



Justice without the Rule of Law?
The Challenge of Rights-Based Industrial Relations
in Contemporary Cambodia

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Abstract

A significant proportion of the world's work is done in contexts where the rule of law is absent or severely lacking. This paper describes one such context - that of contemporary Cambodia. Based on a literature review and interviews with key informants the authors find that there are opportunities to embed labor markets in regulatory frameworks, even at the periphery of the global economy. In such contexts, however, it is suggested that orthodox models of legal and judicial reform, which focus on drafting better laws and building capacity in judicial and administrative institutions for their enforcement, may not be the most effective way forward. Rather, the Cambodian experience suggests that the following were crucial in moving towards better protection of workers' rights:

1. Understanding the limitations of law as an instrument for attainment of rights absent independent and accessible judicial institutions;
2. Confronting the barriers to the establishment of such institutions (and being open to alternative strategies);
3. Recalling that law can have a powerful normative force, even without direct enforcement;
4. Engaging with the way in which rights are attained through processes of social contest; and
5. Supporting institutional forums for such contests to be played out in ways which maximize the potential for the disadvantaged to take part and tap in to the legitimating power of the law.

Even adopting these strategies, however, it is noted that results have been uneven. In particular the poorest and most vulnerable workers are observed to have difficulty in extracting responsiveness from the sorts of systems described.

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Justice without the Rule of Law?
**The Challenge of Rights-Based Industrial Relations in Contemporary
Cambodia**

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Thanks are due to David Craig, Adrian Di Giovanni, Colin Fenwick, Stephane Guimbert, Caroline Hughes, Richard Messick, Doug Porter, Jamele Rigolini, John Ritchotte, and Caroline Sage, who gave vital input to the development of this paper. Earlier drafts of parts of this chapter appeared in World Bank, “Informalizing the Formal: Labor Relations in Cambodia,” Justice for the Poor Briefing Note, Issue 3 (Washington, DC: World Bank, 2007), <http://www.worldbank.org/justiceforthe poor>; and World Bank, “Cambodia. Sharing Growth: Equity and Development in Cambodia,” Poverty Reduction and Economic Sector Unit, East Asia and Pacific Region Report No. 39809-KH (Washington, DC: World Bank, 2007), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/06/12/000090341_20070612113137/Rendered/PDF/398090KH.pdf. The views expressed in this paper are those of the authors and should not be attributed to the World Bank, its executive directors, or the countries they represent.

—Our starting assumption was that a globalization of rules without a globalization of enforcement would *not* be a process of great consequence. Empirically we found this assumption to be false...”¹

INTRODUCTION

Globalizing labor rules has long been a goal of international labor movements and organizations. In contemporary developing-country contexts like Cambodia, such globalization offers the prospect of bringing labor conditions and wages into alignment with international norms—a great advance on local labor isolation under sweatshop conditions. One significant problem with globalization for labor rights is that the key labor-protection advances achieved during the twentieth century were structured around the regulatory strength of the nation state. Over the past 20 years, with the rise of systems of production, investment, and trade that allow capital much greater freedom in locating production, the cost of labor has become a major point of competition among nations, resulting in a continuing pressure to allow the market to determine labor conditions. This is especially the case in the developing world.

But even in today’s relatively deregulated international contexts, capital and global markets are not all-powerful in relation to labor. Rather, in Cambodia (as elsewhere), international markets exist in a tension with local regulatory and other factors, all of which offer the prospect of what Karl Polanyi described as the “re-embedding” of labor market relations into a range of social, cultural, and regulatory structures.² This paper attempts to delineate some key dimensions of the way such reembedding might foster the emergence of labor rights. It is based theoretically on a reconsideration of contemporary local and international regulatory arrangements, and empirically on an analysis of recent Cambodian case studies.

Writing in 1944, Polanyi argued that an unregulated market “could not exist for any length of time without annihilating the human and natural substance of its society.”³ That society had not been “annihilated” as part of the industrial revolution was, in Polanyi’s view, due to the fact that “markets and societies always existed in a lurching relationship and struggle which progressed unevenly as, in a two stage ‘double movement’, markets dis-embedded themselves from social constraint, and were then re-embedded and thereby secured and sustained” by movements of “enlightened reaction.”⁴ Though Polanyi’s thinking developed as an attempt to explain the social and economic transformations that occurred in early modern Europe, its relevance to questions of globalization and labor rights is apparent. If the past three decades have been characterized by a process of markets breaking out from and disrupting the social norms of a previous era, the issue becomes, in Polanyi’s terms, whether and how a double movement can be supported with a view to “re-

¹ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000), 10.

² Karl Polanyi, *The Great Transformation* (New York: Rinehart and Co, 1944).

³ *Ibid.*, 3.

⁴ David Craig and Doug Porter, *Development Beyond Neoliberalism?: Governance, Poverty Reduction and Political Economy* (New York: Routledge, 2006), 3.

embedding” markets in the social, governmental, and regulatory contexts that, though constraining them, also lead to their long-term viability. Particularly for this paper, important questions remain as to (1) the sorts of reembedding that might be expected in a context like Cambodia’s, and (2) which mechanisms might support such processes.

Regulatory reembedding, especially in today’s global market environment, will clearly be a complex process and one about which we should be appropriately cautious of our ability to engineer. Local social and territorial governance modes, like local labor, must engage international capital and compete with other countries’ labor. At the same time, however, as in earlier periods of labor market regulation in, for example, Europe, there are international opportunities, both for those organizing labor and for those seeking models and support for labor market regulation. As Ronaldo Munck notes, labor and labor practices can now be seen as socially constructed and embedded along multiscalar lines with local, national, and international dimensions to this construction, each interpenetrating the others. As Munck describes, a focus on the interpenetration of these “scales” of human activity can “open up labor analysis and strategizing in ways that recognize the complexity and fluidity of the world we now live in.”⁵

John Braithwaite’s sociolegal perspectives in effect describe the legal dimensions of these kinds of internationally uneven, multitiered regulatory arrangements. Braithwaite’s work on the development and reach of international regulatory frameworks has thrown light on the processes by which these are embedded in local and social contexts of “enlightened reaction,” which he describes as in part “self regulatory.” Such arrangements, he argues, can have an effect even where, as in Cambodia, there is a relative absence of the formal rule of law. For example, he argues that

[g]lobalized rules and principles can be of consequence even if utterly detached from enforcement mechanisms. Rules or principles do not have to be incorporated into state law or international law to have significance. Modelling of self regulatory principles and the rules of private justice systems of corporations are crucial to understanding how the globalization of regulation happens.⁶

Braithwaite’s regulatory new institutionalism is particularly interested in the kinds of deliberative, negotiated possibilities for regulation emerging out of plural, dialogue-based interfaces, where what otherwise might be conflicting contexts can be turned into *institutionalized* negotiations. For example, in relation to developing countries, he notes the potential for “networked regulation,” a situation whereby “weaker actors [state or non-state] can become stronger by networking with weaker

⁵ Ronaldo Munck, “Globalization, Labor and the Polanyi Problem,” *Labor History* 45: 3 (August 2004): 258.

⁶ Braithwaite and Drahos, *Global Business Regulation*, 10.

actors” and “enrol the power of one strong actor against another.”⁷ Without overemphasizing either the importance of local strategy or the limits of the kinds of self-regulatory and dialogue-based frameworks Braithwaite pursues, this paper is concerned with investigating the possibilities presented by what we call an “interim institutional approach” to the divide between law and politics in the emergence of labor rights.

In part 1, this paper describes the social and economic circumstances that define labor relations in contemporary Cambodia. It then provides an overview of the legal framework for industrial relations in terms of national and international law. In part 2, it examines two contemporary attempts to expand labor rights, in order to provide an empirical basis for a discussion of how workplace justice might be advanced in the absence of the rule of law. In Part 3, the paper reflects on the lessons resulting from these cases—in particular, it discusses the role of law in the emergence of labor rights and the consequences of these cases for our thinking on law and development more generally.

PART I: THE COUNTRY CONTEXT

To establish the context for this discussion it is useful to recount briefly the key debates around development in Cambodia.

Representing an early post–Cold War attempt by the international community to engage in the process of peacebuilding, Cambodia was to be a showcase for development—an example of how the new global consensus around markets and liberal democracies could be used to put a small conflict-ridden country on the road to recovery. The extent to which this vision has been brought to fruition is the subject of significant debate. Nevertheless, there is one thing that Cambodian optimists and Cambodian pessimists can agree on: the country represents an interesting test of the orthodoxies of development at the beginning of the twenty-first century. It is in this context that Cambodia offers a valuable case study in the theory and practice of the struggle for labor rights in the global south.

Put schematically, Cambodian optimists see a country that has achieved a remarkable transition since the economic and social meltdown of the Khmer Rouge era (1975–79) and the debilitating civil war that ensued and was not finally brought to a close until 1998. They see a country that has entered an unprecedented era of peace, stability, and economic growth. They see Cambodia as a poor country—with a per capita gross domestic product (GDP) of \$2,100 purchasing power parity (PPP) in 2008, it was still one of the poorest countries in Asia—but as one that has achieved widespread poverty reduction. The national poverty rate fell from an estimated 47 percent in 1993–94 to 35 percent in 2004.⁸ While acknowledging that governance is

⁷ John Braithwaite, “Responsive Regulation and Developing Economies,” *World Development* 34: 5 (2006): 892.

⁸ The World Bank, “Cambodia: Halving Poverty by 2015? Poverty Assessment 2006,” East Asia and Pacific Region Report No. 35213-KH (Washington, DC: The World Bank, 2006), <http://www->

still weak, the optimists would point to the durability of the 1993 Constitution, which established Cambodia as a liberal democracy with commitments to the rule of law and to key international human rights instruments. They might also point to the staging of periodic national elections in 1993, 1998, 2003, and 2008; progress that has been made in developing more participatory forms of governance at the local level; the country's accession to the World Trade Organization (WTO); and the government's ability to steadily increase tax revenue as a percentage of GDP. Finally, they would highlight progress in terms of human development. A feared HIV/AIDS epidemic appears to have been contained, with prevalence rates declining steadily from 3 percent in 1997 to 1.9 percent in 2003, and net primary school enrollment has increased even among the poorest quintile of the population.⁹ For the optimists then, Cambodia is undergoing an impressive, if gradual, postconflict transition and will likely continue to do well from its increased participation in a regional economy that, despite the current downturn, in the long run is likely to be a driver of global growth.

Without necessarily contradicting any of the above data, Cambopessimists paint a different picture. They argue that though achieving double digit annual economic growth, the country has nonetheless underperformed in terms of poverty reduction. The reasons for this are manifold. First, the past decade has seen significant population growth. Second, improvements in GDP have been accompanied by a rapid increase in inequality, as development has disproportionately favored the wealthy. Importantly for the current study, Cambodia's growth has been driven by a few key industries, particularly tourism and garment manufacture, that have primarily created jobs in and around the urban centers. These industries have distinct international connections that, while crucial to advancing labor rights, do not exist to the same extent in other industries. However, the vast majority of Cambodia's population, particularly the poor, live in rural areas and are dependent on agricultural production and the exploitation of common-pool natural resources for their livelihoods. The pessimist would point out that the past decade has seen the widespread depletion or privatization of many of these resources in a process that impacted especially heavily on the poor.

This raises the question of governance, wider institutional arrangements, and capacity, which, for the pessimists, are the key problems in Cambodia. Despite the formal establishment of a range of liberal democratic institutions, the pessimists would remind us that real power continues to be exercised through entrenched patronage networks that have developed around the ruling Cambodian People's Party (CPP). These power structures leave little room for a functional system of checks and balances on government power and as such, lend themselves to large-scale corruption and rent seeking. In these circumstances, any discussion of rights becomes somewhat theoretical, as the existing elite have little interest in the emergence of independent courts or other systems of accountability that might challenge their grip on power. Middle-class interests, which have been vital to the strengthening of a range of rights

wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/02/22/000012009_20060222102151/Rendered/PDF/352130REV0pdf.pdf.

⁹ World Bank, —Cambodia. Sharing Growth: Equity and Development in Cambodia.”

and rule of law agendas in other contexts, are yet to emerge in Cambodia as a significant bloc. For the pessimists then, Cambodia's wealth is being channeled to benefit local elites and their associates, while existing systems of patronage and political structures remain both dynamic and (at a fundamental level) durable. The extent to which benefits have flowed to other groups has largely been the result of a one-off "peace dividend" that is unlikely to produce sustained benefits to Cambodia's poor over the next decade.

Labor Relations in Cambodia

The size of Cambodia's workforce has grown significantly over the past 10 years, particularly in the garment and tourism sectors. In 1998 the garment industry employed 80,000 workers; by 2008 this figure had grown to over 350,000. The tourism sector has experienced similar rates of growth, with employment now estimated at 100,000 workers, up from 10,000 in 1994. Despite growth in these sectors, the lack of formal employment opportunities is without doubt the central issue in the Cambodian labor market. As a result of a baby boom in the 1980s, more than 250,000 young Cambodians now enter the labor market each year. There is no current prospect for the absorption of these job seekers in the formal labor market, particularly in the context of a global economic downturn; instead, they are finding work in the informal sector, primarily in agriculture, but also in trade, construction, and services.¹⁰

The formal labor market, defined for current purposes as those enterprises registered with the labor inspectorate as required by law, represents an estimated 10 percent of the entire workforce. Within this group of enterprises some attempts are made at compliance with the labor law. Nevertheless, enforcement is patchy and issues remain with regard to wages, working hours, leave, forced overtime, and antiunion discrimination. Outside the formal labor market there is little expectation of compliance with even the most basic labor standards. Seven-day work weeks are common, as are 12–14 hour days. Child labor is prevalent, with an estimated 27 percent of children between the ages of 10 and 14 in the labor force,¹¹ the majority of whom are engaged in agriculture. More pernicious forms of child labor are also in evidence, including minors working under dangerous conditions in brick-making, mining, and on rubber plantations, salt farms, and fish processing plants. In urban areas, children engage in a variety of income-generating activities, from scavenging to shoe polishing. Children, particularly girls, are employed in domestic work and the

¹⁰ Eva Mysliwiec, "Youth, Volunteering and Social Capital in Cambodia: Results of a Feasibility Study Conducted for a Cambodian Youth Service Program" (Phnom Penh: Youth Star Cambodia, 2005), <http://www.youthstarcambodia.org/documents/Feas%20Study.pdf>; World Bank, "Cambodia at the Crossroads: Strengthening Accountability to Reduce Poverty," East Asia and Pacific Region Report No. 30636-KH (Washington, DC: The World Bank, 2004), 72, http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/08/09/000160016_20050809181530/Rendered/PDF/306360ENGLISH0KH0white0cover01public1.pdf.

¹¹ World Bank, "Cambodia at the Crossroads," 136.

sex trade. The trafficking of children for the purposes of sexual exploitation and various forms of work, including forced labor and begging, is a significant issue.¹²

Cambodia's shortcomings in labor rights do not derive primarily from weaknesses in its labor or antitrafficking laws. Rather, the problem lies in poverty, poor governance, and the gap between the law on the books and the law in practice. This situation is hardly exceptional in the developing world. Writing about the application of land law in Africa, Wardell describes how formal law provides only part of the picture—a state of affairs that could equally apply in Cambodia:

... practice often differ[s] significantly from what the law (-makers) could be held to expect. Law is not implemented or enacted unscathed by everyday negotiations or more dramatic circumvention, by manipulation or outright non-observance. Thus the meaning and affect of law in a particular place depend on the history, the social setting, the power structure, and the actual configuration of opportunities. This does not mean that laws and regulations do not have an effect. In fact they constitute significant, though not exclusive, reference points for actors and politico-legal institutions in the negotiations of access and rights – even if they are not enforced.¹³

It is in this context, as a “significant though not exclusive” reference point around which negotiations over labor rights occur, that a brief description of Cambodia's legal framework is required.

Labor and Other Law in Cambodia

The current Constitution of the Kingdom of Cambodia has been in place since 1993. It was adopted by a Constitutional Assembly at the end of the United Nations Transitional Administration for Cambodia (UNTAC), which established the Kingdom of Cambodia as a constitutional monarchy to be governed according to the principles of “liberal democracy and pluralism” (art. 1).

Of particular importance for the current study is chapter III of the Constitution (arts. 31–50), titled “Rights and Duties of Khmer Citizens.” These articles include broad-ranging protections of human rights, including a number of provisions relevant to industrial relations.

International labor law thus has at least formal relevance to Cambodia labor contexts. The cornerstone of chapter III of the constitution is paragraph 1 of article 31, which provides that:

The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, The Universal Declaration of Human Rights, the covenants and conventions related to human rights, women's rights and children's rights.

¹² U.S. Department of Labor, “Foreign Labor Trends – Cambodia,” International Labor Affairs Bureau (Washington, DC: U.S. Department of Labor, 2005).

¹³ D. Andrew Wardell and Christian Lund, “Governing Access to Forests in Northern Ghana: Micro-Politics and the Rents of Non-Enforcement,” *World Development* 34: 11 (2006): 1887.

This provision requires the state, in all its manifestations, to respect all of the major UN human rights instruments that were in effect at the time the constitution was adopted. Whether this provision would extend to the fundamental International Labour Organization (ILO) conventions, to all of which Cambodia is now a signatory, is not clear.

An example relating to labor rights is article 22 (1) of the International Convention on Civil and Political Rights (ICCPR), which provides that ~~everyone~~ shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” Accordingly, any act of the Cambodian state that impinges upon freedom of association could be challenged under the constitution on the basis that it violates article 22 (1) of the ICCPR.

Other substantive rights relevant to work are included in the following articles of the constitution:

- the right to strike and to conduct non-violent demonstrations ~~within~~ the framework of the law” (art. 37)
- the right to participate actively in the political, economic, social and cultural life of the nation, regardless of sex (art. 35 (1))
- the right to choose any employment according to their ability and to the needs of the society (art. 36 (1))
- the right to receive equal pay for equal work regardless of sex (art. 36 (2))
- right to form and to be member of trade unions (art. 36 (5))

The constitution further prohibits discrimination against women (art. 45), guarantees maternity leave, (art. 46 (1)), and provides that the state must give ~~opportunities~~ to women, especially to those living in rural areas without adequate social support, so they can get employment (...) and have decent living conditions” (art. 46(2)). With regard to children, the constitution obliges the state to ensure that they are not employed in ways that ~~affect~~ their education and schooling, or that are detrimental to their health and welfare” (art. 48 (2)).

Of course such provisions are largely unrealized at present. As with other dimensions of Cambodia’s legal system, it is important to recall that the constitution is only weakly embedded in the various institutional, political, and cultural structures that might lend it stronger normative power.

Similar considerations apply to the primary piece of legislation governing employment in Cambodia: the Labour Law of 1997. This law was drafted with assistance from the ILO and the U.S. union movement.¹⁴ It is a hybrid piece of legislation that draws on a number of sources, including, most significantly, Cambodia’s postcolonial (and heavily French-influenced) 1972 labor code, international labor standards, and the immediate postsocialist Cambodian labor code of 1992.

The 1997 law is similar to earlier Cambodian labor laws in that it provides a detailed framework for the regulation of most private sector employment

¹⁴ Arturo Bronstein, “The Role of the International Labour Office in the Framing of the Labor Law,” *Comparative Labor Law and Policy Journal* 26 (2004–5): 339.

relationships. The only significant category of private sector employees that is excluded from the labor law is domestic servants. Major topics covered by the law are wages and benefits (though establishment of a minimum wage is left to the executive or through collective bargaining), working hours, leave, health and safety, discipline, and dismissals. The areas of the law that contained major innovations compared to the 1992 code related to the ILO's key labor rights norms, namely:

- the establishment of a system for the resolution of labor disputes;
- the inclusion of the right for workers to form, and be members of unions;
- the elaboration of the right to bargain collectively; and
- the protection of the right to strike [according to mandated procedures].

In examining the process whereby international standards permeated local legislation, it is noteworthy that the passage of the 1997 labor law preceded Cambodia's ratification of the ILO's conventions on freedom of association (C.87) and collective bargaining (C.98), which occurred in 1999, but followed its ratification of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which occurred in 1992 while the country was under *de facto* administration by UNTAC. Emerging from this period as a heavily donor-dependent country seeking reintegration in the international community, Cambodia's openness to the formal adoption of international human rights instruments has been a hallmark of its postconflict transition. Law reform has, however, by no means automatically led to changes in labor relations. A combination of existing practices, together with a variety of incentive systems in workplaces, the labor market, and state institutions charged with upholding and enforcing the law, ensure that this is not the case. In these circumstances, the practical attainment of international labor rights standards is not a project that relates primarily to law *per se*; rather, it is the subject of political contests played out on multiple levels, both legal and nonlegal.¹⁵

PART II: LABOR REFORMS IN CAMBODIA

Two practical examples serve to illustrate this argument. The first relates to efforts to improve working conditions in Cambodia's garment factories (the working-conditions improvement project). The second involves labor dispute resolution and the establishment of a labor arbitration council, including in particular, a dispute that occurred in the hotel industry in 2003–4.

Case Study 1: Garment Factory Monitoring

Cambodia emerged as a garment exporter in the mid 1990s. This occurred not so much because of the natural advantages the country has as a site for garment manufacture but because of its cheap labor, increased political stability, and the

¹⁵ c.f. Boaventura de Sousa Santos and Cesar Rodríguez-Garavito, eds., *Law and Globalisation from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).

restrictions placed on major exporters, particularly China, as part of the Multi-Fibre Arrangement (MFA) that regulated international trade in textiles until their expiry in December 2004. Following a rapid expansion of the garment industry between 1995 and 1998, the U.S. government sought to impose quotas on Cambodia's textile exports.

At the same time, labor conditions in Cambodia's factories developed as a major issue. Responding both to issues of national politics and the growth of the garment sector, local unions became more active, the number of strikes increased, and international labor rights groups drew attention to working conditions there.¹⁶ This combination of factors informed the negotiation of a bilateral trade agreement between the United States and Cambodia in January 1999 that imposed quotas on a range of Cambodia's garment exports. However, building on similar clauses in other bilateral trade deals driven by the United States, the agreement also provided that Cambodia would support the implementation of ~~a~~ program to improve working conditions in the textile and apparel sector, *including internationally recognized core labor standards*, through the application of Cambodian labor law."¹⁷

In order to provide an incentive for such improvements, the agreement also established a system whereby quotas would be increased by 14 percent per year¹⁸ if the United States determined that ~~w~~orking conditions in the Cambodia textile and apparel sector substantially comply with such labor law and standards." The agreement created an immediate commercial incentive for improved implementation of the labor law for all stakeholders—employers, unions, and the government as a whole, which auctioned the quotas to manufacturers. Crucially, it also provided opportunities for high-ranking government officials, for whom rent seeking is widely common, to be involved in the allocation of quotas.¹⁹ The question remained, however, how the labor standards clause would be implemented, given the absence of credible country systems for monitoring and enforcing the law.

After some negotiations, this question was answered by the establishment of an ILO project (funded primarily by the United States)²⁰ that would ~~o~~perate an

¹⁶ John A Hall, ~~H~~uman Rights and the Garment Industry in Contemporary Cambodia," *Stanford Journal of International Law* 36 (2000): 199.

¹⁷ ~~C~~ambodia Bilateral Textile Agreement" (italics added), (1999), available at http://cambodia.usembassy.gov/uploads/images/M9rzdrzMKGi6Ajf0SIuJRA/uskh_texttile.pdfhttp://cambodia.usembassy.gov/uploads/images/M9rzdrzMKGi6Ajf0SIuJRA/uskh_texttile.pdf.

For further analysis of the trade agreement see: Sandra Polaski, ~~C~~ambodia Blazes a New Path to Economic Growth and Job Creation," *Carnegie Papers* 51 (2004); Kevin Kolben, ~~F~~rade, Monitoring, and the ILO: Working To Improve Conditions in Cambodia's Garment Factories," *Yale Human Rights and Development Law Journal* 7 (2004): 79; and Regina Abrami, ~~W~~orker Rights and Global Trade: The US-Cambodia Bilateral Textile Trade Agreement," Harvard Business School Case Study (Cambridge, MA: Harvard Business Publishing, 2004).

¹⁸ A figure that was increased to 18 percent when the agreement was extended in 2001.

¹⁹ Kolben, ~~F~~rade, Monitoring, and the ILO."

²⁰ Financial contributions from the Royal Government of Cambodia and the Garment Manufacturers Association were also received.

independent system to monitor working conditions in garment factories.²¹ Under this system, all garment exporters would be subject to inspection by the ILO and the U.S. government would make its decisions on the quota increase based on the ILO's findings. This was a novel development for two reasons: it involved the ILO in the monitoring of compliance with a national labor law, and it established clear linkages between monitoring and quotas.

The ILO working-conditions improvement project produced its first "Synthesis Report" on working conditions in 30 garment factories in November 2001. In terms of international labor standards, it found no evidence of child or forced labor but did uncover significant limitations on freedom of association. Other findings focused on breaches of the Cambodian labor law, primarily related to wages and overtime. Later reports identified findings for individual enterprises and assessed whether or not these were remedied. The ILO synthesis reports, for example, indicate that progress was being made in terms of overall compliance:

In most of the factories, significant progress has been made in improving working conditions, but obstacles still persist. A substantial number of factories continue to implement suggestions, while a small number of factories made little effort to improve.²²

Progress in terms of international labor standards is not necessarily easy to measure. In Cambodia, however, at least in relation to the garment industry, there is a rich source of data from the ILO monitoring reports.²³ This data is supplemented by the U.S. State Department's annual *Country Reports on Human Rights Practices*, which include a chapter on labor rights as well as findings from interviews with unionists and others involved in labor rights issues.

Based on the above sources, it appears that the initial years after the signing of the bilateral trade agreement (2000–2003) showed a marked improvement in freedom of association. Though accurate figures are difficult to obtain, the estimates of the U.S. Embassy in Cambodia were that approximately 12 percent of Cambodia's 150,000 to 170,000 garment workers were unionized in the year 2000.²⁴ This figure increased to 25–30 percent in 2001 and by 2005, it was estimated that 40–50 percent of the approximately 280,000 garment and footwear workers were union members.²⁵

²¹ International Labour Organization, "First Synthesis Reports on Working Conditions in Cambodia's Garment Sector" (Geneva: International Labour Organization, 2001), <http://www.ilo.org/public/english/dialogue/ifpdial/publ/cambodia.htm>.

²² International Labour Organization, "Synthesis Reports on Working Conditions in Cambodia's Garment Sector" (Geneva: International Labour Organization, 2006), 57.

²³ Though the methodology for monitoring factories has evolved over the years, it is nevertheless possible to conduct some longitudinal analysis of data contained in the synthesis reports.

²⁴ U.S. Department of State, "2001 Country Reports on Human Rights Practices: Cambodia," Bureau of Democracy, Human Rights, and Labor (Washington, DC: U.S. Department of State, 2002), section 6a, <http://www.state.gov/g/drl/rls/hrrpt/2001/eap/8283.htm>; The year 2000 estimate is from U.S. Department of Labor, "Foreign Labor Trends – Cambodia," International Labor Affairs Bureau (Washington, DC: U.S. Department of Labor, 2003).

²⁵ U.S. Department of State, "2005 Country Reports on Human Rights Practices: Cambodia," Bureau of Democracy, Human Rights, and Labor (Washington, DC: U.S. Department of State, 2006), see Section 6a, <http://www.state.gov/g/drl/rls/hrrpt/2005/61604.htm>.

Surveys of garment workers conducted for the Asian Development Bank (ADB)²⁶ and the ILO/World Bank²⁷ suggest union membership at similar levels, with the latter study indicating that membership is strongest among unions that are considered independent of the CPP. The previous five years have also seen fundamental improvements in the registration of unions. Until 2002, independent or opposition-aligned unions often reported difficulty in registering with the Ministry of Labour.²⁸ Since 2003, this issue has been substantially addressed, and there has been a proliferation of new union registrations in recent years.²⁹

However, since 2004 there have been indications of a resurgence of antiunion activities. The year 2004 was marked by the murder of two union leaders associated with the opposition-affiliated Free Trade Union and a series of major disputes around the unionization of the hotel sector. A long-range analysis of the ILO synthesis reports also reveals a marked increase in the number of factories cited for antiunion discrimination and other freedom of association issues starting in mid-2004 (see figure 1).³⁰ While the causes of any fluctuations in the environment for freedom of association are undoubtedly complex—and the ILO’s methods for collecting the data on which this analysis is based have not been fully consistent—local union activists point out that the final round of quota increases under the U.S.-Cambodia trade agreements was assessed in July 2004 and that absent the prospect of further compliance-related increases in market access, the incentives for employers to engage positively with unions may have been reduced.

²⁶ Cambodian Researchers for Development, “Garment Employees in Cambodia: A Socioeconomic Survey” (Manila: Asian Development Bank, 2004).

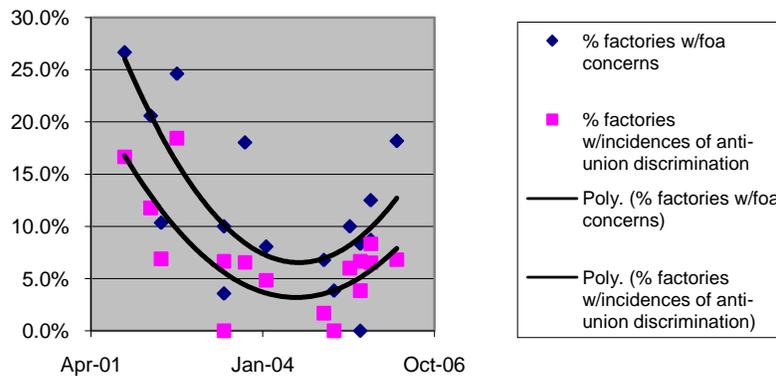
²⁷ World Bank and International Labour Organization, “Cambodia: Women and Work in the Garment Industry” (Phnom Penh: The World Bank, 2006), http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/06/15/000020953_20070615111341/Rendered/PDF/400420KH0Women1the0factory01PUBLIC1.pdf.

²⁸ U.S. Department of State, “2001 Country Reports on Human Rights Practices: Cambodia”; U.S. Department of State, “2002 Country Reports on Human Rights Practices: Cambodia,” Bureau of Democracy, Human Rights, and Labor (Washington, DC: U.S. Department of State, 2003), see Section 6a, <http://www.state.gov/g/drl/rls/hrrpt/2002/18238.htm>.

²⁹ Though there are still complaints about delays in the registration process. See for example U.S. Department of State, “2005 Country Reports on Human Rights Practices: Cambodia”; U.S. Department of State, “2004 Country Reports on Human Rights Practices: Cambodia,” Bureau of Democracy, Human Rights, and Labor (Washington, DC: U.S. Department of State, 2005), see Section 6a, <http://www.state.gov/g/drl/rls/hrrpt/2004/41638.htm>; U.S. Department of State, “2003 Country Reports on Human Rights Practices: Cambodia,” Bureau of Democracy, Human Rights, and Labor (Washington, DC: U.S. Department of State, 2004), <http://www.state.gov/g/drl/rls/hrrpt/2003/27766.htm>.

³⁰ Source: Authors’ calculation based on ILO reports. Data taken from International Labour Organization, “Synthesis Reports on Working Conditions in Cambodia’s Garment Sector,” vols. 1–16 (Geneva: International Labour Organization, 2001–2006).

Figure 1: Overall Trends in Issues Related to Freedom of Association (foa) and Anti-Union Discrimination



While the garment sector in Cambodia remains at one level –essentially no different from the industry in other parts of the world³¹ in terms of its fundamental outcomes and the constellations of power by which it is framed, there is a consensus that it has seen a significant though uneven improvement in compliance with the labor law and international labor rights standards since 2001.³² A number of factors have influenced this outcome.

Primary among these was the role of the U.S.–Cambodia trade agreement in creating the immediate financial incentives necessary for the system to work. Looking behind the agreement, however, it is important to acknowledge the political interests that led the United States to push the labor standards clause, including protectionist elements in the United States (unions and apparel manufacturers) and increased consumer sensitivity to international labor standards driven by U.S. labor rights activists, the media, and union movements in the developing world.

It is also important to consider the impact of a number of changes to the conditions under which the new arrangements worked. Once operational, the ILO project promoted labor rights by relying on (a) processes of “social dialogue” at the national and international level; (b) the provision of public information; (c) “remediation” efforts targeted at factory management; and (d) making links to trade preferences, rather than direct recourse to national or international law or more grass roots empowerment strategies.

While improved performance had financial benefits at the industry level, one might have expected free riding at the enterprise level. However, this was avoided in

³¹ Doug Miller, Veasna Nuon, Charlene Aprill, and Ramon Certeza, “Business - as Usual? Governing the Supply Chain in Clothing – Post MFA Phase Out. The Case of Cambodia,” Discussion Paper no. 6 (Geneva: Global Union Research Network, 2007), 22, <http://library.fes.de/pdf-files/gurn/00268.pdf>.

³² International Finance Corporation and the World Bank, Foreign Investment Advisory Service, (FIAS), “Cambodia - Corporate Social Responsibility & the Apparel Sector Buyer Survey Results” (Washington, DC: FIAS, 2004), <http://www.betterfactories.org/content/documents/Cambodia%20Corporate%20Social%20Responsibility.pdf>; Polaski, “Cambodia Blazes a New Path to Economic Growth and Job Creation”; Don Wells, “Best Practice in the Regulation of International Labor Standards: Lessons from the U.S. – Cambodia Textile Agreement,” *Comparative Labor Law and Policy Journal* 27 (2006): 357.

three ways. First, the granting of export licenses was made conditional on an enterprise subjecting itself to the ILO monitoring system.³³ Second, the ministries of commerce and labor set up a system whereby employers could be deprived of their export licenses if they were found to be involved in continued breaches of core labor standards.³⁴ Third, benefits were focused and free riding lessened by publishing information on individual factories; in this way, the system generated pressure for improved “corporate citizenship” from both other members of the garment manufacturing community and their brand name buyers in the United States.³⁵ Though it is difficult to assess the relative importance of these factors, the willingness of both the Cambodian government and the country’s employers to continue with the monitoring after the expiration of the MFA, and thus of the quota system, suggests that the financial incentives established by the trade agreement, while instrumental in the establishment of the system, were only part of its long-term attractiveness. Whether monitoring and associated processes can generate the necessary incentives to drive long-term improvements in core labor rights absent the direct carrot and stick effect of access to U.S. markets remains to be seen. Similarly, the extent to which improvements in the garment sector will extend to broader labor conditions such as pay and working hours or have positive follow-on effects for industrial relations in the rest of the economy is more questionable still.

In relation to these broader issues, the ILO has attracted criticism, most notably from political scientist Caroline Hughes, who argues that the working-conditions improvement project is typical of an approach to development that “channels participation into atomizing problem solving” by divorcing “the issues of pay and conditions from wider questions regarding power relations between workers, their employers, and the state” and thus undercuts “any agenda of collective representation” of workers.³⁶ Put briefly, Hughes’ position is that the focus of the project on compliance with existing rights, with its method centered around negotiations at the national and international level, was fundamentally disempowering. These factors, she argues, undermine unions’ ability to mobilize

³³ This ensured maximum participation in the project. Nevertheless, cases of participating enterprises outsourcing production to nonparticipating manufacturers were reported. It is estimated that such off-site manufacturing accounts for approximately 10 percent of the industry.

³⁴ Joint Prakas 2588/00 (“on The Enforcement of the Labour Law in the Kingdom of Cambodia,” July 25, 2000) set up an interministerial committee to monitor the implementation of the Labour Law in the garment industry. This committee had the right to receive complaints and conduct investigations into suspected violations of the Labour Law with the result that serious offenders could have their export licenses revoked. Though this sanction was never invoked, in November 2002 the Ministry of Commerce issued a warning to 28 factories ordering them to refute within 48 hours accusations that they had been involved in antiunion activities. The warning threatened to restrict these factories’ access to export licenses if they could not provide an adequate explanation.

³⁵ A survey of major brands conducted in 2004 found that labor conditions and cost were the two most important factors in determining where garments were sourced. See FIAS, “Cambodia – Corporate Social Responsibility & the Apparel Sector Buyer Survey Results.”

³⁶ Caroline Hughes, “Transnational Networks, International Organizations and Political Participation in Cambodia: Human Rights, Labour Rights and Common Rights,” *Democratization* 14: 5 (2007): 834–852.

workers on more fundamental issues, from pay increases and reform of the labor law, to anticorruption and greater social justice.

In support of her argument, Hughes cites increases in the minimum wage following strikes in 1997 (to \$40) and 2000 (to \$45), the disappointing trajectory of real wages since then, and the involvement of the opposition-aligned Free Trade Union in the political tumult of the late 1990s as indicators of the early potential of collective action among Cambodia's garment workers.

The contrary argument would point to the rapid growth of the union movement from 25–30 percent membership (circa 50,000 members) in 2001 to 40–50 percent membership (circa 150,000 members) in 2006 and the continued prominence of the Free Trade Union, which Hughes singles out as the union most disadvantaged by the new regime.³⁷ It would also point to an increase in strikes, followed by collectively bargained wage increases in 2006 and 2008, as well as inherent limitations on wage growth based on the Cambodian industry's productivity and position in relation to its regional competitors.³⁸

In the view of the current authors, Hughes probably overestimates both the transformative potential of Cambodia's nascent union movement in the late 1990s as well as the ILO project's negative impact on that potential. To a significant extent, however, we accept her argument about the tendency of international actors to promote forms of participation that are both individualizing and heavily policed, and it is here that our second case study—with its focus on collective action—contributes to the discussion.

Case Study 2: Labor Dispute Resolution

Our second example, relating to labor dispute resolution, emerges from the same context as the working-conditions improvement project. The initial ILO proposal to the U.S. Department of Labor for work in relation to the trade agreement, entitled “Labour Law Implementation in the Textile and Apparel Industry of Cambodia,” focused more on building the capacity of national labor-relations institutions and less on direct factory monitoring (Kolben 2004, 91-92). This was, in effect, an acknowledgement that beyond any monitoring system, effective tripartism is founded in institutions in which potentially conflicting relations among unions, companies, and government can be turned into processes involving legally framed and enforced deliberation and negotiation.

A significant component of the project was to be strengthening mechanisms that fostered closer cooperation in preventing disputes, settling quickly and fairly

³⁷ Jennifer Makin, “Cambodia: Women and Work in the Garment Industry” (Phnom Penh: International Labour Organization and the World Bank, 2006), 25, <http://www.popline.org/docs/1760/319262.html>.

³⁸ In this regard, a 2005 study of the U.S. Agency for International Development on the competitiveness of Cambodia's garment industry noted that “The range of products currently produced emphasizes basic construction and design, with very little added value. This forces Cambodian producers to compete directly with other low-wage countries.” Nathan Associates, “Measuring Competitiveness and Labor Productivity in Cambodia's Garment Industry” (Washington, DC: U.S. Agency for International Development, 2005), 31, <http://www.eicambodia.org/downloads/download.php?unumber=88>.

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.”³⁹ As the garment-sector working-conditions improvement project moved to focus on direct factory monitoring by the ILO, the industrial relations component of the earlier proposal was hived off in a separate labor dispute-resolution project. This project was to provide technical assistance to the Ministry of Labour in consultation with the union movement and employers associations to establish and implement “transparent, fair and expeditious dispute procedures.”⁴⁰ Activities were anticipated at the enterprise level with the Ministry’s conciliators, through the establishment of an arbitration tribunal and a labor court.

The working-conditions improvement project described above stressed, at least in its initial phases, the need for the reliable monitoring of working conditions in the garment sector. The labor dispute-resolution project, however, was an attempt at an engagement with the question of how labor rights and equitable industrial relations could be promoted using national systems. The core problem in this respect was the lack of credible institutions for law enforcement and dispute resolution.

When the project was established in 2002 there were essentially three ways to deal with labor disputes. First, negotiated outcomes could be sought at the enterprise level, with or without recourse to industrial action; second, the issue could be referred to the Ministry of Labour for conciliation or enforcement proceedings; or third, rights disputes could be dealt with by the courts.

Each of these methods of dispute resolution had significant drawbacks. Systems for handling grievances at the factory level were underdeveloped and the failure to manage conflict was leading to increasing levels of (often violent) industrial action. The labor inspectorate, responsible for both the conciliation of labor disputes and the enforcement of the law, suffered from all of the deficiencies of the Cambodian public service sector. Capacity was limited and at approximately \$40 per month, official wages were well below what was required to support a family. In these circumstances, labor inspectors developed a reliance on informal payments from industry to support their livelihoods, and in the process, their credibility as neutral conciliators or enforcers of the law was heavily undermined.

The courts suffered from similar problems. The UN Special Representative for Human Rights in Cambodia summarized these as follows:

The issue of impunity lies at the centre of problems in the administration of justice and continues to be compounded by the lack of neutrality and independence in the judicial and law enforcement systems, as well as by a low level of professionalism in those bodies. Inadequate funds are allocated to the administration of justice. The judiciary is subject to executive interference and open to corruption from interested parties. Judges have concerns about their

³⁹ As cited in Kolben, “Trade, Monitoring, and the ILO,” 92.

⁴⁰ As cited in Daniel Adler et al., eds., *The Arbitration Council and the Process for Labour Dispute Resolution in Cambodia: Law and Commentary* (Phnom Penh, Cambodia: Community Legal Education Center, 2004), 6.

personal security (...). Law enforcement officials often fail to enforce court orders and judgements, and sometimes act in open defiance of their terms.⁴¹

There were a range of possible responses to these circumstances. A provision for a labor court existed in the labor law and a rights-based approach to industrial relations could thus have focused on the judiciary, with the argument that equitable institutions for the enforcement of law are the *sine qua non* of rights. However, the ILO, represented by its Chief Technical Advisor (CTA) (a Dutchman who had prior experience working on legal and judicial reform in Cambodia and thus brought with him a particular *habitus*),⁴² concluded that it is very difficult to get classical institutions of the rule of law (those that are both independent and have the power to make binding decisions) to work in settings where government is dominated by a strong neopatrimonial executive.⁴³ Observing previous attempts at legal and judicial reform in Cambodia, the CTA anticipated that the result of pursuing the rule of law directly would be either that: (a) the process of setting up a new labor court would be stalled or (b) the new institution would be immediately captured by powerful government and private sector interests. As a result, a choice was made to focus on the establishment of a new arbitration tribunal called the Arbitration Council, a body that was also provided for in the 1997 law but had never been put into operation.⁴⁴

Articles 309–317 of the Cambodian Labour Law set out a framework for the arbitration of collective labor disputes that cannot be resolved by conciliation. The body to conduct these arbitrations, the Arbitration Council, was established by Prakas (Ministerial Proclamation) 338 of 2002 and the first cohort of 21 arbitrators began their terms of office on 1 May 2003.⁴⁵ The Arbitration Council is a tripartite body composed of members nominated by unions, employer organizations, and the government. Despite this composition, the Arbitration Council aspires to be independent in that its members are not considered representatives of the stakeholder groups that nominated them. Rather, they are required to approach each case on its merits. In order to enhance the independence of the newly established institution, the

⁴¹ UN General Assembly, Fifty-Eighth Session, *Situation of Human Rights in Cambodia*, Third Report of the Special Representative for Human Rights in Cambodia, Peter Leuprecht to the UN General Assembly, A/58/317, 22 August 2003, paragraph 25, http://cambodia.ohchr.org/download.aspx?ep_id=98.

⁴² The term is used in Bourdieu's sense whereby *habitus* can be thought of as a system of lasting and transposable dispositions (i.e. a matrix of perceptions, appreciations, and actions) that color "the kinds of problems that are posed, the kinds of explanations that are offered and the kinds instruments that are employed" in any given context. See Rogers Brubaker, "Social Theory as Habitus," in *Bourdieu: Critical Perspectives*, ed. Craig Calhoun et al. (Chicago: University of Chicago Press, 1993), 213.

⁴³ C.f. Kheang, who posits that Cambodia is a "state dominated by networks of patron-clientelism [and] sustained by corruption" and that this state of affairs fundamentally "inhibits the development of an independent judicial system..." See Un Kheang, "Democratization without Consolidation: The Case of Cambodia 1993 – 2004" (PhD dissertation, Australian National University, 2004), 5.

⁴⁴ Though there is no indication that it is ever operational, an Arbitration Council is also provided for in the 1972 Labour Law. The origins of the institution are not clear, though French (or ILO) influence is indicated, as similar provisions exist in the Labor Code of the Cameroon.

⁴⁵ Pr. 38/2002.

ILO coordinated the selection of the first cohort of arbitrators and ensured that no major stakeholder group had objections to any of the appointments.⁴⁶

Each case referred to the Arbitration Council is decided by a panel of three. Of these three arbitrators, one is chosen by each of the parties to the dispute while the third arbitrator (the chairperson of the panel) is chosen by the two arbitrators already selected by the parties. This panel is responsible for hearing the dispute and giving orders to settle it. In issuing such orders, the panel is free to grant any civil remedy or relief that it deems just and fair in the circumstances.

Though arbitration is a mandatory part of the process for the resolution of collective labor disputes under Cambodian law, the parties choose whether the decisions or awards of the Arbitration Council are binding or nonbinding. In over 90 percent of cases, one or both parties will choose nonbinding. An award will be enforceable immediately (a) if the parties have agreed in writing to be bound by the award or (b) if the parties are bound by a collective agreement that provides for binding arbitration. In all other cases, a party who does not wish to be bound by an award may file an opposition within eight days of receiving notification of the award, rendering it without legal effect. On the other hand, if neither party files an opposition to the award within the time permitted, the award becomes enforceable. Technically, enforcement would require one party to commence proceedings with the court, in which case the court should issue an order for the execution of the award unless there were clear reasons to set the award aside.⁴⁷ To date, however, the authors are not aware of any cases in which enforcement has occurred. Practically speaking, enforcement is not considered feasible due to (a) the high costs and delays involved in court proceedings in Cambodia⁴⁸ and (b) the susceptibility of the courts to bribery, which would most likely result in one or other party to the dispute having the case heard *de novo*.⁴⁹ Fully reasoned decisions of the Council are published both in hard copy and via the Internet—a novelty for a country where courts have not generally published reasoned decisions.⁵⁰

As a tripartite body that generally issues nonbinding and practically unenforceable awards, the Arbitration Council is something of a hybrid between an institution of the rule of law and a forum for social dialogue between organized labor

⁴⁶ The Arbitration Council is often held up as a rare Cambodian example of a clean institution. Thus, in a speech to a national industrial relations conference, the U.S. Ambassador to Cambodia described the Council as “a highly functioning, [and] transparent [body] that is a model for dispute resolution...”

⁴⁷ As provided for in Pr. 38/2002 [superseded by Prakas 99/2004].

⁴⁸ See for example the World Bank’s *Doing Business Indicators* (2009) available at www.doingbusiness.org, which rate the cost of enforcing a standard commercial contract at 102.7 percent of the value of the contract.

⁴⁹ A recent corruption perception survey reported that bribes are paid in all or nearly all court cases: Center for Social Development, “Corruption and Cambodian Households: Household Survey on Perceptions, Attitudes and Impact of Everyday Forms of Corrupt Practices in Cambodia” (Phnom Penh: Center for Social Development, 2004), <http://www.csdcambodia.org/pdf/Pub/Corruption%20and%20Cambodian%20Households.pdf>.

⁵⁰ Awards are available online at www.arbitrationcouncil.org. For an analysis of the impact of the publication of these decisions online see Daniel Adler, “Access to Legal Information in Cambodia: Initial Steps, Future Possibilities,” *The Journal of Information, Law and Technology* 2-3 (2005), http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2005_2-3/adler/.

and management. Yet it would appear from the Cambodian experience that this sort of institution can be used as a tool for focusing and legitimating collective action with a view to the enhancement of workers' rights.

According to its own statistics, the Arbitration Council's case load has increased sharply since its inception in May 2003. From 31 in the first year, it has risen to 158 cases in 2008. The success rate has remained steady. Of the 575 cases received through September 2008, 69 percent were reported as resolved successfully, 37 percent because the parties reached an agreement prior to the issuance of an award, 25 percent because the parties fully or substantially implemented an award, and 7 percent because the parties reached an after-award settlement.

To a significant extent, these disputes have dealt with details of compliance with the minimum standards set out in the local Labour Law. However, in a number of instances, the Council has contended with key human rights issues. These have arisen in cases related to antiunion discrimination, freedom of association, and the right to bargain collectively.

A series of cases relating to disputes in the Raffles hotels in Siem Reap and Phnom Penh serves to illustrate both the ways international labor rights are penetrating Cambodian workplaces and the limited scope of such rights in the local context.

The Raffles dispute arose in late 2003 as a newly established hospitality-sector union mobilized workers in the five-star Raffles le Royal (Phnom Penh) and the Raffles Grande Hotel d'Ankor (Siem Reap) to engage in collective bargaining for the first time. Negotiations foundered around the issue of service charges (mandatory tips included on clients' bills) and how these should be distributed to workers. The legal basis for this discussion is set out in Article 134 of the Labour Law, which provides that monies collected as a mandatory "service charge" added to bills in hotels and similar establishments must be "paid in full to staff who have contact with the clientele." In practice, the Raffles hotels had been collecting a service charge from clients for a number of years. Although management argued that the amount collected had been distributed in full to workers through a combination of wages, bonuses, and other benefits, neither of the hotels had established a transparent or agreed-on method that showed how the service charge was being distributed. The breakdown in negotiations led to lengthy strikes in both hotels, and the dispute became one that focused on issues of core labor rights when management moved to dismiss the remaining strikers (some 97 workers in Phnom Penh and 220 in Siem Reap) in mid-April 2004. In response, the strikers brought cases for reinstatement to the Arbitration Council.

In its awards, the Arbitration Council found that the workers should be reinstated and that:

the employer party has shown a flagrant disregard for the right to freedom of association and the right to bargain collectively, as provided for by the Constitution and laws of the Kingdom of Cambodia, not to mention ILO Conventions on *Freedom of Association and Protection of the Right to*

Organise (C87) and the *Right to Organise and Collective Bargaining* (C98) both of which Cambodia has ratified.⁵¹

While the Arbitration Council made clear reference to both national and international law in its decision, the fact that it was nonbinding meant that the Raffles group had the option of filing objections. As the group did so within the prescribed time limit, the awards became unenforceable. Nevertheless, the unions involved, with support from their international partners, continued to advocate for the reinstatement of their members. The strategies used were multipronged, targeting the international clientele of the Raffles hotel chains both in Cambodia and internationally. Using methods seen in the footwear and textile sectors, the union initiated campaigns to boycott the Raffles chain throughout the world. The International Republican Institute a U.S. government-funded organization affiliated with the Republican Party, was prominent in this boycott, which was also supported in Cambodia by the U.S. Embassy—and even raised as an issue in the U.S. Congress by Representative George Miller, who called on all major international organizations to boycott Raffles. Through their affiliations with the American Council for International Labor Solidarity, the Raffles unions were also able to tap into the resources of the international union movement. Activists picketed the Raffles group's New York and London properties. The dispute was very costly to the Raffles brand; as a Singaporean diplomat observed at the time, “It is our biggest investment in Cambodia. It is so sad... Raffles Le Royale is bleeding.”⁵²

While such approaches to advocacy are primarily political rather than legal, the use of law (ILO Conventions, Cambodian law, and the awards of the Arbitration Council) to legitimate these campaigns is notable. Union press releases on the dispute cited the ILO Conventions as applied by the Arbitration Council in support of workers' claims for reinstatement, despite the fact that the Council's awards had no legal effect. There is something of a paradox in this situation. The hotels—which had sought and received decisions from Cambodia's courts declaring the strikes illegal—were limited in the extent to which they were able to rely on those decisions, at least partially because of the corrupt nature of Cambodia's judiciary. The unions, on the other hand, were able to prevail politically (an agreement to reinstate the dismissed workers was struck in September 2004) thanks to a campaign constructed around a set of practically unenforceable international norms as applied in an arbitral award without legal effect.

In these circumstances, human rights law becomes a powerful tool because it reflects certain prenegotiated and internationally legitimate understandings about what is just. Markets, or at least the market for beds in five -star hotels (as with the market for branded garments), are somewhat embedded in this set of norms; as a result, there

⁵¹ *Raffles Hotel le Royal v. Union of Raffles Hotel le Royal* (AC Case 24/04), 07 June 2004.

⁵² Quoted in “Boycott Hits Cambodian Hotels,” *Far Eastern Economic Review*, 8 July 2004, <http://www.asianfoodworker.net/cambodia/040706raffles.htm><http://www.asianfoodworker.net/cambodia/040706raffles.htm>.

appear to be clear benefits to developing rules even without enforcement, a process that Braithwaite alludes to in the quotation with which this paper opens. In Wardell's terms, we see an illustration of how laws can be –significant, though not exclusive, reference points for actors and politico-legal institutions in the negotiations of access and rights—even if they are not enforced.”

Taking this to its logical conclusion, one could argue that it is the extent to which these rules are embedded in social and political contexts that counts, rather than their formal enforceability. The ideal of the rule of law is then merely the expression of a sociological fact—a state of affairs that can be approached when dealing with rules (or at least rules for rule making), and institutions for the enforcement of those rules, that are well embedded in particular social contexts.

PART III: LESSONS LEARNED: POLITICS, LABOR AND THE RULE OF LAW IN CAMBODIA

In the liberal ideal, law on the books is enforced through administrative and judicial mechanisms that monitor compliance systematically and/or respond to grievances from claim holders. Though actually enforced in only a few cases, the anticipation of such enforcement gives the law a more general normative effect. In the context of the Cambodian workplace, however, these enforcement mechanisms were perceived as not being viable, due to high transaction costs, perceptions of bias, and corruption. Absent the anticipation of systematic enforcement, legislation is just one of many sets of norms competing for legitimacy and ascendancy in the decision-making process. This means that working conditions are determined at the enterprise level, with reference to the market and the distinct constellations of culture and power that emerge in particular employment relationships. While the law is not absent from the workplace, other norms play a defining role, including, for example, those emerging from the managerial culture of (often foreign) employers; corporate codes of conduct imposed by global buyers; and the culture of rapidly escalating (and sometimes violent) collective action that emerges in a context where socially marginal migrant workers encounter difficult working conditions and new-found freedom from systems of social control based around kinship and patronage that dominate rural Cambodia and a volatile union movement.⁵³

The basis for somewhat more equitable labor relations began to emerge in the late 1990s. The extent to which these efforts can be thought successful, it is argued here, rests on the willingness and ability of key players to engage with the inherently contested nature by which rights are attained. Thus, rather than investing primarily in more detailed regulative, administrative, or judicial capacity, a number of alternative initiatives were undertaken. Both of the initiatives described above contain the implicit recognition that there may be advantages to supporting the emergence of rights through ongoing processes of contestation and negotiation—where issues of power are at once more overt and more fluid—before trying to fix them in formal

⁵³ Annuska Derks, *Khmer Women on the Move: Migration and Urban Experiences in Cambodia* (Amsterdam: Dutch University Press, 2005), 93ff.

legal and enforcement frameworks.⁵⁴ The work on labor dispute resolution in particular promotes collective action as a crucial part of such processes.

In these circumstances, this paper argues that the Labour Law's main (equity enhancing) effects have been establishing: (i) a set of (more or less) agreed-on standards regarding working conditions, which, even though not formally enforced, can, in certain circumstances, be drawn upon to legitimate an argument as to what working conditions should be; (ii) a framework for collective action that includes a structure under which the constitutional right to strike and form unions could be realized; and (iii) a system of tripartite dispute-resolution procedures.

The cases outlined above illustrate how a more equitable regulatory context can emerge incrementally, though they also show some clear limitations in this approach. First, we see law being drawn on only in enterprises (primarily garment factories and hotels) that are accountable to an international public through their branding. Second, it must be acknowledged that the systems referred to above operate primarily at the level of the collective. In practice, the current regulatory system neither protects workers rights as individuals, nor does it extend to the most vulnerable workers, such as those in small- and medium-sized enterprises producing for local markets. Third, it should be noted that though steps are being taken to improve compliance with national law, the systems described above do little to address the fundamental international inequities that are played out in Cambodian workplaces.

Despite these limitations and specificities, the case studies outlined here provide some food for thought about the legal development process more generally. As such, this paper concludes with some reflections on the question of how rights emerge and how different types of law become embedded in social relationships.

As law and development practitioners, our normative agenda often drives us to leap to the end game—a discussion about model rules and model institutions for their enforcement. When these laws are absent, we try to fix the situation by drafting better rules and trying to build modern judicial and bureaucratic institutions to enforce them. In doing so we implicitly assume that there are technical shortcuts that lead to the rule of law.

The Cambodian experience of garment-sector monitoring and labor-dispute resolution recounted above follow a different path. They remind us that politics matter in the realization of rights and that “the law is not so central.”⁵⁵ As the discussion above illustrates, rights may be best pursued in the realms of the nonlegal, semilegal, or even the illegal. This finding echoes Braithwaite's insights into the inaccessibility of coercive systems to the weak and his preference for building law from the bottom

⁵⁴ For a similar argument from Indonesia drawing on Habermasian social theory to stress the importance of enhancing the “capacity to engage” of marginalized groups in public spaces through the forging of alternative modes of dialogue and deliberative contestation, see Christopher Gibson and Michael Woolcock, “Empowerment, Deliberative Development and Local Level Politics in Indonesia: Participatory Projects as a Source of Countervailing Power,” *Studies in Comparative International Development* 43:2 (2008): 151-180.

⁵⁵ This turn of phrase comes from Professor Daniel Nina, who introduced it at a graduate seminar on legal pluralism (and its relationship to the film “Blade Runner”) in *Oñati* in 2004.

up in circumstances of significant power imbalance: “Dialogue builds concern and commitment first; when there is shared concern, a regime can move on to agreement on principles, then to agreement on rules, then to commitment to enforce rules.”⁵⁶

A similar concept is advanced (albeit from quite a different political perspective) by Santos and Rodriguez,⁵⁷ who stress that political mobilization (at the local and international level) will be a necessary precursor to effective rights-based strategies for the disenfranchised of the global south. In the absence of (a) lawmaking processes that reflect the interests of marginalized groups or (b) systems (reliable judicial or bureaucratic) that can be relied upon to uphold the law in an impartial manner, it will be naïve to suggest that the poor put too much stock in overly legal conceptions of rights. In these circumstances, systems that facilitate more political contests over rights may be preferable to those that institutionalize unfair legal contests.

This said, the law is clearly important to the development of rights and indeed, may be more central than we think. Neither the garment-sector monitoring project nor the labor dispute-resolution initiatives described above neglect the law. Rather than ignore the fact that the law is not formally enforceable, they acknowledge this and treat it instead as a set of norms around which to structure dialogue (in the case of the working-conditions improvement project) or more overt contestation (in case of labor dispute resolution). The methods for doing this are quite different. The working-conditions improvement project conducts regular inspections of garment factories based on an agreed-on list of criteria derived from the law,⁵⁸ publishing these for a primarily international audience. The labor dispute-resolution project has focused on the establishment of a new national tribunal that arbitrates collective labor disputes, but because of its nonbinding nature, allows both the political and legal aspects of these contests to emerge. A number of principles behind the two projects, however, are similar: both are driven by tripartism and the provision of institutional spaces for the playing out of structural conflict between capital and labor.

Searching for an operational synthesis of these two perspectives—on the concurrent importance and marginality of law—leads to a description of the sorts of cases described here in terms of what we have called elsewhere an “interim institutional approach.”⁵⁹ This is an attempt to understand the “how” in the contemporary expression of Polanyi’s challenge with regard to the reembedding of

⁵⁶ Braithwaite and Drahos, *Global Business Regulation*, 553-4.

⁵⁷ de Sousa Santos and Rodríguez-Garavito, eds., *Law and Globalisation from Below*.

⁵⁸ And interestingly also the Arbitration Council’s interpretation of the law. See Daniel Adler et al., eds., *Better Factories - Guide to Cambodian Labor Law for the Garment Industry* (Geneva: International Labour Organization, 2005), <http://www.betterfactories.org>.

⁵⁹ See Daniel Adler, Caroline Sage, and Michael Woolcock, “Interim Institutions and the Development Process: Opening Spaces for Reform in Cambodia and Indonesia,” Brooks World Poverty Institute Working Paper 86 (Manchester, UK: Brooks World Poverty Institute, 2009), <http://www.bwpi.manchester.ac.uk/resources/Working-Papers/bwpi-wp-8609.pdf>; and Daniel Adler, Doug Porter, and Michael Woolcock, “Egal Pluralism and the Role of Interim Institutions: Challenges and Opportunities for Equity in Cambodia,” World Bank, *Justice for the Poor 2:2* (Washington, DC: World Bank, 2007).

market relations in socializing regulatory frameworks.⁶⁰ Acknowledging that the nature of state-society relations in the countries where development is promoted limits the effectiveness of both law and politics as drivers of more equitable governance, the interim institutional approach is based on the argument that:

(a) equitable, rule-based systems for allocating resources and resolving disputes—that is, the very content and legitimacy of modern institutions of government—emerge and continue to develop because they are subject to ongoing social contest; and (b) because equitable institutional arrangements for social regulation must emerge through social contest, there will be limits to the extent to which they can be designed *ex ante* on the basis of technical knowledge (that is, by governance “experts”).⁶¹

The operational consequence of this approach is a shift in focus from the adoption of “prepackaged” legal/institutional forms (or reforms) deemed effective elsewhere to the location—in a particular political economy—of opportunities for the institutionalization of what we call “good struggles.”⁶²

The test then for the above cases is the extent to which they have (in the Cambodian context) generated more equitable (and thus “good”) struggles out of the dynamic of local unions, the legitimation of collective action, and international trade. While this will be open to debate, the argument presented here is that modest but useful engagements have occurred in the area between law and politics. Yet even in these circumstances, law is seen only as providing a framework for framing more equitable contestation—and not as a technology for securing rights. The situation described is neither the nostalgic “justice without law,” about which authors such as Auerbach⁶³ and Nader⁶⁴ are properly skeptical, nor Ellickson’s more sanguine “order without law”;⁶⁵ rather, it represents a form of legally infused social dialogue, and thus perhaps a little more justice without—or at least in advance of—the rule of law.

⁶⁰ Polanyi, *The Great Transformation*.

⁶¹ Adler et al., “Legal Pluralism and the Role of Interim Institutions.”

⁶² Adler et al., “Interim Institutions and the Development Process.”

⁶³ Jerold Auerbach, *Justice without Law* (Oxford, UK: Oxford University Press, 1984).

⁶⁴ Laura Nader, “Disputing without the Force of Law,” *Yale Law Journal* 88:5 (1979).

⁶⁵ Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, MA: Harvard University Press, 1991).

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