
Note From the Field

Trade, Monitoring, and the ILO: Working To Improve Conditions in Cambodia's Garment Factories

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The U.S.-Cambodia Bilateral Textile Trade Agreement, signed on January 20, 1999, was remarkable for its inclusion of a labor standards provision that created incentives for the Cambodian garment industry to bring itself into substantial compliance with international labor standards and Cambodian labor law. The labor standards provision provided the impetus for the creation of a novel program, to be operated by the International Labor Organization (ILO). This program combined trade-related incentives to enforce workers' rights with an unprecedented plan to have the ILO conduct factory-level monitoring of working conditions. This Article examines how the program was designed and implemented and evaluates the proposals and conceptions that preceded the final project document. This analysis provides a case study on how to construct and implement future programs that combine trade and factory monitoring to improve working conditions and enforce core labor rights along the global supply chain.

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I. INTRODUCTION

With a population of ten million people, an extremely small GDP, and a fledgling export market, Cambodia is perhaps an unlikely candidate for cutting-edge experiments in linking trade with labor rights. Nevertheless, on January 20, 1999 the U.S. and Cambodian governments signed the U.S./Cambodia Bilateral Textile Trade Agreement.¹ The Agreement was remarkable for its inclusion of a labor standards provision creating incentives for the Cambodian garment industry to bring itself into substantial compliance with international labor standards and Cambodian labor law. This compliance was to be facilitated through the creation of a program to improve labor standards in the garment sector. The program was eventually to be operated by the International Labor Organization (ILO).²

The ILO's program in Cambodia is novel because it combines approaches to enforcing and protecting labor rights normally thought of as distinct because they target enforcement in two different realms. First, it uses trade related incentives to enforce workers' rights. Scholars and workers' rights advocates have argued that to achieve these ends trade agreements ought to include workers' rights clauses that condition trading privileges on enforcement of labor rights by signatories to the agreement.³

1 Agreement Relating to Trade in Cotton, Wool, Man-made Fiber, Non-Cotton Vegetable Fiber and Silk Blend Textiles and Textile Products Between the Government of the United States of America and the Royal Government of Cambodia, at <http://www.tcc.mac.doc.gov/cgi-bin/doi.cgi?204:64:189233445:25> [hereinafter the Agreement].

2 The ILO was created in 1919 and is a tripartite organization comprised of three constituencies: governments, employers, and employees. The goal of the organization is to promote social justice by promoting just working conditions. See Declaration Concerning the Aims and Purposes of the International Labor Organization (Declaration of Philadelphia) (1944), [Oct. 9, 1946, 15 U.N.T.S. 35], <http://www.ilo.org/public/english/about/iloconst.htm#annex> (last visited Dec. 12, 2003).

3 See, e.g., SANDRA POLASKI, TRADE AND LABOR STANDARDS: A STRATEGY FOR DEVELOPING COUNTRIES (2002); Marley Weiss, *Two Steps Forward, One Step Back - Or Vice Versa: Labor Rights Under Free Trade Agreements from NAFTA, Through Jordan, via Chile, to Latin America, and Beyond*, 37 U.S.F.L. REV. 689 (2003). Some advocates argue for the adoption of a workers' rights clause in the World Trade Organization. See, e.g., INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS, BUILDING WORKERS' HUMAN RIGHTS INTO THE GLOBAL TRADING SYSTEM (1999) (arguing for the adoption of a workers' rights clause in the World Trade Organization that would establish a joint WTO/ILO advisory board to oversee its implementation). Others argue that workers' rights can be protected in the WTO without a separate workers' rights clause. See Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131 (arguing that a workers' rights clause is unnecessary because Article XX of GATT 1947, providing for an exception to GATT rules in certain circumstances, might be interpreted to allow for non-protectionist import restrictions on products made under conditions that violate core labor rights). But see Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HUM. RTS. L. REV. 1 (1999) (arguing there ought to be a side agreement clarifying that Article XX is to be interpreted to include exceptions for such products). The United States and the European Union have adopted mechanisms such as the Generalized System of Preferences to unilaterally condition trade benefits to developing countries upon adequate enforcement of labor rights. See generally Lance Compa & Jeffrey S. Vogt, *Labor Regulation and Trade Labor Rights in the Generalized*

This strategy is generally aimed at the public regulatory level: it aims to compel states to enact and apply adequate public labor regulation. The Cambodia project represents one of the first and most creative experiments in linking trade privileges to the respect of labor rights in trade agreements.⁴

Second, the Cambodia project harnesses the power of factory level monitoring of labor rights compliance. Some have suggested that the most effective way to regulate and police global supply chains is to allow private actors—usually corporations—to implement and monitor codes of conduct along the supply chain.⁵ This strategy aims to improve respect for workers' rights at the factory level, mostly outside of the public regulatory framework. Some commentators and advocates, particularly trade unions, have suggested that self-regulated codes of conduct are at best inadequate, and at worst an insidious device to replace unions and public regulation with voluntary enforcement by private actors.⁶ The Cambodia program is unique within this debate because it is the ILO, an international organization, that conducts the factory monitoring—not private companies or NGOs. The program serves not only as a mechanism to report on labor conditions in factories, but as a kind of supplement to and temporary replacement for Cambodia's inadequate national regulatory system, which does not, and perhaps cannot, enforce international labor standards or its own labor law.⁷

In what follows, I examine the way in which the Cambodia ILO monitoring program was designed and implemented, and analyze the proposals and conceptions that preceded the final project document. My purpose is three-fold. First, I describe how the Cambodia program

System of Preferences: A 20-Year Review, 22 COMP. LAB. L. & POL'Y J. 199 (2001). For a critique of these unilateral measures, see Philip Alston, *Unilateralism in U.S. Trade Policy*, in HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE (Lance A. Compa & Stephen F. Diamond, eds.) (1996).

⁴ The North American Agreement on Labor Cooperation (NAALC), a side agreement to North American Free Trade Agreement (NAFTA), preceded the U.S. Cambodia Bilateral Textile Trade Agreement. However, it is only a side agreement; the text of NAFTA itself does not include labor rights provisions. Moreover, many critics have argued that the NAALC labor rights enforcement mechanisms are deficient. See, e.g., Weiss, *supra* note 3, at 699.

⁵ See, e.g., Archon Fong, Dara O'Rourke, & Charles Sabel, *Realizing Labor Standards*, BOSTON REVIEW, Feb./Mar. 2001, available at <http://bostonreview.net/BR26.1/fung.html>.

⁶ See Dara O'Rourke, *Out Sourcing Regulation: Analyzing Non-Governmental Systems Of Labor Standards And Monitoring*, 31 POL'Y STUDIES J. 1, 3 (2003) (presenting arguments for and against non-governmental factory monitoring).

⁷ The question of whether or not monitoring programs hamper or complement public regulatory systems is an important issue that I do not have space adequately to address here. It is a particularly acute issue for the ILO, which has traditionally acted as a capacity builder of nations' regulatory capacity. Indeed, much of the conflict over the role of ILO as builder of technical capacity versus factory monitor, which we will see reveal itself in Section IV, hinges on this debate over the ILO's function. For an argument supporting codes of conduct and non-governmental monitoring as a complement to public regulation, see O'Rourke, *supra* note 6, at 25. Others argue that corporate codes of conduct and monitoring potentially undermine certain aspects of labor regulation. See, e.g., Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 IND. J. GLOBAL LEGAL STUD. 401 (Spring 2001).

combines trade and factory monitoring to improve working conditions and enforce core labor rights along the global supply chain. Second, I expound on the purpose of the ILO and the way it approaches labor rights issues, explaining how the ILO monitoring project in Cambodia is a novel and important experiment for the UN organization. Finally, I use the ILO program as a case study to explore how future monitoring programs ought to be constructed and implemented to best improve labor conditions.

The organization of the paper is as follows: Section II provides context to the ILO project by describing the Cambodian garment sector, including the working conditions and obstacles to labor law enforcement that existed in Cambodia at the time of the signing of the Agreement. In Section III, I describe the Agreement's provisions and the legal context within which it was negotiated. Section IV, which constitutes the bulk of the paper, describes and critiques the various ILO monitoring program proposals in order to develop a set of criteria that ought to guide the design of such programs in the future. Finally, I conclude that combining trade strategies with ILO monitoring is a positive development in the effort to improve factory working conditions worldwide. Accordingly, the ILO ought to engage in more factory level monitoring programs that are transparent and work to build independent and democratic trade unions.

II. THE CAMBODIAN GARMENT SECTOR

Cambodia's textile industry produces approximately 75% of the country's exports and is at once the largest and fastest growing segment of the Cambodian industrial sector. In 1998, textile exports to the U.S. alone were valued at \$308 million—an increase of 305% over the previous year.⁸ By 2001, garment exports totaled \$1.1 billion, with US exports comprising \$650 million. In the first nine months of 2002 these figures rose by around 12%.⁹

Approximately 200 factories operate in Phnom Penh at any given moment, employing some 200,000 workers by official count, over 85% of whom are women. Typical of the garment sectors in many developing countries, nearly all of the factories are owned and operated by non-Cambodians, mostly hailing from Taiwan, Singapore, Thailand, and other Southeast Asian countries.¹⁰ These factory owners have few ties to Cambodia, and a quick scan of any one owner's curriculum vitae will usually indicate stints of several years in a large number of low-wage, textile producing countries. These owners are nomads, moving from country to country, seeking low-wage employment markets and other mechanisms for producing at the lowest cost.

⁸ Press Release, United States Trade Representative (Jan. 21, 1999) (on file with author).

⁹ See Regina Abrami, *Worker Rights and Global Trade: The U.S.-Cambodia Bilateral Textile Trade Agreement*, Harvard Business School Case Study, No. 9-703-034, at 16 (Aug. 2003).

¹⁰ Cambodian Ministry of Commerce, *Trade Directory*, at http://www.moc.gov.kh/trade_directory/listgarme.htm (last visited Feb. 10, 2003).

A. Labor Conditions in the Garment Industry

In order to understand the context in which the ILO program was designed and implemented, it is important to consider the factory conditions in the time period during which the program was created. Despite a relatively strong labor code passed in 1996, which provided for numerous worker protections,¹¹ the actual working conditions in many Cambodian garment factories were very poor. John Hall's excellent and comprehensive 1998-1999 case study of Cambodian garment factories, from which I will draw extensively in this section, identified numerous violations of Cambodian labor law and international labor standards.¹² A brief overview of his findings, combined with my own more limited observations from the summer of 1999, will present a glimpse of the challenges facing Cambodian garment workers in the workplace.

In order to obtain a garment factory job, Hall found that workers were often required to pay fees of at least one month's wages to middlemen—in contravention of international and Cambodian law. In return for these fees, the middlemen would arrange for the job and transportation from the countryside to Phnom Penh. These fees, however, often forced the workers' rural-based families into debt, forcing workers to continue their employment in order to pay off the debt in spite of the difficulties they faced in the factories.¹³

Long hours and forced overtime—often without overtime pay—were another typical violation of Cambodian and international law found by Hall.¹⁴ During my own time in Cambodia, many factory workers complained of often being forced to work late into the night, and sometimes workers were locked in the factories until a particular customer order was completed.¹⁵ In one instance, I spoke with several workers from a Phnom Penh neighborhood who reported routinely working at a nearby factory from seven a.m. to seven p.m., six days a week, and until four p.m. on Sundays.¹⁶ However, the interview was broken up prematurely when a man, apparently from management, came over on his motorcycle and asked myself and the workers what we were doing.

Another company, Hung Wah, hired by Nike to produce Nike apparel, was infamous among workers and labor inspectors for its horrible working

¹¹ See LABOR CODE (1997) (Cambodia), at http://www.moc.gov.kh/laws_regulation/rkm_labor_law_97.htm. In addition to the Labor Code, the Cambodian Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation issues "Prakas", which are administrative orders and interpretations of the Cambodian Code that have the force of law.

¹² See generally John Hall, Note, *Human Rights and the Garment Industry in Contemporary Cambodia*, 36 STAN. J. INT'L L. 119 (Winter 2000).

¹³ See *id.* at 152. While this does not explicitly violate any articles of the Cambodian Labor Code, it arguably violates the Code's prohibition against forced labor as workers are compelled to work in the factory to pay off their debts.

¹⁴ *Id.* at 160-61.

¹⁵ *Id.* at 160.

¹⁶ Interview with workers in Phnom Penh, Cambodia (July 1999).

conditions. One worker I spoke with complained of pervasive illness among the employees, which she and NGO workers claim was caused by the long working hours and difficult living conditions endured by workers on account of their low wages and substandard lodging. When workers complained to management about not getting time off on Sundays, the problem of long hours reportedly became worse.¹⁷ In an interview, the head labor inspector also acknowledged severe problems at Hung Wah, including lack of restrooms and forced overtime. However, disputing the workers' account, he claimed that the problems were resolved after labor inspector intervention, and said that no further action was necessary.¹⁸

Wage violations were also common.¹⁹ Although the mandated minimum wage was \$40 for a forty-eight hour week, the workers I interviewed often reported sub-minimum wages, late payment of wages, and illegal wage deductions.

The right to freedom of association and the right to organize, as guaranteed in the Cambodian Labor Code²⁰ and under international law,²¹ were also routinely violated. Workers were harassed, fired, or transferred to less desirable jobs for attempting to organize unions or speak out against abuses. Workers and union representatives were also subject to intimidation and physical abuse by the police and management during labor disputes.²²

Workers seeking to register independent unions not aligned with the ruling party often faced large administrative hurdles in violation of Article 7 of ILO Convention 87 (Freedom of Association and Protection of the Right to Organize).²³ In a 1998 petition to the U.S. government requesting that Generalized System of Preferences (GSP) privileges²⁴ not be extended to Cambodia, the AFL-CIO documented a number of cases in which independent labor unions were unable to register officially and obtain the privileges that would follow, while politically connected unions had few problems.²⁵ One of the primary obstacles documented was the requirement under Cambodian labor law that union officials provide certificates of no criminal record and identification cards.²⁶ Obtaining these documents is

17 Interview with Dy Pich, Garment Worker, in Phnom Penh, Cambodia (June 1999).

18 Interview with Hout Chanty, Deputy Head Labor Inspector, in Phnom Penh, Cambodia (June 25, 1999).

19 Hall, *supra* note 12, at 162-66.

20 See Labor Code Ch. XI (1997) (Cambodia) for details on the rights to freedom of association and to organize. See also CAMBODIAN CONST. art. 36.

21 Hall, *supra* note 12, at 134-44.

22 See *id.* at 142.

23 See *id.* at 136-39 (citing International Labor Organization Convention No. 87, July 9, 1948, 68 U.N.T.S. 17, art. 7).

24 The GSP is a law by which certain developing countries may receive special reductions in tariffs provided they meet certain conditions. See 19 U.S.C. § 2461 (2000) *et seq.* For a history of labor rights in the GSP system, see Compa & Vogt, *supra* note 3.

25 AMERICAN FEDERATION OF LABOR-CONGRESS OF INDUSTRIAL ORGANIZATIONS, WORKERS' RIGHTS AND THE GENERALIZED SYSTEM OF PREFERENCES (CAMBODIA): THE AFL- CIO PETITION TO THE OFFICE OF THE UNITED STATES TRADE REPRESENTATIVES (June 16, 1998).

26 Labor Code, art. 269 (Cambodia).

difficult in Cambodia due to weak bureaucratic structures and entrenched corruption. Thus, because it was almost impossible to fulfill the formal requirements to register, political connections and bribery became the default registration mechanism.²⁷

Other problems included pervasive violations of health and safety standards embodied in the Cambodian Labor Code, including inadequate toilet facilities, inadequate medical care, and poor ventilation in factories.²⁸ In the summer of 1999, for example, over two-dozen workers passed out in a single day because of harmful fumes and poor ventilation in one factory. At the hospital where they were taken, the hospital director stated that many of them were suffering from exhaustion and low blood pressure, perhaps caused by long working hours.²⁹

B. Obstacles to Labor Law Enforcement³⁰

While the Labor Code proscribes many of the conditions and actions noted above, the law was seldom enforced. For example, despite many instances of interference with union organizing by factory owners, documented by the Cambodian Labor Organization (CLO) and other groups, , the Deputy Chief Labor Inspector, Hout Chanty, told me that up until the time of our meeting, no fines had been imposed for interfering with union organizing.³¹

One reason for the lack of enforcement was the inadequacy of the labor inspectorate. Perhaps more important than lack of technical knowledge was that labor inspectors (like all state workers) were paid well below a living wage.³² This means that inspectors, in order to make a living, were forced to take bribes for under-reporting violations in order to supplement their income.³³

A second factor in the lack of enforcement was the connection between the state and industry. The state had a political and financial interest in not enforcing the Labor Code too stringently. As John Hall noted, conducting business in Cambodia means maintaining ties with the ruling party.³⁴ In addition to providing generous financial support to the ruling Cambodian People's Party (CPP) and to Prime Minister Hun Sen, the garment industry

²⁷ Hall, *supra* note 12, at 139.

²⁸ *Id.* at 154-58.

²⁹ Khuy Sokhoean & Yko Maeda, *Factory Fumes Fell Dozens*, CAMBODIA DAILY, July 29, 1999, at 13.

³⁰ Much of the information in this section is based on the author's observations while researching this article in Cambodia, including numerous conversations with NGO workers and union members.

³¹ Interview with Hout Chanty, Deputy Chief Labor Inspector, in Phnom Penh, Cambodia (June 25, 1999).

³² Hall, *supra* note 12, at 126.

³³ It is difficult to obtain the official records of fines imposed on companies. When I requested such a list from a Cambodian official, I was told that it existed but that it would not be distributed.

³⁴ Hall, *supra* note 12, at 131-33.

served both the financial and political interests of the party. In one example, Sen promised garment factory jobs to a set of squatters in return for their involvement in pro-CPP rallies.³⁵ To provide these jobs, Sen needed the cooperation of factory owners.

It was also not uncommon for high-ranking members of the government to have direct financial interests in garment enterprises, although little direct involvement with operations.³⁶ What's more, because Cambodian bureaucracy operated on something akin to a fee-for-service basis (with the fees going into the pockets of bureaucrats and politicians), government officials could personally benefit from business operations.³⁷ Whenever a permit or paperwork or any other service from the state was required, factory owners would pay a fee to the necessary officials.³⁸ These political and financial relationships between government elites and business have important consequences for the way in which programs to improve labor standards are designed and implemented.

The existence of export quotas created yet another nexus between the state and business. Because of the limit imposed on the number of garments that could be exported, the government set up a system of allocating the export quotas to companies. This quota system is complicated, but the basic outline is as follows. The majority of the quotas were to be allotted based on the export levels of the applicant company in the previous year. Ten percent were based on a closed auction where companies bid on the available quotas, and another ten percent were to be "rewarded" to companies exporting "high value textiles...and/or complying with the Cambodian Labor Code with respect to international labor standards."³⁹ In addition, any additional quota granted by the U.S. (pursuant to the Agreement) was to be partially auctioned off and partially rewarded to new businesses or existing businesses.⁴⁰ The allocation system, while serving as a means for the state to raise revenue from the quota auctions,⁴¹ also created the potential for officials administering the auction to get payoffs in return for granting the allocations. This was the clear implication when, upon attempting to collect information on how the "special" quotas were allocated, one factory owner told me that I "would

³⁵ *Id.* at 133.

³⁶ *See id.* at 131. In one instance, when I was trying to contact the owners of a factory from which the independent union leaders had been fired, I was referred to a Cambodian army general who I was informed was a co-owner.

³⁷ *See id.* at 131-33.

³⁸ This was commonly noted by local NGO workers. *See also id.* at 126.

³⁹ Cambodian Ministry of Commerce, Pub. No. 360, Prakas: On the Result of Tender for Quota on Garments to Be Exported to the United States, art. 4 (Feb. 1, 1999) (on file with author).

⁴⁰ *See id.*

⁴¹ Several million dollars were officially raised from the auctions alone. *See* Cambodian Ministry of Commerce, Pub. No. 581, Prakas: On the Result of Tender for Quota on Garments To Be Exported To the United States (Feb. 25, 1999); Cambodian Ministry of Commerce, Pub. No. 793, Prakas: On the Result of Tender for Quota on Garments To Be Exported To the United States (Mar. 19, 1999); Cambodian Ministry of Commerce, Prakas, dated 5/21/99 (on file with author).

be advised not to inquire into that.”⁴²

The ruling CPP also derived political support from unions that were essentially controlled by the party.⁴³ Cambodia has several unions and federations.⁴⁴ Most of these, however, are politically aligned and are what have been termed “paper unions.”⁴⁵ They do little in the interests of the workers they purport to represent, but instead serve as vehicles for mobilizing political support for one political faction or another. For example, during the first consultation meeting between the U.S. and Cambodia to discuss the criteria for the monitoring program, in July 1999, Chuon Mom Thol, leader of the Cambodian Union Federation (CUF), testified that the only major challenge facing workers in the garment industry was the threat of job loss from the imposition of quotas.⁴⁶ The CUF has little grassroots legitimacy. Nevertheless, Chuon Mom Thol is routinely presented by the government as the legitimate representative of the labor movement in Cambodia and serves as vice-chair of the Labor Advisory Committee.⁴⁷

The Free Trade Union of the Workers of the Kingdom of Cambodia (FTUWKC) was the only union aligned with an opposition politician.⁴⁸ At the same time, it is one of, if not the most, dynamic and effective unions in Cambodia.⁴⁹ At one time it received a great deal of support from Sam Rainsy, who was (and remains) a prominent opposition political figure in Cambodia.⁵⁰ The FTUWKC has achieved some notable successes in forcing factory owners—and the ministry of labor—to respond to its members’ demands. For example, in the summer of 2000, the FTUWKC led a massive strike of up to 20,000 garment workers protesting for a higher minimum wage. The minimum wage was subsequently raised to forty-five dollars per month.⁵¹

42 Interview with factory owner, in Phnom Penh, Cambodia (Aug. 3, 1999).

43 See Hall, *supra* note 12, at 145-50.

44 See generally International Labor Affairs Bureau, *Foreign Labor Trends – Cambodia*, at <http://www.dol.gov/ILAB/media/reports/flt/cambodia-2003.htm> (last visited Feb. 25, 2004).

45 See Hall *supra* note 12, at 145.

46 Article 10 of the Agreement states that “[t]he Government of the United States and the Royal Government of Cambodia shall conduct not less than two consultations during each Agreement Year to discuss labor standards, specific benchmarks, and the implementation of this program.” See The Agreement, *supra* note 1. The author attended the first such meeting in July 1999.

47 See generally International Labor Affairs Bureau, *supra* note 44.

48 *Id.*

49 *Id.* Sadly, the leader of the FTUWKC, Chea Vichea, was murdered on January 22, 2004, in what many suggested was a politically motivated assassination. See, e.g., *Cambodian Union Boss Shot Dead*, BBC NEWS WORLD EDITION, Jan. 22, 2004, at <http://news.bbc.co.uk/2/hi/asia-pacific/3418821.stm>.

50 According to John Hall, this support had become primarily legal and logistical rather than financial. Hall, *supra* note 12, at 147. The union had attracted a great deal of foreign support, including the provision of an international advisor who informed me that her position was funded by the Friedrich Ebert Stiftung, a German development organization. Interview with Katja Hemmerich, in Phnom Penh, Cambodia (June 1999).

51 See Sarah Strickland, *Cambodian Clothing Workers Take to Street Over Conditions*, INDEPENDENT (LONDON), June 23, 2000; Wayne Arnold, *Translating Union Into Khmer*, NEW

There used to be only one exception to the politically aligned unions: the National Independent Federation of Textile Unions in Cambodia (NIF-TUC). NIF-TUC was a confederation of politically independent unions that was initially supported by the Cambodian Labor Organization (CLO), a Cambodian labor rights NGO. NIF-TUC's leadership, unlike its colleague federations, was comprised wholly of garment workers.⁵² Recently, a breakaway union called the Coalition of Cambodia Apparel Workers Democratic Unions (CCAWDU) has formed from NIF-TUC. Many now say that CCAWDU has more legitimacy and independence than NIF-TUC, which has come to suffer from credible accusations of corruption.⁵³

III. THE TEXTILE TRADE AGREEMENT

It is in this context that the U.S./Cambodia Bilateral Textile Trade Agreement⁵⁴ was signed on January 20, 1999, and renewed in December 2001.⁵⁵ The Agreement, valid for three years, provides for quotas on twelve apparel product categories exported from Cambodia to the U.S.

A. Putting the Agreement into Context: A Brief Overview of the Regulation of Textile Imports

Textiles have long received special treatment under international trade law.⁵⁶ Beginning in the 1950s, cotton textiles were accorded special treatment due to the fears of developed countries, particularly those of the US, about the impact on domestic manufacturers of low-cost textile imports from Japan.⁵⁷ Following on the heels of independently negotiated agreements between various member and non-member countries, contracting parties to the General Agreement on Tariffs and Trade (GATT) agreed that Article XIX (which provides measures to safeguard local industries) would be significantly expanded for textiles. A series of similar expansions were negotiated over the course of the next thirty years,

YORK TIMES; July 12, 2001, at C1.

⁵² The current leaders of NIF-TUC are Morm Nhim, President, and Ken Ken Chheng Lang, both former factory workers. The Cambodian Labor Organization (CLO) initially supported the creation of NIF-TUC. CLO's approach to union building was to create grassroots democratic structures where workers would become leaders of their unions. While in Cambodia in 1999 I worked closely with CLO on a number of issues, including the creation of NIF-TUC.

⁵³ International Labor Affairs Bureau, *supra* note 44.

⁵⁴ The Agreement, *supra* note 1.

⁵⁵ The U.S. Congress has delegated to the President under 7 U.S.C. § 1854 (2003) the power to negotiate agreements with foreign countries and to place quotas on textile and garment exports from those countries to the U.S.

⁵⁶ For a review of the history of the regulation of textiles in international trade law, see generally Kitty G. Dickerson, *Textile Trade: The GATT Exception*, 11 ST. JOHN'S J.L. COMM. 393, 404 (1996); ELLEN ROSEN, *MAKING SWEATSHOPS: THE GLOBALIZATION OF THE U.S. APPAREL INDUSTRY* (2002).

⁵⁷ See ROSEN, *supra* note 56, at 37-43.

culminating in the Multifibre Arrangement (MFA) in 1974.⁵⁸ The MFA permitted importing countries to place quotas on textile imports when surges in imports of particular products threatened domestic industry. This contradicted basic GATT principles that place a preference on customs tariffs over quotas⁵⁹ and that require all countries to treat their trading partners equally.⁶⁰ The final MFA extension, in 1991-1993, specifically permitted importing countries to punish exporting countries that engaged in trans-shipment by imposing quotas, an action which, as noted, would normally be forbidden under GATT.⁶¹

During the Uruguay Round of WTO negotiations concluded in 1995, the contracting parties concluded the Agreement on Textiles and Clothing (ATC).⁶² Under the ATC, the WTO contracting parties agreed to gradually phase out the MFA over the course of ten years and bring textiles back under traditional GATT rules.⁶³ Currently, Cambodia is neither a member of the WTO nor party to the MFA, and until it becomes such, these rules do not bind the provisions in its trade agreements. But should it, as planned, become a member of the WTO in 2005, quotas would have to be phased out in accordance with WTO rules and only tariffs would remain.

In addition, Cambodia agreed to lower its trade tariffs and barriers to U.S. textile exports.⁶⁴ If Cambodia becomes a member of the WTO in 2005, and assuming the Agreement is renewed for the period until then, the Agreement's provisions may be amended to comply with WTO requirements. However, the U.S. explicitly provided in Article 19 of the Agreement that the provision prescribing labor standards will remain in force and will be referred to the Textile Monitoring Body of the WTO should Cambodia become a member before 2005, at which date the ATC lapses and quotas end.⁶⁵

58 Agreement Regarding International Trade in Textiles (Multifibre Agreement), Dec. 20, 1973, 25 U.S.T. 1001 (entered into force on Apr. 1, 1974).

59 See General Agreement on Tariffs and Trade, Oct. 30 1947, art. XI, 55 U.N.T.S. 188 (entered into force on Jan. 12, 1948).

60 See *id.* art. 1.

61 See Dickerson, *supra* note 55, at 421 n. 153. Transshipment is a technique by which exporters can get around the quotas placed on the country of production. Exporters ship the garments through another country that has unused quotas, or no quotas at all, in order to conceal the identity of the country of origin. This was the situation in Cambodia—other countries were using Cambodia as a transshipment point because Cambodia was not subject to U.S. quotas.

62 See Agreement on Textiles and Clothing, *opened for signature* Apr. 15, 1994 (entered into force Jan. 1, 1995), 1868 U.N.T.S. 14, at http://www.wto.org/english/docs_e/legal_e/16-tex_e.htm (last visited Dec. 12, 2003).

63 See *id.* art. 1.

64 *Id.* art. 20.

65 Article 19 of the Agreement reads:

In the event that Cambodia becomes a member of the World Trade Organization (WTO), and the United States applies the Agreement Establishing the WTO (WTO agreement) to Cambodia, the provisions set out in paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 20 will be necessary in relationship to the implementation of Agreement on Textiles and Clothing. Therefore, upon membership of Cambodia in the WTO and application of the WTO agreement by the United States to Cambodia,

A labor standards provision was included in the Agreement. This was the first time such a provision had been included in a bilateral, U.S.-negotiated trade agreement. This labor standards provision represented a strategy by the Clinton administration to link trade with labor and environmental standards.⁶⁶ American labor unions, particularly the Union of Needletrades, Industrial and Textile Employees (UNITE), played a major role in advocating for linkage in the Cambodia agreement, with NGOs such as the International Labor Rights Fund and the Lawyers Committee for Human Rights playing supportive roles as well. The labor standards provision reads:

Cambodia shall support the implementation of a program to improve the working conditions in the textile and apparel sector, including internationally recognized core labor standards, through the application of Cambodian labor law . . . The Government of the United States will make a determination . . . whether working conditions in the Cambodia textile and apparel sector substantially comply with such labor law and standards.⁶⁷

If the U.S. determined that the Cambodian garment industry were in substantial compliance with Cambodian labor law and internationally recognized labor standards, the U.S. could, on a discretionary basis, increase Cambodia's quotas up to fourteen percent per year in addition to a standard six percent annual increase.⁶⁸ This created a "carrot," in that if the Cambodian garment industry were in substantial compliance, it would be rewarded with a higher quota. In December 2001, the agreement was renewed for another three years, and the quota incentive was increased to up to eighteen percent.⁶⁹ In 2000, the first year of the Agreement's implementation, the U.S. government granted a five percent increase.⁷⁰ In 2003, the U.S. government granted a twelve percent increase out of the possible eighteen percent.⁷¹

IV. THE PROPOSALS

The U.S. and Cambodian governments agreed that the ILO would

those provisions will remain in force and will be notified to the Textile Monitoring Body.

⁶⁶ Telephone Interview with Ray Unger, International Trade Specialist, U.S. Department of Commerce (Dec. 20, 1999).

⁶⁷ The Agreement, *supra* note 1, art. 10.

⁶⁸ *Id.* However, when Cambodia becomes a member of the WTO and quotas are phased out, the U.S. will likely have to alter the mechanism by which its labor provisions are enforced. Textiles are not covered under GSP protections, thus the US would have either to extend GSP to cover textiles, or to replace quotas with tariffs as the mechanism of enforcement for this particular labor provision.

⁶⁹ See Abrami, *supra* note 9, at 15.

⁷⁰ *Id.* at 10.

⁷¹ *Id.* at 15. For a political and historical narrative of how the agreement came into being, as well as the factors that went into some of the initial quota determinations, see *id.*

design and implement the program required by the Agreement.⁷² The cost of the program was budgeted at \$2.2 million: \$200,000 was to come from the Cambodian government, an equal amount from the Garment Manufacturers Association of Cambodia (GMAC), and the remaining \$1.8 million from the U.S. government. On June 9, 1999 the ILO circulated its first draft proposal. This proposal included the input of the United States Trade Representative, the Department of Labor, the Department of State, the AFL-CIO, and UNITE.

No Cambodian NGOs or trade unions, however, were consulted during the drafting process. Indeed, Cambodian groups had almost no knowledge of the terms of the proposal before, during or after the negotiations, and were not asked to contribute. One American official told me at the time that he was concerned about getting too many groups “up in arms” over it.

A total of six project proposals and counter proposals were circulated between June 1999 and May 2000, when the final project document was agreed upon. Although the Cambodian government and GMAC were involved in the process and represented through the ILO’s proposal, the two primary negotiating parties were the U.S. government and the ILO. In the next section, I analyze the initial ILO proposal, the U.S. counter-proposal, and the final, agreed-upon proposal. The first two proposals indicate how the ILO and U.S., respectively, would have preferred to shape the program if left to their own devices. The ILO initially emphasized capacity building in the Cambodian labor inspectorate, while the U.S. proposal emphasized the need for an independent monitoring body run by the ILO. The final joint proposal, which became the ILO program’s mandate, will be the subject of the last section of analysis.

A. ILO Proposal: Labor Law Implementation in the Textile and Apparel Industry of Cambodia

The initial ILO proposal was entitled “Labor Law Implementation in the Textile and Apparel Industry of Cambodia.”⁷³ The proposal’s problem

⁷² UNITE had lobbied for a different monitoring mechanism, designed by Professor Mark Barenberg, a leading expert on international labor regulation at Columbia University Law School. Under this plan, a Labor Supervisory Commission would be established, composed equally of Cambodian government officials, independent Cambodian labor rights experts, and ILO representatives. The Commission would have functioned as something akin to a “shadow labor ministry,” and would have engaged in a number of government-like activities including supervising elections of worker representatives, designing regulations governing union recognition, and conducting unannounced investigations of factories. It would also have had remedial powers, such as the exclusive authority to implement the functions of dispute resolution and mediation as provided for in the law. *See* Memorandum on Proposals for Bilateral Trade Agreement by/from UNITE (Nov. 19, 1998) (on file with author). The U.S. government rejected this proposal, however, because it felt that it would unacceptably infringe upon the sovereignty of the Cambodian government. Interview with Mark Barenberg, Columbia University Law School, in New York, NY (Nov. 2002).

⁷³ Labor Law Implementation in the Textile and Apparel Industry of Cambodia , ILO (June 9, 1999) (draft not publicly circulated, on file with author) [hereinafter Proposal I].

statement declared that the project's key objective was "to ensure that a system of monitoring exists that is adequate to enable 'substantial compliance' with Cambodia's labor legislation to be verified on a regular and on-going basis."⁷⁴ The proposal asserted that enabling compliance with the labor code in a sustainable way required "strengthening capacity for self-compliance with laws and regulations."⁷⁵ This was to be achieved through improving relations between workers and management by building up workplace mechanisms that fostered "closer cooperation in preventing disputes, settling quickly and fairly those disputes that do arise, and generally contributing to the development of an industrial relations system that encourages harmony and cooperation rather than confrontation and conflict."⁷⁶

The proposal identified certain problems that would have to be addressed to bring about substantial compliance.⁷⁷ Generally, the highlighted problems were not violations of core labor rights as defined in the ILO's Declaration on Fundamental Principles and Rights at Work,⁷⁸ such as anti-union discrimination and violations of freedom of association, but rather violations of labor standards such as underpayment of wages, poor health and safety provisions, lack of internal work rules and procedures within individual enterprises, and lack of enforcement of internal mechanisms for conflict resolution, such as free and fair elections of shop stewards.⁷⁹ Although the proposal noted the "lack of, or weak organizations at enterprise level," as well as "general disregard by companies of workers' rights," notably the word "union" was never used in the proposal.⁸⁰

Furthermore, in a section describing problems that existed in the government inspection system, the proposal described a number of technical deficiencies in the inspection process without ever mentioning the fundamental problems that prevented effective inspections: corruption by inspectors and the close relationship between the government and employers.⁸¹ This is noteworthy because, as we will see below, the ILO

⁷⁴ *Id.* ¶ 27.

⁷⁵ *Id.* ¶ 28.

⁷⁶ *Id.* ¶ 30.

⁷⁷ *Id.* ¶¶ 31-32.

⁷⁸ ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998.

⁷⁹ Proposal I, *supra* note 58, ¶¶ 32-34. For a discussion of labor rights versus labor standards, see Gary S. Fields, *The Role of Labor Standards in U.S. Trade Policies* (Paper prepared for the Conference on Social Dimensions of U.S. Trade Policies, Washington D.C April 16-17). Fields calls process oriented standards labor rights, which he defines as "human rights in the workplace." See *id.* at 15. These rights are so fundamental, he argues, that it would better to have no production at all than production using such illegitimate means. I would equate these rights with the core labor rights defined in the ILO's Declaration on Fundamental Principles. See *supra* note 79. Labor standards, on the other hand, are those workplace processes and conditions that, according to Fields, "we would aim towards and rather have than not have." Fields, at 15-16. I believe that a system in which labor rights are adequately protected is the best means of arriving at an optimal level of labor standards.

⁸⁰ Proposal I, *supra* note 72, ¶ 33.

⁸¹ See *id.* ¶ 34.

project strategy never envisioned ILO monitoring, but rather building the capacity of the Cambodian labor inspectorate to monitor and enforce Cambodian labor law through training of government inspectors.⁸²

The proposal set forth a somewhat incoherent set of strategies intended to address “the problems facing the [Ministry of Labor] and the social partners.”⁸³ The proposal made the Tripartite Compliance Committee (TCC) the administrative and advisory focal point of the certification process. It would consist of twelve members: “3 government, 3 workers from separate labor federations/unions, 3 employers, and 3 independent persons,” as selected by the Project Advisory Committee.⁸⁴

The core of the strategy would be to strengthen the Cambodian labor inspection system.⁸⁵ The ILO explicitly excluded itself from undertaking monitoring on its own and “did not envisage the ILO as a law enforcement agency or as an agent to directly monitor compliance with the articles of the USA-Cambodia Trade Agreement.”⁸⁶ Instead, “[t]he ILO’s role [was] to monitor and advise on the implementation of a technical cooperation project, not to undertake inspections in its own name in individual enterprises.”⁸⁷ No monitoring program independent of the government labor inspectorate was to be created. As we shall see, what became reality was far afield of this initial vision.

As envisaged, the inspection process would have been as follows. The labor inspection teams would be comprised of Cambodian inspectors working directly for the government. The ILO would act primarily as a technical advisor to the Ministry of Labor and to these inspection teams.⁸⁸ The teams would submit inspection reports evaluating levels of compliance according to a set of core indicators endorsed by the tripartite committee.⁸⁹ These core indicators would be based on what is required of factories by the Cambodian Labor Code (i.e., not necessarily internationally recognized core labor standards).⁹⁰ Although certain indicators were recommended in the proposal, they tended to focus on industrial relations-type criteria, such as the presence of “manager worker discussion forums” (which are not mandated by the Labor Code), rather than on respect for core labor rights.⁹¹ In a section recommending indicators that would be *necessary* given the labor code, there is little reference to unions or labor rights apart from the protection of union officials from retaliatory firings.⁹²

To ensure effective compliance with Cambodian labor law, a system of certificates of compliance would be established in which companies

82 See *id.* ¶ 38.

83 *Id.* ¶ 35.

84 *Id.* ¶ 45.

85 Proposal I, *supra* note 75, ¶¶ 35(a)(i), 38.

86 *Id.* ¶ 38.

87 *Id.*

88 See *id.* ¶ 39.

89 *Id.* ¶ 40.

90 Proposal I, *supra* note 72, ¶ 41.

91 *Id.* ¶ 40.

92 *Id.* ¶ 41.

deemed to be “substantially complying” would be granted certificates.⁹³ These certificates would enable factories to obtain quota allocations for export of their garments to the U.S.⁹⁴

The process of issuing certificates of compliance would have been as follows. The findings in the inspection report would be shared with representatives of workers and management. If the problems noted in the reports could not be informally resolved between the parties, the report would be forwarded to the director of labor inspection who would make a recommendation to the Minister of Labor, the ILO and the TCC as to whether or not a certificate of compliance ought to be issued to the factory.⁹⁵ Without a certificate, a company would not be able to acquire additional quotas for shipment of garments to the U.S. Initially, certificates would be valid for three months.⁹⁶ No certificate could be issued without being submitted to the TCC for discussion and comment, and the TCC would conduct public hearings by inviting the public to comment in open hearings.⁹⁷ The Minister of Labor, however, and not the TCC would make the final determination. As the document makes clear, “the [TCC] will have no executive powers and will operate [only] as an advisory body.”⁹⁸

The process proposed, including enabling public comment on factories, could have presented a powerful experiment in transparency. First, enabling outside observers and directly affected parties such as workers and unions to comment might have provided an incentive for factories to clean up their practices or be exposed in a public forum. Second, it could have provided workers with an organizing opportunity. By granting unions and their members, as well as other groups, an opportunity to impact the ability of a company to obtain a compliance certificate, a point of leverage might have been created around which workers could mobilize to put pressure on factories to respect Cambodian labor law.

1. Critique

i. U.S. Determination of Quota Increase: Definition of Substantial Compliance

The Agreement requires that a determination be made by the U.S. government, for the purposes of quota allocation, whether Cambodia’s garment sector is in substantial compliance with the Cambodian labor code and international labor standards. Although “substantial compliance” is referred to throughout the proposal, there is no definition of what industry-wide “substantial compliance” means.⁹⁹ The failure to define

⁹³ *Id.* ¶ 36.

⁹⁴ *See id.* ¶ 43.

⁹⁵ Proposal I, *supra* note 72, ¶ 42.

⁹⁶ *See id.* ¶ 44.

⁹⁷ *See id.* ¶ 43.

⁹⁸ *Id.* ¶ 46.

⁹⁹ *See* the Agreement, *supra* note 1, art. 10 (d).

substantial compliance may leave too much room for politically based and subjective decision-making by the U.S. This is a critique of both the way the Agreement was written, and the way in which the project proposal was written. These two documents ought to be read together organically such that the implementation of the program would reduce the discretionary nature of the determination with respect to quota allocation made by the U.S. government.

ii. Certification Process

While the certificate system might have created powerful incentives for individual factories to improve compliance, there were problems in the way the system was designed.

a. Substantial Compliance

There were insufficient objective criteria by which to determine whether *specific* factories were in substantial compliance for the purpose of issuing compliance certificates.¹⁰⁰ Compliance certificates were to be granted based on a set of indicators that would be developed by the TCC and approved by the Ministry of Labor. However, the project proposal provided little basis for guiding the relevant actors on how these indicators would be used to determine if factories were or were not in substantial compliance.

b. International Core Labor Rights

The proposal also failed to require sufficient reflection of core international labor rights in the indicators that were to be used to determine if the factories were substantially compliant. According to the proposal, the legal source of the core indicators would be the Cambodian Labor Code.¹⁰¹ The Agreement, however, specifically called for the indicators to be drawn from both the Code *and* internationally recognized

¹⁰⁰ It should be noted that some critics have generally questioned the value and reliability of factory certification systems. First, certification systems might give incorrect information about the current state of affairs in a factory. Some contemporary systems, such as Worldwide Responsible Apparel Program (WRAP), are based on a certification process that takes place once a year, and eventually twice a year. See <http://www.wrapapparel.org/> (last visited Dec. 11, 2003). Because workplace conditions can be extremely dynamic and quick to change, these snapshots might not accurately reflect the state of labor rights compliance in the factory. Second, some trade unionists suggest that any form of certification is misleading because a factory is never completely compliant. Winning respect of labor rights is an ongoing struggle between workers and management. Third, some argue certification is inherently impossible because of the intangibles inherent in labor rights monitoring. Evaluating compliance with freedom of association, for example, is an inherently qualitative process that seldom lends itself to compliant/non-compliant determinations. Accordingly, determining that a factory is compliant is inherently impossible.

¹⁰¹ See Proposal I, *supra* note 72, ¶ 41.

labor standards.¹⁰² The rationale was to ensure that if there were any deficiencies in labor rights protections under the Labor Code, this gap would be filled by reference to internationally recognized core labor standards.¹⁰³ Thus, the proposal, like the Agreement, should have required that the indicators reflect core international standards.

c. Government Control of the Certification Process

Another problem was that the certification process would essentially be controlled by the government. We have already seen that the Cambodian government was closely aligned with business interests. Although the creation of an ostensibly representative committee is a step towards greater transparency and accountability, the TCC had no real power; and, in the end, it would still have been the government making case by case decisions with little accountability.

d. TCC Prone to Bias

Finally, the TCC was prone to bias. The government and the GMAC would have made up half the body, there was no requirement that the workers' representatives come from independent or democratic unions, and there were few criteria relating to the identity of the independent observers. Genuine workers organizations could very well have had little or no representation at all because of their small numbers compared with the proliferation of government union federations.

iii. Emphasis on Capacity Building

The focus on capacity building and technical assistance and the lack of ILO-conducted monitoring would have been problematic. One of the core problems with Cambodia's monitoring system was the degree of corruption within the inspectorate. Making the ILO only a technical advisor would not have addressed this fundamental problem because an inspector who does not make a living wage cannot be trained to refuse bribes.¹⁰⁴ On the other hand, technical capacity building is a vital element in implementing any ILO monitoring system because long-term sustainability requires a functioning state regulatory system. However, where that is impractical in the short-term, ILO monitoring can provide an important intermediate step in that process.

In the end, the U.S rejected this proposal for many of the reasons cited

¹⁰² The Agreement, *supra* note 1, art. 10 (d).

¹⁰³ It should be noted that at the time of the first proposal, Cambodia had adopted only one of the ILO's core conventions. While the proposal indicated that the others would soon be ratified by Cambodia's National Assembly, it implied that without ratification the industry and government could not be held accountable under the conventions even though the Agreement indicated otherwise.

¹⁰⁴ See *supra* notes 32-33 and accompanying text.

above. The U.S. government took a more involved role in rewriting the agreement and assigned the Department of Labor to make significant alterations to the initial draft proposal with significant input from the AFL-CIO and UNITE, the U.S. textile and apparel workers union. A new draft was circulated (once again, secretly) on September 16, 1999.

B. Proposal II

Whereas Proposal I aimed to enable substantial compliance with the Cambodian labor code, the objective of Proposal II shifted to implementing “a system of monitoring that enables the United States accurately to determine whether the Cambodian Government and Cambodian employers ... are substantially complying with Cambodian labor law and internationally recognized core labor standards.”¹⁰⁵ The Proposal I goal of improving industrial relations was completely eliminated.¹⁰⁶

By contrast with Proposal I’s identification of the primary objectives as improving labor standards and industrial relations, Proposal II clearly stated that the primary problem to be addressed was the violation of labor rights in the factories. Accordingly, the indicators to be used in determining whether or not a factory was in substantial compliance with Cambodian labor law and international core standards explicitly highlighted labor rights such as freedom of association; whether or not the factory engages in good faith bargaining; the right to strike; and if unions are recognized by the employer in accordance with the law.¹⁰⁷ The drafters took pains to emphasize that the indicators would be based not only on Cambodian labor law, but also internationally recognized core labor standards.

Proposal II also substantially changed the role of the ILO. Rather than acting primarily as a technical advisor, it was to begin operating as an independent monitoring body. Teams of ILO inspectors would visit individual factories, make initial assessments of compliance levels with the core indicators, and then make substantial compliance plans for each individual factory.

An innovative protocol required the ILO monitoring teams to respond to complaints by workers alleging anti-union discrimination. The monitoring teams would visit factories:

on each occasion when employees complain that the enterprise has interfered with union activity or engaged in anti-union retaliation, in order to monitor and report on [violations of freedom of association]; on each occasion when employees complain that the enterprise has

¹⁰⁵ Labor Law Implementation in the Textile and Apparel Industry of Cambodia, at ¶ 27, ILO (Sept. 16, 1999) (draft proposal not publicly circulated, on file with author) [hereinafter Proposal II].

¹⁰⁶ *Id.* ¶ 25.

¹⁰⁷ *See id.* ¶ 41 (1-4).

manipulated . . . the independent activity of any labor organization . . . ; on each occasion when a union or union supporters present their demands for recognition, or the enterprise or Cambodian government makes inquiries or determination about the representative status of unions . . . ; periodically during each collective strike or protest.¹⁰⁸

The monitoring teams would write reports on their findings after a factory visit (whether it was routine or requested) and then present them to management and workers, who would then try to resolve the issues in a forum with the inspection team acting as mediator. If there were no agreement, the differences would be noted in the public document. Regardless of negotiated outcomes between workers and management, this document would then be forwarded to a monitoring body called the Tripartite Compliance Committee (now called the Tripartite Advisory Committee (TAC)).¹⁰⁹

The TAC would be comprised of two government representatives, three employer representatives, three union representatives, and four public interest representatives chosen by the ILO's Chief Technical Advisor. This would mean that the independent participants would have a dominant role. Advice on the appointment of the TAC would be given by a proposed Project Advisory Committee (PAC) composed of the parties to the agreement and the ILO.¹¹⁰ The PAC's responsibilities would also be advisory, and would provide advice on such matters as project work plans and implementation.¹¹¹

The TAC would hold public hearings and provide for comment on the reports. Whether all information in the reports would be released and made public was not completely clear. The Chief Technical Advisor would also submit reports on a quarterly basis to the Project Advisory Committee that would assess the level of substantial compliance with the law and with ILO standards.¹¹² Whether this meant an assessment of specific factories, or of overall industry-wide substantial compliance was also not clear. The reports from the monitoring teams and the overall quarterly assessment from the Chief Technical Advisor would then be used by the U.S. in its determinations under the Agreement, and *could* be used by the Cambodian Government in its quota allocation decisions.¹¹³

The final major difference between Proposal I and Proposal II alteration concerned the compliance certification process—in Proposal II it was completely eliminated. In fact, there would be no company-specific financial incentives to encourage compliance, or punish non-compliance.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ¶ 43.

¹¹⁰ Proposal II, *supra* note 106, ¶ 77.

¹¹¹ *Id.* ¶ 76.

¹¹² *Id.* ¶ 47.

¹¹³ *Id.* ¶ 42.

1. Critique

The elimination of the certificate of compliance system meant that there might be insufficient incentives to compel individual companies to comply with the requirements of the Agreement. Without the company-specific instrument of the certificates, there would be only collective incentives for the industry as a whole. This might create a free-rider problem. Individual companies might make a rational decision not to comply with the Labor Code (assuming compliance raises costs or has other perceived or real disadvantages) if they believed that the other companies in the industry would comply sufficiently for the US to grant the industry-wide quota. So long as a company could be confident that it would acquire quota regardless of its individual conduct, it would have little reason to bring its own conduct into compliance.¹¹⁴ Given the suspect nature of the quota allocation system, this would have been a likely scenario.¹¹⁵

An alternative mechanism to deal with this might have been to link individual factory level compliance with individual quota allocation. Because it is likely that very few factories would have been found to be in substantial compliance, a mechanism that allowed for levels of progress might have been developed. An obvious difficulty with this, of course, is the development of a set of metrics that could evaluate the level of compliance in a quantitative way.¹¹⁶ The central point is that in situations where quotas or other forms of incentives are used, there should be some link between individual performance and reward.

Like Proposal I, Proposal II lacked a definition of “substantial compliance.” Thus, the U.S. would have remained free to make decisions unbounded by formal criteria.

Proposal II also lacked mechanisms to address the problem of discrimination in the trade union registration process. While one of the core indicators asks if there has been company intervention in the process of union recognition, there is no reference to government interference. Yet, as we have seen, government bureaucratic obstacles were pervasive in the process of independent unions seeking recognition.

Finally (and this applies to both proposals), protection of workers’ rights also requires permitting workers to be involved in the process of creating and drafting the mechanisms which are supposedly to their benefit. There was close to no outreach to Cambodian workers’ groups during the crafting of these proposals. Indeed, during the first consultation meeting between the U.S. and Cambodia to discuss the labor standards

114 There are, however, collective pressures that might be exerted by the Manufacturers Association on its members to comply. But this assumes that the association would on its own be able to monitor and police its membership adequately.

115 See Hall, *supra* note 12, at 131-33.

116 See, e.g., HUMAN RIGHTS FIRST (formerly LAWYERS COMMITTEE FOR HUMAN RIGHTS), YARDSTICKS FOR WORKERS’ RIGHTS: LEARNING FROM EXPERIENCE, at <http://workersrights.humanrightsfirst.org/> (last visited Apr. 1, 2004).

provision, CLO, NGO's, and the FTWUKC were only formally notified of the meeting two days beforehand.¹¹⁷ Politically connected unions such as the CUF were given a great deal of notice, and thus had the opportunity to craft better speeches for the benefit of the foreign audience.

C. The Final Project Document—Proposal VI: Ensuring that Working Conditions in the Textile and Apparel Sector of Cambodia Comply with Internationally Recognized Core Labor Standards and the Cambodian Labor Law

What emerged in the final agreed upon draft was a program that borrowed from the initial ILO approach as expressed in the June 1999 proposal, as well as the US Department of Labor's approach as expressed in the September 1999 proposal.

The agreed upon problem statement reads: "The key issue to be addressed ... is to ensure that working conditions in Cambodia's textile and apparel sector comply with internationally recognized core labor standards and the Cambodian Labor Code."¹¹⁸ Compare this with the ILO's initial proposal which indicated the key issue to be addressed as "ensur[ing] that a system of monitoring exists that is adequate to enable 'substantial compliance' with Cambodia's labor legislation to be verified on a regular and on-going basis."¹¹⁹ Compare this also with the U.S. government's initial proposed problem statement, which held that the primary goal of the plan was to enable "the United States accurately to determine whether the Cambodian Government and Cambodian employers in the apparel and textile sector are substantially complying with Cambodian labor law and internationally recognized core labor standards."¹²⁰ The first proposal was oriented towards building the monitoring capacity of government labor ministry in order to improve working conditions. The second was oriented to enabling the U.S. to make a determination on substantial compliance. The final document's primary concern is to ensure that working conditions in the factories comply with Cambodian and international standards.

The means of ensuring that working conditions comply with Cambodian and international law is essentially two-pronged. First and most significantly, an independent external monitoring program will be run by the ILO.¹²¹ Second, capacity building and technical assistance will be provided by the ILO through training a core group of Cambodian labor

¹¹⁷ Statement of Cambodian Labor Organization at First Consultation Meeting (on file with author).

¹¹⁸ Ensuring that Working Conditions in the Textile and Apparel Sector of Cambodia Comply with Internationally Recognized Core Labor Standards and the Cambodian Labor Law, at ¶ 26, ILO (May 4, 2000) (on file with author) [hereinafter Proposal VI].

¹¹⁹ Proposal I, *supra* note 75, ¶ 27.

¹²⁰ Proposal II, *supra* note 106, ¶ 27.

¹²¹ Proposal VI, *supra* note 119, ¶ 32.

inspectors.¹²² This capacity building is to be the ILO's means of ensuring that the program addresses and facilitates enforcement issues. The ILO will also provide technical assistance in drafting regulations and labor laws. The inclusion of both of these elements represents a compromise from the initial proposals, since the first ILO proposal focused only on capacity building and the second U.S. proposal focused only on monitoring.

It is also interesting to note how the terms of reference for the program developed. In the first proposal, the terms were to be strictly based on the Cambodian Labor Code. The second proposal by the U.S. focused on the Labor Code and core worker rights as reflected in the ILO core conventions. The agreed upon plan shares the Proposal II approach: the legal standard to be used is a combination of Cambodian labor law *and* internationally recognized workers' rights.¹²³

1. Monitoring Methodology

The methodology of the monitoring is the crux of the agreement, and it is worth giving it some attention. A good deal of discretion is placed in the hands of the ILO's Chief Technical Advisor to operate the program as he sees fit. However, some general methodology is provided for in the monitoring plan.

Four teams of two monitors will each inspect participating Cambodian apparel factories. The stated goal is that each factory would be monitored on average six times per year.¹²⁴ Once the monitoring reports are finalized with the approval of the Chief Technical Advisor, the inspectors are to discuss the findings with employers and the workers.¹²⁵ If there is disagreement as to the findings they are to be resolved in the discussions. If this fails, the disagreements are to be noted in the final factory reports.

i. Indicators

The section governing indicators was one of the most contentious of the negotiations, and provides some of the more interesting insights into the different strategic approaches of the ILO and US Department of Labor. First, in the final project document it was agreed that the indicators would be developed by the Chief Technical Advisor. However, it is made clear that these indicators would at least include the basic worker rights as well as "other working conditions," such as wages and hours, and health and safety issues.¹²⁶ The purpose of these indicators is to provide a "checklist" that monitors would use to evaluate labor rights compliance in the factories. Moreover, the final document emphasizes that the indicators should "focus on the process of workers exercising these rights at the

¹²² *Id.* ¶ 31.

¹²³ *Id.* ¶ 25.

¹²⁴ *Id.* app. 1, ¶ 2.7.

¹²⁵ *Id.* app. 1, ¶ 2.8.

¹²⁶ Proposal VI, *supra* note 119, app. 1, ¶ 2.4.

workplace.”¹²⁷ The checklist that was eventually developed by the Chief Technical Advisor consists of 156 items that are to be monitored by the ILO. It closely tracks the Cambodian Labor Code, categorizing the issues to be monitored under the matching article of the code. The Labor Code is an extremely detailed and comprehensive document, regulating many aspects of industrial relations and factory conditions. The checklist, therefore, covers everything from freedom of association to reporting on whether or not there are daycare centers for workers’ children. The effect is to give far more attention to standards than to rights because of the breadth of the Code.¹²⁸

ii. Compliance Mechanism

Much of the debate about what indicators should be used in the factory monitoring reflects different conceptions about the role of the monitoring program. The U.S. Department of Labor’s approach in Proposal II, clearly reflecting UNITE’s view,¹²⁹ was that one of the important purposes of the program was to facilitate the creation and organization of independent unions. The requirement found in Proposal II that the ILO respond to worker complaints was intended to place special emphasis on the rights of workers to organize. This, it was believed, would be a crucial step towards building up a labor movement in Cambodia that, in turn, would lead to sustainable improved labor conditions.¹³⁰

One of the most controversial paragraphs, and the subject of much negotiation, relates to how responsive the monitors must be to workers’ complaints about employer interference with trade union activity. The Department of Labor proposal envisioned a monitoring program that was very responsive to such complaints and required the ILO to monitor and report on claims of interference with trade union formation. The final agreement’s language requires that the ILO monitor trade union elections and collective bargaining sessions, but only requires that they “give particular consideration” to worker complaints regarding interference with trade union activity.¹³¹ In other words, it is now discretionary rather than mandatory that the ILO respond.

iii. Reporting and Transparency

Every three months, the Chief Technical Advisor is to publish

¹²⁷ *Id.* at app. 1, ¶ 2.5.

¹²⁸ See *supra* note 80 for a discussion of the difference between labor standards and labor rights.

¹²⁹ See Memorandum from United Needletrades, Industrial and Textile Employees to United States Department of Labor 1 (Aug. 4, 1999) (on file with author).

¹³⁰ Indeed, the AFL-CIO was hoping for as strong a mechanism as possible to protect union organizing, for soon after the establishment of the ILO program, it established an office of its Solidarity Center in Phnom Penh, staffing it with an experienced American union organizer.

¹³¹ See Proposal VI, *supra* note 119, app. 1, ¶ 2.5.

“synthesis reports.” According to the project document, these reports are to contain: 1) the names of the participating enterprises; 2) monitoring results including the number of sites and the “results and shortcomings, if any”; and 3) “other information available to the [Chief Technical Advisor].”¹³² These reports and comments on the reports made by the PAC are to be disseminated widely and placed on the ILO website. As of this writing, eight reports have been made public, and two more will be made so shortly.¹³³

2. Critique

The problem with compromises is that often the most interesting innovations are eliminated and the less desirable ones remain. The final proposal did not introduce any new mechanisms, but instead pared down, modified, or eliminated those that were proposed in the first two documents. Because I have discussed these already, a brief account will suffice. First, without a certificate of compliance system or other mechanisms that focus on individual compliance, there are insufficient mechanisms to compel compliance by individual factories. Second, there is still no definition of substantial compliance. Currently, the Committee for the Implementation of Textile Agreements makes the determination.¹³⁴ Third, without the aggressive monitoring protocols with respect to complaints regarding trade union rights violations, provided for in Proposal II, there are insufficient mechanisms to monitor such claims. Finally, the method of quota allocation was not addressed.

In addition to the critiques already noted, another set of issues arise based not only on the structure of the agreement, but also on its implementation, as evidenced by observations during visits in December 2002 and April 2003.

i. No Participation Requirements

Without a certificate of compliance system, there must be another mechanism to compel participation in the monitoring program, if not compliance with the law. There was nothing included in the agreement to require this. However, the Ministry of Commerce did pass an administrative order that all factories, in order to receive export licenses, had to participate in the otherwise voluntary ILO program.

¹³² *Id.* app. 1, ¶ 3.

¹³³ See ILO, EIGHTH SYNTHESIS REPORT ON THE WORKING CONDITIONS SITUATION IN CAMBODIA'S GARMENT SECTOR, at <http://www.ilo.org/public/english/dialogue/ifpdial/publ/cambodia8.htm> (last visited April 18, 2004).

¹³⁴ The committee is comprised of the U.S. Departments of State, Labor, Commerce, Treasury, and the United States Trade Representative. The proceedings of this committee are not generally made public.

ii. Factory Information Not Shared Equally

The project document requires that “once the [Chief Technical Advisor] has approved the report the monitors will discuss it with the employer and workers in an attempt to conciliate and reach agreement.”¹³⁵ However, the project’s Chief Technical Advisor, Lejo Sibbel, made a decision at the beginning of the project that he would not share the results of the factory monitoring with workers and their representatives because of fears that the workers would use it to justify a strike. If the workers were to go on strike in the beginning due to reports, he argued, this would jeopardize the program. This decision was controversial, drawing criticism from unions and workers’ rights groups. A number of groups claimed that they would like to be able to see the reports.¹³⁶ According to Sibbel, he has begun to share the results of the reports with workers, but still does not share the entire reports with workers.¹³⁷

This request of the unions has merit. First, it is unlikely that workers will go on strike because of what is contained in a monitoring report. Generally, workers are fully aware of problems in a factory and will go on strike because other recourse to remedy them has failed. Moreover, if one accepts the premise that improvement of working conditions is best achieved with the participation of workers, then the active participation of workers and unions in the monitoring process is crucial. There are several reasons why full transparency ought to be encouraged. First, if workers’ health is in danger and the monitors uncover this, workers ought to have access to that information. Second, workers who have the full information in the report can make suggestions as to how certain problems might be remedied. Finally, workers and unions who have access to the full factory reports will be able to utilize it to mobilize workers and to negotiate with employers. Workers and their representatives ought to be allowed to comment on the findings of the report and have those comments incorporated into the body of the final report.

iii. Insufficiently Responsive to Worker Complaints

Another issue noted by a number of interviewees was a lack of responsiveness by the ILO to the complaints of workers. Proposal II provided that the ILO was to respond to and monitor complaints made by workers that employers were interfering with the formation of trade unions. This was watered down in the final proposal, which states that monitors will give “special consideration” to complaints of anti-union

¹³⁵ Proposal VI, *supra* note 119, app. 1, ¶ 2.5.

¹³⁶ Interview with Chhorn Sokha, President of Coalition of Cambodia Apparel Workers Democratic Unions (CCAWDU), in Phnom Penh, Cambodia (Dec. 9, 2002); interview with Jason Judd, American Center for International Labor Solidarity, in Phnom Penh, Cambodia (Dec. 10, 2002).

¹³⁷ Interview with Lejo Sibbel, Chief Technical Advisor, ILO Monitoring Program, in Phnom Penh, Cambodia (Dec. 13, 2002).

activities.

At first, the Chief Technical Advisor decided that in order to establish credibility, the program would not respond to any such complaints lest the program be charged with being too pro-worker. Now, because the Chief Technical Advisor feels that the credibility of the program is established, he says that the ILO has begun to respond to such complaints.

Unfortunately, it appears that the initial interference cost the ILO some legitimacy in the eyes of unions. One leader said she once lodged complaints to the ILO, but nothing ever happened so she no longer does.¹³⁸ Chea Vichea, President of the FTUWKC, said he had never really thought about contacting the ILO.¹³⁹ The ILO needs to think about how, from the beginning, it can establish meaningful complaint systems, while not alienating the various stakeholders of the projects.

iv. Focus on Cambodian Labor Law Unduly Privileges Labor Standards over Labor Rights

One structural difficulty with monitoring the entire Cambodian Labor Code is that it is a very comprehensive document that regulates a broad range of issues from core labor standards to the most detailed health and safety issues. This means that the ILO must spend a great deal of time, often out of a monitoring visit that may be no more than half a day to a day, on labor standards instead of labor rights. This also means that less time can be spent developing the cores of sustainable monitoring—effective enforcement of freedom of association and creation of space for legitimate unions to organize.

v. Unanticipated Leverage: Buyer Pressure

One of the more interesting developments, perhaps not fully anticipated by the project designers, is the way in which the incentive and disciplining system has actually come to work. While I have noted the lack of enforcement mechanisms and incentive structures in individual factories, this has been compensated for, in some instances, through buyer pressure. Instead of the pressure falling primarily on the quota allocation system, weight has shifted to foreign buyers, who are subject to consumer pressure to source from labor compliant factories. A local compliance office of the Gap clothing company told me, for example, that Gap requires all the factories in which they source to provide it with ILO monitoring reports.¹⁴⁰ An official connected to an international organization informed me that Nike, after leaving Cambodia due to a BBC report on child labor in one of its factories, agreed to return to two factories, provided they would

¹³⁸ Interview with Chhorn Sokha, President, CCADWU, in Phnom Penh, Cambodia (Dec. 9, 2002).

¹³⁹ Interview with Chea Vichea, President, Free Trade Union of the Workers of the Kingdom of Cambodia, in Phnom Penh, Cambodia (Dec. 9, 2002).

¹⁴⁰ Interview with anonymous source, Phnom Penh, Cambodia (Dec. 2, 2002).

show Nike their ILO monitoring report.¹⁴¹ One factory owner told me that it is not the ILO that has the cane, but rather the buyers.¹⁴² Ray Chew of the Garment Manufacturers Association of Cambodia noted that the buyers ask for the reports and that orders can be lost or acquired because of their content.¹⁴³

This is not to say that buyer pressure is enough to compel most factories into labor compliance. In fact, many factories do not supply goods to companies for which this is a concern. Nevertheless, the growth in labor compliance consciousness creates another pressure point on factories to improve conditions. The ILO reports are clearly supplementing these companies' own efforts, in part because the companies respect the ILO as an institution.

V. CONCLUSION

The ILO monitoring project in Cambodia has resulted in an important confluence of two different methods of protecting workers' rights: linking trade with labor rights and factory monitoring. Trade linkage is most typically directed towards improving labor rights enforcement at the state level through better public regulation, while monitoring, most typically, concentrates on the factory level. Here, the trade provision was designed so that performance of the garment sector, not the government, was used as a basis for granting extra trade benefits. Factory owners therefore have a collective incentive to improve their labor conditions because of the quota incentive created in the Agreement. The monitoring, as we have seen, also serves a second function: factory owners have individual incentives to respect workers' rights because of pressure that is exerted by purchasers who require clean ILO reports.

The ILO has taken an important step forward in Cambodia, perhaps beyond its comfort zone, in its approach to improving working conditions. Factory level work that aims to improve conditions by publicizing monitoring reports is uncharted territory for the organization, but conceivably it will conduct more projects that incorporate factory monitoring as a methodology.¹⁴⁴

¹⁴¹ Interview with anonymous source, Phnom Penh, Cambodia (Dec. 2, 2002).

¹⁴² Interview with Roger Tan, Owner, Thai Pore Factory, in Phnom Penh, Cambodia (Dec. 4, 2002).

¹⁴³ Interview with Ray Chew, Manager, Garment Manufacturers Association of Cambodia, in Phnom Penh, Cambodia (Dec. 4, 2002).

¹⁴⁴ There is currently one other ILO program that utilizes monitoring methodologies as a significant aspect of its program design. This program is located in Bangladesh and works to improve working conditions in the country's garment sector by monitoring for labor conditions, and then showing factory management how remedying abusive conditions will lead to improved productivity and competitiveness. This program differs significantly from the Cambodia effort, however, in that it is non-transparent, and is not linked to a trade agreement. For more information and a critique of this program, see HUMAN RIGHTS FIRST (formerly LAWYERS COMMITTEE FOR HUMAN RIGHTS), INTERNATIONAL STANDARDS AND VOLUNTARY MONITORING: THE ILO'S GARMENT SECTOR PROJECT IN BANGLADESH, at http://www.humanrightsfirst.org/workers_rights/wr_other/Bangladesh_Report.pdf.

The critiques of each proposal that I have made above reveal a set of elements that the ILO and the designers of its monitoring programs ought to consider in designing future programs. These include requirements: 1) that all factories participate; 2) that all information generated from factory inspections be shared equally with employers and employees; 3) that there exist an effective compliance-based system; 4) that the ILO actively work to build democratic and independent trade unions; 5) that respect for core labor rights be a particular emphasis of inspections; 6) that there be incentive structures for both individual factories and the industry as a whole; and 7) that there be complete transparency. These elements should also be instructive for designers of non-ILO monitoring programs, particularly regarding compliance systems and information sharing.

It should be emphasized that this program represents an important and momentous experiment in transparent monitoring. Yet despite the positive steps that the ILO has taken in Cambodia, its reluctance to engage with unions and completely share information equally between employers and workers is disappointing. Some of the reluctance to engage with unions likely stems from a desire to avoid politically challenging positions where illegitimate unions exist, and where there are close and politically charged relationships between the unions, the state, and employers. For a political organization like the ILO, tripartite in its structure, this is a highly challenging issue.

Long-term, sustainable enforcement of labor rights, however, requires engagement with workers and their legitimately selected representatives, and promotion of independent trade unions.¹⁴⁵ The alternative of not engaging with any unions at all, except for in limited structures such as the Tripartite Advisory Committee, is not a viable, long-term solution for improving working conditions and respect of workers' rights. In many countries, like Cambodia, there are fledgling democratic unions that are struggling to grow, and the ILO must begin to consider how it can differentiate such legitimate unions from their non-democratic impersonators.

¹⁴⁵ Indeed, the ILO's mandate, as indicated on its website, calls upon it to "promot[e] the development of independent employers' and workers' organizations." See ILO, ABOUT THE ILO, at <http://www.ilo.org/public/english/about/index.htm> (last visited Dec. 12, 2003).