

**BACKGROUND NOTE FOR THE
WORLD DEVELOPMENT REPORT 2013**

From Law on the Books to Law in Action:

A note on the role of regulation in the production of good jobs in Cambodia's garment sector

Daniel Adler &

Hans Hwang

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The WDR 2012 CN starts with a premise that “good jobs are not those matching a series of ideal criteria, but rather those which can support increases in household expenditures over time, contribute to faster productivity growth at the aggregate level, or do more to foster social cohesion, in a particular country at a specific stage in its development process.” The WDR 2012 framework is also expected to accept core labor standards as establishing minimum conditions and entitlements for good jobs.

This paper will contribute to the discussion of the ways in which law and the systems for its enforcement emerge in ways that support the production of good jobs.

The Cambodia case study presented here is useful in elaborating this discussion as we can track the emergence of labor rights over the last 20 years—from an initial point where there were very few private sector jobs and little effective regulation; through a situation where formal sector employment has grown and industrial relations are starting to mature. We will do this through the lens of the garment industry (Cambodia’s biggest formal sector employer) and with a focus on two specific innovations—the *Better Factories Program* (for monitoring working conditions in garment factories)—and the *Arbitration Council* (for labor dispute resolution) as illustrations of how governments, unions, employers and international development actors can respond to concerns about working conditions and rights at work.¹

Civil Conflict

To understand the situation with regard to jobs and labor rights in Cambodia today, it is worthwhile to review the country context. Cambodia endured almost three decades of conflict, including the devastating genocide under the Khmer Rouge regime from 1975-1979 and the war and civil strife thereafter. While the country began to stabilize in the 1990’s, conflict destroyed Cambodia’s infrastructure, decimated its human capital and weakened or distorted its social, economic and political institutions. Cambodia has since made significant strides in consolidating peace and promoting development it is still a poor country with a familiar array of governance and human development challenges.

Stabilization, expansion of Garment Industry

With greater political stability from the mid-1990’s, Cambodia experienced remarkable economic growth. From 2000 through 2006 the average compound economic growth was 9.4 percent a year, in 2007 growth reached 10.2 percent; poverty was reduced from 45-50 percent in 1993 to 30 percent in 2007 (Deuster, MacDonald and Zimmerman, 2009). Garments, tourism, construction and agriculture have been the primary drivers of the economy.

Cambodia’s garment industry in particular has experienced extraordinarily rapid expansion and is the country’s largest formal sector employer. In 1996 there were only 32 garment factories, employing an estimated 20,000 workers; by 1998, there were over 100 garment factories, employing 72,000 workers (Hall, 2000). By mid-2008, the figures had increased to over 300 active factories employing around 340,000 workers, 90 percent of whom were women (ILO-BFC, 2008).

¹ Given that the experience of Better Factories is well documented elsewhere (EG, EG, EG) the balance of this note is weighted in favor of the Arbitration Council

This growth occurred, not so much because of the natural advantages the country has as a site for garment manufacture, but because of its cheap labor, increased political stability, and the restrictions placed on major exporters, particularly China, as part of the Multi-Fibre Arrangement (MFA) that regulated international trade in textiles until their expiry in December 2004. F Investment was also fueled by the United States granting Cambodia Most Favored Nation status in 1996 and the signing of a framework cooperation agreement with the European Union that allowed access to EU markets under the Generalized System of Preferences in 1997 (Bargawi, 2005).

Labor Strife

As the garment industry was expanding, labor conditions also developed as a major issue. Despite a Labor Law which provided for protection of workers' rights, the Law was seldom enforced; labor inspectors were poorly trained and poorly paid (Kolben, 2004). There was also general concern that dispute resolution in Cambodia was neither effective nor impartial, with government elites and factory owners tied politically and financially. Workers sought help from labor unions, many affiliated with political parties; demonstrations and strikes became increasingly common (Polaski, 2006). In 1997, the Ministry of Labor reported 17 collective disputes; by 1999, this had increased to 126 (ILO, n.d.). U.S. and international labor groups, consumers and students pushed the U.S. government to review alleged abuses of workers' rights in Cambodia's apparel factories (Polaski, 2004).

US-Cambodia Bilateral Trade Agreement

It was in this context that the U.S. and Cambodia concluded the 1999 bilateral trade agreement, which in turn would lead to the establishment of both the Better Factories Program and the Arbitration Council. Building on similar clauses in other bilateral trade deals the U.S. agreed to increase Cambodia's quota for garment imports into the United States if a semi-annual review showed positive findings regarding factory level adherence to core international labor standards and the standards set by Cambodian labor law. The question remained, however, how the labor standards clause would be implemented, given the absence of credible country systems for monitoring and enforcing the law.

Following the 1999 agreement, the U.S. funded two ILO projects to improve working conditions and the application of labor laws. The Garment Sector Working Conditions Improvement Project (later known as *Better Factories Cambodia*) which was established to monitor working conditions in garment factories; and the Labor Dispute Resolution Project (LDRP) which was designed as a complementary project to support the emergence of systems to prevent and resolve labor disputes.

Case Study 1: Garment Factory Monitoring (Better Factories)

The Garment Sector Working Conditions Improvement Project was established to "operate an independent system to monitor working conditions in garment factories" (ILO, 2001a). Under this system, all garment exporters would be subject to inspection by the ILO and the U.S. government would make its decisions on the quota increase based on the ILO's findings. This

was a novel development in two senses: it involved the ILO in the monitoring compliance with a national labor law, and it established linkages between monitoring and quotas.

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

In most of the factories, significant progress has been made in improving working conditions, but obstacles still persist. A substantial number of factories continue to implement suggestions, while a small number of factories made little effort to improve (ILO, 2006a, p. 57).

Progress in terms of international labor standards is not necessarily easy to measure. In Cambodia, however, at least in relation to the garment industry, there is a rich source of data from the ILO monitoring reports.² This data is supplemented by the U.S. State Department’s annual Country Reports on Human Rights Practices, which include a chapter on labor rights as well as findings from interviews with unionists and others involved in labor rights issues.

Based on the above sources, it appears that the initial years after the signing of the bilateral trade agreement (2000–2003) showed a marked improvement in freedom of association. Though accurate figures are difficult to obtain, the estimates of the U.S. Embassy in Cambodia were that approximately 12 percent of Cambodia’s 150,000 to 170,000 garment workers were unionized in the year 2000.³ This figure increased to 25–30 percent⁴ in 2001. By 2005, it was estimated that 40–50 percent of the approximately 280,000 garment and footwear workers were union members,⁴ with this figure increasing further to around 75% in 2008/9 before subsiding to an estimated 60% in 2011 (USDOL figures). The period following the 1999 trade agreement also saw fundamental improvements in the registration of unions. Until 2002, independent or opposition-aligned unions often reported difficulty in registering with the Ministry of Labor (U.S. Department of State, 2002); (2003) see Section 6a. Since 2003, this issue has been substantially addressed, and there has been a proliferation of new union registrations in recent years.⁵

However, since 2004 there were also indications of a resurgence of antiunion activities. The year 2004 was marked by the murder of two union leaders associated with the opposition-affiliated Free Trade Union and a series of major disputes around the unionization of the hotel sector. An analysis of the ILO synthesis reports also reveals a marked increase in the number of factories

² Though the methodology for monitoring factories has evolved over the years, it is nevertheless possible to conduct some longitudinal analysis of data contained in the synchapter reports.

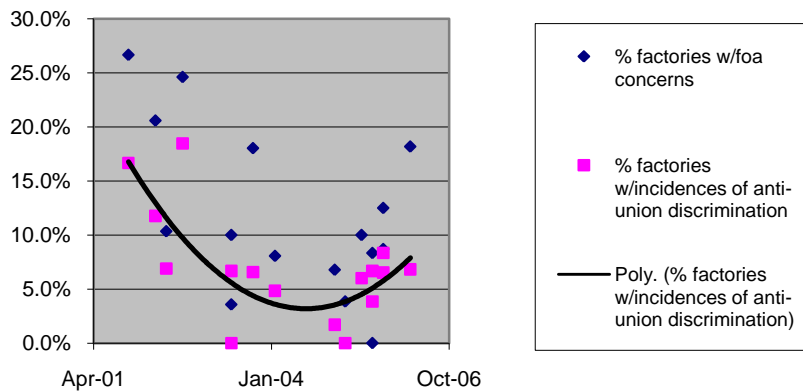
³ U.S. Department of State (2002); estimate from U.S. Department of Labor (2003).

⁴ U.S. Department of State (2006), see Section 6a.

⁵ Though there are still complaints about delays in the registration process. See for e.g.: U.S. Department of State , “2005 Country Reports on Human Rights Practices: Cambodia,” “2004 Country Reports on Human Rights Practices: Cambodia,” (2005) see Section 6a; “2003 Country Reports on Human Rights Practices: Cambodia,” (2004) .

cited for antiunion discrimination and other freedom of association issues starting in mid-2004 (see figure 1).⁶ While the causes of any fluctuations in the environment for freedom of association are undoubtedly complex—and the ILO’s methods for collecting the data on which this analysis is based have not been fully consistent—local union activists point out that the final round of quota increases under the U.S.-Cambodia trade agreements was assessed in July 2004 and that absent the prospect of further compliance-related increases in market access, the incentives for employers to engage positively with unions may have been reduced.

Figure 1: Overall trends in issues related to Freedom of Association (foa) and Anti-Union Discrimination



While the garment sector in Cambodia remains at one level “essentially no different from the industry in other parts of the world” (Miller, Nuon, Aprill, & Certeza, 2007, p. 22) in terms of its fundamental outcomes and the constellations of power by which it is framed, there is near consensus that it saw a significant though uneven improvement in compliance with the labor law and international labor rights starting in 2001 (International Finance Corporation; the World Bank; Foreign Investment Advisory Service (FIAS), 2004); (Polaski, 2004); (Wells, 2006) .

This has been attributed to a number of factors.

Primary among these was the role of the 1999 US–Cambodia trade agreement in creating the immediate financial incentives necessary for the system to work. Tying access to US markets to independently verified improvements in compliance with labor standards created an immediate commercial incentive for improved implementation of the labor law for all stakeholders—employers, unions, and the government as a whole, which auctioned the quotas to manufacturers. Crucially, it also provided opportunities for government officials to derive benefits from the allocation of quotas (Kolben, 2004).

It is also important to consider the impact of a number of changes to the conditions under which the new arrangements worked. Once operational, the ILO project promoted implementation of Cambodia’s labor law and core labor standards by relying on (a) processes of ‘social dialogue’ at the national and international level; (b) the provision of public information; (c) ‘remediation’

⁶Source: Author’s calculation based on ILO reports. Data taken from ILO, *Synthesis Reports on Working Conditions in Cambodia’s Garment Sector*, volumes 1-16 (2001-2006).

efforts targeted at factory management; and (d) making links to trade preferences, rather than direct recourse to national or international law or more grass roots empowerment strategies.

While improved performance had financial benefits at the industry level, one might have expected free riding at the enterprise level. This was avoided in three ways. First, the granting of export licenses was made conditional on an enterprise subjecting itself to the ILO monitoring system.⁷ Second, the ministries of commerce and labor set up a system whereby employers could be deprived of their export licenses if they were found to be involved in continued breaches of core labor standards.⁸ Third, benefits were focused and free riding lessened by publishing information on individual factories; in this way, the system generated pressure for improved “corporate citizenship” from both other members of the garment manufacturing community and their brand name buyers in the United States.⁹ Though it is difficult to assess the relative importance of these factors, the willingness of both the Cambodian government and the country’s employers to continue with the monitoring after the expiration of the MFA, and thus of the quota system, suggests that the financial incentives established by the trade agreement, while instrumental in the establishment of the system, were only part of the story in terms of its long term attractiveness. Whether monitoring and associated processes can generate the necessary incentives to drive long-term improvements in labor rights absent the direct carrot and stick effect of access to U.S. markets is open to question (Arnold & Shih, 2010), as is the extent to which improvements in the garment sector have positive flow on effects in the broader economy.

In relation to these broader issues, the ILO has attracted criticism, most notably from political scientist Caroline Hughes, who argues that the working-conditions improvement project is typical of an approach to development that “channels participation into atomizing problem solving” by divorcing “the issues of pay and conditions from wider questions regarding power relations between workers, their employers, and the state” and thus undercuts “any agenda of collective representation” of workers (Hughes, 2007). Put briefly, Hughes’ position is that the focus of the project on compliance with existing rights and its method centered around negotiations at the national and international level, was fundamentally disempowering. These factors, she argues, undermine unions’ ability to mobilize workers on more fundamental issues, from pay increases and reform of the labor law, to anticorruption and greater social justice.

In support of her argument, Hughes cites increases in the minimum wage following strikes in 1997 (to \$40) and 2000 (to \$45), the disappointing trajectory of real wages since then, and the

⁷ This ensured maximum participation in the project. Nevertheless, cases of participating enterprises outsourcing production to nonparticipating manufacturers were reported. It is estimated that such off-site manufacturing accounts for approximately 10 percent of the industry.

⁸ Joint Prakas 2588/00 (“on The Enforcement of the Labor Law in the Kingdom of Cambodia,” July 25, 2000) set up an interministerial committee to monitor the implementation of the Labor Law in the garment industry. This committee had the right to receive complaints and conduct investigations into suspected violations of the Labor Law with the result that serious offenders could have their export licenses revoked. Though this sanction was never invoked, in November 2002 the Ministry of Commerce issued a warning to 28 factories ordering them to refute within 48 hours accusations that they had been involved in antiunion activities. The warning threatened to restrict these factories’ access to export licenses if they could not provide an adequate explanation.

⁹ A survey of major brands conducted in 2004 found that labor conditions and cost were the two most important factors in determining where garments were sourced. See FIAS, “Cambodia – Corporate Social Responsibility & the Apparel Sector Buyer Survey Results.”

involvement of the opposition-aligned Free Trade Union in the political tumult of the late 1990s as indicators of the early potential of collective action among Cambodia's garment workers.

The contrary argument would point to the rapid growth of the union movement from 25-30 percent membership (circa 50,000 members) in 2001 to 40-50 percent membership (circa 150,000 members) in 2006 and the continued prominence of the Free Trade Union, which Hughes singles out as the union most disadvantaged by the new regime (World Bank; ILO, 2006, p. 25). It would also point to spikes in strike action, followed by collectively bargained wage increases in 2006 and 2008, as well as inherent limitations on wage growth based on the Cambodian industry's productivity and position in relation to its regional competitors.¹⁰

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

Case Study 2: Labor Dispute Resolution

A second example, relating to labor dispute resolution, emerges from the same context as the working-conditions improvement project. In parallel to the working conditions improvement project the ILO secured USDOL funding to run a labor dispute resolution project which provided technical assistance to the Ministry of Labor in consultation with the union movement and employers associations to establish and implement "transparent, fair and expeditious dispute procedures."¹¹ Activities were anticipated at the enterprise level with the Ministry's conciliators, through the establishment of an arbitration tribunal and a labor court.

The labor dispute-resolution project, however, was an attempt at an engagement with the question of how labor rights and equitable industrial relations could be promoted using national systems. The core problem in this respect was the lack of credible institutions for law enforcement and dispute resolution.

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

Each of these methods of dispute resolution had significant drawbacks. Systems for handling grievances at the factory level were underdeveloped and the failure to manage conflict was

¹⁰ In this regard, a 2005 study of the U.S. Agency for International Development on the competitiveness of Cambodia's garment industry noted that "The range of products currently produced emphasizes basic construction and design, with very little added value. This forces Cambodian producers to compete directly with other low-wage countries." (Nathan Associates, 2005, p. 31).

¹¹ Adler *et al.*, *The Arbitration Council and the Process for Labor Dispute Resolution in Cambodia : Law and Commentary* (2004, p. 6).

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

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

The issue of impunity lies at the centre of problems in the administration of justice and continues to be compounded by the lack of neutrality and independence in the judicial and law enforcement systems, as well as by a low level of professionalism in those bodies. Inadequate funds are allocated to the administration of justice. The judiciary is subject to executive interference and open to corruption from interested parties. Judges have concerns about their personal security (...). Law enforcement officials often fail to enforce court orders and judgements, and sometimes act in open defiance of their terms (Leuprecht, 2003, p. 9 (para. 25)).

There were a range of possible responses to these circumstances. A provision for a labor court existed in the labor law and a rights-based approach to industrial relations could thus have focused on the judiciary, with the argument that equitable institutions for the enforcement of law are the *sine qua non* of rights. However, the ILO, that it was very difficult to get classical institutions of the rule of law (those that are both independent and have the power to make binding decisions) to work in settings where government is dominated by a strong neo-patrimonial executive.¹² Observing previous attempts at legal and judicial reform in Cambodia, it was anticipated that the result of pursuing enforcement of the labor law through either the Ministry of Labor or the courts be either that reforms would: (a) stall or (b) be captured by powerful government and private sector interests. Instead, a choice was made to focus on the establishment of a new arbitration tribunal called the Arbitration Council, a body that was also provided for in the 1997 law but had never been put into operation.¹³

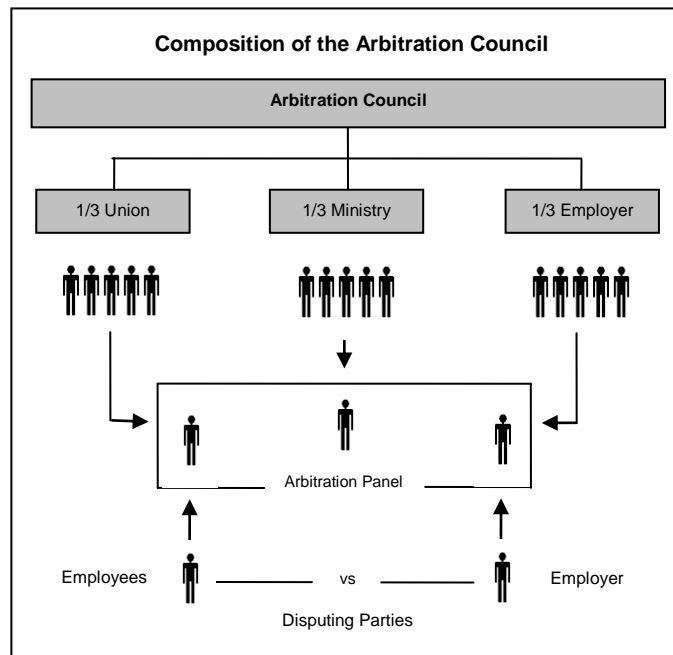
¹² C.f. Kheang, who posits that Cambodia is a “state dominated by networks of patron-clientelism [and] sustained by corruption” and that this state of affairs fundamentally “inhibits the development of an independent judicial system” (2004, p. 5).

¹³ Though there is no indication that it was ever operational, an Arbitration Council is also provided for in the 1972 Labor Law. The origins of the institution are not clear, though French (or ILO) influence is indicated, as similar provisions exist in the Labor Code of the Cameroon.

ARBITRATION COUNCIL

Tripartite Structure

The Arbitration Council is characterized by a tripartite structure. Trade unions, employers organizations and the Ministry of Labor each list and nominate one-third (i.e., 10) of the 30 arbitrators who are formally appointed by the Ministry as members of the Council. The Arbitration Council's tripartite structure is replicated at the level of each particular dispute. Each arbitration panel hearing a labor dispute case is comprised of three arbitrators: two arbitrators are selected by each of the parties from the respective lists of union- and employer-nominated arbitrators; and those two arbitrators in turn select the third arbitrator from the neutral list of Ministry-nominated arbitrators. See Figure [Composition of the Arbitration Council]. Arbitrators work on a case-by-case basis; each arbitrator has separate, full-time employment outside of the Arbitration Council.



Independence

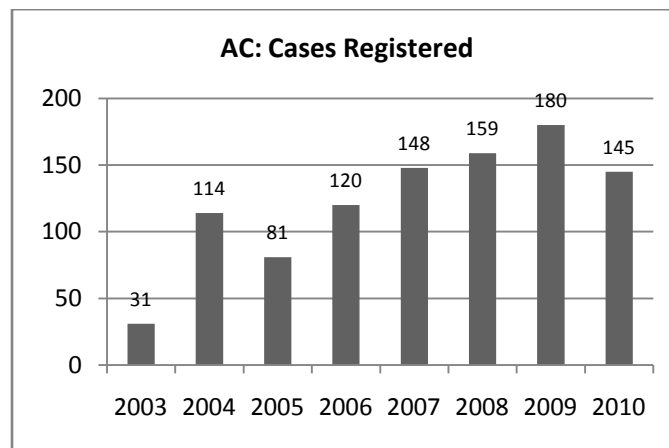
The Arbitration Council is Cambodia's national institution for labor arbitration whose role is specified by law within the larger framework of dispute resolution administered by the Ministry of Labor. However, the Council has always operated independently. During the initial period of the Council's establishment in 2003, it was determined that given the level distrust of the executive and the judiciary in the Cambodian context, a Council under the control of the Ministry would have been perceived by both unions and employers as susceptible to undue influence. More broadly, as a decision-making body of justice and equity in the resolution of labor disputes, a perception that the Council was not independent could undermine its very purpose and existence (van Noord, Hwang and Bugeja, 2011).

The Arbitration Council's tripartite structure (both at the organizational level of arbitrator membership to the Council and the discrete level of arbitration panels handling labor dispute cases) contributes to strengthening its independence against capture by any one party and provides a system of checks and balances. The Council's institutional support structure likewise helps bolster its independence: because the Arbitration Council can rely on its Secretariat and the Arbitration Council Foundation to support and administer its operations, it does not need to rely on the government.¹⁴ Although the arbitration process is free of charge for the parties under the law, to date, the Arbitration Council is not allotted a budget from the Cambodian government. Instead the Council has raised and managed its own funds for its operations, primarily from international donors, as well as international corporate buyers such as the Levis Strauss Foundation and Adidas Sourcing Ltd. Currently, the Arbitration Council receives funding from World Bank and AUSAid under the Demand for Good Governance Project in Cambodia.

ARBITRATION COUNCIL'S TRACK RECORD

Cases Registered

The Arbitration Council registered a total of 978 labor dispute cases from its establishment in May 2003 up to the end of 2010. The general trajectory shows an increasing number of cases registered, reaching a high of 180 cases in 2009. See Figure [AC: Cases Registered]. Among these cases, the Council issued a total of 658 arbitral awards. See Figure [AC: Cases Registered, Awards Issued].



Source: SAC & ACF.

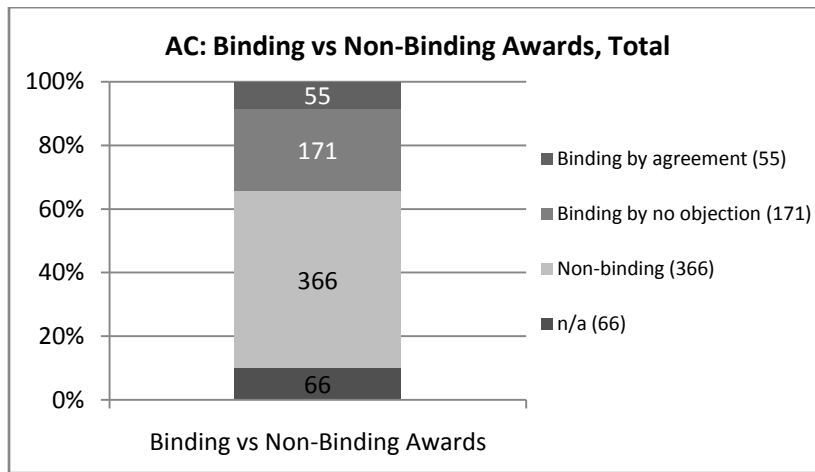
Data for 2003 compiled as of 01 May, date of Arbitration Council opening.

Among all cases registered by the Arbitration Council, approximately 92 percent arise from the garment sector with the second major sector being tourism.

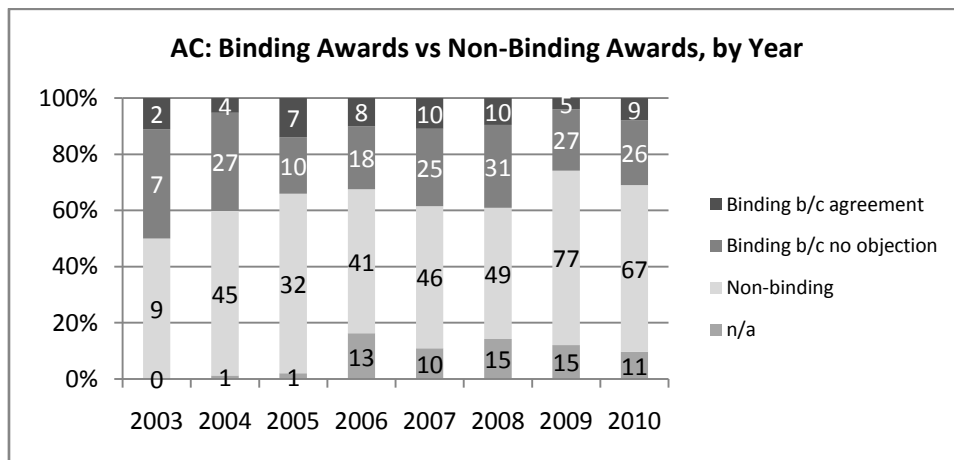
¹⁴ As noted above, the Arbitration Council is comprised of 30 arbitrators; however, it does not employ any support staff. Instead, the Council is supported by two related entities: the Secretariat of the Arbitration Council (SAC) and the Arbitration Council Foundation (ACF). The SAC is officially an arm of the Ministry of Labor and is staffed by the Ministry's civil servants but housed on the Council premises. The ACF is a Cambodian non-governmental organization which was established in 2006 to carry out necessary managerial and technical functions for the Arbitration Council (which were initially carried out by the ILO).

Binding, Non-Binding Awards

Based on the labor law, awards of the Arbitration Council can be binding or non-binding, depending on whether parties mutually agree to a binding award or whether a timely objection is filed by either party to the award. (Awards may also become binding via provisions of a CBA, if any; but, up through 2010, no award had been binding by that route.) Among 658 arbitral awards issued by the Council up to the end of 2010, 226 awards (34.3% of all awards issued) were binding either because parties reached an agreement for a binding award (55 awards, or 8.3% of all awards) or because no objection to the award was filed (171 awards, or 26% of all awards); and 366 awards (55.6% of all awards) were non-binding because parties did not agree to a binding award and an objection to the award was filed. The remaining 66 awards (10% of all awards) were recorded as neither binding nor non-binding as they were issued to close cases because industrial action did not cease or parties failed to attend the hearing. See Figures [AC Binding Awards vs. Non-Binding Awards, Total] and [AC Binding Awards vs. Non-Binding Awards, by Year].



Source: SAC & ACF.



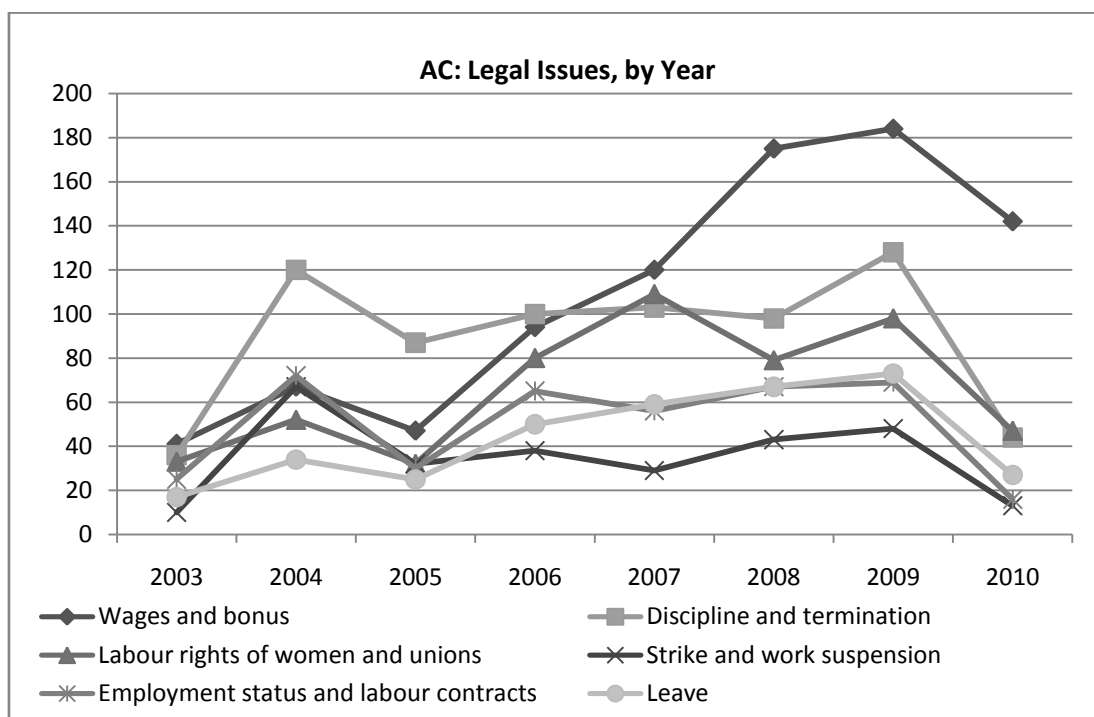
Source: SAC & ACF.

Data for 2003 compiled as of 01 May, date of Arbitration Council opening.

Given that an arbitral award generally determines a winning party and a losing party in a dispute, and the law allows either party the option of rendering an award legally unenforceable (by not agreeing to a binding award and filing an objection within eight days of the award’s issuance), it may be noteworthy that 34.3 percent of all awards up to the end of 2010 have been binding. That is, in approximately one-third of the cases in which an award was issued, parties decided by their own volition (either by reaching a written agreement or by electing not to file an objection) to be legally bound to the decision of the Arbitration Council.

Legal Issues

To a significant extent, the disputes handled by the Arbitration Council involve details of compliance with minimum standards set out in Cambodia’s Labor Law, including disputes about wages and bonuses, entitlements to leave/vacation and general working conditions. However, there are also a number of cases in which the Council has engaged with key human rights issues. These cases have arisen in cases related to anti-union discrimination (often as a basis for claims about illegal termination or discipline), equality (for example, regarding guaranteed rights for women), and freedom of association and the right to bargain collectively (for example, regarding rights for unions and issues involving strikes and suspensions). See Figure [AC: Legal Issues— Total by Categories].

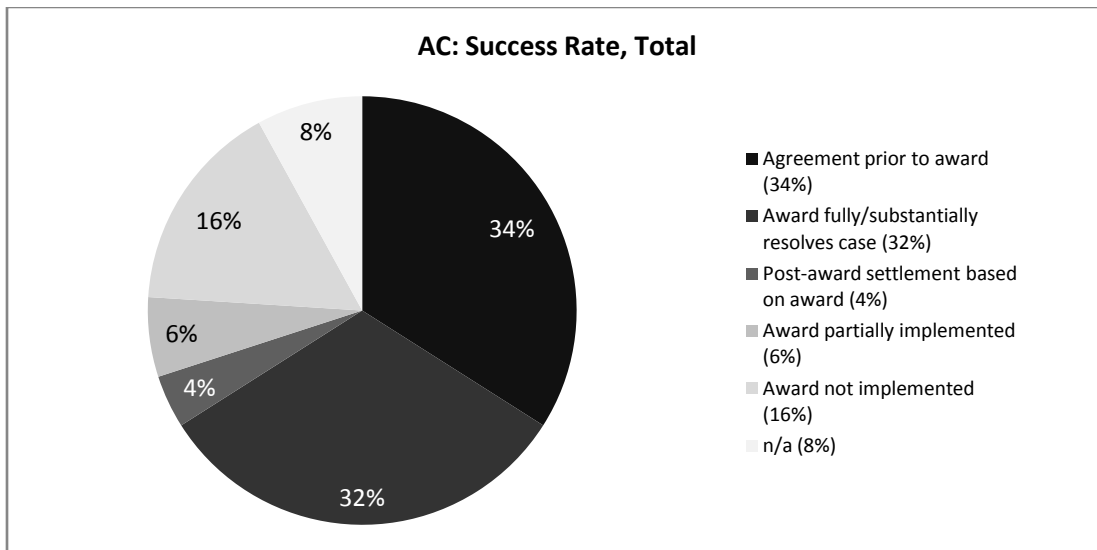


Source: SAC & ACF.

Data for 2003 compiled as of 01 May, date of Arbitration Council opening; selected categories of legal issues are representative and do not comprise all legal issues handled by Council.

Success Rate: Settlement of Labor Dispute Cases

The Arbitration Council has been remarkably effective in resolving the collective labor disputes forwarded by the Ministry of Labor. Of the 978 cases received by the Council up to the end of December 2010, nearly all were handled within the timeframe established by law (15 working days or at such extended deadline as agreed by both parties), a measure of the administrative efficiency of the Arbitration Council's operations. According to the Arbitration Council's own records, as collected by ACF, 70 percent of all cases registered by the Council through 2010 were reported as successfully resolved. The Council considers a successful outcome to be one where it has either: (i) facilitated an agreement between the parties to settle their dispute (34% of all cases); (ii) issued an award which (even if a party filed an objection) has been fully or substantially implemented to resolve the dispute (32% of all cases); or (iii) issued an award which (although a party filed an objection) has formed the basis for a post-award settlement between the parties which has resolved their dispute (4% of all cases).¹ See Figure [AC: Success Rate, Total].



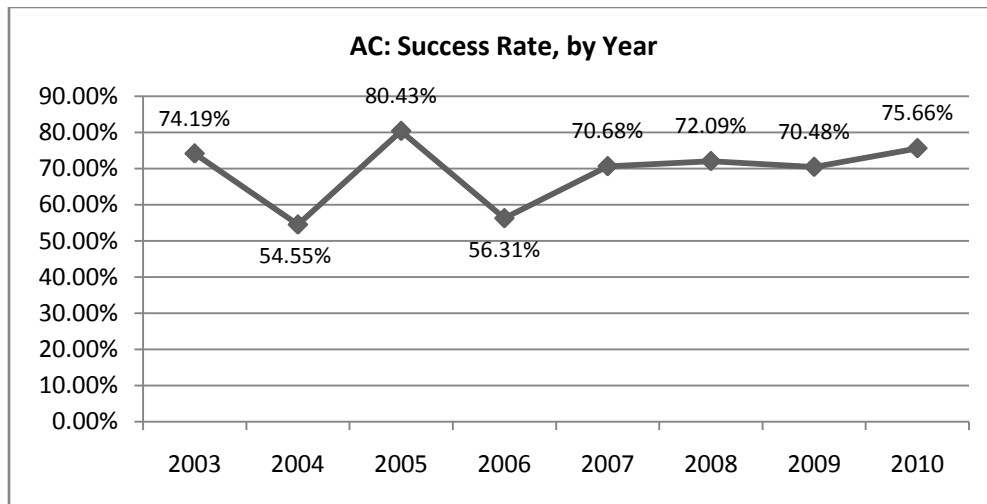
Source: SAC & ACF.

The 70 percent overall success rate is an extraordinary record. In an independent evaluation carried out by Deuster, MacDonald and Zimmerman (2009) for review by USAID of labor and industrial activities and projects in Cambodia, authors analyzed the underlying data for the Arbitration Council's success rate through 2007 and concluded as follows:

For a new organization carrying out an unprecedented function in Cambodia to have seldom missed a deadline in carrying out its principal task is a testament to the effectiveness of its structure, administrative capacity and the dedicated work of the arbitrators, all of whom undertake this work while holding other jobs. Reaching what amounts to a conciliated agreement in 38% of cases where conciliation had already been

attempted by the [Ministry of Labor] speaks of the high regard in which the arbitrators and their skills are held by the parties involved in these cases. The fact that only 20% of all awards were rejected by the parties outright, and some 5% were only partially implemented in an environment where the arbitration process is not binding and in what remains a rather chaotic industrial relations environment, again indicates the high regard in which all parties hold the [Arbitration Council] process.

In fact, as demonstrated by the figures updated through 2010, the Arbitration Council has managed to improve upon its overall success rate since that evaluation for USAID was carried out. After fluctuating during the first two-and-a-half years after the Arbitration Council's establishment in May 2003, the Council's success rate as recorded on a year-by-year basis has steadily increased from approximately 56 percent in 2006 to nearly 76 percent in 2010. See Figure [AC: Success Rate by Year]. Thus, during that period, even as it was handling an increasing number of cases each year, the Council was also able to maintain or improve its national settlement rate of assisting employers and workers in putting their disputes to rest.



Source: SAC & ACF.

Data for 2003 compiled as of 01 May, date of Arbitration Council opening.

Other Indicators of Effectiveness

The Arbitration Council's rate of success in settling labor dispute cases is an important gauge of its effectiveness; but there are other meaningful indicators as well. In the Cambodian context, where corruption is perceived to be endemic among the government and courts, and good governance and mature labor relations are still a struggle, the public's regard for the Arbitration Council matters. That the Arbitration Council has managed to gain the trust and respect of the community speaks to its integrity and ability to effectively resolve labor disputes while upholding principles of fairness and justice.

In 2010, the Arbitration Council, through ACF, commissioned a survey by the Economic Institute of Cambodia (EIC) to understand the public’s perception of the Council and evaluate the effectiveness of its labor dispute resolution services offered and delivered to workers and employers. Data was collected from a sample of representatives from local worker unions, union federations and employer, and disaggregated among the Council’s ‘clients’ (i.e., those with previous direct experience in having labor disputes resolved at the Council) and as ‘non-clients’ (i.e., those who might have heard of the Council, but had no direct experience with the Council).

According to the EIC (2010a) survey:

The survey reviewed levels of confidence in the independence, credibility and effectiveness of the Arbitration Council. In the aggregate, 71 percent of respondents expressed a high or very high level of confidence. On a five point scoring system (1 = very low confidence; 5 = very high confidence), the mean score was 3.90 and the median score was 4.00. Under strict categorization of confidence levels, stakeholder clients and non-clients of the Council would be specified as having “high” confidence levels in the independence, credibility and effectiveness of the Arbitration Council.

Level of Confidence in Independence, Credibility and Effectiveness of the AC, by Client Type										
Score	Level of Confidence	Client			Non-client			TOTAL		
		%	Mean	Median	%	Mean	Median	%	Mean	Median
1	Very low	2%	3.94	4.00	1%	3.86	3.94	1%	3.90	4.00
2	Low	3%			2%			2%		
3	Fair	15%			34%			25%		
4	High	49%			42%			45%		
5	Very high	32%			21%			26%		
	TOTAL	100%			100%			100%		

Source: EIC (2010a).

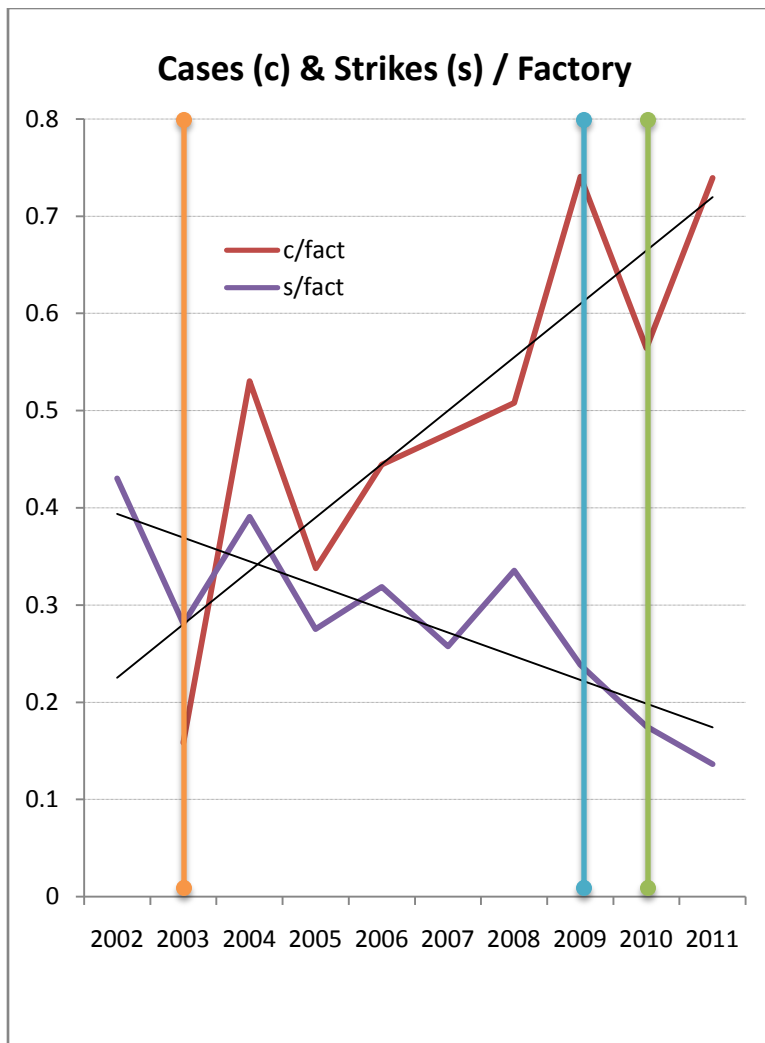
Further, to ensure the responsiveness of its service the AC monitors its case disposal rate, and conducts a regular independent audit of the technical quality of its awards.

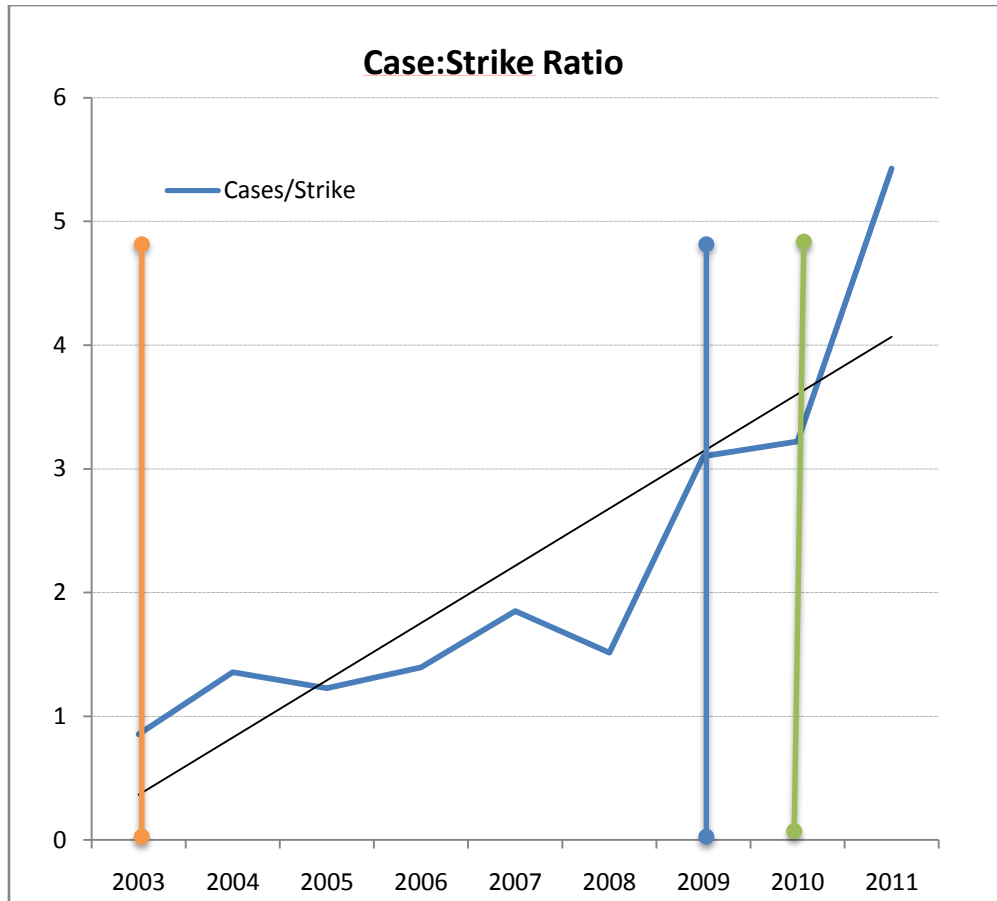
Increasing trust and the gradual institutionalization of industrial relations

Increasing stakeholder trust in the Arbitration Council is reflected in a number of trends that have broader impact on industrial relations in Cambodia more broadly.

Firstly in September 2010, unions and employers reached a landmark agreement on improving industrial relations in the garment industry. Following this MoU the Garment Manufacturers

Association in Cambodia (GMAC) and six of the largest union confederations and federations agreed to use the Arbitration Council's binding arbitration procedures for disputes over rights, allegations of violations of the law (or Prakas) or existing collective bargaining agreements (CBA). In return for giving up the right to object to arbitral awards unions agreed not to strike in relation to issues that could be decided by arbitration. The result has been a marked upsurge in the rate of binding arbitral awards issued by the Council and a decreasing in the rate at which parties are filing objections to awards. At the same time strikes per factor have fallen to their lowest level in 10 years, while cases per factory are increasing. Thus a trend can be seen towards workers and employers deciding to have recourse to law in the resolution of labor disputes, rather than resorting to industrial action as a primary option.





Conclusions

- *Labor standards and enforcement as part of Cambodia's comparative advantage and thus integral to the good jobs story—not just from a compliance or floor point of view.*
- *The Cambodia garment case gives us an interesting lens on the question of how labor rights can be realized (interim institutions—incremental realization of the rule of law—contestation and politics as key drivers of change).*
- *Highlight the importance of international structures and incentives in the story: trade agreements; brands; international consumers—as well as organized local actors—unions / employers—and donors.*
- *Virtuous cycle produced by incentivizing job creation while at the same time investing in institutions of social dialogue, regulation and dispute resolution.*
- *But how durable is this as the international structures of the early 2000s that underwrote its inception phase change—and to what extent will there be spill over to the broader economy—or is it a two track story?*

Annex A. Case studies

Case Study: The Hotel Cases

Cases 11/03-Cambodiana Hotel, 22/04-Raffles Hotel le Royal and 28/04-Raffles Grand Hotel D'Angkor were three cases in a series of labor disputes involving hotels in Cambodia that arose before the Arbitration Council in 2003 and 2004, its first year-and-a-half of operations. The cases required the arbitrators to deal with complex legal issues related to freedom of association, the right to organize and to strike, allegations of union discrimination and conflicts about the entitlement to and proper calculation of hotel 'service charges', potentially worth millions of dollars. These 'Hotel Cases' focused a spotlight of national and international media attention on the disputes in the hotel sector and the Arbitration Council's work in Cambodia. The newly formed hospitality sector union used that spotlight to their own advantage, rallying international support and eventually reaching agreement with hotel management to resolve their disputes.

The underlying issue in the Hotel Cases was whether or not the hotels had met their obligation of distributing the full 'service charge' to employees as required under the Labor Law. The Arbitration Council determined that the hotels had generally failed to meet their legal obligations in this regard. In the first of the Hotel Cases, 11/03-Cambodiana Hotel, both sides had agreed to a binding award and hotel management initially complied by making payments to its employees, though these were later stopped. In the remaining Hotel Cases, breakdown in negotiations over the service charge issue led to prolonged strikes in hotels across Cambodia.

In 22/04-Raffles Hotel le Royal and 28/04-Raffles Grand Hotel D'Angkor, management decided to dismiss striking workers en masse (97 workers in Phnom Penh and 220 workers in Siem Reap) who were making demands related to the service charge issue. In response, unions brought cases for reinstatement to the Arbitration Council. The Council found that Raffles management for the two hotels had engaged in illegal terminations and ordered the reinstatement of certain workers. The Council also found that while the dispute was taking place, the employer in both cases had organized an illegal election for new worker delegates and concluded a new collective bargaining agreement. This had taken place without the required participation of the union leadership, whose dismissal was the subject of the cases at hand. The Council ordered the suspension of the new collective agreement and wrote, "the employer party has shown a flagrant disregard for the right to freedom of association and the right to bargain collectively, as provided for by the Constitution and laws of the Kingdom of Cambodia, not to mention ILO Conventions on Freedom of Association and Protection of the Right to Organize (C87) and the Right to Organize and Collective Bargaining (C98) which Cambodia has ratified."

In both cases, the employer party exercised the right to object to the arbitral award thereby rendering the award non-binding. But neither in those cases nor in any of the other Hotel Cases was that the end of the story. The union parties took the arbitral awards as proof they were right in their position (on the service charge issue, terminations and other issues) and made explicit references to the awards of the Arbitration Council in sustained campaigns to boycott the hotels. With support from an international network of union organizations and attention from national and international media, unions were eventually able to elicit concessions from the hoteliers, including an agreement to reinstate dismissed workers.

Case Study: The Persistent Issue of Fixed Duration Contracts

Case 10/03-Jacqsintex raised a legal question that had long been debated in employment circles about what the Labor Law allowed (and disallowed) as to the length and renewability of labor contracts. At stake from the employer's side was the right to determine the duration of labor contracts it would offer to its own employees; from the union's side, at stake was their ability to organize union activities without the threat of members being terminated by non-renewal of their labor contracts. From the Ministry's perspective, the Arbitration Council did not need to interpret the law on an issue the Ministry had already settled via a letter of the Director of its Department of Labor Inspection.

The Jacqsintex-case presented a legal issue of whether or not the Labor Law placed any limits on the renewal of a 'fixed duration contract' (FDC, a labor contract with a specified ending date; as compared to a labor contract with no specified ending date, an 'undetermined duration contract' or UDC) between the employer and employee. The employer-party in the case employed garment workers on 6-month FDCs and argued the Law allowed an unlimited number of renewals. As a consequence, the employer could also choose to *not* renew a contract at any time and allow the contract to expire under its own (6-month) terms, without the need to provide prior notice to the worker. After a number of hearings between the parties, the Council issued its decision: the Labor Law placed a limit on the renewal of FDCs; FDCs converted to UDCs if a renewal caused the total duration of employment to exceed two years. In reaching its decision, the Council identified the relevant provisions of the Labor Law and undertook an exercise in legal analysis and statutory interpretation. The Council also validated its analysis against international labor standards (in accordance with published ILO Recommendations) and the preceding French language draft of the Cambodian Labor Law.

The Arbitration Council's decision, which aligned with the position of the union party, raised serious concerns from employers and the Ministry of Labor. Employers argued the Council had failed to properly interpret the law, raised allegations against arbitrators of conflicts of interests and bias towards the unions, and issued a press release stating their disapproval of the ruling. Ministry officials, some of whom were already unhappy with the Council's autonomy, expressed the view that the Council had infringed on the Ministry's authority by issuing an award that was not in accordance with the Ministry's own interpretation of the law.

For the Arbitration Council, which was only in its third month of operations, the controversy raised fundamental questions about the power and jurisdiction of the Arbitration Council *vis a vis* the Ministry in interpreting the same provisions of the Law, and raised political risks with the employers and employer associations whose support and ongoing participation in the arbitration process was necessary for the Council's continued functioning. But the Council stood by its decision—and stood by its authority and mandate derived from the Labor Law to independently interpret the law in fulfilling its arbitral duties.

The controversy regarding this issue has not since subsided and the case continues to resound in Cambodia. In early 2009, amidst reports that the deepening global economic crisis was seriously impacting Cambodia's garment and tourism sectors, news began to circulate that the Ministry of Labor was preparing an amendment to the Labor Law. The amendment was to address certain articles of the Law concerning the terms of labor contracts. In fact, they were the very same articles the Arbitration Council had interpreted in its July 2003 award for the 10/03-Jacqsintex case.

The central proposition of the draft amendment was to allow for an unlimited number of renewals for fixed duration contracts, which the Arbitration Council, in its 2003 award, had determined to be prohibited by the existing Labor Law. In effect, the amendment would put aside the long-standing jurisprudence of the Arbitration Council on this issue. Unions and their allies in Cambodia mobilized against the draft amendment which, from their perspective, would imperil their job security and trade union freedoms, and threatened a nation-wide strike. They also enlisted the support of international union organizations which issued statements in late February and early March urging the government to reconsider the proposed changes to the Labor Law. And, on 3 March 2009, a consortium of major corporate purchasers of Cambodia's garments—including Gap, H&M, Levi Strauss and Wal-Mart—sent a letter to senior government officials expressing their concern over the draft amendment. The firms stated that the government's support of labor standards was a key criterion for the companies' sourcing decisions.

On 6 March 2009, the government announced that a decision had been made during a meeting of Ministry officials, union leaders and representatives from employers' associations: the amendment would be delayed.

To date, the status quo on the issue remains. The employers have staked out a position which accords with the Ministry of Labor on this topic; the unions have staked out an opposing position which accords with the published interpretation of the Arbitration Council; and neither the employers nor the unions have backed down or found a compromise. The amendment has still not gone forward.

NOTES

ⁱ In contrast, the Arbitration Council considers a negative outcome to be one where the arbitral award has either not been implemented (16%) or only partially implemented (6%). Implementation is considered to be partial where the arbitral award comprises decisions on multiple issues, and a party has implemented less than half of the decisions. The category, 'not applicable' (8%), includes cases where the Council rejected a claim on jurisdictional grounds (e.g., the claim was improperly brought before the Council; or the complainant lacked standing to bring the claim), procedural grounds (e.g., the complainant failed to take part in the proceedings), or where follow-up was not possible (parties could not be contacted due to company closure or other reasons).