The ILO’s Better Factories Cambodia Program: A Viable Blueprint for Promoting International Labor Rights?

Dr. John A. Hall*

INTRODUCTION

The International Labour Organization’s1 (ILO’s) innovative program, Better Factories Cambodia (“Better Factories”), represents one of the more important attempts made by the international community to promote labor rights in a developing nation. The lessons Better Factories offers are significant for all stakeholders in the global labor market and suggest at least the outline of a practical blueprint for the future promotion of international labor standards globally. While the ILO’s program in Cambodia has achieved notable success in reaching specific criteria, future ILO efforts elsewhere must be adjusted to reflect lessons learned in the Better Factories model. Specifically, future programs will need active, long-term ILO participation and management, and an understanding that supervisory responsibilities cannot quickly revert to local control in many countries. Additionally, future programs intended to promote broad international labor standards must recognize the limitations of a program relying almost entirely on factory monitoring. While Better Factories has been successful in addressing specific factory-floor violations of the domestic labor code—such as working conditions and overtime requirements—it has largely failed to identify or counter broader political concerns, such as the climate of

---

* Associate Professor of Law, Chapman University School of Law; Research Fellow, Center for Global Trade and Development. A version of this paper was presented at the “International Labor Standards, Rights and Beyond” Conference, Stanford Law School, August 14-15, 2009. The author wishes to thank the following people for their comments and suggestions: William B. Gould IV, Stanford Law School; Richard H. Steinberg, UCLA School of Law and Stanford University; Kevin Kolben, Rutgers University Business School; George Cooper, GTZ, Phnom Penh; Paula Church, U.S. Department of Labor; Timothy Canova, Henry Noyes and Kurt Eggert, Chapman University School of Law; Douglas Gillison, Cambodia Daily; and Brigid Kelly, Andrew Cox, and the editorial staff of the Stanford Law & Policy Review.

corruption in which independent trade union leaders have been intimidated, brutalized, and murdered. Better Factories has undoubtedly won important battles in its factory-level campaign for labor rights, but the war will be lost if truly independent trade unions are not permitted to flourish and Cambodia follows the Chinese model of government-dependent unionism.

For more than a decade, a system of quotas limiting imports from key garment manufacturers such as China and India incidentally helped some developing nations by giving them guaranteed access to key markets in the $400 billion global trade in textiles and garments. The Multi-Fibre Agreement (MFA), signed in 1995 under the General Agreement on Tariffs and Trade (GATT), provided a ten-year window for industrialized countries to adapt to the requirements of open competition in the textile and garment industry. Several poor nations, including Cambodia, benefited as rich-country buyers such as the United States began to source materials from countries not subject to quota rules, and as Chinese manufacturers invested in facilities in nations with unrestricted access to the huge U.S. market. Cambodia’s garment industry flourished: exports grew from nothing in 1994 to $1.9 billion in 2004, with two-thirds of sales to the United States and most of the remainder to the European Union. Garments constitute eighty-five percent of Cambodian exports.2 By 2008, over 350,000 Cambodians—primarily young women from the poverty-stricken countryside—were working in over three hundred factories clustered around Phnom Penh.3 The United States Agency for International Development (USAID) estimates that remittances from these workers now sustain twenty percent of the entire country’s population of thirteen million people.4 As the ILO has noted, “No other country in the world depends so much on the garment industry as Cambodia.”5

Cambodia’s garment industry expanded so rapidly that by 1998 the U.S. government began negotiations to bring Cambodia into the quota system. The result was the innovative 1999 U.S.-Cambodia Bilateral Textile Trade Agreement (Bilateral Agreement), which for the first time linked labor conditions to trade privileges. The Bilateral Agreement created trade incentives for the Cambodian apparel and textile industry to bring itself into substantial compliance with Cambodian labor law and international labor standards by

3. Id.
promising as a reward increased access to the U.S. market. Central to the Bilateral Agreement was the establishment of an independent and credible system of third-party factory monitoring intended to assess compliance, which was coordinated and managed by the ILO.

With the phasing out of the MFA quotas on January 1, 2005, poor countries searched for ways to protect their new garment industries in a world of unfettered competition and in the shadow of the now unrestricted manufacturing superpower, China. One option was—as many labor rights activists feared—to “race to the bottom,” cutting costs by driving down already low wages, ignoring or suppressing labor rights, and allowing for the deterioration of factory conditions. Cambodia, however, chose to continue down a different path. Since 1999, Cambodia has—with guidance from the ILO—attempted to create a niche as a “sweatshop-free,” socially responsible manufacturing platform for garments and textiles, providing guarantees of substantial sector-wide compliance with both domestic labor law and international labor standards. There were hopes that this niche would continue to make Cambodia attractive to American and European buyers despite Cambodia’s inability to be competitive in terms of overall cost-efficiency with mega-producers such as China and India.6

The current Better Factories program, which incorporates third-party factory-level monitoring of working conditions and a vigorous outreach and education program, is an outgrowth of the 1999 Bilateral Agreement. Though the Bilateral Agreement expired with the accession of Cambodia into the World Trade Organization (WTO) in 2004 and the conclusion of the MFA quota system for textiles and apparel—which ended the ability of the United States to use increased quotas as a reward for substantial labor compliance—the Bilateral Agreement continued in spirit, with the innovative program of ILO-managed factory monitoring being incorporated into the Better Factories program established by the Cambodian government and ILO in 2005.

Does the ILO’s Better Factories model offer a blueprint for other nations interested in capturing the benefits available from documenting substantial compliance with national and international labor standards and averting the “race to the bottom” pressures associated with unfettered globalization? The ILO certainly believes it may, and has recently introduced a similar program in Vietnam. Better Factories Cambodia, however, also offers cautionary warnings that the program has marked limitations and weaknesses along with great potential. It is clear that Better Factories has been more successful in certain areas of labor law compliance than others. Compliance with provisions regarding, for example, specific working conditions, child labor, health and safety regulations, and minimum wage requirements have improved and are generally carefully documented. On the other hand, Cambodia remains a country where core labor rights are often marginalized: independent union

6. Salinger et al., supra note 4, at 3.
activists—particularly those not members of the ruling political party—are targeted for intimidation and even murder; strikes are frequently broken with violence by security forces; and the legally protected activities of genuinely independent unions are disrupted, typically with no legal consequence.

The future of Better Factories is unclear. The recent global recession and associated financial turmoil has devastated the international trade in garments and textiles, and Cambodian factories have seen U.S. and EU orders collapse in 2009. Extraordinary global pressures beyond the control of Cambodia have been reflected in a wave of factory closures, mass layoffs, and repeated calls by factory owners to lift many of the more burdensome labor protections guaranteed by Cambodian labor law and international labor standards. Unfortunately, it was at this crucial juncture that the ILO’s role in the Better Factories program was reduced, due to a prior agreement that placed program management and control under Cambodian supervision on January 1, 2009.7 Better Factories became, on that date, largely a Cambodian program rather than a purely ILO one. Given the pervasive culture of corruption in Cambodia, the systemic lack of independence among Cambodian government officials, and the dismal record of labor law enforcement prior to the ILO’s participation, it is open to question whether the independent, credible, and transparent monitoring system at the heart of the ILO’s Better Factories program can be maintained. These doubts are particularly resonant due to the recent global recession, which has led some factory owners to question whether the costs associated with substantial compliance can still be justified in the face of widespread factory closures and a collapse in orders from U.S. buyers for whom low price has become paramount.

I. THE RAPID GROWTH OF CAMBODIA’S GARMENT INDUSTRY SINCE 1995

As in many developing nations, Cambodia’s garment and textile industry flourished in the years after the adoption of the MFA, signed in 1995 under the GATT.8 The MFA provided a ten-year window for industrialized countries to adapt to GATT’s requirements for open competition in the textile and garment industries by permitting importing nations to impose limits on imports from key garment manufacturers such as China and India.9 In effect, these limits ensured that producers in key manufacturing nations had to pay a premium to access the enormous EU and U.S. markets or were blocked entirely. Due to these restrictions, EU and U.S. buyers began to source production from countries not subject to quota rules. In response, primarily Chinese investors

8. Agreements, supra note 5, at 1.
9. Id.
began to expand manufacturing capacity in nations not subject to quota limits. As a result, many developing countries, most notably Cambodia and Bangladesh, experienced explosive growth in their garment and textile manufacturing industries.\textsuperscript{10}

As Bama Athreya of the International Labor Rights Forum has noted, “In 1993 the International Monetary Fund (IMF) began a structural adjustment program for Cambodia intended to create an attractive climate for foreign capital.”\textsuperscript{11} Beginning in 1995, foreign investment flowed rapidly into Cambodia, as dozens of garment factories were constructed in and around Phnom Penh. By early 2005, the membership of the Garment Manufacturers Association in Cambodia (GMAC) included 238 companies. By August 2008, there were 326 garment and textile factories in Cambodia.\textsuperscript{12} Tens of thousands of young women poured from the poverty-stricken countryside into the city to work in the new factories.\textsuperscript{13} By early 2005, 250,000 Cambodians were employed in the garment and textile factories.\textsuperscript{14} By August 2008, that number had risen to 360,000.\textsuperscript{15}

The rows of factories are clustered around Phnom Penh, serviced by fleets of trucks bringing imported bulk cloth and thread from the port of Sihanoukville 230 kilometers away, and returning with shipping containers filled with finished garments and textile products destined for export to the United States and Europe. The value of garment exports grew from $26 million in 1995 to $2 billion in 2004.\textsuperscript{16}

Garment exports constitute more than 85\% of Cambodia’s exports.\textsuperscript{17} The United States and the European Union represented, respectively, 64\% and 29\% of Cambodia’s total garment exports in 2004. The USAID reports that clothing manufactured for Gap represents one-third of all Cambodian garment exports.\textsuperscript{18}

\textsuperscript{10. Id.}
\textsuperscript{14. SALINGER ET AL., supra note 4, at 4.}
\textsuperscript{15. Kimsong, supra note 12.}
\textsuperscript{16. SALINGER ET AL., supra note 14, at 3.}
\textsuperscript{18. SALINGER ET AL., supra note 14, at 4.}
Cambodia’s sudden dependence on a single industry controlled by foreigners has created particular vulnerabilities. The influx of garment factories occurred in what had been a largely pre-industrialized rural society suffering the lingering effects of decades of war, genocidal oppression, and societal turmoil. For the government of Prime Minister Hun Sen, the foreign factory owners have reportedly provided a steady source of foreign currency—in the form of taxes, duties, kickbacks, and bribes—that has helped secure the regime’s authoritarian control over the country.19

With poverty levels in the Cambodian countryside rising due to failed government policies, illegal logging, crop failure, and lower crop prices resulting from cheap imported foodstuffs, the salaries of the female factory workers have become a vital component of the floundering rural economy. In the countryside—where most garment workers come from—the average monthly income for an entire household is $40.20 Garment factories are required to pay the Cambodian monthly minimum wage of $45, though the ILO has calculated that with typical overtime the industry average is nearer $70.21 In contrast, the average official monthly salary for a Cambodian civil servant is a mere $28.22 The Asian Development Bank has found that more than one-third of the garment factory workers send home 30-50% of their salaries—around $10-30 each month.23 USAID estimated in 2005 that these remittances sustain 20% of the entire country’s population of thirteen million people.24 As USAID concluded: “These workers’ incomes are critical to their families, the country, and even the region.”25 The stakes for Cambodia’s continued success in the global garment industry are extraordinarily high both for the economy and the people of Cambodia.


24. SALINGER ET AL., supra note 4, at 1.

25. Id.
II. CAMBODIA AND INTERNATIONAL LABOR RIGHTS

Cambodia has been a member state of the ILO since 1969 and has ratified five ILO Conventions: Convention 4 (Night Work of Women), Convention 6 (Night Work of Young Persons in Industry), Convention 13 (White Lead Painting), Convention 29 (Forced Labor), all ratified on February 24, 1969, and Convention 122 (Employment Policy), ratified on September 28, 1971.26

All member states are especially encouraged by the ILO to ratify the seven so-called “fundamental” or “core” Conventions relating to the right to organize and bargain collectively (87 and 98),27 equal remuneration and discrimination in employment (100 and 111),28 forced labor (29 and 105),29 and child labor (138).30 Member states are also encouraged to incorporate ILO standards, reflected in ILO Conventions and Recommendations, into their domestic law. In June 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work (ILO Declaration), which committed all 174 member states to respect the principles at the heart of the ILO’s core Conventions whether or not the member state has ratified them.31 The ILO Declaration states that membership in the ILO carries with it an obligation to respect and promote the “fundamental rights” embodied in ILO Conventions on freedom of association,


forced labor, child labor, and discrimination at work.32

III. LABOR RIGHTS IN THE CAMBODIAN CONSTITUTION AND THE 1997 LABOR CODE

The Cambodian Constitution and Cambodia’s Labor Code33 articulate a range of labor rights.34 Article 36 of the Cambodian Constitution states that “Khmer citizens of either sex shall have the right to form and to be members of trade unions. The organization and conduct of trade unions shall be determined by law.”35 Article 41 of the Constitution establishes that “Khmer citizens shall have freedom of expression, press, publication, and assembly.”36 Article 42 states that “Khmer citizens shall have the right to establish associations and political parties. These rights shall be determined by law. Khmer citizens may take part in mass organizations for mutual benefit to protect national achievements and social order.”37 Chapter XI of the 1997 Labor Code deals in detail with the various legal rights of workers to organize,38 the protections guaranteeing labor union freedom,39 and representation of workers in the workplace.40 Article 266 states that “workers and employers, without distinction whatsoever, have the right, without previous authorization, to form professional organizations [labor unions and employer associations] of their choosing.”41 Article 267 establishes the right “to draw up their own charter and administrative regulations, as long as they are not contrary to existing laws and public policy; to freely elect their representatives; to formulate their plan of action.”42

The 1997 Labor Code is extremely comprehensive and detailed, and covers a wide range of labor standards, from wages and hours to health and safety issues, in addition to basic labor rights.

32. Id.
35. CAMBODIA CONST, ch. III, art. 36.
36. CAMBODIA CONST. ch. III, art. 41.
37. CAMBODIA CONST. ch. III, art. 42.
40. CODE LABOUR (C. TRAV.) ch. XI, sec. 3 (1997) (Cambodia).
41. CODE LABOUR (C. TRAV.) art. 266 (1997) (Cambodia).
42. CODE LABOUR (C. TRAV.) art. 267 (1997) (Cambodia).
IV. THE MINISTRY OF LABOR’S FAILED FACTORY MONITORING PROGRAM, 1995-1999

Lack of enforcement, rather than an inadequacy of available legal protections, posed the greatest obstacle to enforcing and protecting both labor rights and labor standards in the garment industry in Cambodia throughout much of the 1990s. For most of that decade there was no credible program to enforce either domestic or international standards, no collective bargaining arrangements, and no independent trade unions. In 1996, the Asian American Free Labor Institute (AAFLI) noted that “employers unilaterally decide wages, working conditions and internal work rules, and change the terms of employment as they see fit.”43 The state-controlled Cambodian Federation of Trade Unions (CAFTU), which had been established by the Vietnamese occupation government in 1979, was the sole union until the mid-1990s.44 The Ministry of Labor routinely refused to permit workers to form independent trade unions, and encouraged factory owners to select the worker representatives permitted under the Labor Code.45

Under the 1997 Labor Code, responsibility for monitoring factories and enforcing labor law and regulations lay with Labor Inspectors and Labor Controllers within the Bureau of Labor Inspection, part of the Ministry of Labor.46 The Bureau of Labor Inspection was specifically tasked with a wide range of labor-related responsibilities: to ensure the enforcement of labor law and regulations, “as well as other laws and regulations that are not yet codified and that relate to the labor system”; “to provide information and technical advice to employers and to workers on the effective ways of observing the legal provisions” of the labor law; “to bring to the attention of the competent authority any improprieties or abuses that are not specifically covered by the existing legal provisions”; to give advice on issues relating to authorized administrative authorities; and “to monitor the enforcement of the legal provisions regarding the living conditions of workers and their families.”47

In practice, however, the Bureau of Labor Inspection lacked both the resources and the political will to fulfill its mandate. The U.N. report on human rights in Cambodia in 1998 noted that while the Ministry of Labor officially claimed 100 labor inspectors on its payroll, “only about 12 in fact carry out inspections. This is not sufficient if the Ministry is to address labor disputes in a comprehensive manner.”48 The labor inspectors were too few in number, ill-
trained and paid low salaries that opened the way for corrupt practices. In 1998 inspectors were paid twelve dollars per month, an amount inadequate to support a family in Phnom Penh—indeed only a fraction of the minimum wage of a typical factory worker. Inspectors apparently lacked Ministry funds even to buy gasoline for their mopeds in order to visit the factories, and were under considerable pressure if they did visit to accept bribes from the factory owners. Such “gifts” could be cash, or goods for resale such as packaged soup or cigarettes. Factory owners had already “purchased” protection from senior government officials, so the bribes offered to the inspectors were token rather than substantive. The inspectors were simply in no position to actually investigate—even had they wished to—the conditions in factories whose owners were so protected. In 1999, the Deputy Chief Labor Inspector, Hout Chanty, stated that no fines had been imposed for interfering with union organizing. The Ministry of Labor’s factory monitoring program was, quite simply, a sham.

A 1998 report of the U.N. Secretary General regarding the human rights situation in Cambodia noted, “Organizing genuinely independent trade unions remains a serious concern. Management of factories make efforts to control or influence the organizing of unions.”

V. BACKGROUND TO THE U.S.-CAMBODIA BILATERAL TEXTILE TRADE AGREEMENT

By the late 1990s, labor rights activist groups and human rights organizations in the United States and Europe were focused on the poor working conditions in the garment factories flourishing in developing countries. The global garment industry became synonymous with “sweatshops”—a loaded term redolent of abusive conditions, child workers, and below-poverty
wages. The Clinton administration came under pressure from American labor unions concerned with the rising pace of outsourcing and the potentially devastating impact of cheap global competition on American manufacturing industries. The Union of Needletrades, Industrial and Textile Employees (UNITE), for example, lobbied Congress and the White House about what it perceived as unfair competition from countries that ignored labor rights and exploited workers. UNITE played an important role in pushing Washington for so-called “linkage”—rewarding manufacturing countries that respected labor rights and upheld international labor standards with increased access to U.S. markets and restricting access for countries that permitted labor exploitation. In this way, it was hoped, international standards could be promoted while at the same time reducing the impact of cheap foreign competition on American labor. Civil society and labor rights groups, such as the International Labor Rights Fund and the Lawyers Committee for Human Rights, similarly played an important role in pushing the Clinton administration towards developing policies to address labor rights in developing nations. These groups were important in helping to shape the Bilateral Agreement.

Cambodia in the late 1990s offered several attractions for a Democratic American administration interested in experimenting with a new approach to encouraging labor rights overseas. Cambodia had a relatively new, small but rapidly growing garment sector interested in accessing the U.S. market. The Cambodian government was vulnerable to U.S. diplomatic pressure, as it remained weakened from decades of civil war and dislocation and relied on the cooperation of donor nations and international aid organizations to support its economy and feed its population. Cambodia was familiar to many in the international community due to its tragic history of mass murder, atrocities, and appalling suffering under the Khmer Rouge; the role of the United States in destabilizing the region during the anti-communist wars of the 1960s and 1970s; and the distasteful actions of the United States and the U.N. in tacitly supporting the Khmer Rouge following the Vietnamese overthrow of that regime in 1979. The international community—including, and arguably chiefly, the United States—had abandoned the Cambodian people to the horrors of the Khmer Rouge and more than a decade of post-genocide civil war. For many in the humanitarian and human rights communities, there was a debt to be paid for these past failures.

Since the early 1990s, Cambodia had attracted significant interest and resource investment from international human rights groups, civil society organizations, the U.N., and assorted NGOs. Indeed, few countries have received such sustained support from the international community. There was much to be done: Cambodia’s economy was shattered; its population faced starvation and had been brutalized by decades of war and dislocation; its fields and forests were littered with millions of mines; its schools, courts, and government offices were barely functioning; its government was corrupt and intolerant of democratic institutions and values. Cambodia was squarely on the
radar of civil society and humanitarian groups, and had become a massively
funded experiment in social and political engineering for many in the
international community long before Washington contemplated the Bilateral
Agreement. Just twelve local NGOs had operated in Cambodia in the early
1990s; by 2000 there were over 360 that were described as “a sort of shadow
government that provide[d] services ranging from the protection of women, to
the digging of wells, to the provision of legal aid.”54 In December 2000,
Nicholas Platt, the President of Asia Society, optimistically concluded: “[I]t’s
become clear that the influx of foreign aid groups is producing a lasting legacy.
A new era is taking root in this war-torn nation, a nascent civil society and a
culture of human rights is becoming institutionalized.”55 Cambodia was,
in short, a prime candidate for the Clinton administration’s launch of a new
program intended to promote international labor standards by the linkage of
trade and labor rights. The pursuit of labor rights in Cambodia clearly grew out
of and piggybacked on the existing international aid, assistance, and civil
society programs and infrastructure. With such significant NGO and U.N.
activity, Cambodia was far from an unknown quantity in Washington.

VI. THE U.S.-CAMBODIA BILATERAL TEXTILE TRADE AGREEMENT

Between June 1999 and May 2000, several proposals for a bilateral trade
agreement were circulated, based on the input of the U.S. Trade Representative,
the U.S. Department of Labor, the U.S. Department of State, and the unions
AFL-CIO and UNITE. According to Kevin Kolben of Rutgers University
Business School, while the Cambodian government and the Garment
Manufacturers Association of Cambodia were involved, “the two primary
negotiating parties were the U.S. government and the ILO.”56 According to
Kolben, no Cambodian trade unions or Cambodian NGOs were consulted
during the drafting process.57 The U.S. and Cambodian governments signed the
Bilateral Agreement on January 20, 1999.58 Valid for three years, the Bilateral

54. Nicholas Platt, President, Asia Society, Remarks at Asia Society Panel Discussion:
http://www.asiasociety.org/countries-history/conflicts/cambodian-civil-society-challenges-
and-prospects?page=0,2) [hereinafter Platt Transcript]. Today there are over 450 NGOs
active in Cambodia. See Cooperation Committee for Cambodia, NGO Database,
55. Platt Transcript, supra note 54.
56. Kolben, supra note 51, at 91. For the most authoritative analysis of the U.S.-
Cambodian Bilateral Textile Trade Agreement, see generally Kolben, supra note 51;
Andrew Wells-Dang, Linking Textiles to Labor Standards: Prospects for Cambodia and
Vietnam, FOREIGN POLICY IN FOCUS (June 2002), available at
57. Kolben, supra note 51, at 91.
Agreement provided for quotas on various garment categories exported from Cambodia to the U.S.\textsuperscript{59} It was extended for an additional three years in December 2001.\textsuperscript{60}

The Bilateral Agreement was innovative because it linked labor standards to future quota allocation, creating incentives for the Cambodian garment industry to bring itself substantially into compliance with international labor standards and Cambodian labor law. Kolben has described the Bilateral Agreement as representing “one of the first and most creative experiments in linking trade privileges to the respect of labor rights in trade agreements.”\textsuperscript{61} Indeed, this was the first time that a labor standards provision had been included in a bilateral, U.S.-negotiated trade agreement.\textsuperscript{62} The Bilateral Agreement combined what previously had been considered two distinct labor rights enforcement mechanisms: first, it used trade incentives to encourage the enforcement of workers’ rights and standards; and, second, it relied heavily on factory-level, independent third-party monitoring to assess labor rights and labor standards compliance. It was, indeed, as Kolben has noted, “an important and momentous experiment in transparent monitoring.”\textsuperscript{63} Linking trade privileges to the respect of labor rights was a creative experiment that marked a significant move forward for international labor rights.\textsuperscript{64}

The Bilateral Agreement initially permitted the U.S. government to increase Cambodia’s quotas up to 14% per year in addition to the standard 6% increase if the United States determined that the Cambodian garment industry was in “substantial compliance” with Cambodian labor law and internationally recognized labor standards.\textsuperscript{65} In December 2001, this “quota incentive” was increased to a potential 18%.\textsuperscript{66} In 2000, the first year of the program, the United States granted Cambodia a 5% quota incentive increase.\textsuperscript{67} In 2003, the quota incentive was increased to 12%.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{59} Kolben, \textit{supra} note 51, at 88.
\item \textsuperscript{60} \textit{Id}.
\item \textsuperscript{61} \textit{Id.} at 81.
\item \textsuperscript{62} \textit{Id.} at 90.
\item \textsuperscript{63} \textit{Id.} at 107.
\item \textsuperscript{65} Kolben, \textit{supra} note 51, at 90.
\item \textsuperscript{66} \textit{Id}.
\item \textsuperscript{67} REGINA ABRAMI, \textit{WORKER RIGHTS AND GLOBAL TRADE: THE U.S. CAMBODIA BILATERAL TEXTILE TRADE AGREEMENT} (2003), \textit{available at} http://ch.hbsp.harvard.edu/ch/product/703034-PDF-ENG.
\item \textsuperscript{68} \textit{Id.}; Kolben, \textit{supra} note 51, at 90.
\end{itemize}
VII. FACTORY-LEVEL MONITORING UNDER THE BILATERAL AGREEMENT

The terms of reference for the program established by the Bilateral Agreement used a combination of Cambodian labor law and internationally recognized workers’ rights. Article 10 of The Bilateral Agreement stated:

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 Cambodian textile and apparel sector substantially comply with such labor law and standards. 69

The final agreed upon program noted: “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.” 70

This was to be accomplished in two ways: first, and most importantly, a program of independent factory-level monitoring run by the ILO; and, second, capacity-building and technical assistance provided by the ILO to Cambodian labor inspectors. 71 By carefully training a core group of Cambodian labor inspectors, the ILO hoped to overcome the obvious enforcement inadequacies that had previously undermined legal rights.

VIII. MONITORING UNDER THE BILATERAL AGREEMENT

Although considerable flexibility was granted to the ILO’s Chief Technical Advisor to operate the program, the monitoring plan established the basic methodology. Four teams of two ILO-trained monitors were to inspect participating Cambodian garment factories with the goal of each factory being monitored on average six times per year. 72 The ILO’s Chief Technical Advisor helped develop a “checklist” that the monitors would use to evaluate labor rights compliance in the factories. The checklist, as developed, consisted of 156 items that were to be monitored by the ILO, and closely followed the 1997 Labor Code. The checklist, like the 1997 Labor Code, covered a comprehensive range of topics ranging from fundamental labor rights to specific labor standards provisions. Kevin Kolben has noted that “the checklist . . . 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

69. Cambodia Bilateral Textile Agreement, supra note 58, at 4-5.
71. See ILO, Ensuring Working Conditions, supra note 70, at 7-8.
72. Id. at 6.
standards than to rights because of the breadth of the [Labor] Code.”

It is clear that the ability to offer foreign buyers independent documentation of substantial labor compliance was advantageous to Cambodian producers, particularly in creating a niche for some Western buyers who have been stung by allegations of sweatshop abuses within their supply chain. Brad Figel, Director of Government Affairs at Nike, for example, has indicated that Nike and other companies are willing to pay a premium for labor compliance. Nike lost confidence in Cambodia’s compliance in 2000 and began the process of pulling out of the country, but reentered Cambodia in 2002 after the ILO began the labor monitoring program and government officials and contractors promised greater labor compliance.

IX. END OF THE QUOTA SYSTEM

With the accession of Cambodia into the WTO and the phasing out of the system of quotas permitted under the MFA, the ability of the United States to directly link access to its market with ILO-monitored substantial compliance with labor standards came to an end.

A fear widely expressed in late 2004 was that the end of the quota system would prove disastrous for Cambodia and other producing nations, as buyers would flock to mega-producers like China and India to meet their entire order needs. It was predicted that, lacking the guaranteed access to the U.S. and EU markets afforded by the quota system, developing nations would “race to the bottom” to try to compete with China by driving down wages and ignoring poor working conditions.

It was in this fearful atmosphere that Cambodia’s government contemplated the future of the nation’s garment industry in late 2004. What strategies might stave off a flight of production to China? One option, aggressively pushed by the ILO and other international labor groups, was that Cambodia should eschew a “race to the bottom” approach that some factory owners might be tempted to adopt. Instead, Cambodia had an opportunity to continue with the “sweatshop-free” brand it had developed with the ILO under the Bilateral Agreement, thereby offering Western buyers an attractive alternative to the cheaper, but more opaque and suspect, labor practices offered by China. A 2004 World Bank survey of the top fifteen international buyers in Cambodia, who make up forty-five percent of the country’s exports, found that over sixty percent of buyers said labor standards were of equal or greater

73. Kolben, supra note 51, at 102.
importance than factors like price, quality, and delivery times. Good labor standards ranked first out of twelve reasons to source from a specific country. Nine buyers said they would increase their orders in Cambodia after the end of the MFA, and six said they would maintain the same level of orders.76

Dan Henkle, a vice president for GAP, by far the biggest single buyer of Cambodian garments, indicated that the promise of continued labor compliance was key to GAP’s decision to remain in Cambodia.77 During an economic and trade meeting under World Bank auspices in Phnom Penh in February 2005, he assured Cambodian officials that GAP would remain, but only so long as Cambodia continued to follow its special labor program.78 A June 2005 Phnom Penh workshop of garment industry, government, and labor representatives concluded that while the end of quotas undoubtedly posed a threat, the situation was not as desperate as some had predicted one year earlier. It was noted that Cambodia had—at least temporarily—been able to hold its own in the first half of 2005.79 By May 2005, for example, it was reported that sixteen new garment factories had been scheduled to begin production by the end of the year, more than replacing the production capacity of the dozen factories that had closed.80 Many believed that the main reason for the comparatively gentle impact in Cambodia of the end of quotas was the niche that Cambodia occupied as a nation which could offer Western buyers independently verified substantial compliance with labor laws. Cham Prasith, the Cambodian minister of commerce who negotiated the Bilateral Agreement deal with Washington in 1999, indicated that the benefits of the ILO’s third-party monitoring program had exceeded expectations and would be voluntarily extended as a way to preserve the industry: “We are extending our labor standards beyond the end of the quotas because we know that is why we continue to have buyers . . . . If we didn’t respect the unions and labor standards, we would be killing the goose that lays the golden eggs.”81

76. Foreign Inv. Advisory Serv. [FIAS], Cambodia: Corporate Social Responsibility & the Apparel Sector Buyer survey results, at 4, 13 (December 2004), available at http://www.betterfactories.org/content/documents/Cambodia%20Corporate%20Social%20Responsibility.pdf.


78. Becker, supra note 77, at C1; see also GAP, supra note 77.


X. BETTER FACTORIES CAMBODIA

By May 2005, after months of negotiation between the ILO and the Cambodian government, Better Factories Cambodia was formally established as a partnership between the Cambodian government, the ILO, GMAC, and the trade unions. The announcement to stakeholders of May 30, 2005 noted:

The Government has decided that improved labour standards is a key element of the country’s development strategy. The International Labour Organization is pleased to be a partner with the Government and its constituents in this endeavour. This fits closely with the ILO agenda of Decent Work as the key to poverty reduction.

XI. HOW BETTER FACTORIES CAMBODIA WORKS

Better Factories was managed by the ILO and supported by the Cambodian government, GMAC, and unions. Originally known as the ILO Garment Sector Project, the name was changed to Better Factories Cambodia to reflect what was seen by ILO as the core aim of the project: “The Better Factories Cambodia programme is not intended to guarantee complete compliance with labour standards. It focuses on continuous improvement ... It brings about improvement over time.” It aims to do this by “monitoring and reporting on working conditions in Cambodian garment factories according to national and international standards, by helping factories to improve working conditions and productivity, and by working with the Government and international buyers to ensure a rigorous and transparent cycle of improvement.” The focus of Better Factories is on continuous improvement at individual factories rather than on the assessment of sector-wide substantial compliance that triggered quota reward under the Bilateral Agreement.

All garment factories that wish to export their products are required by the Cambodian government to participate in Better Factories in order to obtain an export license.

83. Id.
85. Id.
86. Id.
87. Id.
attracting increased orders; and by avoiding “perverse incentives for non-participation.”\textsuperscript{88}

Better Factories Cambodia conducts unannounced factory visits to check on working conditions. Like the ILO monitors under the Bilateral Agreement, the Better Factories Cambodia monitors rely on a checklist based on Cambodian labor law and the standards of the ILO. The Better Factories Cambodia checklist, however, is more extensive than that used by the ILO under the Bilateral Agreement, and now encompasses over 500 questions endorsed by the government as well as by employers and unions in the garment industry.\textsuperscript{89} Most of the questions relate to articles in the 1997 Labor Code or provisions in relevant ILO conventions. To ensure accuracy, workers and management are interviewed separately and confidentially, with interviews of workers normally taking place away from the factory. Monitors also talk with union leaders and shop stewards.\textsuperscript{90}

Better Factories Cambodia has twelve Cambodian national monitors, trained by the ILO in Cambodian labor law and international labor standards, interviewing techniques, and report writing.\textsuperscript{91} Monitors typically visit in pairs, and all monitoring visits are unannounced. Visits consist of meetings with management, unaccompanied walk-throughs and observation, collection of documents such as payroll, contracts and leave records, and interviews (both at the factory and off-site) with individual workers and union representatives. Monitors rely, wherever possible, on documents and direct observation. The Better Factories Cambodia monitors record answers to the checklist questions on small tablet computers that are specifically designed to collect the monitoring data. After the visit, the monitors review and edit the collected information, and submit their report to the head of the Better Factories Cambodia project—who, until January 1, 2009, was the ILO’s Chief Technical Advisor. Upon approval, the factory’s report is uploaded in English, Khmer, and Chinese to the program’s website and the factory is informed by e-mail. Factories can log on to the password-protected, limited access extranet website to view their own detailed report. Other authorized users, including buyers’ or vendors’ head offices, can also access factory-specific reports. Factories with no e-mail or internet access receive paper copies of the report. Factories can lodge objections to findings online, and these will be reviewed by the ILO and


\textsuperscript{90} Id.

are visible to website visitors granted access to the report. The computerized Information Management System (IMS) streamlines and integrates the data collected during factory monitoring visits enabling the creation of reports for individual factories that show their current compliance and progress over time as well as suggestions for improvement. The IMS also stores data on Better Factories Cambodia training programs and can track the participation of factories as well as the outcomes of these programs. While the detailed factory-specific reports are not made public, Better Factories Cambodia does name those factories that have been monitored and issues summary reports that note factory-specific progress in implementing suggestions for improvement. Better Factories also uses the information collected by its monitors to publish semi-annual synthesis reports that provide sector-wide analysis of compliance trends, employment figures, and progress made towards improving working conditions. The synthesis reports are made public both online and as hard copies.

Education and outreach are central components of Better Factories Cambodia’s efforts to move the industry towards continuous improvement that benefits both management and workers. The ILO, upon request, provides assistance to factories in implementing the suggestions made in the Better Factories Cambodia reports. Better Factories Cambodia also offers a range of training opportunities and resources to the industry, from simple good practice sheets to an intensive twelve-month modular training program. In 2005, Better Factories created a new website, developed new materials and offered a wide range of training programs. The website states that “workplace cooperation between management and unions is at the heart of the Better Factories Cambodia training programs,” with a focus on both boosting productivity and improving working conditions through worker involvement. The website notes that training topics “cover such things as workplace cooperation and dispute resolution, occupational health and safety, working conditions, globalization, and change processes. Training is conducted in Khmer, Chinese, and English.” The emphasis is on creating improved communication between management and labor and on building practical and measurable improvements at the factory level. Better Factories Cambodia also works with government staff to build its own capacity and with local organizations to deliver training to the industry in the longer term.

Initially, Better Factories Cambodia was funded by the U.S. Department of Labor (USDOL), USAID, the AFD, the Cambodian Government (RGC), the Garment Manufacturers Association of Cambodia (GMAC), and international

---

92. About Better Factories, supra note 84.
93. Monitoring, supra note 89.
94. Id.
95. About Better Factories, supra note 84.
buyers. It was anticipated that Better Factories Cambodia would be financially self-supporting by January 1, 2009 with funding provided by participating factories and social partners (such as the government, employers, and unions). The cost of the monitoring is actually modest—less than $3 a year for each worker, or approximately $2800 for each factory. Factories taking part in training programs pay an additional fee.

**XII. IMPACT OF BETTER FACTORIES**

Better Factories is not intended to guarantee complete compliance with labor standards, focusing instead on continuous improvement. Over the four years since it was introduced, the synthesis reports indicate that genuine progress was made in a number of key areas, including working conditions, health and safety issues, timely payment of salary, more adequate screening for child labor, and proper documentation and response to violations. As the ILO has concluded: “Better Factories does what it says. It brings about improvement over time.”

Better Factories has also been responsible for ensuring the continuing interest in Cambodia of a number of socially-conscious U.S. and EU buyers. One Western buyer secured by Cambodia specifically because of the Better Factories Cambodia program was the Walt Disney Company. Disney had refused to permit the manufacture of Disney-branded products in Cambodia as a result of concerns about alleged labor violations. In 2005, however, Disney launched a pilot program in Cambodia to reevaluate the company’s manufacturing prohibition in that country. The program was conducted in conjunction with the Better Factories project, and in early 2007—based on the favorable pilot results—Disney began to allow the manufacturing of Disney-branded garment and textile products in Cambodia with certain restrictions. Disney licensees and vendors sourcing in Cambodia could utilize the monitoring and remediation resources provided by ILO through Better Factories, and Disney has become an active participant in the Better Factories Buyers’ Group, a forum for brands to provide input on the operation of the

---

96. *Id.*
97. *Id.*
101. *Id.*
102. *Id.*
XIII. BETTER FACTORIES CAMBODIA AS A NATIONAL PROGRAM

Crucially, Better Factories Cambodia was never intended to be a permanent ILO program but rather a self-sustaining, long-term national program that would be Cambodian-managed by January 1, 2009. From the outset, most of its staff were Cambodian nationals, and a significant part of the ILO’s technical support of the program involved capacity building. In the context of contemporary Cambodia, the goal of creating a self-sustaining national program, rather than a long-term ILO-managed program, was perhaps overly optimistic. The recent history of the failed domestic factory monitoring efforts of 1995-1999, as I have shown, indicate the pressures—political, economic and otherwise—that national monitors within such a program are likely to face. Many business practices in Cambodia are heavily influenced by nepotism and corruption, with networks intended to reward allies, enforce loyalty, and favor friends and family. Political connections and a willingness to offer kickbacks and bribes to officials are often more important in the business context, for example, than qualifications and experience. An assessment prepared for USAID/Cambodia concluded that corruption has reached “pandemic” proportions: “Patronage and mutual obligations are the center of an all-embracing system. Appointment to public office hinges on political connections or payment of surprisingly large sums, and these payments are recouped through a widely accepted ‘right’ to collect bribes.”

1. Labor Rights in Contemporary Cambodia

While a pervasive culture of corruption and violence would seem to threaten the future legitimacy of any purely domestic monitoring program, there are other possible problems with the Better Factories model. Specifically, the gradual, specific improvements in labor rights promotion at the factory-level have taken place in the broader context of serious suppression of many genuinely independent trade unions. The freedom to form or join a union is enshrined in the Cambodian Constitution and Cambodian labor law, and is a core right guaranteed by member states of the ILO. Under Cambodian law, employers may not make it difficult for employees to form unions; may not force or offer incentives for an employee to be a member of a union or not to be a member of a union; and employees have the guaranteed right to be a member

103. Id.

104. About Better Factories, supra note 84.

of the union of their choice. 106 Nevertheless, enforcement of these legally
guaranteed rights has often been inadequate or non-existent in Cambodia. Prior
to 1997, labor rights were routinely ignored, and most unions that were
permitted to organize were not independent. Following the passage of the 1997
Labor Code and an increasing interest in Cambodia by NGOs, international
trade unions, and the ILO, the number of unions operating in Cambodia
increased dramatically, although most of them still lacked genuine
independence from government and factory management. With the 1999
Bilateral Agreement, however, and its active program of third-party factory
monitoring conducted by the ILO, many workers’ rights began to be monitored
for the first time in a systematic and disciplined way. This process has
continued since the establishment of Better Factories Cambodia, and it is
without question that in some ways the environment in Cambodia today is
somewhat more amenable to labor rights than it was in the 1990s.

There remains, however, a strong cultural suspicion of—and even outright
hostility towards—independent unions amongst many of the primarily Chinese
owners and managers of Cambodia’s garment factories. The Cambodian
government and officials have been frequently lax in punishing violators of
labor rights reported by the ILO’s factory monitors. Most seriously, Cambodian
officials appear to have endorsed or even organized violence aimed at
independent union activists who were members of the opposition’s political
parties. Since the signing of the Bilateral Agreement, it has been reported that
hundreds of independent union leaders and members have been beaten, fired, or
threatened by employers, police, and hired thugs. The International
Confederation of Free Trade Unions (ICFTU), 107 an international trade union
devoted to monitoring and defending workers’ rights, claimed that there was
a consistent government policy of breaking up activist unions and intimidating
independent union leaders in Cambodia’s garment factories, hotels, and
casinos. 108 In its Complaint filed with the ILO in Geneva on October 26, 2004,
the ICFTU suggested that these events show:

[A]t best, that the Government of Cambodia was unable to carry out a proper
investigation into the murders and ensure proper judicial process; at worst,
that it was unwilling to do so. This in turn suggests that the government itself
may not wish the truth to be known . . . [T]he Government of Cambodia has

106. CODE LABOUR (C. TRAV.) arts. 266, 271 (Cambodia); See also ILO, Guide to the
Cambodian Labour Law for the Garment Industry § 12.1 (Daniel Adler et al. eds., 2005),
107. The ICFTU had a membership of 147 million members in 225 affiliated
organizations in 148 countries when it merged with the World Confederation of Labour to
form the International Trade Union Confederation (ITUC) in 2006. See IFCTU Website,
108. See ICFTU, Complaint Against the Government of Cambodia, ILO Case No.
failed to guarantee that trade unionists are able to exercise their activities in a climate free of intimidation and risk to their personal security and their lives. This suggests that international assistance to the investigation and the judicial process could be helpful.\textsuperscript{109}

2. Violent Suppression of Strikes

Cambodian law guarantees the right of workers to go on strike provided that specific preliminary dispute resolution procedures have been attempted.\textsuperscript{110} In most cases, employees are required to first try negotiation, conciliation, and arbitration.\textsuperscript{111} Before going on strike, employees must follow the procedures set out in the union’s statute,\textsuperscript{112} which must include requirements for a secret ballot of the union members who approve the strike.\textsuperscript{113} At least seven working days of notice must be provided to the employer and the Ministry in charge of labor before the strike may occur.\textsuperscript{114} Strikes that fail to comply with these procedures are illegal.\textsuperscript{115} However, only the courts can declare a strike illegal; this is not a determination that can be made unilaterally by the employer or the Ministry of Labor.\textsuperscript{116} Unless the employer can prove that strikers have committed acts of serious misconduct, the employer must allow them to return to work without punishment once the strike is over.\textsuperscript{117} Participating in an illegal strike is not, by itself, serious misconduct under the Labor Code justifying termination or punishment.\textsuperscript{118} However, failure to return to work without a valid reason within

\textsuperscript{109.} Id. ¶ 323.


\textsuperscript{112.} CODE LABOUR (C. TRAV.) arts. 323-29 (Cambodia).

\textsuperscript{113.} CODE LABOUR (C. TRAV.) art. 323 (Cambodia).

\textsuperscript{114.} CODE LABOUR (C. TRAV.) art. 324 (Cambodia).

\textsuperscript{115.} CODE LABOUR (C. TRAV.) art. 336 (Cambodia).

\textsuperscript{116.} CODE LABOUR (C. TRAV.) art. 337 (Cambodia).

\textsuperscript{117.} CODE LABOUR (C. TRAV.) arts. 332-33 (Cambodia); see also ILO, \textit{Guide to the Cambodian Labour Law for the Garment Industry} § 11.5.7 (Daniel Adler et al. eds., 2005), available at http://www.betterfactories.org/content/documents/1/Guide%20to%20the%20Cambodian%20Labour%20Law%20(en).pdf.

\textsuperscript{118.} CODE LABOUR (C. TRAV.) arts. 332-33 (Cambodia).
forty-eight hours of a court order is serious misconduct. Thus, although a strike may be deemed illegal by a court, so long as the strikers return to work within forty-eight hours of a court order they cannot be punished by their employer. The Arbitration Council has interpreted this no-punishment rule to permit an employer to deduct the full $5 attendance bonus from employees who participate in an illegal strike. Any violent acts committed during a strike—whether the strike is deemed legal or illegal—by either party is serious misconduct.

Despite the legal protections for industrial action enshrined in Cambodian law, strikers and union organizers are frequently the target of illegal disciplinary action and violence. The Cambodian police even appear at times willing to serve as “heavies” on behalf of employers, resorting to violent tactics to break up otherwise peaceful strikes. On January 29, 2004, for example, riot units from the Intervention Police fired bullets into the air and used batons to beat striking workers at the MSI Garment (Cambodia) Ltd. Factory in Phnom Penh’s Dangkao district. More than 100 of the workers were injured, and Khim Nheouen, a twenty-year-old striker, was beaten unconscious and detained by the police until he promised not to incite workers to strike. The strike, which began on January 25, was to demand the reinstatement of Toeung Chanrin, the Secretary General of the factory union, who had been suspended after being accused of stealing money from the factory. In October 2004, police used water hoses to break up 1700 striking workers at a factory in Sihanoukville. The strikers demanded the reinstatement of forty-one of their colleagues.

The violence aimed at independent trade unionists escalated during the July 2003 national election cycle when Prime Minister Hun Sen appeared eager to eliminate or intimidate many of his most vocal critics. There appears to have been an orchestrated campaign of intimidation aimed at opponents of Hun Sen’s ruling Cambodian People’s Party (CPP), culminating in several high-profile, politically motivated assassinations. In that election, the CPP, which has ruled Cambodia since the Vietnamese ousted the Khmer Rouge in 1979, initially failed to get a majority of seats in the national legislature. For months after the election, Hun Sen entered into negotiations with other parties to form a new government while the two main opposition parties, SRP and

119. CODE LABOUR (C. TRAV.) art. 337 (Cambodia).
121. CODE LABOUR (C. TRAV.) arts. 330, 336 (Cambodia).
122. ICFTU Complaint, supra note 108.
123. Id.
124. Id.
FUNCINPEC, formed their own alliance called the Alliance of Democrats, aimed at ousting Hun Sen. In the resulting political impasse, tensions escalated and some analysts have accused the CPP of unleashing a campaign of violence to intimidate their opponents. Several leading trade union activists—none of whom were allied with the CPP—were victims of the violence.

The ICFTU filed a complaint with the ILO in late 2004, noting that the political killings included those of a judge and a court clerk who were killed in April 2003, a senior advisor to FUNCINPEC leader Prince Norodom Ranaridh (Sihanouk’s son), who was murdered in January 2003; thirteen political activists who were killed in the run-up to the 2003 elections, and several more murdered in the months following the election. Amongst the slain were high-profile trade unionists, Chea Vichea and Ros Savannareth, who were outspoken critics of Prime Minister Hun Sen.

Some observers have suggested that the high level of violence evident in Cambodia following the 2003 national election, and particularly the threats, intimidation, harassment, and murders of independent trade unionists, indicates that the suppression of trade unions that oppose Hun Sen and the CPP could now be carried out in a climate of total impunity. As Sara Colm, a senior researcher at New York-based Human Rights Watch, noted: “Unfortunately, Cambodia has a poor track record in bringing to justice the perpetrators of political killings.”

3. Assassination of Chea Vichea

The highest-profile trade unionist to have been murdered was thirty-six-year-old Chea Vichea, President of one of the largest unions in Cambodia, the Free Trade Union of the Workers of the Kingdom of Cambodia (FTUWKC). Vichea was closely linked to Sam Rainsy’s opposition party, the Sam Rainsy Party (SRP), of which he was a strong and vocal supporter. Described by Amnesty International as a “human rights defender,” Vichea was known

127. ICFTU Complaint, supra note 108; Lobe, supra note 126.
128. IFCTU Complaint, supra note 108.
129. Lobe, supra note 126.
130. Id.
nationally and internationally for defending trade union rights and other human
rights in Cambodia, and as a forceful critic of Hun Sen and the CPP. 132 The
subsequent investigation into Chea Vichea’s death was marred by failures at
every level of the Cambodian justice system. 133

Vichea was a known instigator of wildcat labor strikes and had numerous
enemies in the garment industry. 134 Prior to his murder, Vichea had been
assaulted for distributing pro-union leaflets at a garment factory. 135 On July 26,
2003, on the eve of Cambodia’s national elections, Vichea received a text
message death threat on his mobile phone. 136

Following the text message death threat, Vichea remained in hiding for two
months. 137 On the morning of January 22, 2004, Vichea was shot to death near
his union office. 138 The police subsequently arrested two individuals in
connection with Vichea’s murder, Born Samnang and Sok Sam Oeun, who
signed confessions that they had been hired to kill Vichea by politicians linked
to opposition party FUNCINPEC. Samnang and Oeun subsequently retracted
their confessions, claiming that they had been beaten by the police to sign
papers that they had not read, and that they had been paid bribes by senior
police officers not to retract their confessions.

When the two suspects were brought before Mr. Hing Thirith, an
investigating judge for the Phnom Penh Municipal Court, Judge Thirith ordered
that the case against Samnang and Oeun be dismissed for lack of evidence. Mr.
Thirith was himself subsequently removed from his judicial position for
unspecified “judicial mistakes” and transferred to the remote province of Stung
Treng. 139 Natalie Hill of Amnesty International has noted that the treatment of
Judge Thirith is “[p]articularly worrying.” 140

The Prosecutor appealed Judge Thirith’s ruling to the Court of Appeal.
Samnang and Oeun maintained that their confessions were the result of police
beatings, threats, and financial inducements. The police failed to appear at the
appeals hearing, and no new evidence was introduced. Nevertheless, the
appeals judge ordered Samnang and Oeun to be imprisoned to await a new

---

132. ICFTU Complaint, supra note 108.
133. Press Release, Amnesty Int’l, Cambodia: Trade Unionist’s Murder Shows Up
134. Samean & Leung, supra note 125.
135. Lobe, supra note 126.
136. The text message, which was in English, reportedly read: “A dog I will kill you,”
and was from the phone number (855-12) 987794. According to the IFCTU, Vichea
requested police protection, but after they investigated the source of the message they
advised him to leave the country because a high-ranking government official wanted him
killed. ICFTU Complaint, supra note 108.
137. Samean et al., supra note 125.
138. Id.
139. ICFTU Complaint, supra note 108.
140. Press Release, Amnesty Int’l, supra note 133.
hearing before the Phnom Penh Municipal Court “in order to find more clear evidence to prove the suspects’ guilt.”\textsuperscript{141} The Cambodian Center for Human Rights has documented the statements of many witnesses to the murder of Vichea who can both attest to being intimidated and threatened by Hun Sen or the CPP and provide alibis for the suspects.\textsuperscript{142} For example, three persons have informed human rights investigators and reporters that the accused were far from the scene of the murder.\textsuperscript{143}

To many observers, the judicial proceedings against Samnung and Oeun suggested that there was no intent to find the actual murderers. An Amnesty International report, issued in response to the murder of Chea Vichea, highlighted the lamentable investigation into his death.\textsuperscript{144}

The murder of Vichea sent a wave of concern through the fledgling independent trade union movement. Sara Colm concluded: “This assassination will surely exacerbate the climate of fear for workers, journalists, environment and human rights activists who speak out or publicly express their views. [It] is a watershed killing that will not only send shockwaves through the labor movement, but may also silence and intimidate opposition activists and journalists.”\textsuperscript{145} The Cambodian Watchdog Council, which consists of the FTUKWC, the Cambodian Independent Teachers Association, the Alliance of Democratic Unions of Cambodian Garment Workers, and the Student Movement for Democracy, concluded: “[I]t looks as if the inability of your government to arrest the real killers, has encouraged contract assassinations during the political deadlock Cambodia is experiencing since the national elections of 27 July 2003.”\textsuperscript{146} Vichea’s partner, Chea Kimny, who was eight-months pregnant, was escorted to Thailand with her two-year-old daughter by staff from the Cambodia Office of the UN High Commissioner for Human Rights. The threat to her life was perceived to be very serious.\textsuperscript{147} She has since been provided political asylum in Finland.\textsuperscript{148}

Several trade union leaders “felt so threatened that they . . . resigned from their leadership positions.”\textsuperscript{149} Others, like FTUWKC acting General Secretary Sum Som Neang, have fled the country.\textsuperscript{150} Rong Chhun, President of the teachers’ union, CITA, raised concerns about his safety in a letter to the ILO on February 2, 2004 and went into hiding in a secret location.\textsuperscript{151} In his letter,
Chhun claimed that he had received a verbal threat from a government official warning him: “You are a poor man, [however] strong you are, Chea was assassinated and, in turn, you will also be killed.” 152 Because of threats made to members of CITA, the union’s activities have been sharply curtailed. 153

4. Murder and Intimidation of Other Trade Union Leaders

Ros Sovannareth, President of the Trinunggal Komara Garment Union and Steering Committee member of the FTUWKC, was shot to death on May 7, 2004. (The ICFTU complained about the killing in a letter to the ILO dated May 11, 2004.) In November 2003, six members of FTUWKC, including Sovannareth, had filed a complaint with the management of the Trinunggal Komara garment factory and with the police at Russei Keo District in Phnom Penh, complaining about the Cambodian Union Federation (CUF). CUF organizer, Khvann Chanlymony, reportedly threatened the six and warned that they “might disappear.” Reports suggest that witnesses to the assassination of Sovannareth, which occurred on Kampuchea Krom Boulevard in Tuol Kork, have been intimidated. No suspects have been arrested, and Chanlymony has indicated that he is merely a “poor worker from the countryside” and that he “did not have the power to do anything like” having Sovannareth murdered. 154 The ICFTY rejected the theory that the CUF had Sovannareth murdered as a result of inter-union rivalry.

Other union leaders have survived assassination attempts. On February 9, 2004, Pov Bunthoeun, a FTUWKC representative for PCCS Garment Ltd., was chased by men on two motorbikes, and escaped by hiding in a public gas station. On May 14, 2004, Bunthoeun was again followed by two menacing men, who followed him until he was able to hide in a crowd of workers outside the PCCS factory. He filed a complaint with the Phnom Penh Municipal Police, but no arrests were made. 155 On June 23, 2004, Lay Sophead, the female president of the FTUWKC-affiliated union at Luen Thai garment factory in Phnom Penh, attempted to organize a strike which was to have begun the next day. 156 That night, she was attacked by two uniformed men who stuffed a towel in her mouth and tied a “khrama” scarf around her head. They accused her of “being a Chea Vichea person,” and threw her under her bed, apparently expecting her to suffocate to death. Though she became unconscious, she survived and was rescued and hospitalized the next day. 157 No arrests were made.

152. Id.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id.
Amnesty International has warned:

Members of the police and military in Cambodia are able to impose their will on the civilian population and commit violations, safe in the knowledge that they will never be called to account for their actions. The government has appeared unwilling to address problems with fundamental human rights, and has more often concentrated on criticizing the work of human rights defenders, including trade union activists, rather than tackling the substantive issues they raise. 158

Natalie Hill, Deputy Asia Director at Amnesty International, has stated:

We believe the most serious human rights problem in Cambodia is impunity—the state allowing people to get away with human rights abuses including killings. . . . As a result of the climate of impunity, members of the police and military can impose their will and commit abuses against civilians, safe in the knowledge that they will never be called to account for their actions. . . . sadly Chea Vichea’s murder was not a one-off. In the last 15 years, while the international community has poured money into Cambodia to rebuild the war-torn country, hundreds of political killings—including of journalists and political activists—have gone unpunished. Many of these people gave their lives trying to rebuild the country. When will the government match words with deeds and restore the faith of the Cambodian people in Cambodian justice? 159

U.S. Ambassador Joseph A. Mussomeli, speaking in December 2005 at his residence in Phnom Penh during the hosting of a Garment Buyers’ Forum for the Better Factories Cambodia, was explicit in warning that actions by the Cambodian government threatened Cambodia’s economic development by weakening the rule of law and freedom of expression. The Ambassador, speaking to a roomful of foreign buyers—including many representing U.S. companies—used the opportunity to highlight what he considered serious threats to the future of political and labor freedoms in Cambodia:

The recent arrest and continued detention of labor leader Rong Chhun and journalist Mam Sonando highlight the narrowing of freedom of expression in Cambodia. We are concerned about the warrant for the arrest of garment union leader Chea Mony. Free speech is the basis for all other freedoms in a democratic society, and certainly any restrictions on freedom of expression create an atmosphere where workers’ freedoms of association may be under pressure as well. It would be yet another self-inflicted tragedy for this country if its political leaders, in their desire to consolidate power, caused a weakening of Cambodia’s economic development. 160

For Ambassador Mussomeli, the garment industry is a bell-weather indicator for the future of Cambodia. “Will Cambodia become a dynamic, free market economy with an open political system or will it become just another

158. Press Release, Amnesty Int’l, supra note 133.
159. Id.
dreary, one-party system seeking to control its economy and its people[?]” 161

XIV. THE IMPACT OF THE GLOBAL RECESSION

By early 2008, it was clear that the Cambodian garment industry was being negatively impacted by the decline in the U.S. economy, and trade officials warned of the consequences of a slowdown in orders from the United States as American consumers cut their spending. 162 Adding to the decline was the sharp global increase in fuel and transportation costs since 2007. Kaing Monika, GMAC’s external affairs manager, commented in August 2008 on the impact of the run-up in fuel prices: “Before only five percent of the total expenses of a whole production chain was spent on oil, but now the expense has gone up to fifteen percent.” 163

The decline in foreign purchase orders was swiftly felt in Cambodia. In the first three months of 2008, garment exports fell sharply compared to the same period one year before. 164 While ten garment factories closed in Cambodia in 2007, 165 twenty-two closed in the first eight months of 2008. 166 The decline intensified in 2009, when garment exports plummeted thirty-five percent in the first quarter. Exports to the United States were hit worse, down forty-seven percent compared with the first quarter of 2008, while those to the European Union fell twenty-two percent, and to Canada twenty-one percent. 167 Seventy-eight factories closed in the first seven months of 2009, and a further thirty suspended operations due to lack of orders. 168 Better Factories estimated that the garment sector shed approximately 48,000 jobs in the twelve months after October 2008. 169

Factory owners have warned that, unless Cambodia can maintain its competitiveness they might relocate elsewhere, and they have used the decline

---

161. Id.
162. See Kimsong, supra note 12.
164. See Kimsong, supra note 12.
165. Id.
166. Daravuth, supra note 163.
in orders to buttress their anti-union and anti-tax message. Cheat Khemara, Senior Labor Officer for the Garment Manufacturers Association of Cambodia (GMAC) warned that:

The garment sector is slower than in the past years, we fear that additional costs would lead factory owners to move to other places . . . The most valuable [garment] exports and textiles went to China, while Cambodia gained only workers’ salaries and factory rental fees. Once the Ministry of Labor implements the salary tax, factory owners will have to pay US$0.80 for each worker. This is a new cost for garment factory operators. They have suffered with high electricity costs, low productivity and too many strikes.170

Some within Cambodia’s garment industry are genuinely skeptical that the way forward in a declining market is to retain Cambodia’s policy of permitting numerous independent unions. Nguon Meng Tech, director general of the Cambodian Chamber of Commerce, has noted, “[t]hat would be nice if the ministry allows only three unions. Look at China, there are no unions. People love working hard to make money.”171 GMAC President Van Sou Leng has also supported the Chinese union model, recently calling upon the government to fast-track legislation to significantly restrict the number of unions:

[We] would like the government to adopt a union law as soon as possible to help the garment sector survive because too many trade unions are causing problems for the sector . . . We want the government to allow just one union in each factory to reduce the number of strikes and demonstrations.172

Allowing only one union per factory, of course, has the real potential for strengthening the position of management-created and pro-government supported unions and effectively prohibiting the activities of genuinely independent unions.

Predictably, union representatives explain the recent decline in foreign orders differently. Chea Mony, President of the Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC), squarely blames what he sees as the disrespect for labor law exhibited by factory owners, and the exploitation of the workforce: “The decline in purchase orders was not caused by the U.S. economic slowdown. On the contrary, it was because garment employers do not respect the labor law.”173 Abuse of workers, Chea argues, makes foreign buyers hesitant to buy Cambodian products.174 In addition, Chea has blamed corruption for driving up production costs: “Some government officials collected salaries ranging from US$300-400 from factories and other

---

171. Id.
173. Daravuth, supra note 163.
174. Id.
bribes.” If the government would eliminate corruption and take action against factories that violate the country’s labor laws, Chea has suggested, production costs would be lowered and foreign purchase orders would increase. Chea has consistently blamed the factory owners for the productivity-reducing strikes within the garment industry.

CONCLUSION

The program of third-party monitoring at the heart of Better Factories Cambodia provides a potential blueprint for similar programs elsewhere, and deserves careful study. As operated under the ILO, the program appears to have generally benefited all stakeholders—management, labor and buyers—by increasing transparency, fostering cooperation, and providing training and outreach, while being able to provide credible documentation of factory-specific and industry-wide gradual improvements in labor conditions over time. It serves as an example of how respect for labor rights can create an attractive product for buyers, benefiting management and workers, and how unfettered global competition need not necessarily result in a “race to the bottom” in terms of factory conditions and labor standards. As such, Better Factories Cambodia offers an optimistic and valuable case study for how, in practice, to incorporate a demonstrable respect for labor rights at the factory level in developing nations that lack the capacity to do so independently.

But Better Factories Cambodia also offers lessons in what could be done differently in the future. First, while Better Factories Cambodia effectively monitors labor conditions and draws attention to areas of improvement, it has no specific enforcement capacity. Cambodia has a seriously inadequate judicial system, subject to corruption and political influence. Cambodian labor rights are fragile at best and exist today largely thanks to the ILO having convinced management and government that it was in their best interest to develop a “sweatshop free” brand to attract foreign buyers. Without an effective judicial system in place, however, workers’ rights remain at risk. A rapid erosion of those rights—a “race to the bottom”—remains a real possibility, particularly at a time of recession and significant economic pressures. The benefits of a Better Factories-style program are fragile and likely temporary, absent judicial enforcement and protection.

Second, there are legitimate concerns about the transition of Better Factories from an ILO-managed program to one that is Cambodian-managed. Vital to the success of the project has been the credibility and independence of factory monitoring. Put simply, can Better Factories continue to prosper in a culture of deep and pervasive corruption, facing a nepotistic, often violent and

175. Id.
176. Id.
177. Kimsong, supra note 12.
autocratic political regime, without the continued technical, logistical, and managerial oversight and support of the ILO? This seems unlikely in the context of contemporary Cambodia, and the same may be true in other nations where such a program is contemplated.

The ILO agreed to a timeline for the transfer of the program at an inopportune time of economic upheaval in the industry, and with no guarantee that the climate for independent unions had improved to a point where the core rights of free association were a permanent part of the Cambodian landscape. In the future, the ILO must remain an active participant in at least a supervisory capacity in those situations where local staff members—however diligently trained and motivated—are likely to face overwhelming pressures in a potentially hostile environment. The continued presence of international staff will serve to buttress future efforts of local monitors and managers to maintain high levels of trustworthiness and independence. Indeed, it is questionable whether or not the basic assumption that such monitoring programs must necessarily become locally managed is in fact correct. Instead, the default assumption should be that these are—and will remain—ILO-administered and managed long-term programs. At the very least, the ILO should review its withdrawal based on an assessment of the viability of a domestic monitoring program with a clear understanding that the ILO can resume full managerial functions should the situation so warrant.

Third, the economic recession has revived management calls for severe curtailing of labor rights in Cambodia and even a move towards a Chinese-style single-union structure. If the Labor Code is amended, or new union-specific legislation is enacted, what exactly will the Better Factories monitors be monitoring? Clearly, monitoring for breaches of a flawed Labor Code will raise serious questions about the legitimacy of the program. There is a danger that a monitoring program could become a tool of government or management to suppress independent unions by identifying “violations” of laws prohibiting, for example, strikes or industrial action. In the future, the ILO should consider creating a monitoring checklist that is less reliant on the specifics of domestic labor regulations—which are always subject to revision in a way not amenable to the broader goal of promoting international labor standards—and more focused on international standards and core rights intended to foster the encouragement of independent unions generally. It is not enough, for example, to monitor union participation at a factory, if independent unions in the industry generally are suppressed in favor of government- or management-sponsored unions. Any qualitative assessment of labor standards must, therefore, be more than a sum of its parts.

Finally, it remains unclear whether or not many other countries will agree to a Better Factories-style program. Lejo Sibbel and Petra Borrman have correctly concluded that Better Factories Cambodia would not have been possible without the U.S.-Cambodia Bilateral Agreement that provided the positive incentive of bonus quotas and that initially made the parties accept the
establishment of an independent monitoring system under ILO supervision.\textsuperscript{178} The Bilateral Agreement gave Better Factories the time necessary to prove that it was of benefit to all parties even past the expiration of the bilateral agreement with the U.S. Absent this initial incentive—no longer possible under international trade law—will many other nations voluntarily submit to such an intrusive role for the ILO?

As Ama Marston of Realizing Rights has noted, the Better Factories Cambodia project highlights the complexities that countries face as they begin to address how to balance international market competitiveness with human rights, labor standards, and sustainable livelihoods:

While imperfect, the model set forth by the ILO monitoring project in Cambodia, has created a foundation for others to build upon as they begin this process, providing a point of departure from which they can innovate and evaluate their own efforts with a critical eye. Nonetheless, the real challenge lies in creating binding normative frameworks that reach beyond time-limited, bilateral agreements to discourage development models and business practices predicated upon the erosion of workers’ rights.\textsuperscript{179}

\begin{flushright}

\end{flushright}