

Use of soft law to address HIV/AIDS in Southeast Asia

Non-binding agreements, or “soft law,” have played a role in influencing government policy and reducing HIV vulnerability among construction workers in the Greater Mekong Subregion of Southeast Asia. In this article, David Patterson et al state that soft law sometimes offers advantages over treaty law, but that challenges remain in the implementation of soft law.

In recent years, most economies in Southeast Asia have experienced rapid economic growth and investment in major infrastructure projects. While many of the mostly male construction workers for these projects may be internally mobile nationals, many others may be migrants (documented or undocumented) from other countries in the region.

All of these workers are at increased risk for HIV infection because they have money to spend on alcohol and other drugs and sexual services; they are far from their families and social support networks; and they may not be reached by HIV prevention programs for local communities (where they exist) due to language and literacy barriers. When they return home, they may bring HIV and other infections to their sexual and drug-injecting partners.

Most governments in the Southeast Asian region have shown little interest in ratifying existing treaties on migrant workers' rights.¹ The *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* has only been ratified by the Philippines and Timor-Leste. Cambodia and Indonesia have signed but not ratified the Convention. Only the Philippines has ratified the *Migrant Workers (Supplementary*

Provisions) Convention of the International Labour Organization (ILO).

HIV-specific non-binding international and regional agreements offer advantages over treaty law in that they can be created relatively quickly and, if regional, they can be adapted to local contexts. Monitoring mechanisms can also be more informal and flexible than the corresponding treaty mechanisms.

In November 1999, the Association of South East Asian Nations (ASEAN) Task Force on HIV/AIDS (ATFOA) proposed that “ASEAN governments adopt a common policy recommending the integration of HIV prevention programmes as a precondition for construction and infrastructure development contracts bidding and approval.” A regional inter-governmental meeting in Bangkok in October 2003 adopted “Recommendations on Building HIV Resilience along the ASEAN Highway” (Bangkok Recommendations) which incorporated this provision.²

In the 2001 *Declaration of Commitment on HIV/AIDS*, all U.N. Member States undertook, “...by 2005, to develop and begin to implement national, regional and international strategies that facilitate access to HIV/AIDS prevention programmes

for migrants and mobile workers, including the provision of information on health and social services...”³ The monitoring framework developed to measure the implementation of the Declaration also included references to mobile populations.⁴ The Declaration was reaffirmed by the U.N. General Assembly in 2006.⁵

In 2004, six countries (Cambodia, China, Lao PDR, Myanmar, Thailand and Vietnam) agreed in a Memorandum of Understanding (Regional MOU), *inter alia*, to “...strengthen collaboration among Ministries responsible for agriculture, construction, finance, health, home affairs, labour, public works, public security and transport sectors to promote the updated Bangkok Recommendations on infrastructure construction along the ASEAN Highway Network...”

The Regional Strategy on Mobility and HIV Vulnerability Reduction in the Greater Mekong Subregion 2002-2004 (Regional Strategy) was developed by the U.N. Regional Task Force on Mobility and HIV Vulnerability Reduction (UNRTF). In 2006, the Regional Strategy was revised and extended for the period 2006-2008, and incorporated a reference to the Regional MOU (albeit noting that national implementation was so far limited).⁶

In 2005, an assessment tool was developed and administered in Cambodia, Lao PDR, Thailand and Vietnam to assess country recognition of, and compliance with, these agreements. This national policy self-audit was used to draw the attention of government and non-government stakeholders to their international commitments and to stimulate discussion of, and commitment to, advancing the policy reform process.

Thailand, for example, reported that although it does not require an HIV impact assessment, it would develop guidelines on how such an assessment should be undertaken. Thailand also committed to developing a policy on the integration of HIV prevention programs as a precondition for construction contracts bidding and approval.⁷

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In June 2007, the health ministers of the countries that make up the Asia Pacific Economic Cooperation (APEC) endorsed guidelines for APEC economies which reference the ILO *Code of Practice on HIV/AIDS and the World of Work*, and which incorporate key elements of the Bangkok Recommendations.⁸

Specifically, the APEC guidelines recommend that HIV impact assessments be undertaken as part of the feasibility study phase for infrastructure projects, and that preconditions for bidding and approval include integration of comprehensive gender-sensitive occupational health and HIV prevention programs.

Case study: Cambodia

The national response to HIV in Cambodia is coordinated by the National AIDS Authority (NAA). In 2004, the NAA convened a multi-sectoral technical working group (MTWG) on HIV and mobility. A member of the MTWG, the Ministry of Public Works and Transport (MPWT), also created a Ministerial Committee on HIV/AIDS. In 2005, this Committee developed its own HIV action plan.

Priority areas for advocacy and policy reform in the MPWT action plan include the implementation of the Regional MOU as it relates to large infrastructure projects. An advocacy training workshop was held for MTWG members in October 2005.⁹ The workshop included the development of an advocacy plan for the adoption of a policy regarding the allocation of a budget for HIV activities in infrastructure projects.

In 2006, the MPWT adopted a suite of policies on HIV/AIDS, including one explicitly designated to implement obligations incurred under the Regional MOU, which was referenced in the introduction and included as an annex. This policy provides, *inter alia*, that “all budgets in the bidding contracts on project development programmes on public infrastructure construction shall be submitted to the chairman of the AIDS Committee of the Ministry

of Public Works and Transport for review and recommendation to the ministry management for approval of prevention programmes against HIV/AIDS and STD epidemics...”¹⁰

Discussion

The experience of Cambodia demonstrates that non-binding agreements between states can promote national HIV policy reform consistent with international guidance and best practice.

The challenges of implementation remain, and countries are reluctant to include HIV budgets in loan agreements, arguing that these funds should be provided as grants. There is as yet no general commitment from donors to include grants for HIV prevention activities in the budgets of infrastructure projects, although some funders have supported such activities as part of their assistance.¹¹

For Southeast Asia, advocacy through regional bodies such as the UNRTF, ATFOA and APEC is needed to encourage donors to incorporate such grants routinely in infrastructure project budgets.¹² The potential negative social and economic harms to be addressed can be quantified using tools developed for this purpose.¹³

As with treaties, there is still the risk that governments will take their obligations lightly. To date, the Regional MOU and the APEC guidelines have only been endorsed by ministers of health. To increase national engagement, such agreements should also be endorsed by national HIV multi-sectoral bodies and ministries with convening powers, such as the Ministry of Economic Planning or equivalent.

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2007, ASEAN leaders adopted the *Declaration on the Protection and Promotion of the Rights of Migrant Workers*, which reiterated this commitment.

² The Bangkok Recommendations were updated in Yangon, Myanmar, in February 2004. L-N Hsu, *Mobile Populations and HIV Vulnerability: Selected Responses in South East Asia*, United Nations Development Programme (UNDP), 2002, at 13.

³ Declaration of Commitment on HIV/AIDS, U.N. General Assembly Resolution S-26/2, adopted 27 June 2001, at para. 50.

⁴ *Monitoring the Declaration of Commitment on HIV/AIDS: Guidelines on the Construction of Core Indicators*, UNAIDS, 2005.

⁵ *Political Declaration on HIV/AIDS*, U.N. General Assembly Resolution 60/262, adopted 2 June 2006.

⁶ Available at www.hiv-development.org.

⁷ *Consolidated National Policy Self Audits: Cambodia, Lao PDR, Thailand and Vietnam*, CSEARHAP, 2006. At www.csearhap.org.

⁸ *Guidelines for Creating an Enabling Environment for Employers to Implement Effective Workplace Practices for People Living with HIV/AIDS*, APEC, 2007.

⁹ See *Summary Report of the Workshop on Advocacy and*

Policy Promotion Related to Mobility and HIV/AIDS, NAA, Cambodia, 2005. The workshop was conducted by PACT Cambodia in cooperation with the NAA, with funding and technical assistance from CSEARHAP.

¹⁰ *Policies on HIV/AIDS Prevention in Response to Activities of Public Works and Transport Sectors in the Kingdom of Cambodia*, official translation from Khmer, signed 18 August 2006.

¹¹ In 2001, the Japanese Bank for International Cooperation (JBIC) funded the reconstruction of the Sihanoukville Port in Cambodia. Some 300 workers a day were employed on the project, and the sex industry around the port flourished. In response, JBIC initiated HIV prevention activities, implemented through the local health authorities and local and international non-governmental organizations. *HIV/AIDS Prevention for Mobile Population in Greater Mekong Subregion: Corporate Social Responsibility in JBIC Infrastructure Projects*, report of satellite meeting at the 7th International Congress on AIDS in Asia and the Pacific, Kobe, 2 July 2005. At www.jbic.go.jp

¹² See statement titled *Joint Initiative by Development Agencies for the Infrastructure Sectors to Mitigate the Spread of HIV/AIDS*, Toronto, Canada, 11 August 2006.

¹³ See *HIV Impact Assessment Tool: The Concept and Its Application*, UNDP, 2001.

¹ However, the ASEAN Vientiane Action Programme, adopted by ASEAN leaders in Vientiane, Lao PDR, on 30 November 2004, proposes the "...elaboration of an ASEAN instrument on the protection and promotion of the rights of migrant workers," s. I.1.4.6. On 13 January