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Citation:

Allen Ponak; Daphne Taras, Rule of Law and the Arbitration Council of Cambodia, 20 EMP. RTS. & EMP. POL'Y J. 37 (2016).

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# RULE OF LAW AND THE ARBITRATION COUNCIL OF CAMBODIA\*

BY  
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\* Requests for information: allenponak@gmail.com. An earlier version of this paper was presented at the Labour Law Research Network Conference in Amsterdam, Netherlands, in June 2015. We would like to thank Jeffrey Wheeler, International Labor Affairs Bureau, U.S. Department of Labor, for his perceptive comments on an earlier draft. We gratefully acknowledge the full cooperation of the current and former senior leadership of the Arbitration Council Foundation of Cambodia. The views expressed in this paper are those of the authors only.

At the invitation of its director, Allen Ponak and Daphne Taras have presented several training programs in Phnom Penh to the arbitrators and staff of the Arbitration Council of Cambodia since 2008. This work has been *pro bono*. As well, Dr. Ponak is a founding member of the Council’s five-person International Advisory Board that meets from time to time to provide advice to the senior leadership of the Council.

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## I. INTRODUCTION

The existence of efficient, less legalistic, and party-owned alternatives to the courts is taken for granted in well-developed democracies with rule of law. We applaud mediation, arbitration, and other forms of alternative dispute resolution (ADR) as a *different* route to justice in employment, sports, commercial endeavors, international trade, and social activities. With ADR, general court dockets do not become clogged with matters that can best be resolved through other forums. Disputants are able to participate in a system of justice that is parallel to, but different from, the general courts. But what if arbitration was the *only* route to justice? What if the system of arbitration is the only forum in which rule of law is promulgated? We examine developments in Cambodia, where a traumatized nation could not develop workplace justice processes through its courts or traditional government institutions, but rather, turned to an experiment in arbitration. Since 2003, the Arbitration Council of Cambodia (ACC or Council) has arbitrated and mediated two thousand labor disputes and serves as the venue of choice for the rapidly-developing garment and footwear industries.<sup>1</sup>

## II. THE NEED FOR AN ALTERNATIVE DISPUTE RESOLUTION SYSTEM

The establishment of the arbitration system is especially noteworthy in a country racked by decades of war, including the horrific 1970s genocide committed by Pol Pot and the Khmer Rouge that decimated the country's population, particularly the educated urban elite.<sup>2</sup> Though the Khmer Rouge was defeated in 1978 with Vietnam's invasion, the fighting within Cambodia continued for another twenty years until the Khmer Rouge movement collapsed in 1998.<sup>3</sup> Efforts to rebuild the Cambodian economy have been

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1. *Statistics on Labour Dispute Resolution*, THE ARBITRATION COUNCIL, <<http://www.arbitrationcouncil.org/en/about-us/statistics>> (last visited May 3, 2016).

2. John Hall, *Human Rights and the Garment Industry in Contemporary Cambodia*, 36 STAN. J. INT'L L. 119, 119-20 (2000).

3. *Id.*

hampered by the loss of up to one-third of its population, death or exodus of skilled professionals, political rivalries destabilizing recovery, and trauma and fatigue associated with thirty years of warfare.<sup>4</sup>

Cambodia remains one of the world's poorer countries, with annual per capita income of approximately \$1100 (USD).<sup>5</sup> The minimum wage in the garment industry, which is effectively the wage earned by the majority of employees, was \$140 per month in January 2016, a 75 percent increase from the \$80 per month minimum wage in 2013.<sup>6</sup> A major part of this rise was achieved in the aftermath of a garment workers strike during which state security forces shot into a crowd of striking workers in the factory districts outside Phnom Penh, killing five people and injuring more than thirty.<sup>7</sup> During much of 2014, the government suspended the right to form new unions and assemble, and prominent union leaders were convicted of incitement to violence and property damage and imprisoned.<sup>8</sup> Optimists see major strides being made as the country stabilizes and the economy develops, while pessimists point to entrenched patronage networks that hamper the development of true rule of law.<sup>9</sup>

Corruption remains endemic. Cambodia was ranked 150th out of more than 175 countries on Transparency International's 2015 Corruption Perceptions Index, with a score of 21 (out of 100), the same level as Zimbabwe.<sup>10</sup> There has been little change in either Cambodia's ranking or score since 2012. The 2014 National Integrity

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4. This history is told by Caroline Hughes, *Cambodia*, IDS BULL., Mar. 2006, at 67.

5. See THE WORLD BANK, WORLD DEVELOPMENT INDICATORS 2016, at 48, available at <<https://openknowledge.worldbank.org/bitstream/handle/10986/23969/9781464806834.pdf?sequence=2&isAllowed=y>> (showing per capita gross national income of \$1020). All financial information in this paper is given in U.S. dollars unless otherwise indicated.

6. See Suman Varandani, *Cambodia Raises Minimum Wage for Garment Industry to \$140 but Fails to Meet Union Demands*, INT'L BUS. TIMES (Oct. 8, 2015, 6:18 AM), <<http://www.ibtimes.com/cambodia-raises-minimum-wage-garment-industry-140-fails-meet-union-demands-2132388>>; David Welsh, Editorial, *Fair Trade for the Garment Industry*, INT'L N.Y. TIMES, May 21, 2015, at 8. David Welsh was country director of the AFL-CIO Solidarity Center in Cambodia until mid-2015. He currently holds a similar position in Indonesia.

7. Welsh, *supra* note 6, at 8.

8. *Id.*

9. Daniel Adler & Michael Woolcock, *Justice Without the Rule of Law? The Challenge of Rights-Based Industrial Relations in Contemporary Cambodia*, 2 WORLD BANK JUSTICE & DEV. WORKING PAPER SERIES 166 (2009), available at <<https://openknowledge.worldbank.org/bitstream/handle/10986/18101/495820NWP0Box31f0version0with0cover.pdf?sequence=1&isAllowed=y>>.

10. *Corruptions Perceptions Index 2015*, TRANSPARENCY INT'L, <[www.transparency.org/cpi2015#results-table](http://www.transparency.org/cpi2015#results-table)> (last visited May 3, 2016) (in the search box, type "Cambodia" and press "enter" on your keyboard, or select "Full Table" and scroll down to 150).

System Assessment concluded that the judiciary and law enforcement agencies “are the two weakest pillars” in Cambodian society.<sup>11</sup> Bribes are commonplace.<sup>12</sup> Key laws are weak, and even when they espouse good practices, they rarely are followed. Laws on the status of judges and prosecutors are relatively new and salaries of legal professionals are inadequate, creating fertile ground for corruption. Further, the courts and police are “highly politicised,” with appointments and rewards based on patronage rather than merit.<sup>13</sup> Using a scale from “very weak” to “very strong,” Cambodia’s judiciary is judged to be “very weak” on average, with little capacity to improve and a poor role in advancing rule of law.<sup>14</sup>

During the Khmer Rouge period (1975-1979), few judges and lawyers survived. After liberation of Cambodia, only ten legal graduates – including five judges – were alive.<sup>15</sup> Cambodia’s national budget allocates a paltry amount to the Ministry of Justice. The judiciary is often unable to enforce its judgments, partly due to a lack of capacity. Not surprisingly, the World Bank ranked Cambodia 142 out of 185 countries with regard to respecting and enforcing contracts.<sup>16</sup> It is difficult for a country to participate effectively in the global community if basic contracts cannot be relied upon. The score for the independence of the judiciary in the 2014 Integrity Assessment was zero out of a possible 100 points.<sup>17</sup> Similar results were reported by the World Justice Project’s 2015 Rule of Law Index. Cambodia was ranked lowest among ASEAN countries and close to lowest in the world overall. It ranked worst in the world for civil justice and second worst for its regulatory enforcement.<sup>18</sup>

Court decisions lack transparency, and there is very little information available to the public about the operations of the

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11. TRANSPARENCY INT’L CAMBODIA, CORRUPTION AND CAMBODIA’S GOVERNANCE SYSTEM: THE NEED FOR REFORM 6 (2014), *available at* <[http://www.transparency.org/whatwedo/publication/cambodia\\_national\\_integrity\\_system\\_assessment\\_2014](http://www.transparency.org/whatwedo/publication/cambodia_national_integrity_system_assessment_2014)>.

12. *Id.* at 6, 11, 61, 188, 192.

13. *Id.* at 6-7.

14. *Id.* at 3, 10.

15. *Id.* at 52.

16. THE WORLD BANK & INT’L FIN. CORP., DOING BUSINESS 2013: SMARTER REGULATIONS FOR SMALL AND MEDIUM-SIZE ENTERPRISES: COMPARING BUSINESS REGULATIONS FOR DOMESTIC FIRMS IN 185 ECONOMIES 154 (10th ed. 2013), *available at* <<http://www.doingbusiness.org/-/media/GIAWB/Doing%20Business/Documents/annual-Reports/English/DB13-full-report.pdf>>.

17. TRANSPARENCY INT’L CAMBODIA, *supra* note 11, at 55.

18. *Rule of Law in ASEAN: Not at All Appealing*, ASEAN BRIEFING (June 17, 2015), <<http://www.aseanbriefing.com/news/2015/06/17/rule-of-law-in-asean-not-all-appealing>>.

judiciary. There are no comprehensive websites for the Cambodian highest courts. The actual laws and procedures that exist in the Cambodian Constitution (especially Article 129) speak to judges' "strict respect for the laws, wholeheartedly and conscientiously."<sup>19</sup> Modern labor and human rights are well-articulated in the Constitution, but the provisions are either ignored or unenforced.<sup>20</sup> The role of the judiciary in overseeing the country's executive branch is lacking.<sup>21</sup>

Cases involving labor relations matters illustrate these problems. When trade union leader Chea Vichea was murdered in 2004, the judge made a ruling against the government's interests and was immediately relocated to an isolated provincial court.<sup>22</sup> In another case, a District Governor fired a gun into a crowd of garment workers injuring three women. In 2012 the Provincial Court dropped all charges against him.<sup>23</sup>

There is little faith within the international community that Cambodia's court system is making adequate progress. The United States Secretary of State, John Kerry, released a report in 2012 that criticized the lack of momentum and found that "the courts were subject to influence and interference by the executive branch, and there was widespread corruption among judges, prosecutors, and court officials. At times the outcome of trials appeared predetermined."<sup>24</sup> One of the most alarming sections of the Anti-Corruption Law enables the courts to imprison whistleblowers for up to six months if the Anti-Corruption Unit does not find sufficient corroborating evidence of corruption.<sup>25</sup> Who would dare bring forward evidence in such a system?

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19. CAMBODIA CONST. art. 129.

20. TRANSPARENCY INT'L CAMBODIA, *supra* note 11, at 12-13.

21. *Id.* at 61-62.

22. *Id.* at 62.

23. *Id.*

24. BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2013: CAMBODIA 2013 HUMAN RIGHTS REPORT 7 (2014), available at <<http://www.state.gov/documents/organization/220395.pdf>>.

25. Lauren Crothers, *Corruption, Impunity Rule in Cambodia: Report*, THE CAMBODIA DAILY (Sept. 10, 2014), <<https://www.cambodiadaily.com/archives/corruption-impunity-rule-in-cambodia-report-67795/>>.

### III. THE DEVELOPMENT OF THE ARBITRATION COUNCIL OF CAMBODIA

For effective labor relations, there need to be mechanisms that offer predictability, stability, and the sense of procedural justice; that is, a party will get a fair and impartial hearing, and that outcomes will be based on evidence, precedents, and statutes. Where might good labor relations justice operate in Cambodia?

The usual development in introducing rule of law for countries is either through new labor courts, tribunals, or other institutions that are funded by governments and breathe life into statutes. While Cambodia's statutes – with the exception of whistleblower provisions – might be a good starting point, Cambodia lacked the basic context within which institutions of natural justice and due process could emerge. Government-funded institutions would be unduly influenced by the Executive and Party interests, appointments would be based on patronage, and the basic expertise necessary to impartially adjudicate disputes would not be valued. This was a perplexing situation.

From its inception, Cambodia's garment industry has been closely monitored by the International Labor Organization and a number of NGOs. As state-of-the-art factories sprouted in large industrial zones outside Phnom Penh, so too did scrutiny of labor practices and working conditions. Illustrative is a 2015 report published by Human Rights Now, a Tokyo based NGO. The report was highly critical of factory practices, citing "illegal and cruelly prolonged overtime," worker vulnerability due to short term employment contracts, discrimination for union activity, poor safety standards, abuse of female workers, the absence of recourse for individual disputes, and attacks on labor unions.<sup>26</sup> The report requested government action, called for major brands, like H&M, to intervene with their subcontractors, and named several factories as serial offenders.<sup>27</sup>

The Arbitration Council of Cambodia has stepped into this

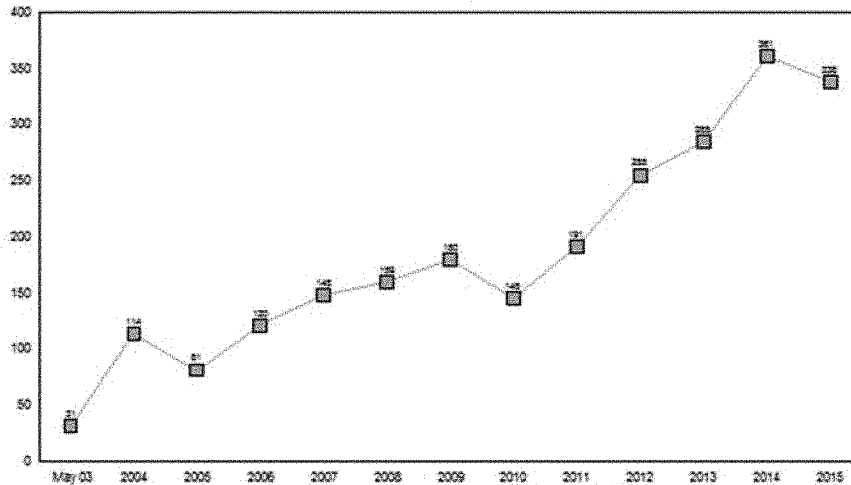
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26. *Cambodia: Labour Exploitation in the Garment Industry – Responsibilities of the Cambodian Government and International Brand Companies*, HUMAN RIGHTS NOW (Apr. 16, 2015), <<http://hrn.or.jp/eng/news/2015/04/16/cambodia-labour-exploitation-in-the-garment-industry-responsibilities-of-the-cambodian-government-and-international-brand-companies/>>. The report itself, in a Microsoft Word document, is available for downloading from this page.

27. HUMAN RIGHTS NOW, *CAMBODIA: LABOUR EXPLOITATION IN THE GARMENT INDUSTRY – RESPONSIBILITIES OF THE CAMBODIAN GOVERNMENT AND INTERNATIONAL BRAND COMPANIES 6-7* (2015).

crucible. Established in 2003 through the efforts of the International Labour Organization, national employer and labor federations, and the Cambodian Ministry of Labour,<sup>28</sup> its purpose is to resolve labor-management rights and interest disputes through mediation and arbitration. Since its inception, the Council has resolved well over two thousand disputes.<sup>29</sup> Table 1 shows the growth of the ACC caseload from May 2003 inception to today. In 2014, 216,270 workers were directly covered by ACC arbitrations and mediations.<sup>30</sup>

Table 1. Caseload Registered at ACC (by Year, May 2003 - Aug 2015)



Eighty-eight percent of its cases are in the garment and footwear industries with the remainder in other manufacturing, hotels and tourism, services, and construction.<sup>31</sup> The majority of the disputes were resolved peacefully and were implemented by the parties.<sup>32</sup> As a measure of acceptance of the system, the major labor federations and the powerful Garment Manufacturers' Association of Cambodia,

28. CMTY. LEGAL EDUC. CTR., *THE ARBITRATION COUNCIL AND THE PROCESS FOR DISPUTE RESOLUTION IN CAMBODIA* 3 (2d ed. 2004); HUGO VAN NOORD ET AL., *INDUS. & EMP'T RELATIONS DEP'T, INT'L LABOUR OFFICE, CAMBODIA'S ARBITRATION COUNCIL: INSTITUTION BUILDING IN A DEVELOPING COUNTRY* 6-10 (Dialogue Working Paper No. 24 2011); Adler & Woolcock, *supra* note 9, at 179-82.

29. See THE ARBITRATION COUNCIL, *ANNUAL REPORT 2014*, at 28 (2015), available at <[http://www.arbitrationcouncil.org/uploads/33913-annual-report-2014\\_eng.compressed.pdf](http://www.arbitrationcouncil.org/uploads/33913-annual-report-2014_eng.compressed.pdf)>.

30. Data used in tables and discussion were provided by the ACC to the authors in January 2016. These data remains on file with authors.

31. *Id.*

32. *Id.* By majority we refer to cases in which the parties either agreed to be bound by the award or a mediated settlement was reached.



whose members produce the brand names recognized worldwide,<sup>33</sup> have signed memorandums of understanding committing the parties to working with the Council and abiding by its decisions.<sup>34</sup> The lack of confidence in public institutions was a key impetus for the establishment of the ACC.<sup>35</sup> In contrast, transparency is a critical component of the ACC's work. All decisions of the ACC are published in Khmer and English and available on its website.<sup>36</sup> The website contains photos and biographies of ACC arbitrators and good information on Council procedures.

The history and major features of Cambodia's arbitration system have been ably described elsewhere.<sup>37</sup> In this article, we focus on contemporary issues that are facing the Council as it moves into its second decade. As well, we evaluate its success as Cambodia's sole provider of neutral and independent labor relations dispute resolution.

#### IV. RESEARCH METHODS AND SOURCES

We began a relationship with the ACC in 2004 and have travelled to Phnom Penh four times since then, always as volunteers, continuing to train Cambodia's roster of arbitrators and meet with ACC leaders and staff. During our 2014 visit, we conducted formal interviews with Council leadership and staff, arbitrators, labor and employer representatives, staff interns from other countries, and outside observers.<sup>38</sup> We also were given access to internal documents and provided with statistics generated by ACC staff to support our research. We are both participants and observers, and have enjoyed a unique relationship from which we can assess developments at the ACC and in Cambodian industrial relations.

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33. The manufacturers rarely, if ever, actually advertise these international brands. Company names give no hint of the international brands for whom the factory may be producing.

34. *E.g.* Memorandum of Understanding on Improving Industrial Relations in the Garment Industry (Sept. 28, 2010), available at <[http://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/—ilo-phnom\\_penh/documents/genericdocument/wcms\\_145234.pdf](http://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/—ilo-phnom_penh/documents/genericdocument/wcms_145234.pdf)>.

35. See CMTY. LEGAL EDUC. CTR., *supra* note 28, at 8.

36. *Arbitral Decisions*, THE ARBITRATION COUNCIL, <<http://www.arbitrationcouncil.org/en/ac-decisions/arbitral-decisions>> (last visited May 4, 2016).

37. CMTY. LEGAL EDUC. CTR., *supra* note 28; VAN NOORD ET AL., *supra* note 28.

38. The discussion which follows reflects what we learned in those interviews, but the identity and many details are kept confidential. Notes from these interviews are on file with the authors.

## V. EXAMINING THE ACC IN LAW, PRACTICE, AND IMPACT

### A. *Origins and Scope of the ACC*

After years of war, Cambodia began stabilizing in the 1990s and experienced rapid growth in the garment and footwear sector. The growth accelerated with the signing of a bilateral trade agreement between Cambodia and United States in 1999 and accelerated again when Cambodia joined the World Trade Organization in 2005.<sup>39</sup> Along with these formal international ties came international obligations, one of which was a requirement for fair labor practices.<sup>40</sup> External pressure for standards coincided with internal pressures. As industrialization gathered momentum, a nascent and fragmented labor movement confronted an equally fragmented and inexperienced group of employers. The results were predictable. Van Noord et al. summarized the situation as follows:

In 1996 there were only 32 factories, employing an estimated 20,000 workers. By 1998 there were over 100 garment factories, employing 72,000 workers. By mid-2008, this figure had grown to over 300 active factories, employing around 340,000 workers, approximately 90 per cent of whom were women. . . . [T]otal garment exports in 1995 were US \$26.5 million . . . and in 1998 . . . US \$360 million. By 2007 exports were valued at US \$2.8 billion, with 70 per cent going to the U.S. market where Cambodia was the eighth largest supplier.

. . .

At the same time as the expansion of the garment industry, labour conditions developed as a major issue. Despite a Labour Law which provided for protection of workers' rights, the Law was seldom enforced. Labour inspectors were poorly trained and poorly paid, reduced to taking bribes for under-reporting violations in order to make a living. There was also general concern that whatever dispute resolution process did exist was not effective or impartial, with government elites and garment factory owners tied politically and financially.

The union movement emerged parallel with the development of the garment industry, and was linked from birth to political parties and the state. Internally, most unions were organised at enterprise and federation level, with the garment industry characterised by multiple unions at both levels. A lack of experience and capacity,

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39. See VAN NOORD ET AL., *supra* note 28, at 3-4.

40. See Cambodia Bilateral Textile Agreement art. 10, Cambodia-U.S., Jan. 20, 1999, available at <[http://cambodia.usembassy.gov/uploads/images/M9rzdrzMKGi6Ajf0SIuJRA/uskh\\_texttile.pdf](http://cambodia.usembassy.gov/uploads/images/M9rzdrzMKGi6Ajf0SIuJRA/uskh_texttile.pdf)>; World Trade Organization, Ministerial Declaration of 13 December 1996, art. 4, WTO Doc. WT/MIN(96)/DEC, 36 ILM 218 (1997) [hereinafter Singapore Declaration], available at <[https://www.wto.org/english/news\\_e/pres96\\_e/wtodec.htm](https://www.wto.org/english/news_e/pres96_e/wtodec.htm)>.

serious allegations of corruption and extortion, and personal and political rivalries contributed to a chaotic industrial relations environment. This was mirrored on the employers' side by a similar lack of experience and capacity, allegations of poor HR practices and regular violations of the labour laws, anti-union discrimination, and attempts to bribe or otherwise unduly influence union leaders at enterprise and federation level.

Strikes, sometimes violent, increased rapidly with the growth of the sector. . . .<sup>41</sup>

With little faith in the courts or other government institutions, stakeholders, with a major assist from the ILO, began looking for alternatives for the effective resolution of labor disputes.<sup>42</sup> This search ultimately led to the creation of the ACC. The most politically sensitive task was to ensure the Council's independence in both fact and perception while providing legal status of the Council under Cambodian labor law.<sup>43</sup> This was achieved by the drafting of special legislation, with substantial ILO input, that recognized the Arbitration Council, gave it broad powers, and protected its independence.<sup>44</sup>

The ACC has, since its inception, sought to meet the highest global standards for natural justice and due process. The current and former executive directors of the ACC both have graduate degrees from countries with rule of law, and many arbitrators and staff members have significant international experience and credentials.<sup>45</sup> The ACC is assisted by a number of Australian advisors stationed in Cambodia and working within the ACC.<sup>46</sup> American law students have been invited to examine the ACC and produce reports. Top U.S.A. and Canadian arbitrators from the U.S.-based National Academy of Arbitrators (NAA)<sup>47</sup> are invited to train the Cambodian arbitrators and staff, and two Presidents of the NAA, as well as many members of the NAA who hold university faculty positions, have

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41. VAN NOORD ET AL., *supra* note 28, at 3 (citations omitted).

42. *Id.* at 8-9.

43. See Van Noord et al., for an excellent discussion of the trials and tribulations surrounding the birth of the ACC and the search for a politically acceptable solution that would assuage the government yet ensure ACC independence. *Id.* at 10-11.

44. CMTY. LEGAL EDUC. CTR., *supra* note 28, at 6.

45. See *The Arbitration Council Foundation*, THE ARBITRATION COUNCIL, <<http://www.arbitrationcouncil.org/en/about-us/the-arbitration-council-foundation>> (last visited May 4, 2016)

46. See THE ARBITRATION COUNCIL, *supra* note 29, at 26.

47. The National Academy of Arbitrators is the pre-eminent professional association of arbitrators from United States and Canada with strict admission standards and a code of professional ethics that governs its members. See NAT'L ACAD. OF ARBITRATORS, <<https://www.naarb.org>> (last visited May 4, 2016).

spent considerable time with the ACC. There is an International Advisory Board that is much more than merely symbolic; its advisors meet frequently using Skype and its members periodically offer advice to the Council's executive director.<sup>48</sup> The ACC has leading dignitaries from Australia involved in promoting the ACC work both within Cambodia and to the World Bank. Indeed, in recognition of his significant contributions, Commissioner Michael Gay of Australia was knighted by the Royal Government of Cambodia in 2014.<sup>49</sup> Funding requests are created by multinational teams of experts. The ACC is a key element in the World Bank's Demand for Good Governance initiative, and it is continuously scrutinized.<sup>50</sup> The ACC operates without secrecy; indeed, it invites inspection. A consequence of this desire to meet international standards is that it is difficult to "Cambodianize" justice.

In striving to meet a universal standard for justice, it should be noted that taken-for-granted concepts in some countries are quite controversial in others. During an arbitrator training session that we led, a heated discussion took place over the issue of "make whole" orders and especially back-pay. Cambodians became engaged in a passionate debate – how could workers possibly gain wages without actually doing the work, even if it was subsequently established that an employee had been disciplined or discharged without cause and had not been able to work through no fault of their own? Would any employer comply with a back-pay award? Would the future of the ACC be harmed by the promulgation of such a novel concept? The idea that employees would be paid while not working was clearly a principle that had no resonance in Cambodia. If one worked, one got paid; if one did not work, one did not get paid regardless of the reason for not working.

This discussion reinforces the need for caution – elements of

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48. See *Our Team*, THE ARBITRATION COUNCIL, <<http://www.arbitrationcouncil.org/en/about-us/the-arbitration-council-foundation>> (last visited May 4, 2016) (scroll down and select "International Advisory Board").

49. *The Royal Government of Cambodia Knights Commissioner of Australian Industrial Relations Commission*, THE ARBITRATION COUNCIL (June 20, 2014), <<http://www.arbitrationcouncil.org/en/post/19/The-Royal-Government-of-Cambodia-knights-Commissioner-of-Australian-Industrial-Relations-Commission>>.

50. See THE WORLD BANK, REPORT NO. RES 13474, RESTRUCTURING PAPER ON A PROPOSED PROJECT RESTRUCTURING OF DEMAND FOR GOOD GOVERNANCE PROJECT GRANT H4410-KH 5 (2014), available at <[http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2014/02/10/000333037\\_20140210103838/Rendered/PDF/RES134740PJPR00r0FINAL0revised00702.pdf](http://www-wds.worldbank.org/external/default/WDSCContentServer/WDSP/IB/2014/02/10/000333037_20140210103838/Rendered/PDF/RES134740PJPR00r0FINAL0revised00702.pdf)> ("In Component 1 . . . , the Arbitration Council (AC) sub-component has again achieved highly significant outcomes.").

natural justice accepted as Gospel in one society do not easily translate into another.<sup>51</sup> While the ACC is trying mightily to introduce concepts of fairness into industrial relations justice, there are some natural strains that will develop when foreign ideas conflict with strongly-held local sensibilities. Cambodian arbitrators likely will continue to struggle with the concept that people can be paid damages for lost wages. It truly is a foreign notion unlikely to achieve traction in Cambodia.<sup>52</sup>

As will be discussed later in the paper, the independence from government has proven to be a mixed blessing. While arguably essential to the Council's effectiveness, it has meant that financial sustainability has been a struggle from the ACC's creation. Independence from government has meant little or no government funding, creating reliance on external sources such as the World Bank.<sup>53</sup> In November 2014, the Government of Sweden committed \$1.2 million to keep the Council functioning through 2016.<sup>54</sup>

The work of the Council and labor relations in general feature prominently in Cambodia media. It is rare for a week to go by without front page stories of a labor dispute and quotes from Council officials. The Council translates its decisions quickly and issues them publicly. The website of the ACC makes decisions available. Decisions are a source for media coverage. In a country with little access to judicial decisions and schedules, the ACC is a refreshingly open and transparent body. Several knowledgeable external observers working in Southeast Asia described it as the Cambodian adjudicatory institution that most conforms to the characteristics of a rule of law system. The ACC is a source of pride for Cambodian government officials when speaking about economic growth and the rights of workers and employers.

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51. The discussion arose quite by chance when Ponak described awarding a large amount compensation to a successful grievant in one of his cases. The response from the Cambodian arbitrators was immediate and led to a very lively debate from which all parties emerged with greater appreciation of cross-cultural differences. There was no intent to suggest that the North American approach to back-pay was a concept that ought to be imported into Cambodia.

52. It is also worth noting that the elapsed time between a dismissal and an arbitration decision is measured in days, not months, in Cambodia. The back-pay issue may be less consequential in practice compared to a not atypical North American case where an employee may have to wait a year for an arbitration decision.

53. See, e.g., THE WORLD BANK, *supra* note 49, at 6 (noting that despite its success, the post-project sustainability of the Council was at risk).

54. Srey Sokmeth, *Core Support for Labour Dispute Resolution in Cambodia*, AC NEWSLETTER, Oct.-Dec. 2014, at 3, available at <[http://www.arbitrationcouncil.org/uploads/6d05a-newsletter-ac-english\\_q4\\_2014.pdf](http://www.arbitrationcouncil.org/uploads/6d05a-newsletter-ac-english_q4_2014.pdf)>.

Media coverage also has the effect of publicizing labor standards, expectations, and educating the public about such important conditions as minimum wage, holidays, the proper treatment of gratuities by tourists, and access to rights. There is human drama in the stories that are depicted in ACC decisions – how tips are diverted by hotel owners, why a major international beer company refuses to accept an ACC decision, how workers without adequate ventilation in factories suffer mass fainting spells.

One of the more interesting episodes for the ACC was how its 2004 decision against the 5-star Raffles le Royal hotel in Phnom Penh and Raffles Grande Hotel d'Angkor in Siam Reap reverberated internationally.<sup>55</sup> The case involved a nascent union and a first-time collective bargaining agreement. Service charges (i.e. gratuities) automatically added to bills were not being distributed properly and eventually the workers went on long strikes.<sup>56</sup> The hotels moved to dismiss 97 workers in Phnom Penh and 200 in Siam Reap.<sup>57</sup> The Cambodian courts found that the workers were engaged in an illegal strike, but the courts' decision was neither respected nor influential.<sup>58</sup> The union filed cases for the reinstatement of striking workers to the ACC. The ACC heard the case and concluded that the employer showed a "flagrant disregard for the right to freedom of association and the right to bargain collectively," rights protected by the Constitution.<sup>59</sup> The publicity surrounding the work of the ACC facilitated an effective international boycott of the Raffles hotel chain. While the ACC decision was non-binding, the furor surrounding the decision forced Raffles to reinstate the workers.<sup>60</sup> Although this was an extreme example, it illustrates that the ACC's decisions can be very influential even when they are non-binding (binding versus non-binding decisions are discussed below).

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55. Raffles Hotel le Royal v. Union of Raffles Hotel le Royal, Case No. 24/04 (Arb. Council June 7, 2004), available at <[http://www.arbitrationcouncil.org/uploads/1e74b-22.04-le-royal\\_e.pdf](http://www.arbitrationcouncil.org/uploads/1e74b-22.04-le-royal_e.pdf)>.

56. *See id.* at 6, 9-11.

57. *Id.* at 7-8.

58. *Id.* at 9-10, 12-13.

59. *Id.* at 18.

60. Yun Samean, *Raffles, Union Agree to End Dispute*, THE CAMBODIA DAILY (Sept. 14, 2004), <<https://www.cambodiadaily.com/archives/rafflesunion-agree-to-end-labor-dispute-42763/>>.

### *B. Key Features of Cambodia's Labor Arbitration System*

Under Cambodia labor law, labor disputes are first submitted to Ministry of Labour conciliators.<sup>61</sup> Should conciliation not resolve the dispute, a report (referred to as a “non-conciliation report”) is prepared by the Ministry conciliator and the matter, along with the report, is supposed to be referred to the Council.<sup>62</sup> A potential blockage in the system can occur if the Ministry permanently delays referral to the Council because of political pressure or other types of interference by powerful interests. Council officials suggested that such tactics were more common in the early years of the ACC but had become increasingly rare as the arbitration system had gained acceptance. Some external observers were less optimistic, commenting that a lack of transparency at the Ministry level created opportunities to circumvent dispute resolution mechanisms.<sup>63</sup>

Once a dispute is referred to the ACC, a three-person arbitration panel is constituted and a hearing is scheduled.<sup>64</sup> The hearings are usually held in the Council's Phnom Penh offices and typically last less than a full day. Increasingly, employers are retaining lawyers to represent them at the hearing. Because of cost, unions are much more likely to rely on their own staff. The Council usually attempts to mediate before the formal hearing begins and has proven effective; in 2013 approximately 30 percent of cases referred for hearing to the ACC were resolved through mediation.<sup>65</sup> Awards must be (and often are) issued within fifteen days of the completion of the hearing.<sup>66</sup> Mediated cases take an average of 9.1 days to reach settlement, while arbitrated cases take 22.3 days before the award is issued. The longest time period for any dispute in the history of the ACC was 189 days, and it is considered an outlier.<sup>67</sup> The awards are public documents and

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61. LABOUR LAW art. 300, ¶ 2 (Cambodia); *id.* arts. 304-06; CMTY. LEGAL EDUC. CTR., *supra* note 28, at 13-14, 17-18.

62. LABOUR LAW art. 308 (Cambodia); CMTY. LEGAL EDUC. CTR., *supra* note 28, at 18.

63. See VAN NOORDE ET AL., *supra* note 28, at 22-23.

64. CMTY. LEGAL EDUC. CTR., *supra* note 28, at 20-21.

65. THE ARBITRATION COUNCIL, ANNUAL REPORT 2013, at 7 (2014), *available at* <[http://www.arbitrationcouncil.org/uploads/a6ce7-annual-report\\_english.pdf](http://www.arbitrationcouncil.org/uploads/a6ce7-annual-report_english.pdf)>.

66. CMTY. LEGAL EDUC. CTR., *supra* note 28, at 25.

67. Case No. 42/04 (on file with author). In sum, these are impressive statistics when compared to North American settings. For example, in the mature system in Canada, there was an 80 percent probability that an arbitration would be delayed beyond 200 days, mostly due to the difficulty associated with scheduling hearing dates. See Allen Ponak et al., *Using Event History Analysis to Model Delay in Grievance Arbitration*, 50 INDUS. & LAB. REL. REV. 105 (1996). In a more recent study of almost 2000 Canadian arbitration awards, the authors found that once a hearing was concluded, the average time it took an arbitrator to issue an award was

are published on the Council's website.

The arbitration system divides disputes into three basic categories: interest disputes, collective rights disputes, and individual rights disputes.<sup>68</sup> Technically, only interest disputes and collective rights disputes are under the jurisdiction of the ACC.<sup>69</sup> Not surprisingly, unions attempt to cast all rights disputes as collective ones, with most of the jurisdictional jockeying taking place at the Ministry of Labour conciliation stage. In theory, the Ministry will not refer individual rights disputes to the Council but in practice some referrals to the ACC still raise questions about whether the dispute has been properly classified. When this occurs, arbitration hearing time is directed toward the question of jurisdiction rather than the merits of the dispute.

Based on our interviews, many of the arbitrators and stakeholders, employers included, view the collective/individual distinction as somewhat artificial and a source of frustration that ought to be eliminated. As one employer representative stated – “it distorts the system.” In this view, both individual and collective rights disputes should be subject to arbitration. As it currently stands, individual disputes that are not successfully resolved at the Ministry of Labour conciliation can be taken to court,<sup>70</sup> in practice meaning little or no recourse at all.

### *C. Choosing Arbitrators*

Panels of three arbitrators hear and decide each case. Panels are selected on a case by case basis by the parties from pre-set lists of arbitrators. There are three separate lists: an employer list, an employee list, and a Ministry of Labour list.<sup>71</sup> There are ten arbitrators on each list. The union and employer each choose an arbitrator from their respective lists and the two arbitrators together select a third arbitrator from the Ministry list who automatically

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fifty-three days, but with variability ranging from thirteen days to 719 days. See Daphne Taras et al., *Personality and Time Delay Among Arbitrators*, in *ARBITRATION 2010: THE STEEL WORKERS TRILOGY* AT 50, PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 389, 394 (2010).

68. CMTY. LEGAL EDUC. CTR., *supra* note 28, at 7-12, 15.

69. *See id.* at 16-19.

70. *Id.* at 13-14.

71. *See List of Arbitrators*, THE ARBITRATION COUNCIL, <<http://www.arbitrationcouncil.org/en/about-us/the-arbitration-council/list-of-arbitrators>> (last visited May 5, 2016).



becomes panel chair.<sup>72</sup> When the arbitration system was originally established, it was anticipated that the lists would be generated by the parties themselves. A combination of internal wrangling, political pressures, and inexperience resulted in the ILO effectively recruiting and selecting candidates for all three lists. These lists were vetted by each of the parties and were initially supposed to be in place for a two year transition period.<sup>73</sup> Since the original lists were established there has been virtually no turnover and the initial two year “transitional” list has in effect become permanent.<sup>74</sup>

A list of the arbitrators with photos and biographies is available on the ACC website.<sup>75</sup> Of the thirty arbitrators, most are over fifty years of age and five are women. With one exception, all arbitrators are lawyers licensed to practice in Cambodia. Most arbitrators received their first degree in Cambodia and many acquired additional education in law, economics, public administration, and business in United States, France, Japan, and Russia. A comparison of the background and training reveals no obvious differences among arbitrators across the three lists.

The workload is not evenly distributed among the arbitrators.<sup>76</sup> On the employee list, three arbitrators were appointed to 75 percent of the cases. The concentration is even more pronounced on the Ministry or neutral list where two arbitrators accounted for over 70 percent of the case load. The employer list has the most even distribution with three busiest arbitrators appointed 60 percent of the time. On all three lists there are several arbitrators who are rarely selected, having been appointed to less than twenty cases in the twelve years since the Council’s inception. The pattern of a handful of arbitrators performing most of the work is hardly unique to Cambodia. In Canada and United States, a small portion of arbitrators handle a disproportionate amount of the cases. There is a bi-modal distribution of a handful of extremely busy arbitrators and another set of arbitrators who are rarely appointed.<sup>77</sup> North American arbitrators who are rarely selected will usually move into other kinds of work and drop out of the profession.

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72. CMTY. LEGAL EDUC. CTR., *supra* note 28, at 20-21.

73. See VAN NOORDET AL., *supra* note 28, at 10.

74. See *id.* at 18 (describing the limited pool of qualified individuals and the legal changes that allowed essentially indefinite terms).

75. *List of Arbitrators*, *supra* note 71.

76. Internal records of the ACC (on file with authors).

77. Taras et al., *supra* note 67, at 393.

In Cambodia the original list of thirty arbitrators has not changed in twelve years. Even those arbitrators who are appointed only once or twice a year remain on the list. Partly this is because all arbitrators have full time jobs and do arbitration cases on a part time basis. Many have private law practices, several are senior university professors or administrators, and others hold senior positions in a variety of public and private institutions and international NGO's. Thus, their livelihoods are not dependent on arbitrating. Remaining on the list, even if it does not translate into cases, is largely cost free and a source of prestige. Also, given the difficulties in compiling the lists in the first place, making changes would be politically sensitive and simply not worth the cost. Clearly the parties themselves have decided which arbitrators they prefer. In our interviews, arbitrator replenishment was not a high priority for the parties although some of the arbitrators we interviewed expressed disappointment at not being selected more often.

Given the centrality of the ACC as a forum for dispute resolution, it is not clear whether parties could develop "off-list" arbitrators, as they are free to do in North America. Indeed, the legal status of arbitration awards outside the ACC is unclear, and there is no incentive for the parties to take the risk of entering this grey area where there would be little protection by courts, the ACC, or any other mechanisms. In Cambodia, new arbitrators were appointed to the ACC roster *before* proving themselves to the parties; by contrast, in North America, arbitrators are appointed to rosters *after* their acceptability to the parties is established via years of practice. The ACC must, and does, engage in continuous training for its arbitrators.<sup>78</sup>

#### *D. Arbitration Decision Writing*

The concentration of appointments among a small group of arbitrators has had some unintended consequences. Arbitrators are paid on a per case basis by the ACC, regardless of the complexity of the case and the amount of time needed to prepare an award. In 2015, the payment rate was \$120, a fee that may seem generous in the context of Cambodian per capita income but is substantially less than the fee schedule of an experienced Phnom Penh lawyer. The low

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78. See THE ARBITRATION COUNCIL, *supra* note 29, at 19 (reporting on professional development efforts).

payment and the high caseloads of the most popular arbitrators mean that arbitrators rarely draft their own decisions. Drafting is handled by the Council's permanent legal team and at least one member of the legal team will attend the hearing.<sup>79</sup> For more complex cases, two legal team members attend. At the conclusion of a hearing, the three member board will meet, agree on their decision, and hand the matter to the Council's legal team for drafting.<sup>80</sup> One advantage of having the decision drafting handled by the legal team is their great familiarity with previous awards, allowing for more award consistency.

The practice of delegating award writing to the legal team has some disadvantages. Most experienced arbitrators know that "writing is thinking" and that the rigor of having to clearly articulate and explain the conclusions produces better decisions. Experienced arbitrators also know that sometimes the decision that was thought to be the correct one at the end of the hearing is not what eventually emerges. Some decisions "just won't write," resulting in reanalysis and possibly a different outcome. Having the awards prepared routinely by others means the chance for this additional reflection and analysis by the decision maker is lost. Exacerbating the situation are the very short time lines, a mere fifteen days to issue the award. We were told in our interviews that members of the arbitration panel often receive the award draft at the fifteen-day deadline and do not have an opportunity to review it carefully or make substantive amendments before the award is released.

While the practice of having awards drafted by the legal team is not a secret, it is also true that the Council does not advertise this practice. From the interviews, it was clear that senior union and employer leaders are aware that the awards are not prepared by the arbitrators but do not consider it a problem. Both union and employer representatives commented that the arbitrators have full time jobs and accepted that they might simply not have the time to prepare decisions given the very tight timelines. One labor leader expressed the opinion that it is more important to have the awards issued expeditiously than to have the arbitrators write them.

### *E. Expectations of Arbitrator Neutrality*

We canvassed the parties and the arbitrators about the

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79. See VAN NOORD ET AL., *supra* note 28, at 20 (describing the permanent legal team as functioning like court clerks).

80. See CMTY. LEGAL EDUC. CTR., *supra* note 28, at 30.

expectation of neutrality for the arbitrators on the employee and employer lists. In North America, for example, when tripartite arbitration panels are used,<sup>81</sup> it is expected that the panel members chosen by each of the parties will favor the party that chose them.<sup>82</sup> There is not an expectation of strict neutrality; the neutral role is left to the chair. In the Cambodian system, there is a similar expectation of strict neutrality from the arbitrator chosen from the Ministry list.

The expectation for arbitrators from the employer and employee lists was more ambiguous. One frequently chosen arbitrator from the employee list, who was a union activist at one time, said any perceived biases arose from his better understanding of unions: “I have more knowledge and hear more concerns about the union but I make sure both parties get justice.” He admitted that it is sometimes difficult to jettison years of empathy with workers but believed that he personally decided each case on its merits despite pressure at times to favor the union position.

An experienced arbitrator on the employer side said he considered himself neutral and independent but indicated that employers expect him to take their side in the dispute. He commented that he has occasionally been contacted directly by employers about an ongoing case and has had to explain that he is neutral even though he appears on the employer list. In his view, his strong position on neutrality has cost him appointments.

There were mixed responses from representatives of labor federations. Several indicated that they expect their appointees to protect the interests of workers and to convince the other board members to decide the case in the union’s favor. The Ministry list arbitrator, on the other hand, was expected to be strictly neutral. Another representative, however, stated that she expects the employee list appointee to be neutral and was satisfied that this was the case. The union representatives were unanimous that the knowledge of the arbitrator and his or her experience with similar cases were the most important factors in arbitrator selection. On the employer side, we were told that factory owners want an arbitrator

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81. The practice of using tripartite panels, once the dominant practice in Canada, has declined significantly in the past twenty years. In our experience, tripartite panels are increasingly rare in rights arbitrations although they remain the norm in the arbitration of interest disputes.

82. See generally David J. McLean & Sean-Patrick Wilson, *Is Three a Crowd? Neutrality, Partiality and Partisanship in the Context of Tripartite Arbitrations*, 9 PEPP. J. DISP. RESOL. 167 (2008).

“who is able to speak the language of business.”

### *F. Binding Versus Non-Binding Awards*

When the arbitration system was established in 2003, arbitration awards were nonbinding unless both parties agreed to be bound by the decision.<sup>83</sup> In the case of an interest dispute, if one or both parties declined to be bound by the award, the union was free to strike and the employer could lock out. In the case of a rights dispute, the only recourse was to re-litigate the matter in court. The non-binding nature of arbitration was a compromise to help gain acceptance of arbitration, a new institution that was viewed initially with a good deal of suspicion.<sup>84</sup> It allowed the parties to “be secure in the knowledge that they have a legal right to protect themselves from a decision being imposed upon them.”<sup>85</sup> Another initial advantage of allowing for non-binding decisions is that it sidestepped, for the moment, the politically fraught question of enforcement. If either party rejected the decision, they were not legally bound by it, making the enforcement issue moot.

The non-binding nature of awards has brought its own set of problems. As the system has matured, the issue of award compliance and the reluctance of losing parties to implement awards have emerged as a major problem. Not only are awards not being implemented in cases where the parties have not committed to be bound by the decisions, but there is often a refusal to implement awards in cases where the parties have voluntarily agreed to be bound by the decision or where there is an industry agreement that the awards are to be binding.<sup>86</sup> Many strikes occur when employers refuse to implement awards. And striking unions ignore Interim Return to Work Orders with increasing frequency.<sup>87</sup> As demonstrated in Table 2, the ACC’s internal statistics show a trend line of increasing non-compliance.

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83. VAN NOORD ET AL., *supra* note 28, at 11-12.

84. *Id.*

85. *Id.* at 12.

86. See, e.g., WORKER RIGHTS CONSORTIUM, WORKER RIGHTS CONSORTIUM ASSESSMENT OF KIN TAI GARMENT (CAMBODIA): FINDINGS, RECOMMENDATIONS AND STATUS 4 (2014), available at <<http://gsd.lacity.org/sms/WRC/WRC%20Compliance%20Investigation%20Report%20for%20LA%20Kin%20Tai.pdf>>.

87. See Michelle Chen, *Cambodia’s Garment Workers Aren’t Backing Down*, THE NATION (Jan. 23, 2015), <<http://www.thenation.com/article/cambodias-garment-workers-arent-backing-down/>>.

**Table 2:** Compliance with Interim Return-to-Work Orders, 2003-2015<sup>88</sup>

<b>Number of cases and percentage of cases complied with Interim Return-To-Work Order (IRTWO)</b>	<b># of strikes</b>	<b>% of strike cases complied with IRTWO</b>	<b># of workers involved in strike</b>
May 2003	2	100%	NA
2004	20	100%	NA
2005	12	100%	NA
2006	22	73%	1,575
2007	18	82%	9,504
2008	25	71%	18,790
2009	33	67%	34,449
2010	17	92%	6,498
2011	21	71%	16,596
2012	45	61%	30,172
2013	64	54%	48,477
2014	94	55%	80,170
Aug-15	40	59%	9,258
<b>Total</b>	<b>413</b>	<b>70%</b>	<b>255,489</b>

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88. Internal Records of the ACC (on file with authors).

The Arbitration Council has been gathering data on the relative proportion of binding and non-binding awards. Since 2003, the proportion of binding awards has been increasing slowly, but there is still a great deal of year to year fluctuation. Table 3, based on internal data from the Arbitration Council, shows the number of countable awards<sup>89</sup> issued by the ACC from 2003 to 2014 and the percentage of binding versus non-binding awards. It reveals that the total number of awards has grown steadily since the arbitration system's inception. In 2004, the ACC's first full year, it issued seventy-six awards; by 2014, the number of awards had increased to 182. Until the end of 2010, the proportion of binding awards fluctuated between 29 percent and 46 percent. Since 2011, the proportion of binding awards has climbed substantially with 56 percent of the awards being binding in 2014. As discussed in the next section, the increase in the proportion of binding awards since 2011 is attributable to the signing of an unprecedented memorandum of understanding between the major employers in the garment and footwear industry and the major union federations.

Caution should be used in interpreting Table 3, as there is a difference between awards that are classified as binding versus awards that in practice are binding. As we will discuss in the next section, some parties ignore binding awards or fail to implement them fully. There also is a problem of some parties refusing to attend arbitration hearings, leading to cases being listed by the ACC as "closed cases" rather than as parties' failure to attend. For example, out of 2070 cases filed with the ACC, 185 are considered "closed." Hence, noncompliance with the ACC's authority may be higher than simply failure to abide by the ACC's written decisions.

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89. The number of awards excludes cases where a work stoppage took place prior to the convening of an arbitration panel or the parties refused to attend the arbitration hearing. The ACC classifies these as "closed cases."

**Table 3:** Proportion of Binding Versus Non-Binding Arbitration Awards, 2004 to 2014<sup>90</sup>

<b>Year</b>	<b>Number of Awards</b>	<b>Percentage Binding</b>	<b>Percentage Non-Binding</b>
2004	76	41%	59%
2005	49	35%	65%
2006	67	39%	61%
2007	81	43%	57%
2008	90	46%	54%
2009	104	29%	71%
2010	102	34%	66%
2011	122	66%	34%
2012	146	52%	48%
2013	168	57%	43%
2014	182	56%	44%

### *G. Memorandum of Understanding*

In September 2010, the Garment Manufacturers Association and the major labor federations, recognizing the instability of the existing arrangements, signed a watershed two year Memorandum of Understanding (MOU) committing the parties to accept arbitration rights awards as binding and banning strikes during the life of a collective agreement.<sup>91</sup> As a result of the MOU, the proportion of binding awards issued by the Council increased substantially, explaining the jump in binding awards from 34 percent in 2010 to 66 percent in 2011 (Table 3). The MOU was renewed in October 2012 for a second two year term with only minor changes.<sup>92</sup> At the time this paper was prepared (January 2016), negotiations towards a third MOU have been underway since Fall 2014 but have stalled over how to ensure compliance with arbitration awards and eliminate pre-hearing strikes. The ACC reports that the parties, for the most part, continue to abide by the expired MOU while the renewal issues are

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90. Internal records of the ACC (on file with authors).

91. Memorandum of Understanding on Improving Industrial Relations in the Garment Industry, *supra* note 34.

92. Memorandum of Understanding on Improving Industrial Relations in the Garment Industry (Oct. 3, 2012), available for download at <[http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=93337&p\\_country=KHM&p\\_count=183](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=93337&p_country=KHM&p_count=183)> (select "PDF of MoU in English").



addressed.

While the MOU is restricted to the garment and footwear industries, these industries are by far the largest and most influential in Cambodia and account for 80 percent of cases referred to the ACC.<sup>93</sup> The significance of the MOU cannot be overstated. It was an important vote of confidence in the Council and the system of arbitration by the most important employer group in the country. It is a recognition of the high costs of work stoppages and acknowledgement that unions cannot be ignored in the development of the country's economy. The MOU also reflects an attempt by the major garment manufacturers to create a level playing field for its own members and reduce the possibility of being undercut by rogue companies unwilling to abide by the rules. Ultimately, it is an expression of appreciation in the rule of law. The 2012 MOU was signed by the secretary general of the Garment Manufacturers Association of Cambodia and the leaders of eight different labor federations.<sup>94</sup> The preamble of the 2012 MOU reflects the importance attached to good industrial relations practices.

In the interest of promoting harmonious industrial relations in Cambodia, we, the undersigned parties representing workers and employers in the garment industry, have committed today to improve industrial relations in the garment industry. This solemn agreement, referred to as the MoU, has been reached freely and in good faith, and commits the parties to respect and adhere to certain key principles, and to follow up these principles with a number of concrete steps and actions.

This MoU covers, on the side of employers, current and future members of the Garment Manufacturers Association in Cambodia. It covers, on the side of the unions, the confederations and federations that have signed this MoU, and their current and future affiliates at the enterprise level. Any registered union federations and confederations may "opt-in" to this MOU by informing in writing the Secretariat of the Arbitration Council, with copies to GMAC and signatory union confederations.

The undersigned shall promote and encourage the spirit of this MoU to all employers and workers who are not signatory to this MoU. GMAC, with the support of unions, will make particular efforts to extend coverage of this MOU to all garment and footwear factories. . . .<sup>95</sup>

Specific terms of the 2012 MOU relevant to arbitration include the

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93. THE ARBITRATION COUNCIL *supra* note 65, at 6.

94. Memorandum of Understanding, *supra* note 92.

95. *Id.* at 1.

following (paragraphs 5 & 6):

Any dispute that arises during the term of the collective bargaining agreement will be settled in accordance with a shortened dispute procedure with binding arbitration on rights disputes. No strike shall take place over disputes of rights.

In the absence of a collective bargaining agreement, the parties shall agree to use the national dispute procedure and accept, where mediation is unable to resolve the issue, binding arbitration for rights disputes. The parties also agree to follow the dispute resolution procedures and not resort to strike or lockout during the process. Where an arbitration decision on dispute of rights is given, the employer and workers and their representatives accept that the decision is final and binding on them. Where a party fails to honour the agreement, then strike or lockout shall be available as a last resort.<sup>96</sup>

The MOU included promises by the signatories to inform their members and publicize the agreement.<sup>97</sup>

Lofty declarations notwithstanding, partial or complete non-compliance with the arbitration system in the garment and footwear industry awards is not unusual. The ACC estimates that in approximately 30 percent of the cases referred to the Council for arbitration, workers are on strike prior to the referral, a contravention of the MOU.<sup>98</sup> On the employer side, the ACC estimates that employers do not fully implement the arbitration award in 30 percent of the cases. Union leaders and neutral observers who we interviewed complained that where awards ordered reinstatement of a group of terminated workers, it was not uncommon for employers to agree to only reinstate some of workers and refuse to reinstate others. Labor leaders gave an example of a case where the employer's non-implementation of an award led to a strike which in turn resulted in the firing of many workers. After government intervention, the strike ended but the company was allowed to pay compensation to the discharged workers without rehiring them. They were very bitter that almost 200 workers lost their jobs.

GMAC leaders interviewed also recognized that non-compliance with awards that are supposed to be binding is a problem, but did not believe it as widespread as suggested by labor leaders. In their view, the majority of companies comply with decisions but conceded that

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96. *Id.* at 2.

97. *Id.*

98. Internal records of the ACC (on file with authors).

some employers will only partially comply – in those cases, managers “look for other ways to work with their workers.” Currently, GMAC does not collect information on non-compliance and has limited tools to identify and pressure members who refuse to implement binding decisions. Not surprisingly, industry leaders were very unhappy with strikes that took place in advance of referral to arbitration. Generally lasting one week or less, these strikes were viewed as extremely disruptive and very expensive. They also undermined employer commitment to the arbitration system.

Finding solutions to non-compliance with the arbitration system has been the major impediment delaying the signing of a third MOU. The previous MOU expired in October 2014 and was extended for three months. There has not been a further extension but most employers and unions in the garment and footwear industry continue to informally abide by the MOU while the parties continue to negotiate. Companies have an interest in eliminating work stoppages over rights disputes and labor federations want to ensure that awards issued by the Arbitration Council will be implemented.

Part of the problem in bridging this gap has been the absence until very recently of good information on the extent of pre-hearing strikes and the degree of non-compliance with released awards. There is a general recognition that collecting systematic data, publicizing the results, and sharing it with the parties is a necessary first step in addressing the compliance issue. There have been suggestions of public “naming and shaming” of MOU signatories who violate the MOU, which in some cases may result in pressure by major international brands on local manufacturers. One experienced foreign observer, who has played an informal advisory role since the arbitration system’s birth, commented that in the near term, finding solutions is going to be difficult in the face of “imperfect compliance with the terms of a compact, reached voluntarily, in circumstances where contractual enforcement is, in any realistic sense, unavailable.”<sup>99</sup> He then suggested a number of concrete procedural steps that could be introduced at the arbitration hearing stage to reinforce the binding and final nature of the award (e.g. having representatives sign a document at the hearing promising

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99. E-mail from Michael Gay, Comm’r, Tasmanian Indus. Comm’n, to Allen Ponak (and several others) (December 2, 2014, 7:28AM) (on file with authors). From 1990 to 2013, he was Commissioner, Australian Industrial Relation Commission (since renamed the “Fair Wage Commission”). Mr. Gay is a member of the International Advisory Board of the ACC and gave permission to the authors to cite his email and to identify him by name.

compliance). In the case of alleged non-compliance with an award, he proposed remedial hearings before the same arbitration panel. In the case of pre-hearing strikes, interim cease and desist orders by the Council were suggested. The emphasis was placed on a remedial and educative approach, rather than a punitive one.

For repeat violators, negotiators involved in the renewal of the MOU have proposed deregistration from GMAC of companies that fail to abide by arbitration decisions three or more times.<sup>100</sup> For unions that repeatedly strike in violation of the MOU, it has been proposed that the labor federation “shall replace enterprise union leaders.”<sup>101</sup> It remains to be seen whether these enforcement mechanisms will ultimately be adopted and whether, if adopted, they will have the desired impact. The ability of the parties to successfully untie the Gordian knot of non-compliance will be a very good test of the arbitration system’s progress and its future.

#### *H. Funding and Sustainability*

To remain and be perceived as independent, the Council has eschewed financing from the Cambodian government. From its inception, the arbitration system has relied on funding from a variety of international organizations and foreign governments, most recently from Sweden.<sup>102</sup> Council leaders recognize that ongoing internal funding sources must be developed. The most obvious way is through some type of per capita tax per worker from companies and unions. Companies have expressed willingness to explore such an arrangement and even acknowledge that they may have to contribute proportionally more than the unions.<sup>103</sup> Thus far the labor federations have balked, claiming that already impoverished employees should not be forced to pay anything. The Solidarity Center has supported some kind of per capita contributions that would enable the ACC to be self-sustaining and wean it from reliance on international

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100. Information obtained by authors from sources close to the MOU re-negotiations.

101. This information on the MOU re-negotiation came from very confidential emails from senior ACC leadership. Because of the highly sensitive nature of the negotiations we are very reluctant to provide details of how we obtained the information. We prefer to protect our sources. Does the following work: “Information obtained by authors from sources close to the MOU re-negotiations.”

102. THE ARBITRATION COUNCIL, *supra* note 29, at 25.

103. THE WORLD BANK, NO. 92187, DFGG LEARNING NOTE 11, at 2 (2015), available at <[http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/03/03/000442464\\_20150303113324/Rendered/PDF/921870BRI038530dia0Learning0Note011.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2015/03/03/000442464_20150303113324/Rendered/PDF/921870BRI038530dia0Learning0Note011.pdf)>.

agencies.<sup>104</sup> The current Swedish grant will keep the ACC operating until the end of 2016. As of early 2016, the ACC still remains far from a permanent solution to the ongoing funding problem.

## VI. MEASURING SUCCESS

North American grievance arbitration systems are typically evaluated on whether they are “equitable, inexpensive, and expeditious.”<sup>105</sup> On these criteria, there can be no doubt that the Arbitration Council of Cambodia is successful. Its processes and outcomes can be characterized as equitable in that the ACC is independent and neutral and is viewed that way by employers and unions. The parties choose arbitrators from a roster into which they had input, the arbitration process itself is conducted according to established and publicly available rules, and the decisions are widely disseminated and easily accessible. The decisions, a substantial number of which we have reviewed, are decided on evidence, precedents, and statutory law. As with any adjudicative system, there are winners and losers in individual cases, but interviews did not disclose suggestions, let alone evidence, that outcomes were pre-ordained or improperly influenced.

With respect to cost, the arbitration system is free for the parties. Hearings are held in the ACC offices, and the payment of the arbitrators comes from the ACC budget. The parties are only responsible for the compensation of their own representatives. The speed of the system would be the envy of almost any grievance arbitration system of which we are aware. Matters move from filing a dispute to an award in forty-five days, approximately half the time of which is for the Ministry of Labour conciliation process. Once a case comes to the ACC, it is scheduled, heard, and decided within twenty days.

While the ACC shines on the above three criteria, in democratic societies with a tradition of rule-of-law, the question of compliance is rarely articulated because it is largely taken for granted. Including compliance as a factor in measuring success, provides less favorable results for the Cambodian arbitration system. Illegal pre and post-award strikes are a major problem, and employers, with some

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104. This view was expressed by David Welsh, then Country Director of Solidarity Center in Phnom Penh, during discussions with the authors.

105. Kenneth Thornicroft, *The Grievance Arbitration Process: Theory and Practice*, in UNION MANAGEMENT RELATIONS IN CANADA 374 (5th ed. 2005).

regularity, do not fully comply with ACC decisions that are meant to be binding. A system in which compliance is unpredictable is at risk, and the degree of non-compliance, should it persist, is the Achilles heel of the long run viability of the Cambodian arbitration process. Indeed, finding a workable approach to compliance is the single biggest stumbling block to the renewal of the Memorandum of Understanding between the garment and footwear manufacturers and the labor federations.

At the same time, judging the arbitration process on the criteria customarily applied to long established democratic economies understates the ACC's accomplishments. It is universally acknowledged as an independent and non-corrupt institution, no small thing in a country in which corruption is endemic and the judicial system unreliable. The ACC's reputation for probity is a crucial element in its continued ability to attract funding from reputable international donors. It sets an example for the rest of Cambodian civil society with the transparency of its processes and outcomes, its publication of detailed annual reports, and its willingness to openly cooperate with researchers and other informed observers. It has established an international advisory committee,<sup>106</sup> which it regularly consults. It engages in extensive training of arbitrators, ACC staff, and the parties. In short, the ACC plays a crucial and positive role in the continuing development of Cambodia, a factor that counts heavily in our conclusion that this unique experiment, to date, is clearly a success.

## VII. CONCLUDING OBSERVATIONS

In our travels through Cambodia over several different visits, we were struck by the ever increasing sprawl of enormous new factories around Phnom Penh, anonymously manufacturing familiar international brand name goods. The leading brands that use Cambodian manufacturing – H&M, Gap, C&A, Marks & Spencer, and Walmart<sup>107</sup> – are not obvious. Rather, there is a system of subcontracting work, and there is little obvious linkage between the factory that produces the goods and the brand that sells the goods. This makes enforcement more difficult, except in circumstances in which the chain of ownership to a well-known brand outside

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106. Allen Ponak is a member of this committee.

107. See Welsh, *supra* note 6.

Cambodia can be linked to defiance of an ACC order within Cambodia.

The 2004 case of the Raffles hotel chain allowed workers to gain greater power through an international boycott. It is not an entirely unique situation. In 2011 a major Cambodian beer manufacturer, Angkor Beer, that had refused overtime for weekend work, was ordered by the ACC to pay thirty-four attractive employees – the so-called “beer girls” who publicize Angkor – an extra \$2 for every weekend day of work, with a substantial retroactive component.<sup>108</sup> The company refused to follow the arbitration decision and the women went on strike. The strikers started a boycott movement against Cambrew, the largest brewer in Cambodia that included Angkor among its products. Enforcement was achieved when it was discovered that Cambrew is half-owned by the Danish beer giant Carlsberg.<sup>109</sup> The 175-million strong International Trade Union Confederation and the Danish Confederation of Trade Unions were “appalled by Carlsberg’s behaviour in Cambodia” according to the Cambodian president of the Food Workers’ Association.<sup>110</sup> Carlsberg quickly moved to pay the workers the additional \$2 per day to which they were entitled by law.

The 2014 brutality, in which workers died, and the crackdown afterwards, caused international response because of the global nature of the garment industry. David Welsh, then director of AFL-CIO Solidarity Center in Cambodia, describes the situation:<sup>111</sup>

Cambodia’s garment industry contracted sharply in 2014: Following the brutal crackdown in January that year, international orders for locally produced apparel dropped, partly because of all the bad press and new uncertainty about whether the industry could operate smoothly again. At the same time, however, some major brands – like Adidas, Nike, Levis, Gap, Disney and Walmart – condemned the government repressions and called for the establishment of a formal mechanism to ensure that workers would get a fair wage. Then, after months of media reports and campaigning by unions and nongovernmental organizations, H&M

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108. Cambrew Ltd. v. Cambodian Food & Serv. Workers Fed’n, Case No. 61/11 (Arb. Council July 7, 2011), *available at* <[http://www.arbitrationcouncil.org/uploads/935a5-a\\_6111\\_e.pdf](http://www.arbitrationcouncil.org/uploads/935a5-a_6111_e.pdf)>.

109. May Titthara & Vincent MacIsaac, *Beer Girls Triumph as Payment Promised*, PHNOM PENH POST (Aug. 10, 2011), <<http://www.phnompenhpost.com/national/beer-girls-triumph-payment-promised>>.

110. Chhay Channyda & Vincent MacIsaac, *Beer Girl Allies Target Carlsberg*, PHNOM PENH POST (Aug. 9, 2011), <<http://www.phnompenhpost.com/national/beer-girl-allies-target-carlsberg>>.

111. Welsh, *supra* note 6.

and Zara, among other brands, announced that they would adjust their pricing practices to help local factories defray the costs of having to pay workers better.

In the Raffles and Carlsberg situations, the harm that could be caused to the brand reputation by flagrant disregard of ACC decisions added to the enforcement power of the ACC. The fact that the employer associations and unions enter into a contract making ACC decisions binding shows that there is a need for stability in labor relations. It is not in the interests of either workers or employers to jeopardize the rapidly-developing economy of Cambodia. And international unions use their own leverage in their home countries to publicize non-compliance and pressure brand names to be more sensitive to worker rights when employing sub-contractors. Further, brand name companies will intervene when they feel their goodwill – and customer loyalty – might be eroded. However, in normal circumstances, with a little-known employer making unbranded products, there is considerable worry about compliance.

One of the concerns brought home to us in our research interviews was whether Cambodia was becoming a “show model” developing economy; that is, by building pristine factories with air conditioning and good ventilation, international companies are using Cambodia as a form of “greenwashing.”<sup>112</sup> The 2013 Rana Plaza disaster in Bangladesh, in which 1135 garment workers died as their unsafe factory collapsed,<sup>113</sup> could be contrasted to the modern factories that stretch outside Phnom Penh for many kilometers. Does the use of Cambodia as a model for offshoring factory work tend to hide the use of dangerous conditions in countries like Bangladesh and Myanmar? Do the same companies that comply with ACC decisions tend to subcontract work elsewhere where they can avoid their obligations altogether? This issue needs further investigation as Cambodia develops, not only in the garment and footwear industries, but also in its nascent auto parts manufacturing sector. While acknowledging these concerns, David Welsh of Solidarity Center was satisfied that overall the ACC and its work has been a good thing for Cambodian workers. He also hoped that the ACC model could

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112. Helle Jeppesen, *Minimum Standards vs. Greenwashing*, DEUTSCHE WELLE (Feb. 14, 2014), <<http://www.dw.de/minimum-standards-vs-greenwashing/a-17431249>>.

113. Julfikar Ali Manik & Jim Yardley, *Building Collapse in Bangladesh Kills Scores of Garment Workers*, N.Y. TIMES, Apr. 25, 2013, at A1; Lucy Siegle, *One Year After Rana Plaza, the World Is Still Addicted to Fast Fashion: Disaster Took 1,133 Workers' Lives, but Garment Trade Is Rewarded with a Boom*, THE OBSERVER, Apr. 20, 2014, at 37.



spread to other countries, such as Laos, Myanmar, and Nepal.<sup>114</sup>

The ACC, although continuing to have a vulnerable funding model and despite its issues with award compliance and illegal strikes, has been very successful in creating a venue for rule of law in a country that lacks other institutions for justice. It exhibits a number of the important characteristics of North American labor arbitration systems: low-cost, relatively quick and efficient, and, decisions issued by respected neutrals. The single most important departure from the North American systems is the absence of truly binding decisions in many cases.

There are several issues that must be resolved for the future:

- Funding sustainability currently is reliant upon foreign donors. The ACC is seeking a more stable source of funds, perhaps through a check-off system paid for by both employers and workers. In a country as poor as Cambodia, however, it is very difficult for workers to agree to forego any part of their earnings in exchange for the promise of justice. Nevertheless, in order to remain impartial, it is important that both employers and unions, rather than the government, support the ACC, even if the proportionate amounts might vary.
- Compliance with the ACC awards is a major problem. In a situation in which the judiciary cannot be relied upon to enforce ACC awards, how will enforcement be promoted? Perhaps the employer organizations themselves could take a stronger role in keeping their members compliant with the ACC. There are some opportunities for sanctioning renegade employers; one of the principal strengths of the ACC is that its awards are well-publicized by media. The consequences of noncompliance may be social opprobrium and shaming, as well as union activity and disruption caused by work stoppage. Pressure on international brand names is another tactic that has been proven effective.

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114. This view was expressed by Mr. Welsh during discussions with the Authors. In September 2015 a delegation from the Arbitration Council visited Myanmar. A delegation from Myanmar visited Cambodia in January 2016 to explore the potential of the Cambodian arbitration model for emerging industry in Myanmar. The ILO helped sponsor both visits. See *Myanmar and Cambodia Exchanged Expertise in Industrial Relations*, THE ARBITRATION COUNCIL (Jan. 26, 2015), <<http://www.arbitrationcouncil.org/en/post/54/Myanmar-and-Cambodia-Exchanged-Expertise-in-Industrial-Relations>>.

- The list of arbitrators could be replenished, perhaps by addition rather than deletions. Being a listed arbitrator is a source of pride, even if few cases are heard. The ACC also has training workshops, so arbitrators hear about international developments and are themselves ambassadors for rule of law within Cambodia.

The ACC is dedicated to helping spread rule of law. Through its open and transparent decisions, it functions as a public educator of labor standards. The media reports its work, especially in high profile, dramatic cases. To date, the Council has successfully insulated itself from a judicial system that inspires little confidence, and it has maintained an arms' length relationship with government and political parties. It is an experiment that deserves to thrive and be permanently embedded in Cambodia and indeed, in other countries struggling for workplace justice.

We are not, however, naive. The issues are far more complex than simply declaring the ACC as a valuable resource for the development of Cambodia's labor intensive economy. Because the ACC is used to bypass an unreliable judiciary, it is troubling that the ACC might be inadvertently removing pressure to reform other parts of the system of Cambodian justice. If employers and unions ignore the courts and instead create an isolated island within Cambodia in which labor relations justice can be achieved, how then will the normal institutions be pressured to reform themselves? How long can this experiment in justice survive within a country whose main institutions' adherence to rule of law is compromised? And as competitive pressures mount from other low-wage countries such as Myanmar, Vietnam, and Bangladesh, will these pressures provide an excuse to bypass or dismantle the ACC experiment?

On the other hand, a more optimistic view is that the ACC will prove to be a building block for the spread of rule of law within Cambodia. We noticed in our visits that the ACC "graduates" its staff throughout Cambodian society. As people move from the ACC to private and public sector organizations, they bring with them the values of the Council – respect for the law, due process, and incorruptibility. The success of the ACC has also spawned initiatives to create commercial arbitration and dispute resolution systems. Thus, the ACC may soon be joined by other islands showcasing rule of law. This augurs well for the future.

