
Better Work: Problems with Exporting the Better Factories Cambodia Project to Jordan, Lesotho, and Vietnam

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Over the last decade, the International Labor Organization (ILO) has managed a dynamic project in Cambodia which has resulted in drastically improved working conditions in Cambodian textile and apparel factories. The success of the Better Factories Cambodia project has led the ILO to expand the project beyond Cambodia to other jurisdictions. The new Better Work Project will develop micro-level projects in Jordan, Lesotho, and Vietnam to improve the respect for workers' rights in those jurisdictions. This article analyses what enabled the Better Factories Cambodia Project to be so successful and analyse the barriers in operationalizing the Better Work Projects in Jordan, Lesotho, and Vietnam.

During the 1990s, the production of retail goods increasingly moved from wealthy, developed countries to less-developed countries where production costs were cheaper. Reports began to emerge that the working conditions in some less-developed countries resembled sweatshops and the competitive advantage gained by the outsourcing of products often came at the expense of the human rights of workers.¹ As globalization removed the barriers restricting trade across borders, corporations took advantage of the opportunities to outsource work to intermediary agents and factories across the globe. Substantial regulatory challenges have been created by the increase in these global supply chains, which often contain a large number of separate corporate entities situated in literally dozens of different nations. Both developed and developing countries proposed a range of regulatory interventions to improve labor rights while maintaining trade. Less-developed countries have struggled to find strategies to maintain their economic growth while protecting labor rights. Cambodia is one less-developed country that has worked with the International Labor Organization (ILO) successfully to increase the recognition of labor rights without economic harm.

The regulatory interventions in Cambodia, which resulted in increased labor rights without damaging trade, were made possible by the micro

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and macro involvement of the ILO in developing and implementing the Better Factories Cambodia Project. The effectiveness of the Better Factories Cambodia Project has resulted in the ILO expanding this project into the independent Better Work Projects in the countries of Jordan, Lesotho, and Vietnam.

This article argues that the Better Factories Cambodia Project model can be successfully transplanted to Jordan, Lesotho, and Vietnam only if the Better Work Projects carefully manages the challenges associated with the transplantation. This article analyses the barriers which the Better Work Projects will confront in transplanting the Better Factories Cambodia Project model and recommends how these challenges can be managed. To analyse the barriers associated with the transplantation of the Better Factories Cambodia Project model, this article uses a doctrinal comparative law approach. This approach is used to analyse the similarities and differences between the jurisdictions and the range of incentives available to the Better Work Projects to encourage participating countries and their factories to respect labor conditions.

THE BETTER FACTORIES CAMBODIA PROJECT

The ILO is the paramount international institution charged with ensuring that countries maintain a regulatory framework that facilitates the protection of labor rights.² The ILO was founded in 1919 by the Treaty of Versailles and became the first specialized agency of the United Nations in 1946. The ILO's roles include conducting discussions with governments, employer groups and employee groups, drafting treaties, and handling their ratification. The ILO has drafted numerous conventions which aim to protect labor rights. Due to the support from the United Nations and ILO member countries, the ILO arguably has considerable credibility in setting labor standards and vehicles for their enforcement.

Historically, the ILO has encouraged compliance with labor standards prescribed in conventions through moral persuasion, publicity, shame, diplomacy, dialogue, and technical assistance.³ While the ILO has traditionally been involved at a macro level by encouraging nations to establish a regulatory framework in which labor rights can be respected, more recently, the ILO has become increasingly directly involved with ensuring that labor standards are respected in international supply chains by becoming involved at the micro level.⁴ One of the ILO's most successful projects has been the Better Factories Cambodia Project.

Cambodia is a country in Southeast Asia with approximately 13.3 million people.⁵ This less- developed country has suffered some major blows in the recent past. During the rule of the Khmer Rouge Regime from 1975 to 1979, over two million people were victims of genocide. The Khmer Rouge lost power when Vietnam invaded in the Cambodian–Vietnamese War which resulted in Vietnamese occupation from 1975 to 1989. Cambodia then benefited from international intervention during

the United Nations' Transitional Authority in Cambodia from 1992 to 1993. To date, the United Nations and other international bodies are heavily involved in supporting Cambodia through removing landmines, funding education, and supporting democracy.⁶ This article focuses on the international support Cambodia has received to promote a vibrant export textiles and apparel industry that respects labor rights. The ILO is driving the labor rights intervention in Cambodia through the Better Factories Cambodia Project.

The Better Factories Cambodia Project became possible initially due to a free trade agreement between the United States and Cambodia called the United States–Cambodia Bilateral Textile Trade Agreement of 1999. This agreement sought to promote Cambodia's fledgling export market, which was responsible for approximately 75 percent of all Cambodia's exports.⁷ When the United States was negotiating the free trade agreement, the United States desired to ensure that their market was not flooded by sweatshop products. Despite the passage of the 1997 Cambodian Labor Code, labor abuse was relatively common in Cambodia's approximately 200 factories in 1999.⁸ To reduce the instance of sweatshop products being sold in the United States, the United States–Cambodia Bilateral Textile Trade Agreement linked labor rights with increased trade opportunities through a social clause.

A social clause links countries' treatment of social issues, such as human rights or labor rights, with continuing trade.⁹ These social clauses can either rely upon countries' stated intentions to enforce labor rights or can have provisions to motivate compliance. Provisions that enforce compliance can either rely upon enforcement provisions or encourage compliance through linking trade incentives to respecting labor rights. The United States–Cambodia Bilateral Textile Trade Agreement incorporated a social clause with trade incentives in a dynamic approach.

To monitor the labor rights in the FTA, the Cambodian parties invited the ILO to become involved at the micro and macro level in Cambodia. After consulting with the country's parties, factories, and trade unions, the ILO agreed to monitor labor conditions in Cambodian factories producing textile and apparel products for export to the United States.¹⁰ The way in which the United States–Cambodia Bilateral Textile Trade Agreement linked labor rights at the factory level, auditing by the ILO, and the use of trade incentives, had not been attempted prior to this agreement.¹¹

To monitor labor conditions, the ILO developed a project called the ILO Garment Sector Working Conditions Improvement Project. Subsequently, in 2001, this project changed its name to the Better Factories Cambodia Project, which is the name used in this article. Better Factories Cambodia provided assistance to Cambodia by providing guidance and support in improving domestic labor laws, providing advice to factories, and generally improving Cambodia's capacity to improve labor conditions. Arguably, the aspect of the project which had the greatest impact on improving labor conditions in Cambodia was the rigorous factory audits.

Factory audits remain a major part of the Better Factories Project. To generate these factory audits, the Better Factories Project's teams inspect factories three months after factories sign up with the project. After providing a report to the factory, six months later, Better Factories' inspectors re-audit the factory and make both reports publicly available in quarterly synthesis reports.¹² After this initial period, factories are inspected approximately every nine months and the results are uploaded onto the project's Information Management System's Web site. The factory can then use its password to view its factory audit or give its password to third parties who can also view factories' audits directly from the Better Factories Cambodia Project's Web site.

The Better Factories Cambodia Project summarizes the factory audit data from the Information Management System and creates overall synthesis reports. These synthesis reports provide reasonably accurate data on what is occurring in Cambodia's factories. These synthesis reports were previously used by the United States to determine whether or not Cambodia was entitled to benefit from increased trade access through the trade incentive. The ILO was engaging here in a major micro-level project. The ILO was not assessing the extent to which Cambodia enforced its laws; the ILO was assessing whether Cambodian factories respected labor rights. Even though the conduct of the Cambodian government was not being assessed, clearly the Cambodian government had a vested interest in ensuring Cambodian factories passed the ILO's audits.

The existence of the trade incentive was arguably a significant motive for the Cambodian government to adopt substantial regulatory interventions to ensure Cambodian factories' labor conditions met international standards, which would pass the ILO's inspections. In 1996, Cambodia enacted the 1997 Cambodian Labor Code. This enactment had a number of worker protections. The largest problem in Cambodia was not the existence of labor laws but the failure to enforce those laws. Kolbe analysed the literature on the situation in Cambodia and concluded that prior to the United States–Cambodia Bilateral Textile Trade Agreement there were “pervasive violations of health and safety standards embodied in the Cambodian Labor Code, including inadequate toilet facilities, inadequate medical care and poor ventilation in factories.”¹³ This created a substantial barrier to Cambodia receiving the benefits from the trade incentives.

To improve domestic labor standards, Cambodia utilized the assistance of the ILO. The United States–Cambodia Bilateral Textile Trade Agreement did not require all factories to participate in the Better Factories Project. The voluntary nature of the Better Factories Project created concerns in Cambodia that some factories would become free riders.¹⁴ The concern was that free-riding factories would gain the benefits of the national positive trade incentives without improving their factories' labor conditions. This would provide free-riding factories with a significant economic advantage over factories that respected labor rights.

As factories that abused labor rights would reduce their labor costs, this would likely result in factories that respected labor rights losing trade to free-riders. This would create pressure upon factories that respected their workers' labor rights to reduce their labor costs by lowering working conditions.¹⁵ In addition to internal pressure upon factories to cut labor standards, the Cambodian government was also concerned that the existence of free-riders threatened the increased market access that Cambodian exports enjoyed under the United States–Cambodia Bilateral Textile Trade Agreement.

To reduce the problem of free-riders and to increase the involvement of the ILO in improving labor standards, the Cambodian government implemented Ministerial Regulation 108 of 2001 which only permitted factories that were participating in the Better Factories Project to gain the benefits from the positive trade incentives flowing from the United States–Cambodia Bilateral Textile Trade Agreement. The Cambodian government achieved this through only giving export licenses to factories that participated in the Better Factories Cambodia Project.¹⁶ This approach was not perfect. As the Better Factories Cambodia Project did not have any enforcement powers and the issue of trade incentives was implemented nationally, individual factories that rated poorly on the audit may not necessarily have lost trade benefits if most other factories in Cambodia passed the audit.

The positive incentive under the Better Factories Project was possible due to the operation of the Multi-Fibre Agreement. This agreement permitted countries that imported products to place quotas on textile imports when surges in imports of particular products threatened domestic industries. This enabled the United States to provide Cambodia additional market access in the United States–Cambodia Bilateral Textile Trade Agreement. The Agreement on Textiles and Clothing resulted in these quotas being removed in 2005. On its face, the removal of the trade incentive reduced the motivation for Cambodia to ensure labor rights were respected. This article now analyses the research that demonstrates that labor conditions continued to improve while the trade incentive was operational under the United States–Cambodia Bilateral Textile Trade Agreement and also when this trade incentive was removed.

The regulatory framework in Cambodia has not significantly altered since the quotas were removed. After the trade incentives ceased to operate, the Cambodian government has continued the policy of requiring all factories that are exporting manufactured textiles and apparel to participate in the Better Factories Cambodia Project. Due to this policy, the research indicates that the respect for labor rights has not diminished when the trade incentive was no longer operational. Pulaski has reviewed the results from the first eight synthesis reports and has concluded that labor conditions in Cambodia have improved due to the ILO's involvement.¹⁷ She noted that 61 percent of factories have implemented about half the suggestions flowing from the audits. When the suggestions concerned wage-related matters, Pulaski notes that the

synthesis reports indicate 95 percent of factories complied with the audit suggestions, but only 41 percent complied with suggestions concerning hours of work and overtime. Wells performed an analysis of published research on the status of labor conditions in Cambodia.¹⁸ He observed that companies such as Nike and Disney, which had left Cambodia prior to 1999, have returned due to the reliable factory audits and the improvements in labor conditions. Wells has concluded:

Based on evidence provided in these reports from 2001 to 2005, it appears that while there is a considerable distance to go in achieving full compliance with international and Cambodian labor standards . . . [The United States–Cambodia Bilateral Textile Trade Agreement] with its ILO plant monitoring led to significant improvement in many important labor standards.¹⁹

Based upon the ILO-produced synthesis reports and the literature, it appears the Better Work Cambodia Project has had a significant, positive influence on workers' rights in Cambodia.

Why has the Better Factories Cambodia Project been so successful, even without a trade incentive motivating compliance? Perhaps one reason that Cambodian labor conditions continue to be respected after the trade incentives ended is the culture that was created during the period of time when the trade incentive was operational. Cambodia gained a reputation for respecting labor rights and could use this as a competitive advantage over other jurisdictions. While other jurisdictions could have private corporate social responsibility supply chain auditors, Cambodian factories could rely upon ILO audits.²⁰

In addition, the Cambodian government has continued the program of reforming Cambodian labor laws, which started when the trade incentive was operational. The ILO, the United States, and Cambodia have worked together to identify regulatory improvements. One major improvement was the development of the Arbitration Council to hear disputes.²¹ The Arbitration Council has become extremely effective in hearing disputes and has the confidence of factories and unions to resolve disputes justly.²² In this industrial climate, workers became increasingly collectivized and empowered.²³ Once workers became collectivized, they were in a stronger position to resist unilateral actions by factory management through domestic and international campaigns.

While the increased respect for workers' rights is extremely positive, the recognition of workers' rights arguably increases labor costs. The increased cost of production may make some countries and factories reluctant to participate fully in similar schemes. It is therefore important to determine whether the improvement in labor rights has resulted in any economic harm. Considering the size of the export textiles and apparel industry in Cambodia and the growth enjoyed by this sector, it is arguable that the Better Factories Cambodia Project has provided a positive boost to Cambodia's economy. It is possible to track how

Cambodia's economy has continued to grow during the operation of the Better Factories Cambodia Project. Eighty percent of Cambodia's exports are connected with exports in the textile and apparel industries and Cambodia has become the first developing country to achieve \$1 billion USD in annual exports.²⁴ Part of this economic growth can be attributed to the United States–Cambodia Bilateral Textile Trade Agreement. During the first six years of this agreement Cambodia's textile and apparel exports quintupled to \$1.9 billion USD and employment levels almost tripled. Rather than resulting in economic damage, the Better Factories Cambodia Project can be associated with substantial economic improvements in Cambodia.²⁵

BETTER FACTORIES CAMBODIA BECOMES BETTER WORK

The success of the Better Factories Cambodia Project has motivated the ILO to use this project as a launching platform to expand the Better Factories Program by transplanting this model into other nations. In 2009, the ILO Better Factories Project became the Independent Better Factories Project and the Better Work Project was created.²⁶ The Better Work Project is currently developing projects with Jordan, Vietnam, and Lesotho.²⁷ This article now analyses the challenges the Better Work Projects will confront in transplanting the Better Factory Cambodia Project model into Jordan, Vietnam, and Lesotho.

The Development of the Better Work Projects

When transplanting a legal project from one jurisdiction to another, it is crucial to consider the historical, social, economic, political, cultural, and psychological context which has impacted on the operation of the existing laws.²⁸ The fact that a law has successfully achieved its purposes in one jurisdiction does not mean that same regulatory model will achieve the same outcome in another jurisdiction. Montesquieu famously declared in 1748 that “political and civil laws of each nation . . . should be adapted in such a manner to the people for whom they are framed that it should be a great chance if those of one nation suit another.”²⁹ Lord Denning has remarked on the problems of transplanting laws where his Honour observed that: “Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed but it needs careful tending.”³⁰

Perhaps the least challenging legal transplant confronting the ILO is the Better Work Vietnam Project. Cambodia and Vietnam have comparatively similar Southeast Asian cultures and share a common border. In contrast, Jordan's culture is based around Arab and Islamic influences and is situated in the Middle East, and Lesotho has a tribal African culture and is surrounded on all sides by South Africa. Economically, all of

these countries have substantial textile and apparel sectors. For example, Jordan's export textile and apparel sector made up approximately 30 percent of this country's total exports in 2005 and the sector employs over 54,000 workers (two thirds of whom are guest workers).³¹ Similarly to Jordan, both Vietnam and Lesotho have significant export textile and apparel industries. While all three countries have textile and apparel exports, the economies of these jurisdictions are substantially different. Lesotho is a small country with a gross domestic product (GDP) of approximately \$3.8 billion USD while Cambodia's GDP is approximately \$30.6 billion USD, Vietnam's GDP is approximately \$85 billion USD, and Jordan's GDP is approximately \$26.8 billion USD and supported by large oil exports.

Regardless of the similarities between jurisdictions, a law will have the greatest probability of being successfully transplanted if key stakeholders in the transplanted country are consulted and the transplanted law is modified where appropriate. When implementing the Better Work Projects in Jordan, Lesotho, and Vietnam, the Better Work Projects have worked with local stakeholders and have adopted the operation of the Better Work Project to reflect local conditions.

The least-developed Better Work Project is the Better Work Lesotho Project. This project started with an action plan in May 2006 at the conference, *Destination Lesotho: On the Road to Responsible Competitiveness*.³² While Better Work Lesotho has not released reports thus far, it can be noted that Lesotho has ratified the core ILO Conventions and has enacted domestic industrial relations laws, which on a brief inspection appear to provide adequate labor protections on paper. The Labor Code Order 1992 (Lesotho) provides for protection of wages in parts IV and VII, contracts, severance pay, and dismissal protection in part V, safety at work in part VIII, and contains some anti-discrimination provisions in part IX. In 2006, this law was amended by the Labor Code (Amendment) Act 2006 (Lesotho) which provided protection for people with HIV from discrimination and made some other administrative changes.

The Better Work Projects in Jordan and Vietnam are far more advanced than the project in Lesotho. The Better Work Jordan Project has a range of interventions to improve the competitiveness and labor conditions in its textile and apparel sector. Better Work Jordan is preparing to commence independent enterprise assessments to ascertain the level of compliance with ILO standards and Jordanian laws.³³ Following this step, the Better Work Jordan Project intends to engage in "training and remediation" to improve the respect for labor rights. Finally, this project will work towards shared solutions with government, employers, unions, and international buyers to improve labor conditions.

The Vietnam Better Work Project is the only Better Work Project that is fully operational, with the Better Work Vietnam Project commencing on July 30, 2009.³⁴ One of the motivations behind factories signing on to Better Factories Vietnam is the anticipated reduction in private factory corporate social responsibility inspections.³⁵ Currently, some

factories are audited several times a year by representatives in different supply chains. The Better Factories Vietnam Project aims to replace the repeated inspections by different supply chain representatives with one reliable yearly inspection. It is intended that the Better Work Vietnam Project inspection will have sufficient creditability so that foreign supply chain representatives will be satisfied with relying on the Better Work Vietnam Project inspection, rather than performing their own private audits. Ms. Tara Rangarajan, Program Manager of Better Work Vietnam, explained:

The goal is to find practical solutions that will decrease costs for project participants, enhance factory competitiveness in international markets, and reduce poverty among Vietnamese apparel workers, their families, and communities. ... The focus of Better Work Vietnam is to make “practical improvements through a focus on workplace cooperation, combining independent assessments of labor standards with advice and training.”³⁶

Importantly, all the Better Work Projects have been modified and developed with local support. In Jordan, the Jordanian government has worked with the ILO and the International Finance Corporation to develop the Better Work Jordan Project.³⁷ In Lesotho, the Project is being developed following buyers consultations and contributions with key stakeholders including buyers, non-governmental organizations (NGOs), trade unions, and government officials.³⁸ The Better Work Vietnam Project was developed with local stakeholders and the pilot Project steering committee includes Molise (which is the Ministry of the Government of Vietnam, which carries out the country’s administration of labor), VCCI (which is a national organization which represents Vietnam’s business community) and VGCL (which is a socio-political organization representing workers).³⁹ The fact that Better Work Projects are working with local stakeholders and are prepared to modify the model increases the probability that these Projects will be successful. This article now turns to analysing two major barriers which will arise in successfully implementing the Better Work Projects:

- The absence of a trade agreement with trade incentives; and
- Ensuring the accuracy of Better Work Project factory audits and their economic and legal consequences.

Absence of a Trade Agreement with Trade Incentives

The most substantial difference between the establishment of the Better Work Project in Cambodia and the Projects in Jordan and Vietnam are the absence of international trade agreements with trade incentives. The positive incentive program associated with the Better Factories Cambodia Project motivated the Cambodian government to make substantial reforms

to its domestic laws and to make significant efforts to enforce labor laws. The immediacy of trade incentives acted as a motivation for Cambodia and Cambodian factories to improve their respect for labor rights. Once the program was established and the trade incentives removed, the respect for labor rights continued. Without the support of trade incentives, the Better Work Projects will need to find a different motive to ensure sufficient public and private support to enable the Projects in Jordan, Lesotho, and Vietnam to be implemented successfully.

While it is difficult to speculate whether Jordan, Lesotho, and Vietnam will make similar efforts to Cambodia's in implementing their Projects, it can be noted that it is crucial that Better Work encourages these jurisdictions to review the operation of their domestic labor laws to ensure they comply with international standards. It is beyond the scope of this article to perform a review of Lesotho, Jordanian, and Vietnamese labor laws. It can be noted that there are substantial differences between the coverage of Jordanian and Vietnamese labor laws. For example, Section 2 of the Labor Code of the Socialist Republic of Vietnam protects all workers employed under employment contracts and other groups including trainees and domestic workers. The main labor law in Jordan has a far more limited coverage than the law in Vietnam. Act No. 8 of 1996 to Promulgate the Labor Law of Jordan provides workers with general employment protections including some anti-discrimination and occupational health and safety protections. This law however excludes a substantial number of vulnerable workers. Article 3 of the Act No. 8 of 1996 to Promulgate the Labor Law of Jordan excludes certain workers from the operation of the statute, including public and municipalities' employees, family members of the employer who work in their business against no wage, domestic workers, cooks, and people in similar occupations, and agricultural workers, unless provided for expressly by law or regulations.

This means that a large number of potentially vulnerable workers will receive no protection under the Labor Law of Jordan. For example, the operation of Article 3 means that all home-based textile and apparel workers will not gain industrial relations protection if they work for a family member without pay. This means if a wife and children work for their husband/father without receiving wages, they receive no labor protection. Home-based outworkers are a vulnerable sector of the economy and require protection.⁴⁰ It is crucial for the Better Work Jordan Project to find vehicles to encourage Jordan to address this apparent regulatory gap in its laws. While it is positive that Lesotho, Jordan, and Vietnam have ratified all the major ILO Conventions, it is crucial that Better Work identifies strategies to motivate the country to ensure that the domestic legislation provides protection in accordance with ILO standards and that those laws are enforced.

In identifying potential strategies, the Better Work Projects need to find motivations without seeming to punish these countries for participating in projects which are trying to improve labor conditions. For example, if one of these countries received additional negative attention from the Better

Work Projects because the country has problems with its labor laws, then this may result in that country being less willing to continue working with the Better Work Projects. Rather than substantially criticizing a country for its labor laws, perhaps the Better Work Projects could require participating countries to implement certain law reforms prior to the Project commencing. This would ensure there is a reduced variance between the Better Work Project audit criteria and the domestic state and should reduce the instance of companies receiving significantly negative reports.

Perhaps the Better Work Projects could encourage countries to use their synthesis reports to demonstrate compliance with existing international obligations. This is especially relevant with Jordan, which has a free trade agreement with the United States entitled the Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area (2000). This agreement was the first US Agreement to place the labor provisions in the main part of the Agreement and renders a dispute over these provisions subject to the general dispute resolution provisions.⁴¹ Comparatively speaking to other US free trade agreements, the US–Jordan Free Trade Agreement has a reasonably strong social clause that requires Jordan to strive to ensure labor laws are enforced.⁴² If the Better Work Projects are able to be successfully utilized by countries to demonstrate a level of compliance with labor rights, then perhaps future free trade agreements may more heavily integrate auditing projects similar to the United States–Cambodia Bilateral Textile Trade Agreement.

As the Better Work Projects is primarily focused on auditing factories, perhaps the focus on providing micro-support and audit reports to factories may provide sufficient motivation for those factories to respect labor rights. To support the Better Work Projects, governments could use their procurement practices to only purchase from factories that have reliable corporate social responsibility audits or have Better Work Project audits. A similar procurement program is currently in operation in some jurisdictions in the United States.

The development of procurement policies that are linked to labor rights has developed out of the sweat-free movement in the United States. This movement was started by the State of Maine, and requires all corporations that supply products to the public bodies associated with the State of Maine, not to have acquired those products from domestic or international sweatshops.⁴³ Similar laws have now been introduced in other jurisdictions, including California,⁴⁴ Pennsylvania,⁴⁵ Portland, Maine⁴⁶ New Jersey,⁴⁷ and San Francisco, California.⁴⁸

Ensuring the Accuracy of Better Work Project Factory Audits: Economic and Legal Consequences

The Better Factories Cambodia Project has blanket coverage over the textile and apparel industry in Cambodia. The Better Work Projects in

Jordan and Vietnam currently do not audit a significant number of factories. As the Better Factory Projects in Jordan and Vietnam are still in their developmental stages, the scope of coverage is not surprising. However, if the participation of factories with the Better Work Projects does not increase substantially, then the nature of the Better Work Projects must alter. Better Factories Cambodia releases reports on how Cambodian labor laws are being respected at the macro and micro level. If the Better Work Projects in Jordan and Vietnam have a more limited role, it will be important for the Projects to focus upon reporting on Better Work Project participants only.

The different processes involved in producing micro reports when compared to macro reports can potentially threaten the Better Work Projects' reputations. There are significant differences between macro and micro reports. Macro reports generally comment upon the content of domestic laws, the extent of prosecutions, and whether those laws are being enforced generally. In developing these reports, institutions such as the ILO, work with the target country. In contrast, micro reports can focus upon the labor conditions in one single factory. Focusing upon micro reporting creates numerous logistical problems. For example, the Better Work Projects may be able to have a reasonable understanding of a country's accuracy on country-based reporting of labor rights and labor activities generally in that country. In determining how a state is likely to respond, the Better Work Project can draw from ILO reports and publications by the United Nations. In contrast, the Better Work Projects will need to understand the activities of private actors in those jurisdictions. Where there are only a few hundred countries in the world, there are literally millions of workplaces across the globe. For example, in 2000, the Asia Monitor Resource Centre reported there were over 5,000 toy factories across China, with a working population of over 1.3 million.⁴⁹

Perhaps one reason behind the ILO structuring the Better Work Projects as independent bodies was to isolate the ILO from any negative consequences flowing from micro reporting. Alston has cautioned that the ILO's move to promote rights at the micro level rather than focusing upon state compliance with treaties at the macro level has the potential to weaken the role of the ILO.⁵⁰ In creating the independent Better Work Projects, the ILO has reduced its micro-level involvement in these projects. This will enable the Better Work Projects to increase their expertise in micro-level auditing. When inspecting private entities, the Better Factory Projects must ensure that their inspections are performed in a way that reduces the possibility that factories are able to hide labor abuses from the inspectors.

Performing audits of factories is a substantially difficult process and even major players in the social auditing market have attracted criticism. For example, while accounting firms come with centuries of credibility with auditing financial accounts, these entities failed to successfully audit corporate codes. Accounting firms proved to lack sufficient expertise in

auditing environmental, employment, occupational safety and health, and other areas related to social responsibility.⁵¹ In addition to accounting firms' apparent lack of qualified social auditors, for-profit auditing firms were regarded by workers as merely an extension of management and were viewed with suspicion. O'Rourke has concluded:

[A]ccounting firms retained by manufacturers are not the appropriate organisations to be conducting audits of labor . . . conditions. Accounting firms such as Ernst & Young simply do not have the training, independence, or the trust of workers, to perform comprehensive, unbiased audits of working conditions.⁵²

To date, the Better Factories Cambodia Projects or the Better Work Projects focus only on auditing the factories and their workers. If that factory outsources production to home-based outworkers or small subcontractors, it is critical for the audits to include all parties in the factory's supply chain. If audits do not incorporate the supply chains, there is a real risk that factories will simply outsource the labor abuses to smaller and harder to regulate subcontractors and outworkers.

It is crucial for the Better Work Projects to ensure that their factory audits are rigorous and do not attract criticism for failing to detect labor abuses. If the Better Work Projects do attract such criticism, these Projects will lose their credibility as independent experts and international supply chains will likely stop relying on their Better Work Project reports to determine factories' labor conditions. This could potentially undermine the ability of the Better Work Projects to encourage countries and factories to participate in the projects.

In addition to losing credibility, if the Better Work Projects provide negligent audit reports, they could be liable under US laws. Some corporations have been accused of using factory audits as exculpatory propaganda—as a form of ideological social control rather than a genuine effort to improve labor conditions.⁵³ The reliance upon apparently inaccurate factory audits came to a head in the US case of *Nike Inc. v Kasky*.⁵⁴ In response to substantial negative media attention about labor conditions in their supply chains, protests, and a decline in sales, Nike launched a public relations blitz.⁵⁵ This public relations blitz largely consisted of Nike claiming it had complied with its corporate code of practice, and that labor conditions in its supplier factories was acceptable. A consumer activist, Kasky, filed suit against Nike, claiming, in effect, Nike was lying. Kasky claimed Nike was, in fact, acting socially irresponsibly, and that its public relations blitz consisted of false and misleading commercial statements in violation of California's unfair trade practices and false advertising laws, found in the California Business & Professional Code. The unfair competition law defines "unfair competition" to include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law]."⁵⁶

Nike did not seek to deny that it had lied. To defend the case, Nike argued, *inter alia*, that the claim was flawed and that it should not be liable for its representations because it had a constitutional right to free speech in the First Amendment to the US Bill of Rights. In essence, Nike pleaded that constitutionally, it has a right to mislead the public in its corporate social responsibility propaganda. Piety explains Nike's position as follows:

[Kasky] claimed Nike lied, and Nike replied (in effect), "So what? The First Amendment protects everything your lawsuit alleges we said, even if we lied."⁵⁷

This case was never heard on its facts. Nike attempted to have the case struck out on constitutional grounds through the lower courts, to the California Supreme Court and ultimately to the US Supreme Court. The US Supreme Court did not hand down a judgment on the substantive issues in the case. The US Supreme Court held *certiorari* was "improvidently granted."⁵⁸ Kasky's claim was struck down and the veracity of Nike's public relations' claims was never tested. Even though the US Supreme Court declined to hear the case and provide a precedent, human rights advocates have rated *Nike Inc. v Kasky* as a victory, in the sense that it provides a warning to corporations and other entities that they run the risk of litigation if they use knowingly inaccurate or suspect audit reports.⁵⁹ This means that if the Better Work Projects provide audited reports of factories and fail to identify substantial labor abuses in those factories, then there is a risk that the Better Work Projects could be sued.

THE BENEFIT OF BETTER WORK: CREATING ECONOMIC GROWTH THROUGH RIGHTS AND NOT THEIR ABUSE

The Better Work Projects represent an extremely positive policy shift for many developing countries. Previously, some countries aimed to create economic growth through abusing labor rights. The most egregious policies to create economic growth through abusing labor rights can be evinced by special economic zones or export processing zones. These zones are geographical areas that are designated to be largely free from domestic regulation, providing that all products manufactured in the zone are exported outside the country.⁶⁰

Prior to the 1970s, Asian manufacturing factories generally manufactured products for domestic consumption. With the encouragement of major international institutions such as the World Bank and the International Monetary Fund, Asian nations developed special economic zones to assist in these states' economic growth.⁶¹ The purpose of these zones was, and continues to be, to attract investment in building factories and exporting goods in a regulatory environment that does not

enforce labor rights. Through abusing workers' rights, factories are able to reduce costs and undercut factories that respect labor rights. For example, special economic zones were introduced in China, *inter alia*, to develop economically and to improve the employment prospects of its under-utilized population.⁶² Factories took advantage of these zones and exploited labor in the factories.⁶³ The introduction of special economic zones as a vehicle for economic growth has resulted in substantial adverse results for workers.⁶⁴

In contrast to special economic zones that aim to create economic growth through abusing rights, the Better Factories Projects aim to create economic growth through improving labor rights. The success of the Better Factories Cambodia Project has resulted in three jurisdictions embracing the model of improving labor rights as an approach to improving economic growth. The policy shift that underpins the expansion of the Better Work Projects has the potential to improve the lives of tens of millions of workers across the globe as states move away from abusing rights towards respecting workers' rights.

CONCLUSION

In 1999, the ILO became involved with a dynamic project in Cambodia to improve respect for workers' rights in the textile and apparel sector. This project became known as the Better Factories Cambodia Project. This project has been credited with improving the labor conditions of Cambodian workers. The success of the Better Factories Cambodia Project has resulted in the ILO expanding this concept into other jurisdictions. The new Better Work Projects are developing Projects in Jordan, Lesotho, and Vietnam. This article has analysed the reasons behind the success of the Better Factories Cambodia Project and speculated whether the format of the emerging Better Work Projects will achieve similar success.

The major difference between the Better Factories Cambodia Project and the emerging Better Work Projects is the motivation countries have to be involved. The Better Factories Cambodia Project was created as part of an international trade agreement that provided Cambodian exports increased access to trade with the United States if the ILO determined that Cambodian factories were complying with ILO labor standards and Cambodian labor laws. This created a significant trade incentive for the Cambodian government and factories to respect labor rights. In contrast, the new Better Work Projects are not associated with any international trade agreement involving incentives to improve labor rights. The Better Work Projects rely on improving the efficiencies of, and attracting supply chains to, participating jurisdictions. While the Better Work Projects offer enormous resources to participating countries, the level of this support may not motivate the same level of compliance as incentives linked to an international trade agreement. If states participating in the

Better Work Projects are not committed, this creates a potential barrier to these Projects' success. As the Better Work Projects will be performing factory audits, the Projects will attract negative publicity and litigation if labor abuses emerge in audited factories. Under the Better Work Vietnam Projects, factories will only be audited once a year. This creates a large window of opportunity for factories to abuse workers' rights. The success of the Project will therefore depend upon the ability of participating countries to enact and enforce domestic laws. To support the Better Factories Cambodia Project, Cambodia enacted new laws and enforced those laws. Countries that participate with the Better Work Projects should be expected to review their domestic laws to ensure they meet ILO standards, review those laws where appropriate, and enforce those laws. While the development of the Better Work Projects will be complex, if the improvement in labor rights from Cambodia can be replicated in other states, then the ILO's decision to devote resources for micro-level development will be vindicated.

NOTES

1. Santoro observes some supply models focus upon exploitation while others focus upon developing a positive image in the region. Whether the supply chain will involve sweatshops will depend upon, *inter alia*, the corporate objective: Santoro, MA, *Profits and Principles: Global Capitalism and Human Rights in China*, Cornell University Press: Ithaca and London, 16–32 (2000); *see also* Cooney, S, "Improving Regulatory Strategies for Dealing with Endemic Labor Abuses," 107 (2005) (SJD thesis, Columbia University); Cooney, S, "A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?" 28 *Melb. Univ. L. Rev.*, 291 (2004); and Louie, MCY, *Sweatshop Warriors: Immigrant Women Workers Take on the Global Factory*, South End Press: Cambridge, Massachusetts, 4 (2001).
2. Milman-Sivan, F, "Labor Rights and Globalization: an Institutional Analysis of the International Labor Organization," SJD thesis, Columbia University (2006).
3. Ehrenberg, DS, *From Intention to Action: an ILO-GATT/WTO Enforcement Regime for International Labor Rights in Human Rights, Labor Rights and International Trade* (LA Compa, SF Diamond, eds., 1996).
4. See, for example, International Labor Organisation, Supply Chain Management within the Area of Occupational Safety and Health, retrieved from http://www.ilo.org/public/english/protection/safework/li_suppliers/supply/index.htm, accessed Nov. 2009.
5. National Institute of Statistics of Cambodia, Press Release of the 2008 Cambodia General Population Census (2009), available at <http://www.nis.gov.kb/nis/census2008/PressReleaseEng.pdf>, accessed Nov. 30, 2009.
6. Anderson, N, Palha da Sousa, C, Paredes, S, "Social Costs of Land Mines in Four Countries: Afghanistan, Bosnia, Cambodia and Mozambique," 311 *Br. Med. J.*, 718 (1995); Ear, S, "International Democracy Assistance for Peacebuilding: Cambodia and Beyond/Dancing in Shadows: Sihanouk, the Khmer Rouge, and the United Nations in Cambodia," 30 *Contemp. Southeast Asia: J. Int'l & Strategic Aff.*, 1, 140 (2008); Luftglass, S, "Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Involvement from the

- Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge,” 90 *Va. L. Rev.*, 3, 893 (2004).
7. Kolben, K, “Note from the Field: Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia’s Garment Factories,” 7 *Yale Hum. Rts. & Dev. L. J.*, 80, 82–83 (2004).
8. Hall, J, “Human Rights and the Garment Industry in Contemporary Cambodia,” 36 *Stan. J. Int’l. L.*, 119 (2000).
9. Blackett, A, “Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation,” 31 *Co. H. R. L. R.*, 1 (1999); Dessing, M, *The Social Clause and Sustainable Development*, Sustainable Development and Trade Issues, International Centre for Trade and Sustainable Development (ICTSD), Resource Paper No. 1, International Environment House: Geneva, Switzerland (2001); Griffin, G, Nyland, C, O’Rourke, A, “Trade Unions and the Social Clause: a North-South Union Divide?” (National Key Centre in Industrial Relations, Monash University, Melbourne Working Paper, No. 81, 2002).
10. Sibbel, L, Borrmann, P, “Linking Trade with Labor Rights: The ILO Better Factories Cambodia Project,” 24 *Ariz. J. Int’l. & Comp. L.*, 235, 237 (2007).
11. Polaski, S, “Cambodia Blazes a New Path to Economic Growth and Job Creation,” *Carnegie Papers*, 51, 1, 17 (2004).
12. Better Factories Cambodia, Memorandum of Understanding (2005), discussed in Kevin Kolben, Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes, 48 *Harv. Int’l. L. J.*, 203, 239 (2007).
13. Kolben, *supra* n.7, 86.
14. Pecker, M, “A Lesson from the East: International Labor Rights and the U.S.–Cambodia Trade Agreement of 1999,” 26 *Buff. Pub. Int. L. J.*, 39, 56–57 (2007).
15. For a discussion of the operation of the “race to the bottom theory” see Chan, A, “A ‘Race to the Bottom’: Globalisation and China’s Labor Standards,” 46 *China Persp.*, 41 (2003); Herbert, A, *International Labor Standards: Reversing the Race to the Bottom*, ILO Sectoral Activities Department, Report (2005); Li Sheng, “Low Wage and Low Labor Standards in China: A Substitute Explanation of ‘the Race-to-the-Bottom’” in *The Chinese Economy after WTO Accession* (S Bao, S Lin, and C Zhao, eds., 2006); and Thorborg, M, “Chinese Workers and Labor Conditions from State Industry to Globalized Factories. How to Stop the ‘Race to the Bottom,’” 1076 *Annals of the N.Y. Acad. Sci.*, 1 (2006).
16. Sibbel, Borrmann, *supra* n.10, at 235, 238.
17. Polaski, S, “Combining Global and Local Forces: the Case of Labor Rights in Cambodia,” 34 *World Dev.*, 919, 924–927 (2006).
18. Wells, D, “‘Best Practice’ in the Regulation of International Labor Standards: Lessons of the US–Cambodia Textile Agreement,” 27 *Comp. Lab. L. & Pol’y. J.*, 357 (2006).
19. Wells, *supra* n.18, at 369–373; see also Sibbel, Borrmann, *supra* n.10, at 238.
20. Kolben, *supra* n.7, at 106.
21. Polaski, *supra* n. 11, at 1.
22. Kolben, K, “Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes,” 48 *Harv. Int’l. L. J.*, 203, 139 (2007).

23. Kolben, *supra* n.7, at 82.
24. Pecker, *supra* n.14, at 53.
25. Becker, B, "Cambodia's Garment Makers Hold Off a Vast Chinese Challenge," N.Y. Times, May 12, 2005, at C1.
26. Better Work, We're in Business! From Better Factories to Better Work, available at <http://www.betterwork.org/public/global/public-files/n>, accessed Nov. 30, 2009.
27. Better Work, Programme Countries, available at <http://www.betterwork.org/public/global/programme-countries>, accessed Nov. 30, 2009.
28. Legrand, P, "How to Compare Now," *Legal Studies*, vol. 16, no. 2, 232, 236 (July 1996).
29. Charles de Secondat, Baron de Montesquieu, *The Spirit of Laws* (1748), reprinted in M. Adler ed., T. Nugent and J Prichard trans., *Great Books of the Western World, Encyclopaedia Britannica* 35 (2d ed. 1990).
30. Nyalı Ltd. v. Attorney-General [1956] 1 QB 16, 16–17.
31. Better Work, Better Work Jordan Information Sheet, available at <http://www.betterwork.org/internal/geneva/communications/information-sheets/jordan>, accessed on Nov. 30, 2009.
32. Better Work, Programme Countries, available at <http://www.betterwork.org/public/global/programme-countries>, accessed on Nov. 30, 2009.
33. Better Work, *supra* n.31.
34. Better Work, Better Work Vietnam Launches Services, available at <http://www.betterwork.org/public/vietnam/public-files/news/better-work-vietnam-launches-services>, accessed on Nov. 30, 2009.
35. *Id.*
36. Better Work, About Better Work Vietnam, available at <http://www.betterwork.org/public/vietnam/about-better-work-vietnam>, accessed on Nov. 30, 2009.
37. Better Work, *supra* n.31.
38. Better Work, *supra* n.32.
39. Better Work, *supra* n.36.
40. Harpur, P, "Occupational Health and Safety Duties to Protect Outworkers: the Failure of Regulatory Intervention and Calls for Reform," 12 *Deakin L. Rev.*, 2, 48 (2007); Harpur, P, "Clothing Manufacturing Supply Chains, Contractual Layers and Hold Harmless Clauses: How OHS Duties Can Be Imposed over Retailers," 21 *Austl. J. Lab. L.*, 3, 316 (2008); James, P, Johnstone, R, Quinlan, M, Walters, D, "Regulating Supply Chains to Improve Health and Safety," 36 *Indus. L. J.*, 163 (2007); Johnstone, R, Mayhew, C, Quinlan, M, "Outsourcing Risk? The Regulation of Occupational Health and Safety Where Subcontractors Are Employed," 22 *Comp. Lab. L. & Pol'y. J.*, 351 (2001); Johnstone, R, Wilson, T, "Take Me to Your Employer: The Organisational Reach of Occupational Health and Safety Regulation," 19 *Austl. J. Lab. L.*, 3 (2006).
41. The Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area Article 6 (2000).

42. Griffin, G, Nyland, C, O'Rourke, A, "Trade Promotion Authority and Core Labor Standards: Implications for Australia," 17 *Austl. J. Lab. L.*, 2 (2004); Polaski, S, "Protecting Labor Rights Through Trade Agreements," *Journal of International L. & Pol'y*, 10 (2003).
43. Administrative Procedures and Services Regulation (State of Maine), Part 4, Subchapter I-B, State Purchasing Code of Conduct for Suppliers.
44. AnAct to amend § 6108 of the Public Contract Code, Relating to Public Contracts 2003 (California, SB 578).
45. Executive Order for Sweat-Free Apparel Procurement 2004 (Pennsylvania).
46. Sweat-free Procurement Ordinance for the City of Portland (Maine).
47. Sweat-free Procurement Rules 2006(New Jersey).
48. The Sweatfree Contracting Ordinance of the City and County of San Francisco, 2005.
49. Wong, M, Frost, S, "Monitoring Mattel: Codes of Conduct, Workers and Toys in Southern China," Asia Monitor Resource Center, Report 6 (2002).
50. Alston, P, "Core Labor Standards and the Transformation of the International Labor Rights Regime," 15 *Eur. J. Int'l. L.*, 457 (2004).
51. O'Rourke, D, "Monitoring the Monitors: A Critique of Corporate Third-Party Labor Monitoring," in *Corporate Responsibility and Labor Rights: Codes of Conduct in the Global Economy* (R Jenkins, R Pearson, G Seyfang, eds., 2002).
52. O'Rourke, D, "Smoke from a Hired Gun: A Critique of Nike's Labor and Environmental Auditing in Vietnam as Performed by Ernst & Young, Transnational Resource and Action Centre, Report 11 (1997).
53. Williams, H, "Smiling and Lying: Corporate Evasions of Responsibility Regarding Global Sweatshops," (MA in Sociology thesis, Marshall University) (2003).
54. 539 U.S. 654 (2003); for a good discussion of this case, see Ronald, K, Collins, L, Skover, DM, "The Landmark Free-Speech Case That Wasn't: The *Nike v. Kasky* Story," 54 *Case W. Res. L. Rev.*,965 (2004).
55. Ronald, K, Collins, L, Skover, DM, "The Landmark Free-Speech Case That Wasn't: The *Nike v. Kasky* Story," 54 *Case W. Res. L. Rev.*,965, 970-972 (2004).
56. Cal. Bus. & Prof. Code § 17200 (West 2000).
57. Piety, TR, "Grounding Nike: Exposing Nike's Quest for a Constitutional Right to Lie," 78 *Temple L. Rev.*, 151, 153 (2005).
58. *Nike Inc. v Kasky*, 539 U.S. 654, 655 (2003).
59. Bigge, D, "Bring on the Bluewash: A Social Constructivist Argument Against Using *Nike v. Kasky* to Attack the UN Global Compact," 14 *Nw. Sch. L., Lewis & Clark C. Int'l Leg. Pers.* 6, 6 (2004); Fisher, J, "Free Speech to Have Sweatshops? How *Kasky v. Nike* Might Provide a Useful Tool to Improve Sweatshop Conditions," 26 *B.C. Third World L. J.*, 267 (2006).
60. Madani, D, "A Review of the Role and Impact of Export Processing Zones," World Bank, Report 16 (1999).

61. Arnold, DG, Hartman, LP, "Moral Imagination and the Future of Sweatshops," 108 *Bus. Soc. Rev.*, 4, 425 (2003); Wu, W, "Pioneering Economic Reform Through Promoting Foreign Investment in China's Special Economic Zones," ch. 1 (1996) (PhD thesis, Rutgers: The State University of New Jersey).
62. Ge, W, *Special Economic Zones and the Economic Transition in China*, 11 – 44 (2000); Jenkins, M, "Export Processing Zones in Developing Economies: Theoretical and Empirical Considerations," (PhD thesis, Brandeis University) (2000); Huang, J, "Special Zoning Strategy in the People's Republic of China: State Capacity and Policy Implementation," (PhD thesis, The University of Tennessee) (1998).
63. Roi Albert, Export Processing Zones: Symbols of Exploitation and a Development Dead-End 8 (2003).
64. Davin, D, *The Impact of Export-Oriented Manufacturing on Chinese Women Workers*, UNRISD Project on Globalization, Export-Oriented Employment for Women and Social Policy, Report (2001); Ching-Kwan Lee, *Production Policies and Labor Identities: Migrant Workers in South China*, in *China Review* 1995384 (Lo Chin Kin ed., 1995); Lu, J, "Manufacturing Work and Organizational Stresses in Export Processing Zones," 47 *Ind. Health* 5, 543 (2009); Lu, J, "Occupational Hazards and Illnesses of Filipino Women Workers in Export Processing Zones," 14 *Int. J. Occup. Saf. Ergonomics*, 3, 333 (2008).