International Journal of Legal Information
the Official Journal of the International Association of Law Libraries

Volume 33
Issue 3 *Winter 2005*

Article 6

1-1-2005

Tailoring Globalization to Reduce Global Poverty and Inequality: a Case Study of the U.S.-Cambodian Bilateral Textile Agreement

Jimmy Howell

Follow this and additional works at: http://scholarship.law.cornell.edu/ijli
The *International Journal of Legal Information* is produced by The International Association of Law Libraries.

Recommended Citation
Howell, Jimmy (2005) "Tailoring Globalization to Reduce Global Poverty and Inequality: a Case Study of the U.S.-Cambodian Bilateral Textile Agreement," *International Journal of Legal Information*: Vol. 33: Iss. 3, Article 6.
Available at: http://scholarship.law.cornell.edu/ijli/vol33/iss3/6

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in International Journal of Legal Information by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Tailoring Globalization to Reduce Global Poverty and Inequality: a Case Study of the U.S.-Cambodian Bilateral Textile Agreement

JIMMY HOWELL*

I. INTRODUCTION

Globalization has done little to fight global poverty and inequality.[1] Though some critics have used this fact to argue against global economic integration,[2] this article explains that those in favor of a freer and fairer global trade and finance system must link that regime with labor rights in order to

---

* Jimmy Howell is in his third and final year of the J.D. program at American University's Washington College of Law. He is concurrently enrolled in an ABA-cooperative program earning a D.E.J.E.I. (Diplôme des études juridiques européennes et internationales) at the Université de Paris-X. In the fall of 2006, he will be an associate at the law firm Thompson Hine, LLP. The author would like to thank several people who were involved with the writing of this article. First and foremost is Tonya Keusseyan who offered advice, encouragement, and humor at every step of the writing process. I thank Professor Jerome Levinson for inspiring me to study "legal architectures" in the field of international trade and finance. As well as my parents Jim and Debbie Howell for their support. Finally, I am grateful to Professor Tom Sargentich who always encouraged curiosity into the role of law and government in our daily lives. I hope this article makes all of them proud.

[1] *See* U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT, 2-3 (Oxford Univ. Press, 1999) (studying the relationship between economic integration, global poverty, and inequality), *available at* http://hdr.undp.org/reports/global/1999/en/pdf/hdr_1999_full.pdf (last visited Feb. 12, 2005). The income gap between the fifth of the world's people living in the richest countries and the fifth in the poorest was 74 to 1 in 1997, an increase from 1990 when the same ratio was 60 to 1 and 1960 when it was 30 to 1. *Id.* at 3. The wealthiest twenty percent of the world's population share in eighty-six percent of the world's GDP, while the poorest twenty percent receive only one percent of the world's GDP. *Id.* at 2.

[2] *See* Gijsbert van Liemt, *Towards a different kind of globalization, or how the anti-globalists view the world*, 3-5 (Mar. 2004) (explaining that anti-globalist reasons against globalization range from agriculture to cultural identity).

achieve a reduction in global poverty and a more equitable distribution of trade gains.[3] Without this connection, today's most powerful economies will be tomorrow's least relevant markets, finding themselves subordinate on the global supply chain to countries who were once thought of as "lesser developed." This result will not come from increased development from those countries. Instead, it will derive from the erosion of progress in leading markets initiated by enhanced competition from countries with lower relative standards of living. Simply put: without a mechanism to increase those standards in the poorest countries, the richest countries will find their own standards retrograded in order to remain competitive. Accordingly, legal architectures must link free trade and global finance with core worker rights—or else.

Bilateral and multilateral trade agreements hitherto have been the most effective means of connecting trade and finance with worker rights.[4] One of the most recent and revolutionary trade deals that have incorporated provisions to protect labor rights was the U.S.-Cambodian Bilateral Textile Agreement ("USCBTA").[5]

While this emerging field of international law is of monumental importance for advocating for the continued relevance and expansion of global economic integration as well as for combating the perils of global poverty and inequality, it remains an understudied and misunderstood field.[6]

---

[3] *Cf.* ARNE MELCHIOR ET. AL., GLOBALIZATION AND INEQUALITY: WORLD INCOME DISTRIBUTION AND LIVING STANDARDS, 1960-1998, 1 (Royal Norwegian Ministry of Foreign Affairs 2000) (arguing that globalization has in fact contributed to a reduction in global poverty as evidenced by the fact that global inequality as a whole has decreased since the 1960s), *available at* http://odin.dep.no/archive/udvedlegg/01/01/rev__016.pdf (last visited Feb. 12, 2005).

[4] *See* Sandra Polaski, *Protecting Labor Rights Through Trade Agreements: An Analytical Guide*, 10 U.C. DAVIS J. INT'L L. & POL'Y 13-15 (Fall 2003) (providing the recent historical background of labor provisions appearing in trade agreements beginning with the International Trade Organization's Havana Charter).

[5] *See* Cambodia Bilateral Textile Agreement, Jan. 20, 1999, U.S.-Cambodia [hereinafter USCBTA], *at* http://www.mac.doc.gov/tcc/data/commerce_html/tcc_2/cambodiatextilebilat.html (last visited Jan. 16, 2005); *see also* Press Release, Office of the United States Trade Represenative, U.S.-Cambodian Textile Agreement Links Increasing Trade with Improving Workers' Rights (Jan. 7, 2002) [hereinafter PR: Linking Trade and Labor Rights] (celebrating the USCBTA as a unique agreement linking trade incentives with labor rights promotion), *at* http://www.ustr.gov/Document_Library/Press_Releases/2002/January/U.S.-Cambodian_Textile_Agreement_Links_Increasing_Trade_with_Improving_Workers'_Rights.html (last visited Mar. 5, 2005).

[6] *See generally Making Globalization Work: Expanding the Benefits of Globalization to Working Families and the Poor*, BROOKINGS INSTITUTION,

Fundamental questions arise as to what challenges trade agreements should attempt to face, how far states should reach in trying to overcome these challenges, which methods states should use in accomplishing treaty goals, to what degree two or more states should seek to harmonize domestic social practices with those of their trading partners, and how much such trade agreements should depend on international principles?[7] In an effort to answer some of these questions, this article analyzes the goals that the USCBTA envisioned and the methods the parties used to achieve them.[8]

Part I explains the background of the treaty.[9] This section begins with an historical discussion of the trend to use trade agreements and programs to connect economic integration with more intrinsically human issues, such as labor rights.[10] From there, this section transitions to a discussion of the USCBTA and the labor and political problems that it confronted.[11]

Then, Part II explains how the treaty addresses each of these problems and whether the parties are able to achieve the mission that they established in the trade agreement.[12] This part will highlight the successes and failures of the agreement, arguing that while there is a limit to the extent that trade agreements can influence domestic labor practices, the USCBTA fell too

---

CARNEGIE ENDOWMENT FOR INT'L PEACE, THE INT'L LABOR ORG. (Dec. 2, 2002) (surveying the general problems that globalization has been unable to address and discussing the possible reasons why globalization has left them unaddressed), *at* http://www.brookings.edu/dybdocroot/comm/events/20021202panel1.pdf (last visited Feb. 14, 2005).

[7] *See* discussion *infra* Part III (answering the questions that the USCBTA failed to address adequately).

[8] *See* discussion *infra* Part II (providing the background behind the treaty, the mission it set out to accomplish, and the role of the International Labor Organization in helping to ensure substantial compliance in the garment industry with Cambodia's Labor Code).

[9] *See* discussion *infra* Part I (providing the relevant treaty language and explaining what the treaty sough to accomplish).

[10] *See* discussion *infra* Part I (placing the treaty's labor provisions in the context of Cambodia's long history of war and political infighting). As the labor movement has developed, it has remained tethered to the major political parties, which are themselves remnants of the conflict between warring domestic factions and international enemies. *Id.*

[11] *See* discussion *infra* Part I (explaining the major labor challenges that the USCBTA sought to address, including freedom of association, the right to organize, the right to bargain collectively, child labor, working conditions, and employment discrimination, among others).

[12] *See* discussion *infra* Part II (examining how the USCBTA confronted the challenges described in the background section).

short of that boundary to achieve the lasting, high-impact social change that is necessary to connect globalization with poverty reduction.[13]

Part III will elaborate on these commentaries and criticisms.[14] This section will recommend how drafters of future trade agreements can learn from the USCBTA experience, recommending the kind of labor standards that future trade agreements should incorporate, how far states should go to overcome the particular labor issues, and which methods states should use to deal with them.[15]

II. BACKGROUND: MAKING THE CONNECTION BETWEEN ECONOMIC INTEGRATION AND GLOBAL POVERTY AND INEQUALITY

A. THE TREND TO PROTECT LABOR RIGHTS IN TRADE AGREEMENTS BEGAN WITH NAFTA

The USCBTA, an otherwise innocuous textile trade agreement, punctuated a decade's evolution towards incorporating labor rights into the international trade and finance regime.[16] This evolution began with the North American Free Trade Agreement ("NAFTA"), the multilateral trade agreement linking the United States, Canada, and Mexico.[17] Accompanying NAFTA was a side agreement whose drafters designed it theoretically to

---

[13] *See* discussion *infra* Part II (providing opposing sets of commentary and criticism from authoritative observers in an attempt to provide a complete discourse on what the treaty was intended to do and what the actual effects were).

[14] *See* discussion *infra* Part III (including issues that the commentary missed). This legal field is relatively small. *Id.* The discourse is incomplete, which might explain why the USCBTA and other treaties have had difficulty in effectuating their intended results. *Id.*

[15] *See* discussion *infra* Part III (arguing that factors like race, class, gender, age, and culture complicate the field of trade, finance, and labor in a way that treaty negotiators largely ignore). Ignoring these complexities begs for failure. *Id. See also* Amy Kazmin, *Cambodia Makes a Final Break With the Past: Three Decades After the "Killing Fields," the Country is to Join the WTO in an Experiment That Could Backfire*, FIN. TIMES, Sept. 12, 2003 (showing that approximately thirty years ago the Khmer Rouge murdered anyone with an education); discussion *infra* Part III (arguing that the USCBTA's mistreatment of the history of ethnic strife is an impediment towards a successful protection of labor rights). The USCBTA also ignores that the textile industry mostly employs Cambodian women, while the managers and owners are foreign men. *Id.* The treaty misses the race and gender issues as well. *Id.*

[16] *See* Polaski, *supra* note 4, at 14, 15 (surveying the development of the trend to protect labor rights through unilateral, bilateral, and multilateral treaties).

[17] North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289 [hereinafter NAFTA], *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?CategoryId=42 (last visited Mar. 5, 2005).

protect core worker rights.[18] Unfortunately, the labor side agreement's provisions were so weak as to render it almost meaningless.[19]

Despite NAFTA's failings, the agreement served as a working model for continued improvement.[20] Labor provisions appeared in

- the Canada-Chile Agreement on Labour Cooperation,[21]
- the U.S.-Jordan Free Trade Agreement,[22]
- the U.S.-Chile Free Trade Agreement,[23]
- the U.S.-Cambodian Bilateral Textile Agreement, and
- the U.S.-Singapore Free Trade Agreement.[24]

Similar provisions also appeared in unilateral trade preference programs including

- the Generalized System of Preferences,[25]
- the Caribbean Basin Initiative,[26]
- the African Growth and Opportunity Act,[27] and

---

[18] *See* North American Agreement on Labor Cooperation, opened for signature Sept. 8, 1993, U.S.-Can.-Mex., 32 I.L.M. 1499 (entered into force Jan. 1, 1994) [hereinafter NAALC] (protecting, in theory, labor rights through dispute resolution panels), *available at* http://www.naalc.org/english/agreement.shtml (last visited Mar. 5, 2005).

[19] *See* Mark J. Russo, *NAALC: A Tex-Mex Requiem for Labor Protection*, 34 U. MIAMI INTER-AM. L. REV. 51, 119 (2002) (arguing that the labor side agreement cannot provide effective regulatory development and enforcement of the domestic labor laws of each of the NAFTA parties).

[20] *See* J.F. HORNBECK, CRS ISSUE BRIEF: THE U.S.-CHILE FREE TRADE AGREEMENT, (Mar. 5, 2001) (The Clinton Administration emphasized the need for future trade agreements to make up for what NAFTA lacked), *at* http://fpc.state.gov/6123.htm (last visited Jan. 16, 2005).

[21] Agreement on Labour Cooperation, Feb. 6, 1997, Can.-Chile, 36 I.L.M. 1213 [hereinafter Canada-Chile FTA], *available at* http://www.hrsdc.gc.ca/en/lp/spila/ialc/06Canada_Chile_Agreement.shtml (last visited Feb. 12, 2005).

[22] Agreement on the Establishment of a Free Trade Area, Oct. 24, 2000, U.S.-Jordan, 41 I.L.M. 63, *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Jordan/asset_upload_file250_5112.pdf (last visited Feb. 12, 2005).

[23] Free Trade Agreement, June 6, 2003, U.S.-Chile [hereinafter U.S.-Chile FTA], *at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/asset_upload_file535_3989.pdf (last visited Feb. 12, 2005).

[24] Free Trade Agreement, May 6, 2003, U.S.-Sing. [hereinafter U.S.-Singapore FTA], *at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file708_4036.pdf (last visisted Feb. 12, 2005).

[25] Generalized System of Preferences, 19 U.S.C. §§ 2461-2467 (2004).

[26] Caribbean Basin Economic Recovery Act, 19 U.S.C. §§ 2701-2707 (2004).

- the Andean Preferences Act.[28]

B. HOW THE USCBTA WORKS

The drafters of the USCBTA were able to draw upon these earlier agreements and programs to respond to the significant challenges facing the labor movement in Cambodia's textile industry.[29] The relevant provision of the USCBTA states,

> The Parties seek to create new employment opportunities and improve living standards and working conditions through an enhanced trading relationship; affirm respect for each Party's legal system and seeking to ensure that labor laws and regulations provide for high quality and productive workplaces; and seek to foster transparency in the administration of labor law, promote compliance with, and effective enforcement of, existing labor law, and promote the general labor rights embodied in the Cambodian labor code.[30]

To give force to the treaty's language, inspectors from the International Labor Organization ("ILO") periodically evaluated the working conditions inside textile manufacturing firms and published their reports for interested parties to see, especially American textile buyers and officials of the American government.[31] If U.S. officials considered that Cambodian firms

---

[27] African Growth and Opportunity Act, 19 U.S.C. §§ 3701-3741 (2004), *available at* http://www.agoa.gov/agoa_legislation/agoatext.pdf (last visited Feb. 12, 2005).

[28] Andean Trade Preference Act of 1991, 19 U.S.C. § 3201 et. seq. (2004) (expired Dec. 4, 2001, renewed through Dec. 31, 2006) *amended by* Andean Trade Promotion and Drug Eradication Act of 2002 in the Trade Act of 2002 §§ 3101-3108 (Pub. Law No. 107-210) (2002)).

[29] *See generally* Wayne Arnold, *Translating Union Into Khmer*, N.Y. TIMES, sec. C (July 12, 2001) (explaining the obstacles that unions have faced in the Cambodian textile industry).

[30] USCBTA *supra* note 5, para. 10(A); *see also* Labor Code (1997) (Cambodia) [hereinafter Labor Code] (relying very heavily on the Ministry of Labor to provide inspectors to enforce the labor provisions), *at* http://www.moc.gov.kh/laws_regulation/rkm_labor_law_97.htm (last visited Mar. 5, 2005). The Labor Code was similar to the USCBTA in that both approaches relied on inspectors to enforce the provisions. *Id.* art. 25.

[31] *See* Sandra Polaski, *Cambodia Blazes a New Path to Economic Growth and Job Creation*, 7-8 (Carnegie Endowment for International Peace: Trade, Equity, and

had substantially complied with Cambodian labor laws and internationally recognized core labor rights, the U.S. government would increase export quotas, allowing Cambodian firms increased access to U.S. markets.[32] Unlike previous trade agreements, the USCBTA used neutral observers from an international organization to ensure that participating factories were in compliance with the Cambodian Labor Code as well as an incentive system to reward factories for complying with the law.[33]

C. THE LABOR SCENE BEFORE THE USCBTA

As is the situation in many other countries, the greatest challenges to protecting labor rights in Cambodia appear in the form of state suppression of collective labor activity—government conduct with a long history beginning with the Khmer Rouge's killing fields.[34] Despite Cambodia's history of

---

Development Project, 2004) (explaining the critical role of the ILO in the determination of increasing Cambodia's export quota).

[32] *See* Polaski, *supra* note 31, at 16-17 (advancing similar structures for future trade agreements as a mechanism for incentivizing compliance with labor laws).

[33] *See* Polaski, *supra* note 31, at 16-17 (showing that the USCBTA's approach to labor enforcement was unique because of the use of the ILO's inspection regime and the use of the quota system as a reward for industry compliance with the Labor Code).

[34] *See* David Chandler, *Killing Fields*, [hereinafter Killing Fields] (explaining that the world may never know exactly how many people died in Pol Pot's killing fields), *available at* http://www.cybercambodia.com/dachs/killings/killings.html (last visited Jan. 14, 2005). The mystery surrounding Pol Pot and the Khmer Rouge has made it impossible to know exactly how many people died during the revolution. *Id. See also* Kazmin, *supra* note 15, at 1 (contrasting Cambodia's dark history with its rapid development and lucrative economic opportunities and discussing the cultural struggle that existed before, during, and after Pol Pot's brutal regime, which provides the background for Cambodia's unique economic successes in the face of dire national despair). The Khmer Rouge ruled until the Vietnamese took control of Phnom Penh in 1979, although the Khmer Rouge remained powerful until the early 90s when the group split into two forces, and ultimately lost all power after Pol Pot's death in 1998. *Id.* Pol Pot's reign of terror began with his deceptive utopian plan to modernize the country and create perfect equality. Killing Fields, *supra* note 34. In 1975, the Khmer Rouge captured Cambodia's capital, bringing to the country's war-ravaged people a renewed hope for peace and prosperity. *Id. See also* Bruce Sharp, *The Banyan Tree: Untangling Cambodian History*, 2, (demonstrating the dichotomy between Cambodians' support of Pol Pot before his reign and the devastation that occurred after he usurped government authority), *available at* http://www.mekong.net/Cambodia/banyan2.htm (last visited Jan. 14, 2005). An estimated 1.7 million Cambodians died, which was nearly thirty percent of the population. *Id. See also* Veron M.Y. Hung, *Cambodia*, in ASIA-PACIFIC CONSTITUTIONAL YEARBOOK 1996, at 69-70 (Cheryl Sanders & Graham Hassall eds., 1998) (explaining that the Paris peace treaty called for the United Nations to assume administrative control over the government in 1992). The country's first democratic free elections occurred the following year. *Id. See also* Elizabeth Becker, WHEN THE

conflict, the National Assembly passed the 1997 Labor Code, which offers thorough protections for labor rights.[35] Although the Labor Code provides for these safeguards, there have been several roadblocks to effective enforcement, resulting in few protections for workers, especially in the garment industry.[36] The section that follows explains these challenges in greater detail.[37]

D. PROBLEMS THAT THE USCBTA'S DRAFTERS INTENDED THE AGREEMENT TO CONFRONT

1. Freedom of Association

Cambodia's labor force consists of approximately 5.4 million people, the majority of whom work in subsistence farming.[38] Eight percent of the employees work in the industrial sector, with around 200,000 of these workers

---

WAR WAS OVER: CAMBODIA AND THE KHMER ROUGE REVOLUTION, 441-42 (1998) (stating that Hun Sen's party, the Cambodian People's Party ("CPP"), earned the second largest bloc in the National Assembly); *see generally* David P. Chandler, THE TRAGEDY OF CAMBODIAN HISTORY: POLITICS, WAR, AND REVOLUTION SINCE 1945 (1991) (surveying the history of conflict that ensued well into the 90s). Not until 1987 in Paris did peace talks begin between warring factions, including principally the Khmer Rouge and the Vietnamese-supported indigent government, the leader of which was the current Prime Minister, Hun Sen. *Id.* In 1989 Vietnamese officials announced that they would remove their forces from Cambodia, which preceded the signing of the 1991 peace treaty. *Id.* In 1998, Hun Sen's political party, the CPP, gained additional seats in the National Assembly, and an agreement between rival political factions and the CPP made Hun Sen the country's sole Prime Minister. *Id.* In return, Prince Ranariddh, leader of the CPP's political rival the Front Uni National pour un Cambodge Independent, Neutre, Pacafique, et Copartif ("FUNCINPEC"), became President of the National Assembly. *Id.*

[35] *See* Siphana Sok & Denora Sarin, THE CAMBODIA LEGAL RESOURCES DEVELOPMENT CENTER, LEGAL SYSTEM OF CAMBODIA 139 (1988) (the 1997 Labor Code "has clearly provided the necessary legislative reform more conducive to a free market economy").

[36] *See* John A. Hall, *Human Rights and the Garment Industry in Contemporary Cambodia*, 36 STAN. J. INT'L L. 119, 146 (explaining the weaknesses in the Labor Code's enforcement). The Code is only as strong as the will of labor inspectors to enforce it. *Id.* The Ministry of Labor is rife with corruption, where low-paid inspectors receive bribes in the form of money and food to augment their government income in exchange for turning a blind eye to Code violations. *Id.*

[37] *See* discussion *infra* Part II.D.1-3 (discussing the labor problems that the ILO had to deal with).

[38] *See* INT'L LABOR AFFAIRS BUREAU, FOREIGN LABOR TRENDS: CAMBODIA (2003) [hereinafter Int'l Labor Affairs Bureau] (summarizing the state of Cambodia's economy), *at* http://www.dol.gov/ILAB/media/reports/flt/cambodia-2003.htm (last visited Feb. 12, 2005).

employed in the textile industry.[39] The relatively small number of Cambodia's laborers in the textile trade work in an industry that accounts for roughly eighty percent of the country's exports.[40] In the late 90s there were nine registered federations/national labor unions that claimed to represent only around 160,000 of the 5.4 million workers.[41] Eight of those federation/national labor unions operated in the textile trade.[42]

The principle challenge to freedom of association was truly free and independent labor union activity.[43] Most of the unions were tethered either to political parties,[44] which used the unions as a political device, or to managers

---

[39] *See* Kevin Kolben, *Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories*, 7 YALE HUM. RTS & DEV. L.J. 79, 82 (2004) (describing the Cambodian garment industry's demographics).

[40] *See* Amy Kazmin, *Nike Weighs Return to Cambodia: ILO Move to Monitor Factories May Prompt a Change of Heart by the US Sportswear Giant*, FIN. TIMES, June, 18, 2002 (describing Nike's return to the sizable Cambodian garment industry).

[41] *See* Int'l Labor Affairs Bureau, *supra* note 38, at 3 (reporting that these numbers include "cumulative, overlapping, out-of-date or entirely fictional information").

[42] *See id.* (noting that despite the existence of these large labor federations and the protections offered to workers in the Cambodian constitution and the Labor Code, the Cambodian government seldom enforces these rights).

[43] *See*, *3rd man charged in killing of Cambodian labor leader*, ASIAN POLITICAL NEWS, Feb. 9, 2004 (discussing the conspiracy behind the death of Chea Vichea, a powerful labor leader who died as a result of an assassination). Government opposition leaders argue that the dominant political parties arranged for Vichea's death because of his leadership in Cambodia's most independent labor union, the FTUWKC. *Id.*

[44] *See* Hall, *supra* note 36, at 146 (providing the history behind Cambodia's labor unions and the struggle for freedom of association rights). Cambodia's oldest union is the Independent Trade Union of Cambodian Workers ("ITUCW"), which descends from the Ministry of Unions that existed from 1979 until 1992. *Id.* The Ministry of Unions was the sole labor organization in Cambodia at a time when all enterprises were state-owned. *Id.* The ITUCW claimed to represent 18,591 members throughout nineteen of the registered garment unions as of 1998. *Id.* Its leader is Men Samon, who is a Member of Parliament under Hun Sen's CPP. *Id.* Through Men Samon, the CPP uses the ITUCW for political purposes and not necessarily for the good of the ITUCW's members. *Id.* The largest of Cambodia's labor unions is the Cambodian Unions Federation ("CUF"), which claims to represent 55,700 members of whom ninety percent works in the textile industry. *Id.* at 145. Chuon Mom Thol, who leads the CUF, also serves as the vice-chairman of Cambodia's Labor Advisory Committee, which is a forum for employers, workers, and the government to address labor-related issues, and frequently represents Cambodia's labor movement at international functions, including the ILO. Kolben, *supra* note 39, at 87. However, Chuon Mom Thol suffers criticism for leading nothing more than a "paper union," designed to present a friendly face to the international community, but which in practice does very little for the employees it represents. *Id.* Philip Robertson of the AFL-CIO's Bangkok

in the garment industry, who created "paper unions" to appear compliant with the Labor Code and to suppress otherwise legitimate union activity.[45] At the end of the last decade, the Labor Code's promises for meaningful rights to associate freely remained unfulfilled, as the government and private actors denied workers the ability to organize and to fight for their rights on their own.[46]

2. Collective Bargaining

The Labor Code offers little protection in the collective bargaining field.[47] Originally, the law allowed factory workers to elect shop stewards to represent the workers to negotiate with management.[48] The legitimacy of

---

office in explained in an interview with Hall that paper unions usually consist of representatives who the factory management has elected, not the workers. Hall, *supra* note 36, at 145. The factory management creates election ballots of "approved" candidates who function for management's purposes after their election. *Id.* The Free Trade Union of Workers of the Kingdom of Cambodia ("FTUWKC") is potentially the most independent of Cambodia's unions. *Id.* With unions in sixteen garment factories representing 117 male and 2,213 female workers, the FTUWKC is Cambodia's largest union. *Id.* Sam Rainsy, of the Sam Rainsy Party, founded the FTUWKC. *Id.* As with the other unions, the FTUWKC has received criticism that it functions for its leader as a source of political power. *Id.* Of course, the Sam Rainsy Party is not a part of the CPP-FINCINPEC coalition government and is far from approaching the power of either party. Hall, *supra* note 36, at 145. Some commentators have noted that the FTUWKC may be the start of an independent and credible labor movement in Cambodia. *Id.*

[45] *See* Hall, *supra* note 36, at 149 (providing the history of the Free Union Federation of Cambodia ("FUFC"), which is a coalition of around one hundred unions in garment, cement, lumber, and brick factories). Ted Ngoy, who founded the union in 1993, is a Khmer-American who owns several factories that employs the FUFC's members. *Id.* At the same time that Ngoy founded his union, he also founded the Development Republican Party. *Id.* The AFL-CIO has condemned the FUFC as an illegitimate union that serves as a vehicle for Ngoy's political and financial ambitions. *Id.*

[46] *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2000 (Feb. 23, 2001) (explaining that trade unions became more numerous active because the Government eased the process of union registration and improved labor law enforcement), *available at* http://www.state.gov/g/drl/rls/hrrpt/2000/eap/681.htm (last visited Feb. 13, 2005). Despite this growth in union activity, enforcement of the Labor Code remained a problem. *Id.*

[47] *See* Int'l Labor Affairs Bureau, *supra* note 38, at 11 (explaining that although the Labor Code provides for protections of these internationally recognized core worker rights, the inspectors rarely enforce them because of a lack of proper funding). *See also* Kolben, *supra* note 39, at 85 (documenting evidence of government corruption as an obstacle to effective labor law enforcement).

[48] *See* Hall, *supra* note 36, at 139-40 (explaining the election of shop stewards and the fraudulent circumstances surrounding the elections).

these elections was questionable as manufacturers strictly controlled the process for nominating candidates.[49] Whatever the validity of the elections, factory management negotiated with the stewards instead of the unions because the law provided these stewards with negotiation rights superior to those of labor unions.[50] However, a recent regulation changed the way that system functioned.[51] The regulations established a voting process for determining who has the right to represent the factory workers, which solved the steward problem.[52] Despite the new regulations, collective bargaining has been relatively nonexistent.[53]

3. Employment Discrimination

The predominance of women and girls in the workforce has facilitated the possibility for employment discrimination along gender lines.[54] Although women constitute fifty-two percent of the overall population and seventy percent of the industrial workforce, the overwhelming majority of managers in the garment industry are men.[55] In fact, in Phnom Penh, approximately 200 textile factories are in operation, employing around 200,000 workers.[56] Over eighty-five percent of these employees are women.[57]

---

[49] *See* Int'l Labor Affairs Bureau, *supra* note 38, at 11 (describing the process by which management influenced steward elections).

[50] *See id.* (demonstrating the way the Labor Code allowed factory management to circumvent the role of labor unions by using stewards).

[51] *See id.* (discussing the new regulation providing for a process to determine who has the right to negotiate with management).

[52] *See id.* (observing that despite the new regulation, collective bargaining rights remain elusive).

[53] *See* Kolben, *supra* note 39, at 84 (elaborating on the difficulties surrounding enforcement of the Labor Code due to government corruption).

[54] *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2002, sec. 4 (Mar. 31, 2003) (describing the conditions in Cambodian industry that give rise to gender imbalances in the work place), *available at* http://www.state.gov/g/drl/rls/hrrpt/2002/18238.htm (last visited Mar. 5, 2005).

[55] *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2003 (Feb. 25, 2004) (explaining that women comprise 52 percent of the population, 60 percent of agricultural workers, 85 percent of the business work force, 70 percent of the industrial work force, and 60 percent of all service sector workers), *available at* http://www.state.gov/g/drl/rls/hrrpt/2003/27766.htm (last visited Feb. 13, 2005). Women often are concentrated in low-paying jobs in these sectors and largely were excluded from management positions. *Id.*

[56] *See* Kolben, *supra* note 44, at 82 (describing the employment situation Cambodia's garment industry).

[57] *See id.* (using factory demographic figures to suggest that the labor rights agenda is more complex than the employer-employee relationship; gender, race, and age also play critical roles in deciphering the poor conditions in Cambodia's textile industry).

Although Cambodian law provides women with significant legal protection, the reality is that many of those protections exist only on paper.[58] The 1998 U.N. Report of the Secretary General on the Situation of Human Rights in Cambodia concluded that "the situation of women in Cambodia, in particular in relation to their . . . conditions of work and violence against them, continues to be of deep concern and needs to be addressed as a matter of high priority."[59] The same report noted that the Ministry of Women's Affairs received less than one percent of the national budget in 1998.[60] According to the Cambodian Labor Organization, managers and security guards are responsible for many abuses of worker rights, such as verbal and physical abuse, intimidation, and coerced overtime—all of which result from the managers' perception of the proper way to treat female employees.[61]

III. ANALYSIS: ENFORCING THE LABOR PROVISIONS OF THE USCBTA

Although the USCBTA incorporated the Cambodian Labor Code to achieve its goals "to improve . . . working conditions,"[62] the ILO's interpretation of the agreement failed to implement the parties' objectives.[63] While the ILO's program included some initially promising features, critical failures occurred in the inspection regime's:

- organizational structure,
- factory recruitment process,

---

[58] *See Special Representative of the Secretary-General for Human Rights in Cambodia*, *Situation of Human Rights in Cambodia: Report of the Secretary General*, U.N. GAOR, 53rd Sess., ¶¶ 108-17, U.N. Doc. A/53/400 (1998) [hereinafter SG Report: Cambodia] (describing the laws designed to protect Cambodian women in contrast to the significant problems women face with regard to employment, health care, education, and equitable treatment from law enforcement), *available at* http://www.hri.ca/fortherecord1998/documentation/genassembly/a-53-400.htm (last visited Mar. 5, 2005). Cambodian law grants women significant protection from employment discrimination. *Id.* ¶ 108; *see also* Hall, *supra* note 36, at 158 (asserting that the Constitution provides for equal rights for women, including equal pay for equal work).

[59] SG Report: Cambodia, *supra* note 58, at 108.

[60] *See id.* at 110 (suggesting that discrimination against women continues to persist because of a lack of political will to change it).

[61] *See* U.S. Dep't of State, *supra* note 46, at sec. 6(a) (explaining that the Cambodian constitution contains explicit language providing for equal rights for women, equal pay for equal work, and equal status in marriage, but cultural traditions continue to limit the ability of women to reach senior positions in business and other areas).

[62] USCBTA, *supra* note 5, para. 10(A).

[63] *See* discussion *infra* Part III (showing that while the agreement called for the promotion of the Labor Code, the ILO program never achieved that goal because of the ILO's weak enforcement role).

- monitoring and reporting methods,
- the incentive structure, and
- the interpretation of the Labor Code's provisions regarding freedom of association, labor disputes, employment discrimination, and child labor.[64]

As a result, working conditions in the garment industry remained unimproved, in stark contrast to the intentions of the USCBTA's drafters.[65]

A. THE ILO ESTABLISHED A PROGRAM THAT WAS TOO WEAK TO IMPROVE LIVING STANDARDS AND WORKING CONDITIONS IN THE GARMENT INDUSTRY

1. The Project Structure That the ILO Implemented to Enforce the USCBTA Successfully Encouraged Broad Participation

To implement the Labor Code as the USCBTA required, the ILO effectively established an organizational structure equitable to all parties involved, without which the monitoring project never would have developed and the treaty's goals never could have materialized.[66] Although the agreement's language was indeterminate with regard to the organizational structure and silent on the identity of the parties that the ILO needed to involve, the circumstances of the business environment in the garment industry required the ILO to bring together parties from the Ministry of Social Affairs, Labor, Vocational Training, and Youth Rehabilitation ("MOSALVY"), the Garment Manufacturers Association in Cambodia, and the Cambodian trade union movement to discuss the manner in which the ILO

---

[64] *See* discussion *infra* Part III (focusing on these critical failures because these are internationally recognized core labor standards).

[65] *But see* PR: Linking Trade and Labor Rights, *supra* note 5 (proclaiming the success of the USCBTA).

[66] *See* USCBTA, *supra* note 5, para. 10(A) (agreeing that the benefits of trade should include improved working conditions and living standards for workers in the Cambodian garment industry, while remaining silent on how the ILO should implement the Labor Code to achieve those goals). This silence allowed the ILO to adopt its own organizational structure, removing from the U.S and Cambodian governments the onus of determining this element in the agreement itself. *Id. Compare Capitalism in the Raw: Labour Rights and Free Trade with the United States*, ECONOMIST, Jan. 24, 2004 [hereinafter Capitalism in the Raw] (suggesting that the Central American Free Trade Agreement ("CAFTA") may never pass through the U.S. Congress if the agreement fails to include essential enforcement provisions, which are generally highly contentious when states negotiate trade agreements because enforcement encroaches on sovereignty), *available at* 2004 WLNR 15258863 (last visited Feb. 12, 2005), *with* Russo, *supra* note 19, at 112-19 (questioning whether NAFTA's labor side agreement managed to provide an effective dispute resolution structure despite bargaining and compromise).

would structure its implementation program.[67] Including these parties in developing the program was crucial because it allowed all parties with a stake in the USCBTA to voice their concerns about the way the ILO enforced the agreement.[68] With such involvement, more parties were likely to participate in the program, allowing an increased number of workers to reap the benefits of the ILO inspections, which in turn was supposed to lead to improved working conditions and living standards.[69] However, despite the ILO's novel organizational structure, those benefits never materialized because of critical failures in other areas.[70]

2. The Registration Process That the ILO Adopted Failed to Foster Adequate Transparency

The USCBTA failed to define how the trade regime would "foster transparency in the administration of labor law,"[71] which allowed the ILO to

---

[67] *See Cambodian Govt Expands Partnership With Private Sector*, XINHUA GENERAL NEWS SERVICE, July 5, 2000 (illustrating the confluence of interests of the government, the garment industry, and labor interests that the ILO needed to address because of the great economic value that the industry represented for Cambodia and its people).

[68] *See, e.g.*, INT'L LABOUR ORG., THIRD SYNTHESIS REPORT ON THE WORKING CONDITIONS SITUATION IN CAMBODIA'S GARMENT SECTOR: STATEMENT OF THE PROJECT ADVISORY COMMITTEE ON THE RELEASE OF THE THIRD ILO SYNTHESIS REPORT ON THE WORKING CONDITIONS SITUATION IN CAMBODIA'S TEXTILE AND APPAREL SECTOR (June 24, 2002) [hereinafter Third Synthesis Report] (stating the opinions of representatives from the government of Cambodia, the Garment Manufacturers Association in Cambodia, and the Cambodian trade union movement regarding the ILO's third synthesis report on the working conditions situation in the garments industry), *at* http://www.ilo.org/public/english/dialogue/ifpdial/publ/cambodia3.htm (last visted Feb. 4, 2005).

[69] *See* INT'L LABOUR ORG., SEVENTH SYNTHESIS REPORT ON THE WORKING CONDITIONS SITUATION IN CAMBODIA'S GARMENT SECTOR: STATEMENT OF THE PROJECT ADVISORY COMMITTEE ON THE RELEASE OF THE SEVENTH ILO SYNTHESIS REPORT ON THE WORKING CONDITIONS SITUATION IN CAMBODIA'S TEXTILE AND APPAREL SECTOR (Sept. 19, 2003) (expressing appreciation that the ILO ensured that all parties involved had fulfilled their duties, which in turn led to improved respect for worker rights), *at* http://www.ilo.org/public/english/dialogue/ifpdial/publ/cambodia7.htm (last visited Feb. 4, 2005).

[70] *But see ILO report reveals improved Cambodian work conditions*, WOMEN'S WEAR DAILY, April 20, 2004 (presenting reports that ILO inspections led to improved working conditions in textile and apparel factories), *available at* 2004 WLNR 12873960 (last visited Mar. 4, 2005).

[71] *See* USCBTA, *supra* note 5, para. 10(A)-(E) (discussing in general terms that the U.S. and Cambodian governments should promote and rely on transparency, while

adopt the least stringent registration program.[72] The registration process was essential to transparency because without it any factory could have traded with the United States, even a factory that refused to allow the ILO to undertake inspections.[73] With this system, at least U.S. businesses knew that their trading partners in the Cambodian garment industries, at a bare minimum, participated in ILO labor inspections.[74] More than that, however, the registration process that the ILO adopted involved a contract, the MOU that the ILO signed with the factories,[75] that used a full access clause, which was essential to achieving transparency.[76] Because the MOU required that factory management give to the ILO monitors full access to the factory,

---

not including language defining what constitutes sufficient transparency or how the parties intended to achieve that goal).

[72] *But see* Amy Kazmin, *Garment Factories Are Being Forced to Mend Their Ways*, FIN. TIMES, Dec. 10, 2002, at 3 (praising the model of transparency as "unrivalled"), *available at* 2002 WLNR 6785214 (last visited Mar. 4, 2005). The article also mentioned that factory owners "frantically" telephoned ILO inspectors to ensure a clean report before the inspectors named their factories individually. *Id.*

[73] *See* INT'L LABOUR ORG., FIRST SYNTHESIS REPORT ON THE WORKING CONDITIONS SITUATION IN CAMBODIA'S GARMENT SECTOR, sec. 1.3.1 (Nov. 22, 2001) [hereinafter First Synthesis Report] (explaining that the Ministry of Commerce corrected this problem by promulgating a regulation that permitted only registered factories to use allocated export quotas to trade with U.S. markets or to buy export quotas through the official quota bidding process), *at* http://www.ilo.org/public/english/dialogue/ifpdial/publ/cambodia.htm (last visited Mar. 4, 2005).

[74] *See* Amy Kazmin, *Garment Buyers Prefer Cambodia*, FIN. TIMES, Dec. 4, 2004, at 9 (reporting that while buyers know that Cambodia's labor standards outrank those of other major Asian textile exporters, such as Vietnam, China, Thailand, and Bangladesh, Cambodia ranks worst in terms of "red tape" and customs delays), *available at* 2004 WLNR 13022063 (last visited Mar. 4, 2005).

[75] *See* First Synthesis Report, *supra* 73, sec. 1.3.1 (explaining the details of the contract between the ILO and the participating parties).

[76] *Compare* Anthony DePalma, *Nafta's Powerful Little Secret; Obscure Tribunals Settle Disputes, but Go too Far, Critics Say*, N.Y. TIMES, Mar. 11, 2001, sec. 3 (reporting criticism that NAFTA tribunals, which investors can use to sue governments for violations of NAFTA Chapter Eleven provisions, are too secretive, even though they are effective at protecting investor rights), *available at* 2001 WLNR 3421720 (last visited Mar. 4, 2005). Unlike the ILO program, which uses a regulatory approach, the NAFTA Chapter Eleven tribunals use an adversarial model, which provides transparency to the fact-finder through pleadings, arguments, and evidence. *Id.*, *with* PUBLIC CITIZEN, ANOTHER AMERICAS IS POSSIBLE: THE IMPACT OF NAFTA ON THE U.S. LATINO COMMUNITY AND LESSONS FOR FUTURE TRADE AGREEMENTS, 14 (asserting that similar NAFTA provisions are too weak to protect labor rights), *available at* http://www.citizen.org/documents/LatinosReport.pdf (last visited Mar. 4, 2005). Even though workers can bring complaints like those that the investors can bring under Chapter Eleven, the transparency is ineffective because the labor provisions are too dilute. *Id.*

including free interaction with shop stewards, union representatives, and factory workers, the inspectors were able to go beyond their checklist by using interviews to determine the full extent of their working conditions.[77] Yet, despite this full access guarantee, the inspection regimen did not require interviews with workers, it only granted permission for interviews.[78] Although workers were free to interview with the ILO inspectors, the ILO was powerless to protect workers from intimidation or job loss for reporting truthfully or for "whistle-blowing."[79] Furthermore, even though the MOU guaranteed full access in the name of transparency, recipients of the ILO's reports knew little more about the factories than their names and what kinds of suggestions that the inspectors rendered.[80]

3. The Monitoring and Reporting Mechanisms Were too Weak to Fulfill the USCBTA's Mission

Although the parties to the USCBTA sought to "improve . . . working conditions" and foster "transparency in the administration of labor law,"[81] the

---

[77] *See* First Synthesis Report, *supra* note 73, sec. 1.3.1 (explaining further that while the ILO was interested in obtaining full access to factory employees, the factories were concerned with inaccuracies that this system could have generated). In exchange, the ILO agreed that monitoring visits would occur in a fair and objective manner, that inspections would take place in such a manner as to cause the least disruptions, that basic information would be kept confidential, and that the ILO would have considered any allegation of inspection-related misconduct in good faith. *Id.*

[78] *See* Kolben, *supra* note 39, at 91 n. 72 (explaining that the United States rejected earlier proposals for the program that would have granted the ILO greater power because of concerns for Cambodia's state sovereignty). Mark Barenberg, professor of law at Columbia University Law School and an expert on international labor regulation, designed a stronger proposal that would have granted the ILO a greater enforcement role. *Id.* The American Union of Needle Trades and Industrial and Textile Employees ("UNITE") in turn lobbied for the agreement to adopt this plan. *Id.*

[79] *But see* Sheridan Prasso, *Case Study: Bringing Labor Issues Into the Cambodian Textile Agreement*, INITIATIVE FOR POL'Y DIALOGUE, 2003 (asserting that the mere presence of the ILO gave to Cambodian workers too much power to defend their own rights), *at* http://www2.gsb.columbia.edu/ipd/j_cambodia.html (last visited Mar. 5, 2005).

[80] *See, e.g.*, *id.* (lauding the ILO program's impressive strengths such as improvements in correct payment of wages, improvements in mandatory overtime, and improvements with regard to freedom of association protections). Although Prasso cites to the ILO's Sixth Synthesis Report, she provides no guidance as to what constituted a noteworthy improvement or how those improvements related to the original working conditions. *Id.* Nor does Prasso articulate whether those improvements correlated to improved working conditions. *Id.* Because these reports contain little information, no one can. *Id.*

[81] *See* USCBTA, *supra* note 5, para. 10(A) (linking improved working conditions in part to transparency into the enforcement of the Labor Code).

agreement failed in two respects to include sufficient guidance as to how the ILO was to achieve these goals.[82] First, unlike the process that similar treaties adopted, the USCBTA lacked a frequency clause with regard to the numerosity of inspections.[83] In particular, this agreement failed to specify how frequently the ILO inspectors should visit the factories.[84] More frequent inspections would have allowed the ILO to report a more complete picture of the working conditions inside the participating factories.[85] The inspection schedule that the ILO adopted required only two visits to a participating factory during a six-month time period.[86] Although the first visit included a full-blown inspection regimen involving the 156 question checklist, the follow-up visit was limited to those aspects of the checklist that elicited a suggestion from the ILO inspectors during the first inspection.[87] The infrequent inspections meant that the parties to the USCBTA had no certainty that the laborers in these factories received the benefits of the Labor Code's protections on the other days of the year when the ILO inspectors were absent.[88] Yet, those who relied on the reports from these inspections, such as U.S. businesses and U.S. trade officials, used the ILO reports to make trade

---

[82] *But see* PR: Linking Trade and Labor Rights, *supra* note 5 (heralding the ILO project as exemplary for using trade to increase respect for workers' rights).

[83] *See* U.S.-Chile FTA, *supra* note 23, Annex 18.5 (providing an entire section for the U.S.-Chile Free Trade Agreement's Labor Cooperation Mechanism).

[84] *Compare Id.* para. 5(a)-(g) (elucidating seven distinct, but illustrative, methods of achieving the goals of the U.S. and Chilean governments), *with* USCBTA, *supra* note 5, para. 10(A)-(E) (lacking similar specificity, particularly with regard to frequency of inspections).

[85] *See, e.g.*, HUMAN RIGHTS WATCH, BAD DREAMS: EXPLOITATION AND ABUSE OF MIGRANT WORKERS IN SAUDI ARABIA, 6-8 (July, 2004) (asserting that Human Rights Watch's reports of Saudi Arabian working conditions would have been more complete if the inspectors could have conducted interviews of all the available workers), *available at* http://hrw.org/reports/2004/saudi0704/saudi0704.pdf (last visited Mar. 5, 2005). The Kingdom of Saudi Arabia remains closed to human rights inspectors. *Id.* The report acknowledged that without sufficient access to work sites, the conclusions drawn from the reports were an incomplete picture of the full labor scene. *Id.*

[86] *See* Third Synthesis Report, *supra* note 68, sec. 2 (emphasizing that reported information for the named factories only represents changes in the situation from the first visit to the follow-up visit).

[87] *See id.* sec. 1.3.2 (stating that the ILO mainly derived the checklist from provisions located in the Labor Code).

[88] *But see* U.S. EMBASSY IN PHNOM PENH, US-CAMBODIAN ECONOMIC AND TRADE RELATIONS (proclaiming that the USCBTA was an "unqualified success" in promoting Cambodian economic growth while promoting Cambodia as a labor-friendly country) *at* http://usembassy.state.gov/cambodia/wwwf0040.pdf (last visited Mar. 5, 2005).

policy and business decisions worth millions of dollars.[89] Instead of effective transparency and improved working conditions, the result of these inspections was an illusion of compliance, which fell far short of the USCBTA's goals, but which was all that the agreement's lax language required.[90]

Second, the agreement was silent on the specific elements that the reports needed to include.[91] This allowed the ILO to create a reporting system that allowed the Labor Code to go unenforced.[92] This system lacked any indicia of whether a factory was a major violator or a minor violator.[93] Without such a differentiation, the recipients of the reports were unaware of the full picture of the labor landscape.[94] Furthermore, specific details, such as the circumstances in the named factories that gave rise to the suggestion or the severity of the Labor Code violation, would have more effectively created transparency in the garment industry.[95] With the deficient language in the trade agreement, the ILO was free to create an ineffective reporting system.[96]

4. The Quota Incentive System is Ineffective Because It Creates a Free-rider Problem

Although the USCBTA provided that the United States would increase Cambodia's export quota by up to fourteen percent "if the United

---

[89] *See id.* (reporting that in 2003 Cambodian exports to the United States amounted to over $1.2 billion). Eighty-five percent of that amount came from the textile trade. *Id.*

[90] *See* USCBTA, *supra* note 5 (adopting a hollow goal-oriented approach by specifying goals to which the parties aspired while ignoring the steps by which the parties would achieve those goals).

[91] *Compare id.* (agreeing to promote "general labor rights" that were "embodied" in the Labor Code), *with* First Synthesis Report, *supra* note 73, sec. 2 (elaborating all of the elements that the ILO chose to incorporate), and Labor Code, *supra* note 30, chs. III-XIV (enumerating with great specificity particular protections that workers should receive).

[92] *See* PR: Linking Trade and Labor Rights, *supra* note 82 (stating that the United States was willing to trade with any company in the Cambodian garment industry as long as the industry as a whole substantially complied with the Labor Code).

[93] *See, e.g.*, Third Synthesis Report, *supra* note 68, sec. 2 (noting simply whether the named factories complied in full, in part, or not all).

[94] *But see* Prasso, *supra* note 79 (championing the success of the USCBTA in the field of labor rights protection).

[95] *See* Labor Code, *supra* note 30, ch. XVI (providing a sliding scale of penalties depending on the kind of labor provision that a factory owner violated).

[96] *See* First Synthesis Report, *supra* note 73, sec. 1.4 (explaining that the first report only included sixteen percent of the factories participating in the program and that the monitoring of the factories was not an objective in itself, but rather part of a larger process to improve the industry as a whole). The report is silent on what the other parts of the larger process consist of. *Id.*

States Government determine[d] that . . . the Royal Government of Cambodia ha[d] taken . . . major action resulting in a significant change in working conditions,"[97] the incentive structure failed to achieve the treaty's goals because the trade agreement allowed grossly non-compliant firms to trade with U.S. markets.[98] This result occurred because the USCBTA granted to the garment industry a higher export quota if the industry as a whole "substantially complie[d]" with Cambodian labor law.[99] Even those factories that failed to follow any of the ILO inspectors' recommendations were able to trade with the United States at the higher export rate because the industry as a whole complied substantially with the inspectors' suggestions.[100] For instance, every year that the treaty was in force, the United States increased the export quotas, which offered the entire industry enhanced access to U.S. markets.[101] However, the synthesis reports show that several factories refused to institute most of the inspectors' recommendations.[102] Even though these factories declined to change their business practices, they enjoyed the increased trade benefits with the United States because the other factories followed the inspectors' suggestions.[103] For those workers in the "free-riding" factories,

---

[97] *See* USCBTA, *supra* note 5, para. 10(D) (conditioning these statements based on consultations between the U.S. and Cambodian governments).

[98] *But see* Polaski, *supra* note 31, at 14 (remarking that an impressive number of factories made rapid changes and corrections to practices that routinely confronted apparel workers in many countries). The author bases her claims on the flawed ILO reports. *Id.*

[99] *See* PR: Linking Trade and Labor Rights, *supra* note 82 (stating the conditions for which the United States would increase the quota).

[100] *See* Polaski, *supra* note 31, at 7 (stating that nonparticipating firms could have shared in the increased trading without the related costs of more stringent labor policies).

[101] *See, e.g.*, *Cambodia: U.S. increases garment quota*, ASIAN LABOUR NEWS Dec. 5, 2003 (reporting the quota increases, which yielded over $1 billion in revenue for Cambodian industry), *available at* http://www.asianlabour.org/archives/000183.php (last visited Feb. 13, 2005).

[102] *See* Cumulative ILO Synthesis Report Figures (unpublished document, on file with author) (showing that despite the presence of the labor inspectors and the positive incentives from the USCBTA, several factories failed to implement the inspectors' recommendations). This document, compiled from all nine ILO synthesis reports, lists all of the suggestions that the inspectors made in the areas of freedom of association, collective bargaining, employment discrimination, and child labor. *Id.* This document lists all of the suggestions that the inspectors made with regard to these issues, how many factories followed these inspections, and the percentage rate of compliance. *Id.* It also lists the total number of factories that received suggestions from each reporting period and from the aggregate of all nine reports. *Id.*

[103] *See* PR: Linking Trade and Labor Rights, *supra* note 82 (explaining that industry-wide substantial compliance was sufficient for individual factories to participate in the increased quotas).

working conditions may never improve.[104] Factories that severely violated the Labor Code were free to participate in the quota bidding process along-side firms that adhered to all pertinent labor regulations.[105] While the agreement's goals were aspirational, its methods embraced mediocrity.[106]

B. THE USCBTA'S INCORPORATION OF CAMBODIAN LABOR LAW AND THE ILO'S SUBSEQUENT ENFORCEMENT OF THAT LAW FAILED TO ACHIEVE THE TREATY'S OBJECTIVES

1. Freedom of Association

The ILO's method of incorporating the Labor Code's freedom of association provisions was insufficient "to improve . . . working conditions" consistent with the USCBTA's mission.[107] The agreement failed to empower the ILO with an adequate means of enforcing the Labor Code's freedom of association provisions, which guarantee, in part, that "workers . . . have the right, without prior authorization, to form professional organizations of their own choosing."[108] Even though the inspectors conducted over 209

---

[104] *See* Polaski, *supra* note 31, at 7 (discussing the free-rider problem in economics terms, but ignoring the fact that that working conditions will not improve for a large segment of the work force).

[105] *See* First Synthesis Report, *supra* note 73, sec. 1.3.1 (reporting that even though the Ministry of Commerce required that all factories interested in trading with the United States needed to register with the ILO program, there was no requirement that any of the factories adopt the ILO's suggestions at all).

[106] *Compare* USCBTA, *supra* note 5, para. 10(A)-(E) (providing in five brief paragraphs a list of goals and describing the incentive structure, but listing no methods for achieving those goals), *with* U.S.-Chile FTA, *supra* note 23, ch. 18 (devoting eight pages and an entire chapter to labor provisions).

[107] *See* USCBTA, *supra* note 5, para. 10(A) (connecting the goal of improved working conditions with the Labor Code's freedom of association articles).

[108] *See* Labor Code, *supra* note 30, ch. XI, art. 266 (articulating the extensive freedom of association provisions in twelve articles, but which call upon the Ministry of Labor to undertake a significant enforcement role, which the ILO lacked under the USCBTA); *see, e.g.*, Cumulative ILO Synthesis Report Figures, *supra* note 102 (demonstrating the insufficiency of the ILO's inspections in this regard). Thirty-three factories received suggestions that they "ensure that workers have the right to freely form and join trade unions and freely participate in union activities." *Id.* Upon the follow-up visit, the monitors found that seventy-six percent of the factories had complied with the recommendation. *Id.* The monitors suggested to fourteen factories that "management refrain from taking measures that would prevent workers from freely forming or joining unions and engaging in union activities." *Id.* Of these, seventy-nine percent had complied. *Id.* The monitors recommended to ten factories that "management should ensure that union leaders are dismissed only in accordance with the requirements of the law." Cumulative ILO Synthesis Report Figures, *supra* note 102. Ninety percent of the factories complied. *Id.* Twenty-two factories received suggestions that management ensure that "no worker suffers disadvantages because of

inspections, which resulted in a relatively high-level of compliance with the articles on freedom of association, workers in the garment industry still suffered from low unionization and high incidents of suppressed union-related activity.[109] This may have resulted because nowhere in the trade agreement's text is there an authorization, implicit or explicit, for the ILO to intervene in union-management disputes or for the ILO to protect workers who sought to organize pursuant to the Labor Code.[110]

Instead of assuming an enforcement role for the Labor Code's freedom of association provisions, the ILO's only method of incorporating the Labor Code was the use of the 156-question checklist.[111] The questions that the inspector's asked and the suggestions that they made were little more than an affirmation of the industry's respect for existing labor legislation.[112] For instance, one of the suggestions that the inspectors rendered was as follows, "management [should] refrain from taking measures that would prevent workers from freely forming or joining unions and engaging in union activities."[113] But, while the Labor Code expressly called for the Ministry of Labor to enforce this provision, the ILO merely reported whether

---

union membership or participation in union activities." *Id.* Seventy-three percent of the factories complied. *Id.* The inspectors suggested that thirty-two factories hold new shop steward elections. *Id.* Seventy-five percent of the factories complied. *Id.* Ninety-three factories received suggestions to ensure that "the next shop steward elections are held in accordance with the relevant rules and procedures." Cumulative ILO Synthesis Report Figures, *supra* note 102. Only twenty-eight percent of these factories complied. *Id.* One-hundred seventy-eight factories received suggestions to ensure that shop stewards are provided two office hours per week, an office, and working materials to undertake their duties. *Id.* Only twenty-one percent of these factories complied. *Id.*

[109] *See* U.S. Dep't of State, *supra* note 55, sec. 6(a) (explaining the reports of anti-union harassment by employers, including the dismissal of union leaders, in more than 20 garment factories and other enterprises during the year).

[110] *See* Labor Code, *supra* note 30, at ch. XII, art. 301 (granting authority to the Ministry of Labor's inspectors to intervene in labor disputes). The USCBTA fails to empower the ILO with similar authority. *Id.*

[111] *See* First Synthesis Report, *supra* note 73, sec. 1.3.2 (describing all of the monitoring procedures that the ILO used, including the checklist).

[112] *See, e.g.*, Seventh Synthesis Report, *supra* note 69, sec. 2 (illustrating that the contents of the checklist consisted of questions that only reflected the contents of the Labor Code). The checklist method failed to accompany the enforcement power that the Labor Code contained. *Id.*

[113] *See* INT'L LABOUR ORG., EIGHTH SYNTHESIS REPORT ON THE WORKING CONDITIONS SITUATION IN CAMBODIA'S GARMENT SECTOR, sec. 2.1.3.1 (Feb., 2004) [hereinafter Eight Synthesis Report] (reporting that the inspectors gave this suggestion only to eleven factories, of whom seven complied in full), *at* http://www.ilo.org/public/english/dialogue/ifpdial/publ/cambodia8.htm (last visited Mar. 4, 2005).

management violated this element of the code.[114] There is no guidance as to what would have constituted a "measure" to "prevent" workers from "freely" forming unions.[115] The ILO needed to define these terms so that the readers of the reports could know how closely the factories adhered to the freedom of association articles.[116] For instances, there are criticisms that Cambodian unions are linked closely with factory owners or political parties.[117] We simply do not know whether these constitute "freely" formed unions under the ILO checklist system.[118] Nor do we know if these unions were acceptable to the ILO as long as management had refrained from taking the forbidden "measures."[119] This is the result of the checklist approach.[120] While a stronger enforcement role might have provided more certainty and therefore more

---

[114] *See* Labor Code, *supra* note 30, ch. XVI, art. 359 (granting to the Ministry of Labor's inspectors the power to enforce penalties).

[115] *See id.* ch. XVII, arts. 387-89 (creating labor courts that would have the authority to determine the precise meanings of these words so as to give guidance as to how the violators of this provision actually treated its workers).

[116] *See, e.g.*, HUMAN RIGHTS WATCH, WOMEN'S WORK: DISCRIMINATION AGAINST WOMEN IN THE UKRAINIAN LABOR FORCE, 18-26 (Aug., 2003) (providing an example of a reporting method that other investigators have used that give enough details to create a complete image of employment discrimination in the Ukraine), *available at* http://www.hrw.org/reports/2003/ukraine0803/ukraine0803full.pdf (last visited Mar. 5, 2005).

[117] *See* UNITED NATIONS, SITUATION OF HUMAN RIGHTS IN CAMBODIA, para. 107 (Sept. 18, 1998) (reporting that management often assumed control over unions and that the government did little to prevent worker intimidation), *available at* http://www.hri.ca/fortherecord1998/documentation/genassembly/a-53-400.htm (last visited Mar. 5, 2005).

[118] *But see* Eighth Synthesis Report, *supra* note 113, sec. 4 (indicating that the ILO's successes in the area of freedom of association compensates for problems that continue to persist in other fields, despite the lack of guidance as to what constitutes truly free union formation).

[119] *But see* AFL-CIO & UNITE, CENTRAL AMERICA: LABOR RIGHTS AND CHILD LABOR REPORTS PURSUANT TO THE TRADE ACT OF 2002, SECTION 2102(C)(8)-(9), 19 (June 5, 2003) (arguing that CAFTA should replicate the Cambodian example because of the ILO's success, despite the clarity in the checklist's language), *available at* http://www.aflcio.org/issuespolitics/globaleconomy/upload/CAFTA.pdf (last visited Mar. 5, 2005).

[120] *Compare* Seventh Synthesis Report, *supra* note 69, sec. 1.3.2 (suggesting that the regulatory approach works best when the inspectors are in a position to see Labor Code violations, which is problematic because some of the most egregious violations could go unhidden, especially if factory management is particularly coercive), *with* NAALC, *supra* note 18, arts. 4, 5 (creating a private action for workers and granting them access to a full tribunal with due process of law). The NAALC's adversarial approach allows workers to bring to light through pleadings labor law violations that a purely regulatory approach otherwise might miss. *Id.*

transparency, a timid regime of this variety was all that the agreement required.[121]

2. Labor Disputes, Conciliation, and Arbitration

The ILO interpreted its role in this area far too narrowly "to improve . . . working conditions" in the garment industry.[122] The Labor Code provides for remedies of labor disputes in factories that have formal conciliation agreements as well as those factories where management and workers have not yet reached such an accord.[123] The presence of these latter provisions was essential because the ILO's monitory role in this area did little to encourage registration of collective bargaining agreements.[124] For instance, even though there were over 200 factories in the program, MOSALVY only had registered approximately twenty collective bargaining agreements.[125] The inspections failed to encourage workers and management to work together to create such

---

[121] *Compare* USCBTA, *supra* note 5, para. 10(A)-(E) (leaving an open-ended labor law enforcement mechanism, which permitted the ILO to adopt the least stringent means of enforcement), *with* NAALC, *supra* note 18, (devoting over fifty articles, including specific definitions and an entire dispute settlement procedure, as well as several annexes to developing a stronger enforcement structure). However, while the NAALC offered workers direct access to the dispute settlement process, the enforcement structure failed to provide adequate remedies. *Id.* art. 22.

[122] *See* USCBTA, *supra* note 5, para. 10(A) (lacking sufficiently specific information to guarantee that the ILO would adopt the most effective standards to achieve the agreement's otherwise lofty goals).

[123] *See* Labor Code, *supra* note 30, ch. XII, art. 309(a)-(c) (defining the three separate ways that the Ministry of Labor may intervene to resolve disputes between management and labor, including a provision that creates a dispute resolution structure even without a previously written conciliation agreement).

[124] *But see* Cumulative ILO Synthesis Report Figures, *supra* note 102 (demonstrating that the ILO inspectors found that high numbers of factories violated this right and only small percentages of the participating factories actually followed the ILO's suggestions). One-hundred twenty-seven factories received a suggestion to ensure that workers understood the terms of their employment contract. *Id.* Only thirty percent of the factories complied. *Id.* Sixty-six factories received a suggestion to amend employment contracts to comply with the law. *Id.* Only thirty-three percent of the factories complied. *Id.* Twenty-two factories received a suggestion to ensure that dispute settlement procedures comply with the law. *Id.* Thirty-six percent of the factories complied. Cumulative ILO Synthesis Report Figures, *supra* note 102. Twenty-eight factories received a suggestion to that management should implement conciliation agreements. *Id.* Fifty-four percent of the factories complied. *Id.* Twenty factories received a suggestion that management should ensure that conciliation agreements are posted in the workplace. *Id.* Eighty-five percent of the factories complied. *Id.*

[125] Int'l Labor Affairs Bureau, *supra* note 38, at 11 (noting that the low number of collective bargaining agreements is indicative of failed government policy).

an agreement and register it with the Ministry of Labor, which could have enforced the agreement when either party violated the conditions.[126]

In the absence of these agreements, the Labor Code provided that workers still could have received arbitration for labor-related disputes with management.[127] Although the USCBTA used the ILO to circumvent the internal corruption of the Ministry of Labor by using neutral inspectors, the ILO lacked the authority to implement the functions of dispute resolution and mediation as the Labor Code provides.[128] Under the USCBTA, the ILO's role was purely monitory, but that was not enough.[129]

3. Child Labor

The monitoring and reporting system that the USCBTA adopted failed to achieve its stated objectives because it was possible that the relevant provisions of the labor code went unenforced and the number of child workers went drastically underreported.[130] Although the Labor Code called for the

---

[126] *See* Labor Code, *supra* note 30, art. 309(a) (noting that the parties could resolve their dispute through any procedure that they devised in the mutual agreement).

[127] *See id.* art. 303 (allowing the Ministry of Labor's inspector to intervene in labor disputes not only when one of the parties notifies the inspector, but even if the inspector becomes aware of the dispute through other means).

[128] *Compare* USCBTA, *supra* note 5, para. 10(A)-(E)(calling for the promotion of compliance with the Labor Code, but failing to specify whether the ILO should usurp the Ministry of Labor's authority as the Labor Code provides), *with* Labor Code, arts. 302-08 (granting significant authority to the Ministry of Labor to intervene in labor disputes, including the power to bind parties to a collective agreement when the party representing the workers is a trade union).

[129] *See, e.g.*, Labor Code, arts. 302-08 (granting the Ministry of Labor a monitory role, but also providing authority to resolve conflicts). This illustrates that the National Assembly envisioned that while the Ministry of Labor would conduct its role through inspections, it also should have significant enforcement authority over those areas of the Labor Code that factories or workers abrogated. *Id.*

[130] *See* Cumulative ILO Synthesis Report Figures, *supra* note 102 (reporting that the ILO documented only fourteen instances of child labor throughout the four years of inspections and the two hundred factories that they visited); *see also* MINISTRY OF PLANNING, CAMBODIA HUMAN DEVELOPMENT REPORT 2000: CHILDREN AND EMPLOYMENT, 33-35 (2000) (indicating that the ILO reports may be troublingly erroneous), *at* http://hdrc.undp.org.in/APRI/NHDR_Rgn/Cambodia/cmbda_nhdr_2000.pdf (last visited Mar. 5, 2005). Approximately forty-two percent of children aged ten to thirteen were "economically active" during the time period under review. *Id.* at 31. Of the children who held jobs, approximately seven to eleven percent worked in the manufacturing sector, which the report defined as jobs in the garment and apparel manufacturing, brick-making, and salt production. *Id.* On average, these children worked around forty-four hours per week for around thirty-five weeks per year. *Id.* at

Ministry of Labor, and in some cases the Labor Advisory Committee, to regulate the working environment for workers between eighteen and fifteen years old[131] the ILO had no such power.[132] In fact, the USCBTA did not even require or suggest that the ILO work together with the Ministry of Labor and the Labor Advisory Committee in the area of child labor.[133] That kind of cooperation would have been the least possible means to ensure that children received the Labor Code's protection.[134] The result was that the ILO, which had limited power to discover child labor in the first place, had no power to prevent or correct child labor violations once the inspectors found them.[135]

4. Employment Discrimination

For the women working in the garment factories, there was very little hope for improved working conditions or professional advancement despite the presence of the ILO and the financial incentives that the United States government had installed.[136] The regulatory model that the ILO adopted failed in this regard because there was a low compliance rate for the many instances

---

32. The report emphasized that because of its methodology, the reported numbers "may grossly understate the number of child workers in the country." *Id.* at 29.

[131] *See* Labor Code, *supra* note 30, art. 177 (mandating that the minimum age for employment is fifteen years old).

[132] *Compare* USCBTA, *supra* note 5, para. 10(A)-(E) (lacking any discussion of child labor), *with* Labor Code, *supra* note 30, arts. 177-181 (banning child labor and regulating the means by which children between fifteen and eighteen may seek employment), and Canada-Chile FTA, *supra* note 21, art. 25 (offering at least a mechanism by which to discover and remedy instance of child labor), and U.S.-Singapore FTA, *supra* note 24, ch. 17, art. 17.7(1)(d) (providing that children shall be protected through the enforcement of domestic child labor laws).

[133] *See* Labor Code, *supra* note 30, ch. XVI (granting the Ministry of Labor the authority to institute stiff penalties for Labor Code violations). If the ILO cooperated with the Ministry of Labor, the Ministry could have instituted penalties for the violations that the ILO discovered. *Id.*

[134] *But see* USCBTA, *supra* note 5, para. 10(A)-(E) (indicating that even if the USCBTA's drafters sought to fight child labor, they believed that the ILO effectively could have done so using alternate methods).

[135] *See, e.g.*, First Synthesis Report, *supra* note 73, sec. 1.1 (describing the USCBTA as an agreement that provided solely an incentive structure). The agreement contained no punitive measures. *Id.*

[136] *Cf.* Andrew Wells-Dang, *Linking Textiles to Labor Standards: Prospects for Cambodia and Vietnam*, 2-3 (June 2002) [hereinafter Linking Textiles to Labor Standards] (asserting that the growth of the Cambodian garment industry may not be attributable solely or even mostly to the USCBTA's positive incentives) *available at* http://www.fpif.org/pdf/reports/PRtxt-labor.pdf (last visited Mar. 5, 2005). If this is true, then there would have been little if any correlation between the trade agreement's incentive structure and improved working conditions. *Id.* That would include women's rights. *Id.*

of employment discrimination that the inspectors found.[137] Although the Labor Code provided that those guilty of violating the anti-discrimination provisions are liable to pay fines, neither the USCBTA nor any domestic regulations empowered the ILO to impose those penalties.[138]

Furthermore, the monitoring program failed to take any steps to equalize the disparity between the number of low-level female employees and the number of men in management positions.[139] Both the Labor Code and the

---

[137] *See* Cumulative ILO Synthesis Report Figures, *supra* note 102 (showing that the inspectors found that forty-seven factories received a suggestion to ensure that no worker had to pay a fee in order to get a job, while only forty-seven percent complied). Fifty-four factories received a suggestion to ensure that the piece rate was set at such a level to permit a worker of average ability working normal hours to earn the minimum wage. *Id.* Twenty-one percent complied. *Id.* Eighty-seven factories received a suggestion to ensure that ninety days maternity leave is provided, with half pay for workers who had worked at least one year. *Id.* Fifty-one percent complied. *Id.* Fifteen factories received a suggestion to ensure that workers were not subject to negative changes in their contract status when returning from maternity leave. *Id.* Eighty percent complied. Cumulative ILO Synthesis Report Figures, *supra* note 102. One-hundred ninety-two factories received a suggestion that management should ensure that time-off for breast feeding is provided and that workers are aware of this right. *Id.* Twenty-eight percent complied. *Id.* Nineteen factories received a suggestion that management should take steps to address problems related to sexual harassment. *Id.* One-hundred percent complied. *Id.* One-hundred nineteen factories received a suggestion that management should refrain from engaging in indecent behavior. *Id.* Twenty-nine percent complied. Cumulative ILO Synthesis Report Figures, *supra* note 102.

[138] *See* Labor Code, *supra* note 30, arts. 172-76, 182-87, 363 (listing the protections that women receive under the Labor Code as well as the penalties that discriminating employers will suffer for violating those provisions). A typical penalty consists of a fine of thirty-one to sixty days of the base daily wage. *Id.* art. 368. However, only the Ministry of Labor has the power to impose this penalty. *Id.* at 359.

[139] *See* Hall, *supra* note 36, at 158 (explaining that labor violations in the garment industry will have a disparate impact on women because of the overwhelming numbers of women working for men). According to one interview that Hall conducted, a European consultant for the garment industry discussed Chinese male managers' relationships with their Cambodian female employees,

> They really don't like Khmer women at all. Joke [sic] about them being ugly and stupid and lazy. They keep complaining about how the women here don't work as hard as women in China or Malaysia, and how they don't want to do over time . . . They say if they paid these women more money they would gamble it away, or just get drunk . . . I've seen these men hit and shout at women, calling them fucking whores, and slapping them on the face. Then they laugh about it, joking with each other.

Id. at 159.

USCBTA were silent on this issue even though critics of Cambodia's garment industry have argued that resolving this imbalance significantly would improve living standards and working conditions.[140] In this regard, the USCBTA failed to compensate for inadequacies in the Labor Code's provisions.[141]

IV. RECOMMENDATIONS: CONNECTING GLOBALIZATION WITH POVERTY REDUCTION

A. THE INCENTIVE STRUCTURE WORKS

Future trade agreements should offer incentives for compliance, such as the increased quotas that were critical to the USCBTA.[142] Although the quotas that served as the backbone for this plan disappeared on January 1st, 2005, Cambodian officials claim that they will continue with factory monitoring operations because of the financial benefits that the trade deals have brought to the national economy.[143] Since the quota system for textiles has ended for WTO members, future trade deals in quota-free industries cannot replicate the program exactly, but they certainly can offer the benefits of enhanced trade that accompanies transparency and stability.[144]

B. FUTURE TRADE AGREEMENTS REQUIRE ADEQUATE LABOR LEGISLATION

Future trade agreements may have to confront weak domestic labor laws.[145] The drafters of the USCBTA generally avoided this problem because

---

[140] *See* SG Report: Cambodia, *supra* note 58, ¶ 116 (discussing the alarming instances of discrimination against women, especially violent incidents).

[141] *See* Linking Textiles to Labor Standards, *supra* note 136, at 2 (asserting that the ILO was unable to overcome many other challenges to the Cambodian labor environment). For instance, internal corruption, a lack of resources, and a weak judicial system has resulted in gross under-enforcement of the Labor Code, which is why the ILO needed to compensate in some degree for these inadequacies. *Id.*

[142] *See, e.g.*, USCBTA, *supra* note 5, para. 10(A)-(E) (creating a prototypical incentive structure that should be studied, modified, and then replicated).

[143] *See* Polaski, *supra* note 31, at 9 (explaining that textile quotas disappeared for Cambodia when it joined the WTO).

[144] *See id.* at 9, 16-17 (describing the many reasons why Cambodia has chosen to continue adhering to the ILO inspections even though the quota system has ended, including the commercial benefits that flow from consumer confidence in labor-friendly garments). Polaski argues that future trade agreements can replicate the USCBTA program through the use of positive incentives. *Id.* at 17. However, Polaski leaves unaddressed the merits of a hybrid structure that incorporates both positive and negative incentives. *Id.*

[145] *See, e.g.*, Codigo de Trabajo (El Sal.) (1972)(amended 1994, 2004) (providing relatively weak labor protection), *available at*

of Cambodia's relatively thorough Labor Code.[146] Arguably, however, the Cambodian experience is similar to countries without comprehensive labor laws because of widespread corruption in Cambodia's judiciary and labor ministry, which has resulted in systemic under-enforcement.[147] In that regard, the Cambodian experience may be similar to countries without any kind of labor legislation at all, because the result is the same in both circumstances: little or no labor protection.[148] To circumvent these and similar problems, future trade agreements should include their own labor provisions, articulated with the kind of particularity that will create an effective enforcement body.[149]

C. NUMEROUS INSPECTIONS ARE CRITICAL TO ADEQUATE TRANSPARENCY

Inspections must be sufficiently frequent and thorough to offer the kind of transparency that is needed to ensure that the private sector is in compliance with labor standards.[150] A critical drawback to the USCBTA was the small number of inspectors that the parties used to achieve the agreement's vision and the few inspections that the inspectors undertook.[151] In

---

http://www.ilo.org/dyn/natlex/docs/WEBTEXT/49592/65113/S95SLV01.htm; *see also* Capitalism in the Raw, *supra* note 66 (explaining that, unlike the USCBTA, CAFTA cannot depend on countries, like El Salvador, to enforce their own labor codes on the grounds that those labor laws are too lax).

[146] *See generally* Labor Code, *supra* note 30 (providing relatively thorough labor protections). The Labor Code relies primarily upon the Ministry of Labor for enforcement, which is notorious for under-enforcement. *Id.*

[147] *See* Press Release, Human Rights Watch, Cambodia: Judiciary on Trial, (June 20, 2001) (condemning Cambodia's judiciary for corruption and lack of political independence), *at* http://hrw.org/english/docs/2001/06/20/cambod149.htm (last visited Mar. 5, 2005).

[148] *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2004: CAMBODIA, sec. 6(a) (Feb. 28, 2005) (asserting that the Labor Code went unenforced in 2004 due to a lack of political will), *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41638.htm (last visited Mar. 5, 2005).

[149] *See, e.g.*, NAALC, *supra* note 18, Annex 1 (providing a list of labor principles that guide the parties' domestic legislative priorities). While this language is merely aspirational, it remains more prototypical than the USCBTA, which lacks any guiding labor principles. *Id.*

[150] *See* discussion *supra* Part III.A.3 (explaining that two inspections during a four-year time period is insufficient to conclude, infer, or even speculate that Cambodian factories abided by anything more than the worst labor standards imaginable).

[151] *See* INT'L LABOUR ORG., NINTH SYNTHESIS REPORT ON THE WORKING CONDITIONS SITUATION IN CAMBODIA'S GARMENT SECTOR, sec. 1.3 (July 2004) (reporting that the project, which by the ninth report had included at least 243 factories, had recruited only eleven inspectors), *at* http://www.ilo.org/public/english/dialogue/ifpdial/publ/cambodia9.pdf (last visted

order to achieve more transparency, there must be more inspectors and more inspections.[152] Two visits within a four-month period are insufficient to ensure that the visited businesses are in substantial compliance with the law.[153]

D. INDUSTRY-WIDE SUBSTANTIAL COMPLIANCE IS NOT ENOUGH

The Cambodian example suffered from a severe free-rider problem.[154] The USCBTA allowed working conditions to lag in some areas as long as the industry as a whole substantially complied with the law.[155] While it may be unrealistic to require a higher standard of the entire industry, a better solution would have granted preference to firms that participated in the program at different levels of compliance.[156] For instance, firms that complied the most should have had special access to the domestic quota bidding process, while firms that complied the least should have had restricted access to U.S. markets via the local bids.[157] In the absence of quotas, inspectors can rank firms according to their compliance with the relevant labor standards and recommend the best firms to U.S. businesses and provide a warning to avoid the least compliant businesses.[158]

E. ADJUDICATION IS AN ESSENTIAL ELEMENT TO ENFORCEMENT

Feb. 4, 2005). However, the small number of inspectors may have been sufficient since the program so infrequently sent them to inspect participating facilities. *Id.*

[152] *See supra* notes 84-85 and accompanying text (demonstrating the need for more inspections in order to achieve credible results).

[153] *But see supra* notes 70, 72, 79, 82, 88, 98, 119 and accompanying text (showing that the U.S. Trade Representative, the U.S. Embassy in Cambodia, two mighty super unions, an international trade scholar, and at least two reputable journalists proclaimed the ILO program as an exemplary success story on the meager basis of two inspections conducted in a four-year time span with methods of dubious reliability).

[154] *See supra* discussion Part III.A.4 (explaining that the incentive structure allowed grossly noncompliant and defiant facilities to trade with the United States).

[155] *See supra* discussion Part III.A.4 (proving that the free-rider problem was directly related to industry-wide standard).

[156] *But see* Polaski, *supra* note 31, at 17 (eschewing any use of negative incentives, which logically would include the sliding-scale approach advocated here).

[157] *See* Linking Textiles to Labor Standards, *supra* note 136, at 3 (arguing that the disconnect between factory compliance and quota allocations served as a challenge to effective implementation and monitoring).

[158] *See* Regina Abrami, *Worker Rights and Global Trade: The U.S.- Cambodia Bilateral Textile Trade Agreement*, Harvard Business School Case Study, No. 9-703-034, at 15 (Aug. 2003) (arguing that consumer pressure will be strong enough to encourage socially responsible business practices).

Another means of solving the transparency problems that inhere in regulatory models, such as the one that the USCBTA adopted, involves incorporating other kinds of legal architectures into the enforcement mechanisms.[159] Future trade agreements need to pull private companies out of the shadows of international law and allow workers to compel their employers to comply with labor codes.[160] At the very least, there needs to be a public forum where employees can present violations of labor laws and where the owners can present their side of the story, shedding light on violations that inspectors otherwise might overlook.[161] An adjudication system might provide negative reinforcement that accompanies the positive incentives from increased access to U.S. markets.[162]

It is critical that the public has access to the adjudication system and that the employees can obtain effective redress for labor code violations.[163] The lack of redressability was a critical failing of the NAFTA labor side agreement.[164] For instance, a typical remedy for violations involves merely a ministerial meeting between low-level U.S. and Mexican officials.[165] By contrast to the remedies that NAFTA offered to workers, NAFTA's chapter eleven dispute settlement procedures offered more meaningful protections to investors who could obtain financial compensation for violations of the

---

[159] *See, e.g.*, Laurence Hefler & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997) (comparing and contrasting different methods of international dispute resolution systems); *see also* John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submission Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1 (2001) (arguing for a different method for compliance in NAFTA-related environmental disputes).

[160] *But see* Kolben, *supra* note 39, at 91 n. 72 (implying that approaches such as this, which encroach on state sovereignty, will face significant political obstacles).

[161] *See supra* note 76 and accompanying text (showing that the ability to bring a lawsuit in an adversarial setting might increase transparency into the administration of law law).

[162] *But see supra* note 156 (demonstrating the opposition to hybrid positive-negative incentive structures).

[163] *See* Michael Posner, *An Open Letter to Ambassador Robert Zoellick*, (November 26, 2001) (arguing for changes in the USCBTA that would have allowed non-governmental actors to play at least a minimal role in the administration of the Labor Code), *at* http://ur.rutgers.edu/news/ACLA/lchrcambodia.htm (last visited Mar. 5, 2005).

[164] *See* Russo, *supra* note 19, at 112-18 (describing the faults in the NAFTA dispute settlement procedures).

[165] *See* NAALC, *supra* note 18, art. 27 (aspiring to redress labor violations through ministerial consultations).

agreement's provisions.[166] Future trade agreements should adopt an adjudication system similar to NAFTA's chapter eleven, in conjunction with the USCBTA regulatory approach.[167]

CONCLUSION

There is a great need for incorporating labor rights provisions into bilateral, multilateral, and regional trade agreements. However, it was only towards the end of the last century that governments experimented with different types of legal systems to address labor issues. As the debate on this matter moves forward, more attention must focus on the most effective and appropriate legal architectures for labor rights protection in the trade context. The USCBTA was the purest example of a regulatory model that governments have used to link trade and labor protection. The weaknesses in a purely regulatory model indicate that a different approach may have more success. While purely adjudicative models have their own drawbacks, the best approach may be a hybrid of the two. A regulatory-adjudicative model for labor rights enforcement may be the best way to improve living standards and working conditions world-wide. Given the shortcomings of the USCBTA, let us hope that this is not the best that we can do.

---

[166] *See generally* NAFTA, *supra* note 17, ch. Eleven (describing the procedures by which investors can obtain redress for violations of enumerated investment protections).

[167] *See* discussion *supra* Part III.A.3 (revealing the weaknesses in the regulatory model alone).