; Mamic 2004; Barrientos and Smith 2007). On the negative side, scholars have shown that codes have limited impact on *process rights* such as freedom of association (FoA) and the right to collective bargaining (CB) (Anner 2012; Barrientos and Smith 2007; Wang 2005).

While scholars have argued for an uneven impact of codes of conduct, they have only provided vague or general explanations as to why codes have had limited impact on trade union rights. For example, Wang (2005) argues that FoA is a “blind spot” for codes, Barrientos and Smith (2007) that the limited impact is due to a “dominance of a technical or compliance perspective within the private sector,” and Anner (2012) that it is due to limited reputational risk and unwillingness to relinquish managerial control over global value chains. These explanations are all reasonable, but they fail to provide a holistic and detailed explanation as to why codes have had limited impact on trade union rights.

In this paper, we fill this gap in previous research by providing a systematic explanation for the shortcomings of codes of conduct. We do so by synthesizing previous academic and practitioner insights into private regulation of worker rights. This is an important contribution, since a systematic explanation is essential for both evaluating the potential of codes of conduct in terms of trade union rights and improving the effectiveness of private regulation. In the next sections, we discuss why trade union rights are important, how they are respected in global value chains, and what we know about the connection between codes of conduct and trade union rights. We then outline six interrelated explanations for why codes have had limited impact on trade union rights and conclude the paper by discussing potential ways to improve the effectiveness of private regulation of worker rights.

The importance of trade union rights

Trade unionists and human rights advocates have stressed the importance of trade union rights (freedom of association and the right to collective bargaining) as fundamental rights for workers to create and sustain a change in their working conditions. These rights are enshrined in various International Labour Organization (ILO) conventions (nos. 87, 98, and 135, respectively), the Universal Declaration of Human Rights (Article 23), and the International Covenant on Economic, Social and Cultural Rights (Article 8). Trade union rights are thus “key employee rights” and “fundamental rights” that all workers have (Greenwood 2002; Ip 2008). It is important to note that trade union rights are *rights* and not *standards*. For example, a working age of sixteen, a specific minimum wage, or an overtime wage of 1.5 times the base wage are *standards* that can be modified by government decisions, but freedom of association and the right to collective bargaining are non-negotiable *rights* that do not dictate outcomes but guarantee certain procedures (Anner 2012).

Trade union rights are closely related to other civil and political rights, including freedom of expression, freedom of the media, and universal suffrage (ILO 2004, p. 8). This means that trade union rights flow from human rights, since if workers have freedom of association then the organizations they form must also have rights. This, in turn, means, for example, that the organizations must have the right to legal personality, to own property, issue publications, and so on. Freedom of association is therefore indispensable to the enjoyment of other human rights (ILO 2006, pp. 13–15); it is the most basic human right that is essential for, among other things, a democracy. This is further underlined in the UN Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in its resolution 17/4 of 16 June 2011, which explicitly states the corporate responsibility to respect “internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.”¹

The right to organize is also often described as an “enabling right” (ILO 2008, p. 17) that “underpins many other rights” (Van Buren and Greenwood 2008, p. 217). It means that its implementation provides mechanisms through which trade unions can ensure that other labor standards are respected as well (ILO 2008), including, for example, issues related to health and safety, working hours, overtime, grievance mechanisms, and wages. That is to say, in workplaces with a functioning trade union, collective bargaining machinery, and effective dispute and complaints mechanisms, workers are able to monitor working conditions and protect their own rights. Trade union rights thus give workers an opportunity to influence the establishment of workplace rules and thereby gain some control over their work. The impact of trade unions can also extend the scale of the workplace and become an important vehicle through which workers can claim their “fair share of economic and social development” (ILO

¹ http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

2011, p. 4). In this light, several studies have pointed to the positive effects of trade union rights on the economic performance of countries (e.g., Brown 2000; Kurera and Sarna 2006).

Trade union rights in practice

While many argue that trade union rights have “been accepted as universally applicable by much of the global community” (Waddock 2004, p. 318) and are essential for sustained improvements in working conditions in global value chains (Anner 2012), many manufacturers in the export industries remain “notoriously anti-union” (Miller 2008, p. 175). Factory managers typically argue that workers do not need a union since they have an “open door” policy, operate like “a family,” etc. In practice, unions are, however, typically refused access to factory premises, which forces union organizers to meet workers outside the factory during lunch breaks and after working hours. In the factory, acts of discrimination against union members or workers suspected of engaging in organizing activities are commonplace. This includes denial of promotion, transfer to another section of the factory, intimidation, suspension, firing, and criminalization. For example, Cambodian workers state that if they complained about working conditions they would be moved to cleaning toilets rather than their current job of cutting fabric.² Similarly, a female worker from Bangladesh commented, “If they [management] see any activities related to any union, you can be sure that you would be terminated within a few days for sure. They have their own informer. That’s why we do not even talk about this.”³

In recent years, thousands of workers have been fired in ways similar to those described above, for joining unions. This, in turn, sends a strong, discouraging message to nonunionized

² Interviews conducted by Community Legal Education Centre regarding Better Factory Cambodia for the report “10 Years of the Better Factories Cambodia Project: A critical evaluation”, available at http://archive.cleanclothes.org/component/docman/doc_download/53-10-years-of-the-better-factories-project-english.

³ Clean Clothes Campaign and Alternative Movement for Resources and Freedom Society (2009), “Study on a Living Wage in the Export-Oriented Garment Sector in Bangladesh, (final draft), April 5, 2009, p. 50, unpublished document on file.

workers. This is especially so for the thousands of workers on short-term contracts, since these are easily ended by factory management (Tjandraningsih and Nugroho 2008; Wereldsolidariteit 2011). More extreme forms of antiunion harassment are also commonplace. In India, for instance, where unionization rates are generally low, workers who seek to establish a trade union are often confronted with violence. As one observer puts it, “Contractors’ henchmen and the company’s permanent goon will deal with workers if they attempt to unionize.”⁴

Legal maneuvers (and corrupt or otherwise failing legal systems) also make it difficult for unions to register and claim their rights (Carraway 2011). But even if unions are formally recognized and registered, on the factory floor managers often seek to restrict the extent to which unions can carry out activities. For a union to operate, it requires a space at the factory: organizers must have access to workers, and union representatives must be able to consult members and support them in workplace matters. They must also be able to do training (on worker rights, health and safety measures, etc.), organize discussion and elections, and collect union dues. However, management often seeks to restrict the scope for unions to carry out such trade union activities. In addition to these legal and managerial barriers to organizing, unions in exporting countries are often highly fragmented, underfunded, and sometimes corrupt; have weak leadership and limited experience with collective bargaining; and are negatively influenced by interunion rivalry. In sum, despite the centrality of trade union rights and their inclusion in most international human rights standards, the situation is highly problematic for labor unions attempting to exercise these rights in practice.

⁴ Asia Floor Wage Alliance India (4 September 2011) “Researching Tier 1 Companies in India: 3 companies in 3 Garment Clusters”, unpublished research on file.

Codes of conduct and trade union rights

Given the importance of the right to organize and the currently problematic situation facing labor unions in export-oriented countries, it is not surprising that labor rights advocates have stressed that global buyers need to respect trade union rights in both their own and their suppliers' operations. In the early-1990s phase of private regulation, companies were reluctant to include these standards in their codes. Levi Strauss, for example, among the first to adopt a code on labor standards, omitted reference to FoA and CB. Many other companies also adopted code requirements that focused on issues that were considered more sensitive to public outcry, such as child labor or forced labor, and failed to refer to trade union rights. An Organisation for Economic Co-operation and Development (2001) survey of 246 codes of conduct, for example, found that only 30 percent included reference to FoA and CB (2001). In a few cases, companies even adopted antiunion language (expressing the aim of having a union-free workplace) in their codes. Hence, in the early-1990s phase of private regulation of worker rights, codes often ignored the “unique role trade unions can play in helping to ensure a safe and healthy work environment” (ILO 2008, p. 38).

Today, however, the situation has drastically changed, with trade union rights being included in most corporate social responsibility (CSR) and private regulatory standards such as the UN Global Compact (Runhaar and Lafferty 2009), SA8000 (Beschoner and Müller 2007), the Fair Labor Association (FLA) (Everett et al. 2008), the Business Social Compliance Initiative (BSCI), and the Fairtrade Labelling Organizations International (Blowfield and Dolan 2010). Preuss (2009, 2010) furthermore shows that trade union rights regularly are included in companies' codes of conduct—especially those codes dealing with ethical sourcing (see also Prieto-Carron 2008; Yu 2008). Thus, trade union rights are today presented as central components of contemporary private regulation of worker rights, with codes of conduct portrayed as protecting trade union rights at suppliers.

Scholars have shown, though, that these policy commitments have yet to translate into improvements for trade unions on the factory floor (Anner 2012; Barrientos and Smith 2007). The limited impact is partly related to codes of conduct generally proving to have little effect on improving worker rights (e.g., Chan and Siu 2010; Locke et al. 2007; Wells 2007). However, several studies have shown that codes have limited effect in particular on improving *process* rights (such as FoA and CB) in comparison to *outcome* standards. In other words, while the implementation of codes has shown some promise for improving outcome standards such as health and safety, provision of legal minimum wage, working hours, and insurance, it has achieved little or no improvement in trade union rights (Anner 2012; Egels-Zandén 2013; Egels-Zandén and Hyllman 2007; Frenkel 2001; Mamic 2004; Oka 2011; Prieto-Carron 2006; Rodríguez-Garavito 2005). As Wang (2005, p. 51) concludes, “the codes of conduct and auditing process have a blind spot: determining how to measure the freedom of a trade union, and its degree of representation for workers.”

The empirical finding that codes have had limited impact on trade union rights is most meticulously shown in Anner’s (2012) study of audits conducted by the FLA and Barrientos and Smith’s (2007) study of 11 companies that participated in the Ethical Trading Initiative and 23 of their suppliers in Africa, South America, and Asia. Barrientos and Smith (2007, p. 722–723) show that codes “had least impact on freedom of association and the right to collective bargaining on the supply sites” and “there were no instances of codes having led to wage increases through a Collective Bargaining Agreement.” They explain this finding with reference to “the dominance of a technical or compliance perspective within the private sector” (p. 725) that does “little to challenge embedded social relations or business practices that undermine labor standards in global production systems” (p. 727). This technical perspective is, in turn, argued to shape code of conduct auditing and limit the role of workers in the implementation of codes. However, Barrientos and Smith (2007) do not provide a

detailed explanation of the way the “technical perspective” shapes auditing and the role of workers, leading to a vague and underspecified explanation of their empirical finding that codes improve outcome standards but not process rights.

Anner (2012) similarly shows that code of conduct initiatives emphasize detection of violations of outcome standards rather than process rights. He shows that FLA audits rarely detect FoA violations, and if FoA violations are detected, there are low remediation rates. Anner (2012) explains this finding with reference to corporations having a strong role in the FLA and having more to gain in terms of improved legitimacy and reduced reputational risk from improving outcome standards as compared to process rights. Additionally, stronger labor unions lessen managerial control over global value chains, making companies reluctant to effectively work with trade union rights. While this explanation is interesting, it does not provide a detailed explanation for *why* FLA audits do not detect FoA violations or why such violations are not corrected when identified, leading again to a vague and underspecified explanation of the empirical finding that codes improve outcome standards but not process rights.

In sum, numerous studies have empirically shown that, while codes may improve outcome standards, they fail to improve trade union rights. However, when explaining this empirical finding, scholars have either provided vague (for example, trade union rights are a blind spot for codes of conduct) or general explanations (for example, the failure is a consequence of a technical compliance perspective or managers’ wish to control value chains). In the next section, we develop a more nuanced and detailed explanation of the codes’ limited impact on trade union rights. In doing so, we fill an important gap in previous research and provide a solid foundation for discussing the merits of codes of conduct in relation to trade union rights.

Why codes have limited impact on trade union rights

Buyers paying lip service to trade union rights

One reason that codes of conduct have had limited success in securing trade union rights is that trade union rights only are superficially included in many codes. It is more than 20 years since the first codes of conduct related to worker rights at suppliers were developed by companies such as Levi's and Nike (Zadek 2004), and over the years both the adoption and content of codes of conduct have become institutionalized (Long and Driscoll 2008; Preuss 2009). This is shown by the fact that the most common reason for companies to adopt codes of conduct is that such codes represent a way to restore and/or improve corporate legitimacy/trust/reputation/image/brand (e.g., Bartley 2007; van Tulder and Kolk 2001). In other words, to retain their legitimacy, multinational corporations must increasingly adopt codes of conduct with a fairly standardized content (Christmann 2004; Long and Driscoll 2008).

Unions and NGOs have leveraged this corporate vulnerability by, for example, developing “model codes” that stress trade union rights.⁵ These model codes have been used either to push companies into accepting inclusion of trade union rights or as a basis for name-and-shame campaigns. Furthermore, since firms' codes of conduct are easily compared, unions, NGOs, and rating agencies have used policy comparisons to provide low ranking scores to companies that do not include trade union rights in their codes. In this way, codes have come to “display strong evidence for isomorphic pressure” especially in relation to labor issues that are specified in ILO and UN Conventions (Preuss 2009, p. 743), and trade union rights have moved from rarely being mentioned in codes (in the 1990s) to currently being a requisite in any serious code of conduct (Anner 2012).

⁵ See, for example, Clean Clothes Campaign (1998) “Code of labour practices for the apparel industry including sportswear”, and ICFTU (1997) “Basic code of labour practice”.

Despite a clear pattern of policy convergence, serious doubts exist about the extent to which current commitments to trade union rights policy translates into operational procedures and mechanisms. As has been pointed out by Fransen (2012), much of this policy convergence might be driven by an attempt to avoid activist exposure rather than genuine concern for trade union rights. It is thus possible that firms' proclaimed support for trade union rights is decoupled from their actual practices (Meyer and Rowan 1977). As Scott (2008, p. 171) argues, "organizations under pressure to adopt particular structures or procedures may opt to respond in a ceremonial manner, making changes in their formal structures to signal conformity but then buffering internal units, allowing them to operate independent of these pressures." Decoupling is especially likely when the external expectations are perceived by corporate managers to be in conflict with the company's strategic direction (Behnam and MacLean 2011).

It is thus reasonable that at least some of the companies that include trade union rights in their codes of conduct only do so in a ceremonial manner to signal conformity to institutional pressures. Most notably, it is reasonable to expect companies that themselves engage in antiunion activities to decouple their policies and practices. For example, the world's largest retailer, Walmart, is openly antiunion, despite playing an important role in the Global Social Compliance Programme (GSCP), a business-led monitoring initiative that has adopted a strong standard on FoA. Walmart uses a variety of tactics to suppress trade union rights within its retail facilities, among them, screening out potential union supporters through its hiring process, operating an antiunion hotline to damage organizing efforts, closing down stores after workers organize, giving large grants to antiunion organizations, and distributing "A Manager's Toolbox to Remaining Union Free" (Brenner et al. 2006). Given this antiunion attitude, it is not surprising that Walmart has failed to intervene when cases of suppression of trade union rights in supplier factories in, for example, the Philippines, Mexico, and

Cambodia were brought to its attention by labor rights advocates. It is also noticeable that the GSCP's code of conduct is applicable to everyone—manufacturers, all countries of production, supply chain at every level—*except* for the buyers' core businesses: namely, the workplaces where consumer goods are being sold. So why would a supplier feel obliged to comply with a labor right that their buyers actively seek to undermine, and how likely is it that a retailer would strictly enforce a right it refuses to apply to its own workplaces?

Walmart might be notoriously outspoken in its dislike of unions and, in that sense, take a somewhat exceptional position among global buyers. However, a practice of “union avoidance” is widespread among brands and retailers,⁶ implying that decoupling of policies and practices in relation to trade union rights could be equally widespread. Furthermore, union avoidance is not solely restricted to individual companies, but is also prevalent in corporate-influenced, large-scale initiatives such as the GSCP, the FLA, and the BSCI (Anner 2012). BSCI has, as of 2013, attracted over 1,000 companies, many of them active in the garment sector, since its establishment in 2003. While the BSCI has adopted strong standards on trade union rights, the input of nonbusiness stakeholders (including unions) at the governance level in the BSCI is restricted to an advisory board, which is basically “a hostage role without direct influence” (Egels-Zandén and Wahlqvist 2007, p. 182). It is reasonable to assume that initiatives that restrict union influence (such as the BSCI, GSCP, and FLA) in similarity to companies that restrict union influence (such as Walmart) are likely to only pay lip service to the principles of the right to organize. Anner's (2012) study of the way reported FoA violations are handled in the FLA strongly supports this conclusion, with the FLA, for example, placing the burden of proof on the workers and discrediting ILO experts in favor of private auditing firms.

⁶ See, for example, Tesco, for another example of a company that promotes the right to organize at its suppliers' workplaces, while violating these rights at its own facilities (HRW 2010).

Workers treated as passive objects of regulation

Input of worker representatives is not only limited at the governance level of large-scale, corporate-influenced initiatives such as the BSCI; it is also limited in the implementation of codes of conduct on the factory floor. This is evident in the limited concern given to worker voices in the development of codes of conduct, the lack of worker knowledge of codes, and the limited worker and union participation in auditing processes. It is as if workers, and their representatives, do not fit into the code of conduct equation that is focused on improving corporate legitimacy in the eyes of Western consumers and stakeholders. Khan et al. (2007), for example, in a study of child labor practices in Western MNCs' supply chains, showed that when the companies were eliminating child labor from the Pakistan factories producing soccer balls, little concern was given to the views of the workers. As Khan et al. (2007, p. 1070) put it, what mattered "was that the sensibilities of western consumers had been soothed, as the reputation of the branded balls was restored ... whether the stitchers approved of the means through which the 'problem' was solved or whether they welcomed the new practices was apparently of little interest to the companies and most of the NGOs." In other words, "the brands on the soccer balls, not the child stitchers, were the primary objects of reform and restitution" (Khan et al. 2007, p. 1070).

Khan et al.'s (2007) observation is supported by numerous other studies that, for example, show that workers and their local representatives have limited knowledge of codes (Yu 2009), and rarely are involved in development of codes of conduct and monitoring (Bartley 2007; Ählström and Egels-Zandén 2008). As Ngai (2003, p. 7-8) puts it, "workers are conspicuously absent whole process of drawing up, implementing, monitoring and enforcing the company codes of which they are the purported beneficiaries. Indeed, most are unaware of the codes, and of the rationale for applying them to themselves." Hence, the stated beneficiaries of codes

of conduct, that is, local workers and their representatives, have at best a marginal role to play in the development and implementation of codes.

In relation to improving trade union rights through codes of conduct, the limited interest in workers and their representatives is problematic for three main reasons. First, as Braun and Gearhart (2004 p. 194) point out, “[w]ithout their [workers’] active participation, codes of conduct run the danger of becoming tools for corporate interests rather than workers’ interests.” Similarly, Barrientos and Smith (2007) argue that codes of conduct turn labor into a disembodied factor of production rather than people with rights. In this way, codes risk bypassing workers and treating them as means to an end. Codes are thus unlikely to empower workers and, consequently, unlikely to improve the prospect of union formation and collective bargaining.

Second, if workers and their representatives have marginal influence on the development and implementation of codes, it is unlikely that codes will be effectively implemented. Numerous scholars have stressed that increased worker involvement is central to improving compliance with codes of conduct (Anner 2012; O’Rourke and Brown 2003; Egels-Zandén 2007). As Connor and Dent (2006 p. 13) put it, “a democratically-elected well-trained trade union workplace committee, engaging in regular information sharing, consultation and negotiation with factory management, provides strong local governance of a workplace and a sustainable mode of code compliance.” For example, without worker involvement and participation it is difficult to imagine that remediation and corrective action plans can become effective.

Third, without worker participation, it will be difficult for social auditors to collect credible information. It is a well-established fact that auditors have great difficulties detecting breaches of codes of conduct in general (e.g., O’Rourke 2002; French and Wokutch 2005), and in particular, in relation to trade union rights (Barrientos and Smith 2007). To overcome these

difficulties, Egels-Zandén (2007) shows that workers must share information with the auditors, since, collectively, workers are the main actor with both information about working conditions in a factory and incentives to disclose such information. In sum, as long as workers are treated as passive objects and potential victims of human rights violations rather than as “potential agents of change” (Sun and Ngai 2005, p. 193), codes of conduct are unlikely to effectively improve trade union rights.

Auditing cannot address the right to organize

A third explanation for codes of conduct having been unsuccessful in addressing the right to organize can be found in the way codes are audited. This is due to: (i) reliance on a multibillion industry of social audit companies that depend on good relations with global brands, (ii) lack of attention in auditing to FoA and CB violations, and (iii) lack of capacity to identify trade union rights violations in the actual audits.

With regard to conducting audits, most individual firms, and other bodies undertaking code of conduct initiatives, prefer to work with company internal auditors, specialized auditing firms (like Intertek, Société Générale de Surveillance, and Bureau Veritas) or service-driven, semi-commercial NGOs (Brown 2013). There is thus a limited role not only for workers but also for international and local unions in the auditing process (for exceptions see, for example, Riisgaard (2009)). As Barrientos and Smith (2007 p. 717) note, the auditing of codes comprises “an inherent tension between commercial actors who prioritize commercial imperatives over compliance with labor codes and social actors who prioritize workers’ rights.” These tensions have on multiple occasions led to conflicts between local labor unions and auditors, where local unions perceive that independent auditing actually damages their FoA and CB attempts (Armbruster-Sandoval 2003, 2005).

Another consequence of not involving labor unions in the auditing of codes of conduct is that auditing becomes ambivalent about implementing trade union rights. As an ILO research report on social auditing concerning garment production in Bulgaria, Romania, and Turkey concluded, “only about 10-15% of brands give real attention to this topic [trade union rights] in social auditing” (van der Vegt, 2005, p. 32). This is, for example, shown by the fact that even pioneering firms use the crude criterion of “good labor-management communication” as a proxy to measure trade union rights, and how to interpret this criterion is left up to the local auditors (Mamic 2004, p. 309, see also FLA, 2004). This means that auditors may conclude, for example, that having a health and safety committee counts as compliance with freedom of association. This is well captured in one ILO report (2005, p. 32), which points out that

a lot of brands look at the issue of freedom of association as a way to improve dialogue and communication between management and employees. They therefore check to see whether or not there are suggestion boxes, complaints mechanisms and/or worker representatives in the factory.

The vagueness of proxies becomes even more problematic, given auditors and auditing methods’ limited understanding of the right to organize (Barrientos and Smith 2007). For example, Hunter and Urminsky (2003, p. 47) argue that “auditing methods are underdeveloped with respect to these rights and freedoms, and need significant improvement and reconceptualization before offering a sufficient level of assurance.” Budget constraints also make in-depth yet time-consuming audits impossible (Brown 2013). The most common “snap-shot audits” do not even include the most obvious steps to investigate whether the right to organize is being respected (such as off-site interviews with workers and union representatives) (Anner 2012; Auret and Barrientos 2004). Maquila Solidarity Network (2002) puts it this way:

Unless workers have the ability to tell their stories without the threat or perceived threat of management or government retaliation for doing so, it will continue to be difficult for even well-

trained auditors to document real labor practices, as opposed to those that appear in company records.⁷

In addition to being more time-consuming, anonymous off-site interviews also require that workers and unions trust the auditors (Anner 2012; Egels-Zandén 2013). This trust is often lacking (Anner 2012; FLA. 2004), leading auditors to rely on “data provided by management with little or no ‘triangulation’ or cross-checking” (Auret and Barrientos 2004, p. 5). This reliance on material provided by management is problematic, given that supplier managers regularly falsify records and instruct workers in how to respond to auditors’ questions (Egels-Zandén 2007; Jiang 2009; Taylor 2011). This, in turn, means that noncompliance with trade union rights often remains overlooked and underreported (Anner 2012).

Even well-trained, well-resourced, and dedicated auditors—with a clear commitment from their clients to assess compliance with trade union rights—may occasionally face serious difficulties in assessing whether trade union rights are respected. For example, auditors must evaluate whether the nonexistence of a union *is* or *is not* caused by management interference, which can be hard to assess. In addition, in countries with a history of unions under employer control (known as yellow unions, sweetheart unions, Solidarismo, etc.), auditors need to assess whether the existing union(s) operates without undue interference by management. This means that even a copy of a collective bargaining agreement, often taken as a “proof” of workers exercising the right to organize, might actually be a sign of factory management’s successful establishment of a management-controlled “union.” Likewise, in countries where antiunion behavior by management is widespread and often takes on violent dimensions, fear often effectively prevents workers from exercising their right to organize. Auditors can, thus, not simply assume that workers do not want to be represented by a trade union (ITUC et al. 2012, p. 15).

⁷ Maquila Solidarity Network. (2002). Codes Memo Update, November, no.12.

Given auditors' limited expertise, vague measurement proxies of trade union rights, limited attention given to the right to organize in auditing of codes, and difficulty in detecting trade union rights violations, it is not surprising that improvements in visible superficial working conditions such as signposts, presence of fire extinguishers and toilets, stocking of medical cabinets, and provision of drinking water are more impacted by codes of conduct auditing than are breaches of trade union rights.

Parallel means of organizing

The vague measurement proxies of trade union rights in code of conduct auditing have also led some companies to set up parallel means of organizing, instead of labor unions. This is due either to the firms' unwillingness to accept existing local unions or to legal restrictions on trade union rights. For example, in China a union can operate legally only if it has been approved by the All-China Federation of Trade Unions (ACFTU), which is closely linked to the state. As a result, many of the Chinese workplace unions in export-oriented factories are established by management without democratic elections (Yu 2009). In these contexts where the right to organize is legally restricted, many codes of conduct call for the establishment of workers' representation mechanisms—so-called parallel means—instead of labor unions, that is, the employer “shall facilitate” or “not obstruct” parallel means of association and bargaining (Anner 2012; Wang 2005; Everett et al. 2008). This basically provides social auditors a loophole to “attest that freedom of association is respected in countries where the government does not adequately protect this right or where its exercise is illegal” (ITUC et al. 2012, p. 16). For instance, SA8000 states, “The company shall, in those situations in which the right to freedom of association and collective bargaining are restricted under law, facilitate parallel means of independent and free association and bargaining for all such personnel.” (Ascoly and Zeldenrust, 2003, p. 6).

Parallel means refers to activities that intend to elicit workers' views or increase their involvement with the enterprise. These activities may provide workers with an opportunity to address their concerns and seek solutions without fear of repercussions, and are sometimes promoted as a way to obtain the benefits of an industrial relations system with collective bargaining in instances where trade union rights are restricted. The most well-known case of establishing parallel means of organizing is Reebok's initiative to organize elections for trade union representatives in two Chinese factories. The elected representatives, however, struggled to maintain an active and independent role over time (Yu 2008). Other examples include labor NGOs from Hong Kong using the provision of parallel means as a way of getting access to workplaces in Mainland China. For example, the Chinese Working Women Network promotes the facilitation of workers' committees in China in the hope these committees might provide nascent forms of worker self-representation. It should, though, be noted that these initiatives of parallel means lack scale and cover only a fraction of export-oriented factories.

Parallel means are used not only in contexts where the right to organize is legally restricted but also in situations where buyers (or auditors) do not find the local union sympathetic. Some buyers, for example, claim that existing labor unions are passive, unorganized, political, corrupt, or militant, making it more appropriate to form worker committees in these factories than to work with existing labor unions (Wingborg 2006). The risk is that such activities undermine local labor unions in favor of weaker forms of worker representation. An additional risk is that buyers, through their emphasis on parallel means, contribute to factory management's existing use of worker committees to limit existing unions' influence or hinder union formation, which goes against ILO Convention No 135 on Workers' Representatives.

Factory management, for example, has been known to set up fake worker committees to give auditors the impression that they respect freedom of association. As one Sri Lankan unionist

describes it, “They are trying to prevent trade union[s] by establishing worker councils, while repressing the emergence of plant-level unions.”⁸

Studies of the actual impact of parallel means of organizing conclude that they fail to provide workers with an independent voice, let alone genuine worker representation and collective bargaining (Frenkel 2001; Brown and O’Rourke 2007; Merk 2008; Sum and Ngai 2005; Wang 2005). As Bartley and Zhang (2012, p. 20) put it, “worker committees—and related experiments, like the Reebok-sponsored election—have allowed brands, retailers, and certification initiatives to claim that they support freedom of association, but they have rarely generated a durable collective voice for workers.” Bartley and Zhang (2012) even show that, in many CSR-certified factories, workers had no knowledge of there even being a worker committee. These findings are not surprising, given that parallel means were intended to work in contexts in which factory management is used to a high level of control and provides limited leeway for worker representatives. However, the findings imply that the focus on parallel means in codes of conduct is one reason that codes of conduct fail to improve trade union rights.

Furthermore, it implies that parallel means in codes provide a way for companies to suggest that they can address or circumvent a state’s restrictions on trade union rights. This is an important feature of codes, since it allows companies to continue to source from countries where trade union rights are legally restricted, while portraying firms’ sourcing as socially responsible. Parallel means thus remove the incentive for companies to shift production to countries where trade union rights are respected in law.

⁸ Joseph, Lean, National Free Trade Union, interview March, 26, 2011, Colombo, Sri Lanka.

Limited incentives for suppliers

A fifth explanation as to why codes of conduct have led to limited improvement in trade union rights is that buyers provide suppliers with few, if any, incentives to respect this right. It is a well-known fact that buyers' business demands (for example, price and lead times) often clash with their code of conduct demands (for example, respecting minimum wages and overtime limits) (e.g., Barrientos 2013; Ngai 2005; Sun and Ngai 2005). As Jiang (2009, p. 88) demonstrates, suppliers' "excessive overtime, low pay, and other poor working conditions are partly driven by unfair buying practice trends toward tough lead times and squeezing prices." This clash means that buyers' purchasing practices contribute to adverse human rights impacts when suppliers believe that compliance with trade union rights will lead to cost increases.

The lack of incentives to improve worker rights is not unique to *process*, as compared to *outcome*, issues. It is even the case that *short-term* costs of improving outcome issues (such as fire safety and occupational health and safety) are greater than respecting trade union rights. However, *long-term* costs for factory management of allowing union formation are likely to be perceived as far exceeding the cost of sorting out highly visible minor outcome issues, since it might lessen managerial control and challenge the power balance in the production process (Anner 2012; Barrientos and Smith 2007) The long term cost of complying with trade union rights therefore likely exceeds the cost of complying with most outcome issues. Furthermore, the reasons discussed above (such as lip service, limited involvement of workers, and ineffective auditing) for the failure of codes to improve trade union rights imply that the cost of *not* complying with trade union rights likely is less than the cost of *not* complying with outcome issues. Given the higher cost of compliance and lower cost of noncompliance, rational factory managers would need greater financial incentives from buyers to comply with trade union rights as compared to outcome issues.

In practice, there are few, if any, signs of global buyers creating such incentives. Suppliers that do respect trade union rights are rarely rewarded, and labor organizations have so far only unsuccessfully argued that buyers should provide measurable incentives for factories to actually respect freedom of association and enter into collective bargaining. Such incentives could include, for example, preferential placement of orders or a collective bargaining agreement premium in unit prices (Play Fair, 2008, p. 55). High potential costs and limited incentives are thus likely a contributing factor in codes having had limited impact on trade union rights.

Remediating trade union violations

A sixth reason that corporate-driven implementation of codes of conduct often fails to improve trade union rights is the lack of effective grievance mechanisms. A credible effort to implement trade union rights should provide victims of trade union violations an opportunity to bring these violations to the attention of global buyers and/or organizations sponsoring code of conduct initiatives. Such complaints or grievance mechanisms would constitute an essential element to ensure direct input from workers and their organizations in the code of conduct implementation, monitoring, and verification process. Potentially, grievance mechanisms would balance and supplement the limited scope of social audits, which only provide a “snapshot” of labor practices at a specific moment in time (Ascoly and Zeldenrust 2003, p. 4). Such a grievance mechanism should fulfill certain characteristics—for example, concerning legitimacy, accessibility, predictability, and transparency—in order to function well (Rees and Vermijs 2008). Given the risks involved, this requires a mechanism through which workers can safely (i.e., confidentially) report violations of the rights to form, join, and organize unions.

In many code initiatives such mechanisms are either absent, weakly developed, or simply failing (for example, when no means are available to investigate and remediate violations).

For example, Anner (2012) shows how FoA violations have the lowest remediation rate of all identified violations for companies participating in the FLA, with only a third of the violations being fully remediated. The low rates of trade union rights remediation are, according to the FLA, due to the complexity of FoA violations and the length of time it takes to remediate FoA violations (Anner, 2012). This means that not only are trade union rights violations less likely than violations of other standards to be detected in auditing, but they are also less likely to be successfully remediated.

The effectiveness of remediation and grievance mechanisms is “dependent on having a strong (public) campaign” and “having brands or MSIs (multi stakeholder initiatives) involved who dedicate sufficient resources and are prepared to work with local labour rights groups to solve the problem in an efficient manner” (Zeldenrust 2008). The marginalization of workers in both workplace-level monitoring processes and governance structures of code of conduct initiatives restricts such interaction and trustful dialogue. Also, since many brands outsource the monitoring of factory conditions to third-party social audit companies, they often lack the in-house capacity to handle complaints. A complicating factor here is that many auditors are ill equipped—or simply too pro-management—to assess the violations, particularly when they have to deal with conflicting or contradictory information about the nature of the violation (Anner 2012).

Nonetheless, locally driven grassroots leveraging of codes of conduct through complaints mechanisms (often with the support of transnational campaigns) has successfully carved out some space for independent unions to emerge. CSR departments of some well-known brands, including H&M, Nike, and Gap, have occasionally intervened when union rights were violated, for example, by pressuring factory management to reinstate dismissed trade unionists or recognize the independent unions as a collective bargaining partner. Examples here include the Kukdong factory in Mexico, the BJ&B factory in the Dominican Republic,

the Camisas Modernas factory in Guatemala, the Kimi factory in Honduras, the Kolon Langgeng factory in Indonesia, and Trelleborg's factory in Sri Lanka (Anner 2000; Armbruster-Sandoval 2003; Egels-Zandén and Bartley 2012; Egels-Zandén and Hyllman 2007; Ross 2006).

Still, relocation and factory closure have made some of these success stories short lived. As Egels-Zandén and Bartley (2012) conclude, there are few examples of code leveraging that lead to robust establishments of labor unions in factories. This is, of course, not only due to codes of conduct and the brands' sourcing strategies, but also related to newly established unions being inexperienced, having limited resources, and so on. Still, the ample examples of factory closures after union formation pose a problem.

In addition to factory closures, local leveraging of codes is limited by the difficulties of mobilizing successful international campaigns. Resources for public campaigning by labor rights advocates as well as the capacity for citizens to respond to calls for public campaigning are limited (Zeldenrust 2008; Egels-Zandén and Bartley 2012). In addition, as Seidman (2007) argues, transnational campaigns require trustful and long-standing ties between local and international activists and such ties may be weak or absent (Armbruster-Sandoval 2005). In addition to ties, the local and international component of grassroots campaigns must be equally strong (Anner 2000; Armbruster-Sandoval 2005), and they must develop in a synchronized way (Anner 2000). This is far from easy to achieve in practice.

Conclusion

Previous research has shown the uneven consequences of codes of conduct, stressing the codes' limited impact on trade union rights. Scholars have provided only vague or general explanations for this empirical finding. In this paper, we have addressed this shortcoming in previous research and provided a holistic and detailed explanation. We have argued that the

limited impact of codes is due to (i) buyers paying lip service to trade union rights, (ii) workers being treated as passive objects of regulation in codes of conduct, (iii) auditing being unable to detect and remediate violations of trade union rights, (iv) codes emphasizing parallel means of organizing, (v) suppliers having limited incentives for compliance, and (vi) codes being unable to remediate trade union violations.

These six interrelated reasons for codes having limited impact on trade union rights indicate that there is no quick fix for the codes' limited impact, since, even if one or two of the reasons are addressed, several others remain. If companies stay on their current path of codes of conduct and auditing, it is likely that codes will continue to have limited impact on trade union rights. Our findings, however, are not restricted to painting a negative picture about the current situation. They also point to ways in which codes of conduct, and private regulation of worker rights more generally, could be transformed to more effectively address trade union rights.

First, brands' symbolic commitment to trade union rights must be recoupled with their substantive actions. This could be achieved through increased external pressures and surveillance (Hallett 2010), more specific and outcome-oriented external demands (Spillane et al. 2011), internalization of external demands (Sauder and Espeland 2009), or discrediting of competing logics (Reay and Hinings 2009). Labor organizations are thus advised to continue to pressure brands to live up to their trade union rights policies in practice, to specify their demands in more detail and develop measurements of success, to invest in training of CSR and purchasing managers in trade union rights, and to challenge both the inclusion of parallel means of organizing in codes of conduct and the disconnect between buyers' purchasing and CSR demands. In doing this, labor organizations could fruitfully leverage the examples set by companies such as Russell Athletic, which has issued a "Right to Organize Guarantee" to workers at all of its facilities, pledging to respect workers' rights in the areas of freedom of

association and collective bargaining.⁹ Labor organizations could also leverage the UN Guiding Principles, which clearly stress that companies must respect trade union rights in practice.

In addition to becoming more genuinely committed to trade union rights, buyers need to shift their focus from auditing to more inclusive activities. As Oka (2011) argues, it is mainly the activities that go “beyond monitoring, namely training and dispute resolution, [that have] contributed to the broad-based progress in working conditions.” Trade unions and labor rights NGOs have also argued that an “integrated approach which includes the promotion of mature industrial relations is needed to replace the narrow social auditing model” (ITUC et al. 2012, p. 16). The current auditing emphasis has, at least, to be complemented by more capacity building activities. An interesting example moving in this direction is Adidas, which has partnered with the ILO, Manpower/Labor departments, and local industrial relations experts in various countries to provide training to workers, union officials, and factory managers.

Third, such capacity building should tie into both international and local labor organizations. Workers and their representatives must be brought into private regulation in ways that allow them to drive development. An interesting example of such an attempt is the Play Fair negotiations in Indonesia, in which international unions and NGOs mobilized and opened space for local Indonesian unions to negotiate with global brands and suppliers. The negotiations in 2009–2011 focused on developing a freedom of association protocol and monitoring system, and moved on in 2012 to also include issues of contract workers. By providing local unions with a seat at the negotiation table, local union involvement moves beyond implementation of *a priori* defined code standards into a standard setting role. These types of initiatives not only bring local unions into codes of conduct, but also strengthen the ties between local and international labor organizations. This, in turn, is beneficial for

⁹ Nova, Scott. Memo to Primary Contacts at WRC Affiliate Colleges and Universities. 30 January 2008.

successful grassroots leveraging of codes. Future research is well advised to study these new, innovative forms of private regulation of worker rights to analyze whether they hold more potential for improvement of trade union rights than traditional codes of conduct and auditing.

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