STRENGTHENING THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY: A CRITIQUE OF THE INTERNATIONAL LABOR ORGANIZATION’S DEVELOPMENT ASSISTANCE IN SWAZILAND AND ZIMBABWE

Desirée LeClercq¹

Insufficient labor policies contribute to poverty, while those poverty conditions contribute to limited employment opportunities and labor rights abuses. Traditional multilateral lending institutions, such as the World Bank and the International Monetary Fund, provide development aid but tend to treat labor policies as incompatible with efficient market functioning. The International Labor Organization (ILO), on the other hand, provides development assistance specifically targeting labor policies. Unlike traditional lending institutions, the ILO’s assistance imposes no conditions. Instead, the ILO’s mandate requires it to design its programs in consultation with the recipient country’s government and social partners.

This article studies the ILO’s assistance under the Southern African Development Community (SADC). Closely examining two SADC Member States, Swaziland and Zimbabwe, it finds that the ILO’s assistance fails to strengthen labor rights in countries that do not already have strong social partners and social dialogue platforms. In those cases, the ILO cannot second-guess its requisite consultative structure; yet, it must still use the results of those consultations – however dominated by the stronger factions – to design its assistance programs.

This article concludes by arguing that prior to designing its assistance programs, the ILO must invest its resources, when needed, to strengthen the social dialogue platform and social-partner capacity in the country.

¹ Adjunct Professor, American University Washington College of Law, and Director for Labor Affairs at the Office of the United States Trade Representative. Former legal officer at the International Labour Organization. This article expresses only the personal views of the author and does not reflect the official views of any of the above institutions. The author would like to thank Lance Compa, Jack Getman, Terri LeClercq, and Jeffrey Vogt for their views, as well as the staff of Michigan State International Law Review (and, in particular, Tia Rowe) for careful editing. Any remaining errors are to be attributed to the stubborn author.
This task will be difficult, as it requires preconditions and potential delays. Nevertheless, by constructing its assistance to ensure full and effective consultations at the outset, the ILO’s assistance will have a greater impact on labor rights.
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I. INTRODUCTION

Economic development and labor rights are often seen as mutually exclusive. Countries that are trying to grow economically invest their limited resources in market-oriented policies, often at the expense of worker rights.

As countries strive to develop, they are increasingly turning to regional integration for their economic growth strategy. By forming

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Nevertheless, countries that improve their labor standards are more likely to attract foreign direct investment and assistance due to the perception of better industrial relations. See Merran Hulse & Anna van der Vleuten, Agent Run Amuck: The SADC Tribunal and Governance Transfer Roll-back, in GOVERNANCE TRANSFER BY REGIONAL ORGANIZATIONS: PATCHING TOGETHER A GLOBAL SCRIPT 84, 87–88 (Tanja A. Börzel & Vera van Hüllen, eds., 2015). “External funding consistently makes up half or more of SADC’s annual budget.” Id. at 87.

regional, economic blocs, countries are able to harmonize markets and weather economic fluctuations more efficiently than if they remained isolated. These harmonized economic policies are codified through regional integration agreements (RIAs).

Regional integration efforts first concentrated solely on integrating economic policies within regions. Since the 1990s, however, RIA partners have begun to include socio-political elements into their efforts, including the objective of harmonizing labor rights.

The inclusion of labor rights in RIAs seeks to provide a common minimum floor of labor protections so that no regional member may claim a “comparative advantage[] by having less favourable labor legislation.” This common floor is also appealing because it allows countries to define and implement regional labor rights rather than having to satisfy the expectations of industrialized countries at an international level.

The objective to harmonize labor standards is deceptively simple. RIAs are often ratified by countries that are at very different levels of economic development. Those countries that are on the lower end of

7. For an analysis of the evolution of these regional labor efforts, see id. at 16–31.
10. See Garvey, supra note 2, at 249.
the spectrum cannot always provide the resource mobilization and re-distribution to accommodate for unequal resources.11

Acknowledging these challenges, the multilateral community has called for labor-related assistance to enable developing countries to respect labor rights.12 The Commission on Legal Empowerment of the Poor, for example, acknowledges that “[r]ecognition and enforcement of the rights of individual workers and of their organisations is critical for breaking the cycle of poverty.”13 The Addis Ababa Action Agenda, which was adopted at the U.N. Third Conference on Financing for Development, calls for “advance[ing] fully towards an equitable global economic system in which no country or person is left behind, enabling decent work and productive livelihoods for all, while preserving the planet for our children and future generations.”14

As part of their development efforts, governments often request assistance from traditional multilateral lending institutions, such as the International Monetary Fund (IMF), multilateral banks, such as the World Bank, or bilateral donor agencies of Organization for Economic Cooperation and Development (OECD) countries.15 However, these traditional forms of development assistance do not effectively answer the multilateral call for labor-related assistance.16

11. Id.
16. See, e.g., BOB HEPPEL, LABOUR LAWS AND GLOBAL TRADE 193 (2005); see also Peter Auer, Security in Labour Markets: Combining Flexibility with Security in Decent Work 1–2 (Econ. & Labour Mkt. Papers, ILO, Paper No. 2007/12, 2012); see also
Rather than answering that call, IMF and World Bank assistance often treats labor rights as incompatible with efficient market functioning.\textsuperscript{17} These institutions instead presume that stronger labor rights stifle employment growth and economic markets.\textsuperscript{18} They provide loans and other forms of assistance to strengthen markets, but will in turn impose conditionality.\textsuperscript{19} Those conditions typically require strict regulatory and austerity measures.\textsuperscript{20} At best, this assistance fails to promote a conducive environment for labor standards. At worst, it promotes dismantling worker rights by eliminating wage protection and by imposing excessive work hours and other exploitative labor conditions.\textsuperscript{21}


\textsuperscript{19} See SARKAR, \textit{supra} note 15, at 89.

\textsuperscript{20} \textit{Id.} at 275.

\textsuperscript{21} See, e.g., HEPPLE, \textit{supra} note 17, at 17–18; see also Yossi Dahan, Hanna Lerner & Faina Milman-Sivan, \textit{Shared Responsibility and the International Labour
The International Labor Organization (ILO), the U.N. specialized agency mandated to adopt and supervise international labor standards, fills this development void. As part of its mandate, the ILO provides labor-related technical assistance to its member States upon their request. Unlike traditional assistance, ILO assistance aims to stimulate economic development by strengthening labor and industrial relations policies. This assistance is provided unconditionally.

Organization, 34 Mich. J. Intern'l L. 675, 683 (2012) (arguing that “exploitation of workers in the global labor market occurs on an institutional level, namely, in existing regulations of the global economy that have been determined by global institutions (for example, the International Monetary Fund, World Bank, and World Trade Organization (WTO)) or through intergovernmental agreements.”); Arturo Escobar, Encountering Development: The Making and Unmaking of the Third World 39–40 (2d ed. 2012) (describing the discourse of development, whereby modernization took priority over social, cultural, and political elements); Sarkar, supra note 15, at 276 (“[t]he human cost of adjustment policies could be measured in terms of sharply increased unemployment levels, reductions in real wages, and drastically reduced social services to the most vulnerable segments of the population . . . ”); Pia Riggiorazzi, Advancing Governance in the South: What Roles for International Financial Institutions in Developing States? 155 (Timothy Shaw ed., 2009) (“despite successfully tackling problems of hyperinflation and economic stabilization, externally led neoliberal reforms impacted negatively on state–society relations and . . . created vulnerabilities and insecurity particularly among low-income groups, which suffered the most from the costs of economic recession and high rates of unemployment.”).


23. See ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, ILO (June 18, 1998), http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm [hereinafter Declaration on Fundamental Principles] (“Recognizes the obligation on the Organization to assist its Members, in response to their established and expressed needs . . . by making full use of its constitutional, operational and budgetary resources, including, by the mobilization of external resources and support . . . “).


25. Id. at 12–13.
In addition to providing assistance to its individual Members, the ILO also provides assistance to regions that are in the process of integration. In doing so, it must design its programs to harmonize labor and economic policies while taking into account uneven levels of development.

The ILO’s labor-related assistance stands apart from traditional assistance not only because of its labor aim, but also because of its approach. While World Bank, IMF, and other traditional assistance institutions impose pre-defined objectives and conditionality, the ILO must design its assistance programs and define its goals in consultation with representatives of government, trade unions, and employers in the recipient country or region. This unique design is conducive where the recipient, at the time of consultation, is already capable of holding those consultations. Where it is not (in particular, when its trade unions are weak or there is no effective platform for social dialogue), the ILO’s assistance falls short.

This challenge is clearly demonstrated in the Southern African Development Community (SADC). SADC is comprised of sixteen countries that are all at very different stages of development. These

26. See, e.g., Challenges and Opportunities for Labour in the Caribbean Community, at 1, ILO, https://www.ilo.org/wcmsp5/groups/public/----americas/----ro-lima/----sro-port_of_spain/documents/meetingdocument/wcms_306348.pdf (discussing the ILO’s efforts to assist “the Caribbean Community Secretariat in trying to establish and sustain a viable agenda for labour in the context of regional and international development”) (last visited Dec. 02, 2018).
27. See id. at 1–3.
29. Indeed, as the ILO itself has acknowledged: “freedom of association is not just a desired outcome of development, but an integral part of the broader process of development and a critical component of all free and open societies. Without it, there can be no genuine or effective dialogue or cooperation between workers, employers and government on development and labour issues.” Int’l Labour Org., Freedom of Association and Development, at 4 (2011), available at http://www.ilo.org/wcmsp5/groups/public/----ed_norm/----declaration/documents/publication/wcms_160208.pdf.
30. Angola, Botswana, Comoros, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.
different stages of development are coupled with varied approaches to labor rights. Some SADC Members have strong social partners, including trade unions, and long histories of effective social dialogue.\textsuperscript{32} Other Members have consistently ensured weak social-partner participation and social dialogue through years of State-led oppression and exploitative labor laws.\textsuperscript{33}

Despite their disparate economies and levels of social-partner participation, SADC Members have requested ILO assistance to harmonize national laws and practices at a regional level and to gain industrial stability at a national level.\textsuperscript{34} To help SADC Members realize their objectives, the ILO provides various forms of assistance at both levels.\textsuperscript{35} Over the past ten years, it has provided assistance in the forms of decent work programs, high-level advisory missions, and capacity-building workshops.\textsuperscript{36} Some of the recipient countries have made notable improvements in their labor laws and practices.\textsuperscript{37} Others, however, have not.\textsuperscript{38}

This article examines the ILO’s development assistance to strengthen labor rights under SADC’s RIA initiatives, from the early 2008\textsuperscript{39} through

\begin{itemize}
\item 33. \textit{See id.}
\item 34. For a description of SADC instruments committing its Member States to harmonizing labor standards, see \textit{infra} p. 6. \textit{See also} Fenwick et al., \textit{supra} note 32, at 7–8 (discussing SADC treaties and protocols that aim to harmonize national labor laws).
\item 35. \textit{See infra} pp. 17–18.
\item 36. \textit{See infra} pp. 17–19.
\item 37. \textit{See, e.g.}, Fenwick et al., \textit{supra} note 31, at 7–8.
\item 39. Following the implementation of the SADC-ILO Memorandum of Understanding (MOU) on labor. \textit{See Memorandum of Understanding between the
2015. Part I describes the role of labor rights in development, the ILO’s system of labor standards, and its assistance to Members to strengthen those standards. Part I also outlines three key areas in which the ILO’s assistance is unique to traditional forms of multilateral development aid. Part II examines the ILO’s assistance provided in two SADC Member States—Zimbabwe and Swaziland—to strengthen their capacities under SADC integration. In examining the labor rights in those countries, this paper concentrates on freedom of association and collective bargaining, both of which are particularly critical for developing economies. Part III concludes by drawing lessons from the varied impact of the ILO’s assistance in Zimbabwe and Swaziland. It challenges the orthodox theory behind the ILO’s assistance, and offers an alternative approach that calls for the ILO to create a more effective design for each recipient country prior to carrying out its assistance programs.

II. LABOR AND DEVELOPMENT

Poverty and labor exploitation are twin problems. Insufficient labor policies contribute to poverty, while those poverty conditions, in turn,
contribute to limited employment opportunities and labor rights abuses.\textsuperscript{42} Multilateral organizations acknowledge this intrinsic link.\textsuperscript{43} The United Nations has included human rights among its poverty indicators, concluding that human development critically turns on achieving decent employment opportunities for men and women.\textsuperscript{44} The U.N. 2030 Agenda for Sustainable Development similarly includes among its goals the need to ensure decent work, such as by promoting labor rights.\textsuperscript{45}

In addition to global measures, the U.N. system has embraced the concept of regional integration as a way to “tame” the negative consequences of globalization.\textsuperscript{46} In 2006, for example, UNESCO held a High-Level Symposium on the Social Policy Dimension of Regionalism.\textsuperscript{47} This Symposium produced the Buenos Aires Declaration, calling on “regional organisations such as MERCOSUR and the African Union [. . .] to further develop the social dimension of

\textit{SADC Meeting the Challenge?}, at 1 (ILO Sub-Reg’l Office for S. Afr., Issues Paper No. 30, 2008) (“Promoting employment and fighting poverty is a major challenge facing the world today . . . ”); Trebilock, supra note 12, at 559 (noting the “relevance of international labour standards to [economic] development.”).

\textsuperscript{42} See RODGERS, et al., supra note 18, at 23–24; Christian Barry & Sanjay G. Reddy, \textit{International Trade and Labor Standards: A Proposal for Linkage}, 39 CORNELL INT’L J. 545, 607–08 (2006) (“The attainment of at least some basic labor standards must be understood as constitutive of development; promoting these standards is a form of promoting development itself.”).

\textsuperscript{43} See OECD, \textit{Trade, Employment and Labour Standards: A Study of Core Workers’ Rights and International Trade} 16 (1996). Indeed, the OECD has debunked fears that compliance with labor standards will harm developing countries. \textit{Id.} at 105.


\textsuperscript{45} See G.A. Res. 70/1, at Goal 8 (Sep. 25, 2015).


\textsuperscript{47} See Deacon et al., supra note 46, at 335.
regional integration and [called] on the UN to facilitate inter-regional dialogues.°48

III. THE INTERNATIONAL LABOR ORGANIZATION (ILO)

The onus of providing development assistance to strengthen decent work and labor standards falls squarely on the ILO’s shoulders. It was established in 1919 under the premise that poverty and labor rights are intrinsically linked.°49 As stated in its Constitution, “poverty anywhere constitutes a danger to prosperity everywhere.”°50 Its constitutional tripartite structure – representatives of governments, employers, and workers – enables the Organization to approach development policies and programs from a holistic, industrial approach.°51 As discussed below, its system of labor standards (including in particular freedom of association and collective bargaining), coupled with its unique design of assistance, helps the Organization to carry out its objective.

A. The ILO’s System of Labor Standards

In its 1998 Declaration, the ILO confirmed:

Whereas, in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental . . . [labor rights] is of


°49. See id.

°50. See ILO Const., supra note 22.

particular significance in that it enables the persons concerned, to claim freely and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate, and to achieve fully their human potential.\textsuperscript{52}

The ILO accordingly treats economic and social policies as mutually reinforcing, and aims to ensure a “level playing field” by promoting the ratification and implementation of its labor standards.\textsuperscript{53} To supervise the implementation of those standards, the ILO maintains an intricate supervisory machinery.\textsuperscript{54} First, its Committee of Experts on the Application of Conventions and Recommendations (CEACR) meets once a year to discuss the implementation of all ILO member States concerning the conventions they have ratified.\textsuperscript{55} Second, cases of particular importance or significant violations are then taken up by the Committee on the Application of Standards (CAS), which meets during the annual International Labor Conference (ILC).\textsuperscript{56} Exceptionally, the ILO’s highest-level supervisory body, the Commission of Inquiry, takes up cases of significant failure and conducts in-country fact-finding missions.\textsuperscript{57}

B. Freedom of Association and Collective Bargaining

Freedom of association and collective bargaining rights are critical for ensuring that economic development does not undermine worker rights. This importance has been affirmed by the multilateral community,

\textsuperscript{52} See Declaration on Fundamental Principles, supra note 23, at preamble.
\textsuperscript{54} Id. at 10.
\textsuperscript{55} Id. at 102–03.
\textsuperscript{56} Id.
\textsuperscript{57} For a holistic explanation of the ILO’s system of supervision, see id. at 102–09.
including in ILO, the World Bank, and the World Trade Organization reports, as well by development experts.

Dialogue between employers and workers redresses “confrontational attitudes and acrimony . . . [that is typically] associated with the employment relationship.” Consequently, it “promot[es] industrial peace and ultimately, economic growth.” It also contributes to poverty reduction strategies by, for example, determining minimum wages, housing, “health and safety, education for children, and income distribution.”

In an RIA, social dialogue among national trade unions and employers enables policy makers to overcome integration challenges. Efforts to reduce poverty through integration have, in turn, also created the opportunity for strengthened participation of, and dialogue among, social partners.

While critical, these standards are “achievable [only] when there are strong and independent trade unions and employer[s’] organisations” sufficiently positioned to engage in social dialogue. This dialogue is essential to represent the views of their members on economic and social

58. See, e.g., Freedom of Association and Development, supra note 29, at 1, 2–3, 26, 59–60.
59. See, e.g., Khabo, supra note 41, at 1.
60. Id.
61. Id. See also Tzannatos, supra note 58, at 175 (“bargaining coordination reduces strike activity; in turn, a high level of strikes impacts negatively on economic outcomes.”).
64. See, generally Mwamadzingo, supra note 62, at 23.
policy issues. However, these social partners must be able to carry out that dialogue; they cannot meaningfully contribute to poverty alleviation in a prohibitive atmosphere.

C. The ILO’s Unique Assistance: The Decent Work Agenda

The multilateral community acknowledges that labor rights such as freedom of association and collective bargaining are a “cornerstone” to development. Nevertheless, the results-based framework for traditional development programs treats the standards as a subsidiary social good. The ILO thus stands alone in providing assistance to countries with a chief labor objective. To ensure this unique objective, the ILO has

67. See Mwamadzingo, supra note 62, at 22–23.
69. See Deacon et al., supra note 46, at 335. See generally Robert Dañino, The Legal Aspects of the World Bank’s Work on Human Rights, 41 INT’L LAW 21, 22–23 (2007) (discussing the World Bank’s Articles of Agreement, which “provide that only the economic considerations . . . shall be relevant to the decisions of the Bank and its officers.”).
70. For an in-depth discussion of the background and impetus for the ILO’s assistance programs, see generally RODGERS ET AL., supra note 18, at ch. 6.
created a Decent Work Agenda, which makes clear that ILO assistance for economic growth must entail decent working conditions.\footnote{71}{The ILO Director-General affirmed at this time that “[t]he primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.” Int’l Labour Conference, Report of the Director-General: Decent Work, 87th session (June 1999).}

The ILO’s Decent Work Agenda is translated into national or region-specific programs through Decent Work Country Programs (DWCPs).\footnote{72}{For a detailed description of the ILO’s DWCPs see INT’L LABOUR OFFICE, ILO DECENT WORK COUNTRY PROGRAMME: A PRACTICAL GUIDEBOOK 1 (Ver. 4, 2016), available at https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_561025.pdf.}

The ILO designs each DWCP individually to address the specific needs and priorities that are identified through consultations with recipient governments and representatives of workers’ and employers’ associations.\footnote{73}{ILO, PROGRAMME AND BUDGET FOR THE BIENNIA 2016-17 at 14 (2015), available at https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_565220.pdf (“Based on national needs assessments, legal gap analyses and the comments of the supervisory bodies, the ILO will provide expert advice and technical assistance to member States that request it to overcome gaps in the application of ratified Conventions and promote further ratifications.”); see also Michael Sebastian, Poverty Reduction and Decent Work: The Role of the ILO, in TRADE UNIONS AND POVERTY: ALLEVIATION IN AF RICA 9, 13 (Mohammed Mwamadzingo & Ditiro Saleshando eds., 2003).} This process is set out in Table 1, below.
By virtue of its DWCPs, the ILO’s assistance differs from traditional assistance programs in three ways: (i) its objective expressly includes labor standards, (ii) its design is based on the input of national stakeholders, and (iii) it provides advisory support.

1. Objective

The ILO’s Social Justice Declaration forms the basis for its assistance programs. It states:

[T]he Organization should review and adapt its institutional practices to enhance governance and capacity building in order to make the best use of its human and financial resources and of the unique advantage of its

tripartite structure and standards system, with a view to . . . help, wherever necessary, the institutional capacity of member States, as well as representative organizations of employers and workers, to facilitate meaningful and coherent social policy and sustainable development . . .

Traditional multilateral actors, such as lending institutions and development agencies, also provide assistance based on their individual mandates. However, as opposed to the ILO’s Social Justice Declaration, these traditional actors have mandates that concentrate on economic reconstruction (e.g., the World Bank) or the promotion of monetary cooperation and stability (e.g., the IMF). In other words, the assistance stemming from those mandates prioritizes measured approaches to economic growth over normative standards such as labor.

While noting this distinction, certain exceptions bear mentioning. Development assistance that aims specifically to strengthen labor rights, including by strengthening the roles of labor unions and other important civil society actors, has been a critical priority in many bilateral and multilateral assistance programs in the United States, the European Union, and Canada. Furthermore, the OECD has begun to specifically

75. See id.
78. As bilateral and multilateral trade agreements have increasingly begun to include labor standards commitments, developed trade partners have begun to invest a heavy amount of foreign assistance into their trade-partner countries. This assistance has its own complicated implications, worthy of close examination, but which is distinguishable from traditional multilateral assistance and hence goes beyond the scope of this paper. For an interesting examination of the various types of such trade partner development assistance, see Kevin Banks, Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law, 32 Berkeley J. Empl. & Lab. L 45, 4546, 48 (2011).
include labor rights in its programs. These alternative programs certainly contribute to strengthening labor rights during economic development. However, in isolation, they do not go far enough. Multilateral initiatives tend to be ad hoc, reflecting the priorities of the giving countries. In other respects, some multilateral assistance programs focus on broader human rights. Maintaining labor rights as a secondary or tertiary objective may minimize the impact of economic development on labor rights, but it will not be sufficient to significantly impact the rights of workers.

2. Design

The ILO’s DWCPs are designed in consultation with the national representatives of government, workers, and employers. As illustrated in Table 1, above, the ILO’s DWCP process begins with consulting the national tripartite constituents in the country before designing its objectives and plans. As opposed to the ILO’s DWCPs, traditional development programs are designed based on predefined objectives and

79. For a description of bilateral and multilateral developments in labor development assistance, including a description of the OECD programs, see Wood, supra note 3, at 9–15.

The World Bank has acknowledged the importance of a bottom-up approach, such as in its Poverty Reduction Strategy Programs, which sought local ownership informed by local needs and conditions; in other words, it was not merely “a generic package of reforms.” See, e.g., Brian Langille, Imagining Post “Geneva Consensus” Labor Law for Post “Washington Consensus” Development, 31 COMP. LAB. L. & POL’Y J. 523, 529 (2010). For a discussion of the potential for Poverty Reduction Programs to address human rights, see Gobind Nankani, John Page & Lindsay Judge, Human Rights and Poverty Reduction Strategies: Moving Towards Convergence?, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT ch. 18 (Philip Alston & Mary Robinson eds., 2005).


81. See id. at 13–15.

82. See id. at 34 (“only large increases in aid flows are likely to result in significant increases in the rights of workers.”).

83. See ILO DECENT WORK COUNTRY PROGRAMME: A PRACTICAL GUIDEBOOK supra note 72, at 1 (noting that ILO DWCP are “based on ILO principles and standards, the priorities of the ILO’s constituents – governments, employers’ and workers’ organizations – and national development objectives.”).
policy goals that are crafted mainly by the donors.\textsuperscript{84} Their goals are typically quantitative and hence measurable; increases in exports or GDP, for example, may be identified, tracked, and reported.\textsuperscript{85}

3. Advisory Support

The ILO’s assistance includes not only programmatic measures, such as the DWCPs, but also advisory support.\textsuperscript{86} For instance, the ILO holds in-country, high-level meetings and consultations with governments and representatives of workers and employers.\textsuperscript{87} It also advises governments and legislative bodies on drafting legislation and model laws.\textsuperscript{88}

The ILO’s supervisory bodies, including the CEACR and the CAS, provide guidance to governments through formal written comments concerning national implementation of labor standards.\textsuperscript{89} This guidance identifies laws and practices that need to be revised.\textsuperscript{90} As follow-up, the ILO may offer to hold high-level or technical meetings in country to provide additional assistance to governments.\textsuperscript{91} In this respect, the ILO’s

\textsuperscript{84} See Wood, supra note 3, at 5–6.
\textsuperscript{85} See, e.g., Factsheet: IMF Conditionality, IMF, https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality (last visited Sept. 20, 2018) (“Most IMF financing is disbursed in installments and linked to demonstrable policy actions. This aims to ensure progress in program implementation and to reduce risks to the IMF’s resources.”).
\textsuperscript{88} One notable example of the ILO’s regional assistance in advising legislative reforms and model laws took place in the Caribbean Community (CARICOM). CARICOM members requested ILO assistance to audit and assess the extent to which their existing national legislation complied with CARICOM Model Labour Harmonization Legislation. For the results of those assessments, see Legislative Review for the 13 Caribbean Member States of the ILO, ILO (Sept. 09, 2014), http://www.ilo.org/caribbean/projects/WCMS_305932/lang--en/index.htm.
\textsuperscript{90} See id. at 17.
\textsuperscript{91} See id. at 114.
advice and supervisory mechanisms operate synergistically to provide resources to developing countries to assist in their efforts, along with guidance and information concerning measures that should be taken.92

The ILO’s assistance is illustrated in its extensive history with SADC. In SADC, the ILO has provided assistance to countries to strengthen their regional integration efforts, as well as their efforts to implement the ILO’s labor standards.93

IV. THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC)

SADC was established in 199294 under the Windhoek Declaration and Treaty to build a highly harmonized region.95 It aimed to “pool[] [regional] resources to achieve collective self-reliance” and improve the living standards of the people of the region.96 Currently, SADC Members have a total population of over 300 million people,97 a “combined GDP of about US $190 billion,98 and an estimated growth rate of around 6% per annum.”99 Its enormous regional economic

92. See id.
93. See infra at pp. 17–18.
94. See Ashimizo Afadameh-Adeyemi & Evance Kalula, SADC at 30: Re-examining the Legal and Institutional Anatomy of the Southern African Development Community, Monitoring Regional Integration in S. Afr. Y.B. 2010 at 5, 5. SADC traces its institutional origin to the Frontline States (FLS), which had been set up by the region’s independent states in 1970. Id. at 6 n.1. For an in-depth account of the historical background and developments of SADC, see generally id.
99. See id.
potential contrasts sharply, however, with the sharp disparities in wealth among its Members. These disparities have raised critical challenges to its integration and harmonization objectives.

A. Varied Labor Background

Some SADC Members, such as South Africa, emerged from colonialism with a labor system that already respected social dialogue and civil-society participation. Others, notably Swaziland, Zimbabwe, Tanzania, and Angola, responded to independence by strengthening the role of the State at the expense of a greater civic participation.

Over the course of the 1980s and early 1990s, the majority of SADC Members adopted World Bank/IMF structural adjustment programs (SAPs), which called for economic liberalization, “micro-economic policies (such as taxes and tariffs), macro-economic [policies] (fiscal policy) and institutional interventions.” Many of these programs were conditioned upon market-oriented policies, much to the detriment of labor rights. Those policies included, for example: reduced public-sector employment, decentralized wage systems, and increased labor flexibility, essentially permitting employers to easily terminate their employees.

B. SADC Labor Governance

Despite some of the national policies of its Members, as a regional body, SADC aims to harmonize both market-oriented policies and labor

100. See Bronauer et al., supra note 30, at 11.
101. See Takirambudde, supra note 38, at 39.
102. See, e.g., id. (discussing legislation and labor practices in those countries whereby the government suppressed trade unions and other social partners).
103. Id. at 40.
105. See id.; see also Takirambudde, supra note 38, at 40–41.
106. Fenwick et al., supra note 32, at 5.
This aim is reflected both in the Consolidated Text of the Treaty of the Southern African Development Community (SADC Treaty) and the Charter of Fundamental Social Rights in SADC (the Social Charter) of 2003.

1. SADC Treaty

Article 5 of the SADC Treaty sets out the regional economic and political objectives. Economically, SADC aims to alleviate poverty and enhance the quality of life through regional integration. Politically, it aims to “promote common political values, systems and . . . institutions.” To achieve these objectives, the Treaty’s provisions call on Members to harmonize their political and socio-economic policies and to promote “the free movement of capital and labour.”

2. The Social Charter

The Social Charter clearly states that its objectives are to be read against the backdrop of “close and active consultations among social partners and in a spirit conducive to harmonious labor relations . . . .” Its objectives pay special attention to “the retention of the tripartite structure” and the “formulation and harmonisation of legal, economic and social policies and programmes . . . .”


109. See id. at art. 5(1)(a).

110. See id. at art. 5(1)(b).

111. See id. at art. 5(2)(a) – (d).


113. See id. at art. 2(1)(a).

114. See id. at art. 2(1)(b).
The Charter places specific emphasis on the responsibility of its Members to “create an enabling environment consistent with ILO Conventions on freedom of association, the right to organize and collective bargaining . . . .” As follow-up, it requires States to submit regular reports to the SADC Secretariat, in consultation with the most representative organizations of employers and workers.

C. ILO Assistance in SADC

In view of SADC’s commitment to “create an enabling environment” and to harmonize labor policies, the region was fertile ground for strengthening labor standards. By the early 1990s, SADC Members had widely ratified the ILO’s conventions, including on freedom of association and collective bargaining. Despite their ratifications, countries did not necessarily transpose those labor standards into national laws or practices. While countries like Angola, Malawi, and South Africa ensured that their labor-standards commitments were reflected in their constitutions, countries like Botswana, Zambia, and Zimbabwe took no legislative action to secure individual rights to freedom of association.

Many of the SADC Members that refused to secure labor rights witnessed years of industrial instability, whereby discontent workers would disrupt business operations through widespread strikes, and trade unions would gain political favor and eventually challenge national political landscapes. Faced with disparate treatment of labor rights and relative levels of industrial stability, the ILO’s assistance to SADC Members has faced challenges. Nevertheless, the ILO has attempted to

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115. See id. at art. 4.
116. See id. at art. 16(1)–(4). Notably, however, the Charter does not define the period for such “regular” reporting and is silent concerning repercussions of non-compliance.
118. See Takirambudde, supra note 38, at 46.
119. Id.
120. See infra pp. 25–27.
meet this challenge by providing consistent legal and technical assistance in SADC States at both regional and national levels.\textsuperscript{121}

1. \textit{ILO-SADC Memorandum of Understanding}

Albeit not a legally-binding instrument, SADC entered into a Memorandum of Understanding (MoU) with the ILO in 1998,\textsuperscript{122} and again in 2007.\textsuperscript{123} Under Article 1 of the 2007 MoU, the ILO and SADC committed to consult each other on the planning and execution of programs for promoting decent work “as a tool for socio-economic development.”\textsuperscript{124} This commitment extends to matters concerning “tripartite consultation at regional and national levels” and harmonization of labor legislation.\textsuperscript{125}

2. \textit{ILO-SADC Decent Work Program}

The ILO and SADC adopted a Decent Work Program to achieve effective social dialogue.\textsuperscript{126} This program acknowledged that capacity constraints may prevent certain SADC Members from effectively coordinating and monitoring the implementation of regional labor programs.\textsuperscript{127} Consequently, the program includes capacity-building

\textsuperscript{121} See Bamu et al., \textit{supra} note 107, at 461–62.  
\textsuperscript{124} \textit{Id.} at art. 1.  
\textsuperscript{125} \textit{Id.}  
\textsuperscript{126} See Southern African Development Community Decent Work Program (2013-2019), \textit{supra} note 98, at 29.  
\textsuperscript{127} \textit{Id.}
assistance at the national level.\textsuperscript{128} The ILO has assisted Members within this framework to such an extent that its pervasive presence has been identified as a “key driver of labour law reform” in the region.\textsuperscript{129}

V. CASE STUDIES: ZIMBABWE AND SWAZILAND

The SADC Decent Work Program and ILO-SADC MoU provide for ILO assistance to specific Members experiencing resource capacity constraints. Zimbabwe and Swaziland have both benefitted from this assistance, particularly in terms of their freedom of association and collective bargaining laws and practices.

A. Historical Background and Labor Developments

Swaziland and Zimbabwe have similar political and labor histories. Following independence from colonial rule, both countries transitioned into authoritarian regimes, leaving civil society and trade union organizations weak and fractioned.\textsuperscript{130} The countries received IMF and World Bank development assistance,\textsuperscript{131} but nevertheless remained classified as authoritarian,\textsuperscript{132} and were accused of lacking the political will necessary to adhere to SADC’s labor commitments.\textsuperscript{133}

\begin{itemize}
  \item \textsuperscript{128} Id. at 30–31.
  \item \textsuperscript{129} See Bamu et al., supra note 107, at 455. “Most of the labour legislation in the sub-region has been drafted through [] technical support . . . .” See Khabo, supra note 41, at 3; Fenwick et al., supra note 34, at 7.
  \item \textsuperscript{130} See Peter Dwyer & Leo Zeilig, African Struggles Today: Social Movements Since Independence 166 (2012).
  \item \textsuperscript{133} See Smit, supra note 63, at 184.
\end{itemize}
1. Zimbabwe: Historical Background

Zimbabwe gained independence in 1980, concluding a two-decade civil war between the white colonialist settlers and the Zimbabwe African National Union–Patriotic Front (ZANU–PF).\(^\text{134}\) Zimbabwe’s new constitution, signed between the parties in December 1979, brought independence to the country, but did not effectively provide for the right to freedom of association.\(^\text{135}\)

The 1980s were characterized by a State autonomy, where the government intensified economic controls and increased social expenditures.\(^\text{136}\) The resulting hegemonic structure left no room for the struggling labor movement that, at that time, suffered from organizational and financial constraints, as well as internal fragmentation.\(^\text{137}\) Moreover, while some of the State’s economic

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interventions entailed raising minimum wages in low-skilled sectors, the State placed severe restrictions on collective labor action.\textsuperscript{138}

The State established the country’s one national trade union, the Zimbabwe Congress of Trade Union (ZCTU), in 1981.\textsuperscript{139} At that time, its role supported the government “by refraining from recommending strike action and by urging workers to support [State] labor policies.”\textsuperscript{140} The 1985 Labor Relations Act, promulgated by the government, addressed collective bargaining and industrial relations.\textsuperscript{141} It was, however, heavily criticized by employers’ and workers’ organizations for being State-dominated.\textsuperscript{142} The Act extensively regulated working conditions, such as minimum wages, and “imposed an unwieldy structure of industrial conciliation procedures”\textsuperscript{143} that effectively banned industrial action such as strikes.\textsuperscript{144}

By the end of the 1980s, the ZCTU had attracted a growing number of supporters.\textsuperscript{145} As protests and strikes drew tens of thousands into protest,\textsuperscript{146} the union experienced its first real signs of growth\textsuperscript{147} and

\begin{itemize}
\item \textsuperscript{139} See Qinisani Bhebe & Mildred Mahapa, \textit{The Decline in Trade Union Density in the 21st Century in Zimbabwe. A Case of Zimbabwe Congress of Trade Union (ZCTU)}, 2 J. HUM. RESOURCES MGMT. & LAB. STUD., 67, 69 (2014); Wood et al., \textit{supra} note 134, at 5–6.
\item \textsuperscript{140} See SHADUR, \textit{supra} note 3, at 5; See Bhebe, et al., \textit{supra} note 139, at 69; Raftopoulos, \textit{supra} note 136, at 5.
\item \textsuperscript{142} See Paris Yeros, \textit{The Rise and Fall of Trade Unionism in Zimbabwe, Part 1: 1990-1995}, 40 REV. OF AFR. POL. Econ. 219, 221 (2013); Mhone, \textit{supra} note 138, at 11; see generally Raftopoulos, \textit{supra} note 136, at 5.
\item \textsuperscript{143} See Takirambudde, \textit{supra} note 38, at 50.
\item \textsuperscript{144} See Raftopoulos, \textit{supra} note 136, at 5.
\item \textsuperscript{145} See Fashoyin, \textit{supra} note 141, at 113.
\item \textsuperscript{146} See DWYER et al., \textit{supra} note 130, at 167, 182–85.
\item \textsuperscript{147} See Richard Saunders, \textit{Trade Union Struggles for Autonomy and Democracy in Zimbabwe, in Trade Unions and the Coming of Democracy in Africa} 157, 158 (Jon Kraus ed., 2007).
\end{itemize}
asserted its independence. It quickly developed a mass power base among the urban working class and, by 1989, began openly challenging the government’s policies.

In 1990, the government adopted World Bank/IMF reforms and implemented the Economic Structural Adjustment Program (ESAP). Under ESAP, the government committed to a number of economic policies, including trade liberalization, fiscal and monetary reforms, labor and price controls, and ending subsidies in several public and private sectors. ESAP, as well as two World Bank SAPs, precipitated high human development costs at the expense of employment protections.

The government unilaterally adopted a new Labor Relations Act in 1992, despite ZCTU allegations that labor had been left without a voice in policy-making. The new Act contained some positive measures, including a collective-bargaining mechanism between workers and

149. See Bhebe, et al., supra note 139, at 69; Maree, supra note 132, at 15; see also Wood et al., supra note 134, at 1, 6.
150. See Mhone, supra note 138, at 16.
151. See Bhebe, et al., supra note 139, at 70; see also Mhone, supra note 138, at 16–17, 19.
153. See Yeros, supra note 142, at 221. A presumed tripartite committee had been composed in 1987; however, any proposed changes were disregarded. See id.
employers, and some acceptance of trade union pluralism. Nevertheless, it continued to allow the government to refuse to register trade unions.

By the mid-1990s, the ZCTU was supported by State policy opponents, which included civic groups, “elements of the middle class,” the urban community, and students. This opposition arose in particular against the government’s adoption of the ESAP, “both in terms of its conception and the lack of [social-partner participation] in its formulation.”

The ZCTU’s open opposition to the ESAP culminated into a public sector strike in 1996. The government responded by arresting the strike leaders and dismissing the majority of the public sector workers. In 1999, even though the union continued to suffer from internal capacity weaknesses, it still continued to build its membership. The ZCTU elaborated its political campaign and, in May 1999, facilitated the formulation of an opposition political party, the Movement for Democratic Change (MDC). The MDC’s popularity grew remarkably quickly, and by 2000, it rivaled the ZANU-PF in every election. The MDC’s proliferating popularity was met, unfortunately, with increasing ruling party violence, and many of its members were killed during election campaigns from 2000-2003.
Following years of “frustrating and dead-end negotiations between the ZCTU and the Labor Ministry,”164 a Tripartite Negotiating Forum (TNF) was established in “1998 as a voluntary and unlegislated chamber.”165 However, the anticipated social dialogue would not come to fruition for several years.166 Zimbabwe’s deteriorating economy, coupled with infighting, undermined the TNF’s systematic approach to consultation.167

Efforts to develop new legislation in a tripartite setting were more promising in 2000, when the social partners were consulted in the process of revising the 1985 Labor Relations Act.168 However, this promise was cut short in 2005, when the social partners were surprised by the government’s unilateral changes in law,169 including the withdrawal of certain collective bargaining rights.170

The 2008 presidential elections were so close that neither the MDC nor the ZANU-PF held a majority.171 As noted by the ILO Commission of Inquiry that year, there was “a clear pattern of arrests, detentions, violence and torture by the security forces against trade [unions] that

164. See Fashoyin, supra note 141, at 115.
166. See Fashoyin, supra note 141, at 115–16.
167. See id. at 120.
168. See id. at 116–17.
170. See Fashoyin, supra note 141, at 117. By 2009, the TNF stopped meeting altogether. See Uzhenyu, supra note 165, at 6. See Fashoyin, supra note 141, at 120–22, for a detailed account of the collapse of the TNF. While this collapse began in 2007, it had been precipitated by distrust and internal conflicts for several years. Id. at 122.
coincided with ZCTU nationwide events,” which indicated “centralized direction.” SADC leaders persuaded the Government to share power with MDC formations. This persuasion ultimately concluded in the Global Political Agreement (GPA), establishing an “Inclusive Government,” which was signed in September 2008. Despite initial optimism over the Inclusive Government, in 2011, violence against the ZANU-PF intensified, with parliamentarians detained and social activists beaten and tortured.

2. Swaziland: Historical Background

Swaziland’s colonial rule consisted of few settlers; instead, it was upheld through appointed “traditional” chiefs who ensured a subservient urban population. When independence was won in 1968, the role of the chiefs was further strengthened through constitutional arrangements. The constitutional monarchy, based on “tribal

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176. See Wood et al., supra note 134, at 10.

177. Id.
nationalism and authoritarian populism,” actively discouraged trade union formations.\[178\]

By the early 1970s, increasing social and political unrest challenged the traditional rule in the country. In 1973, King Sobhuza II issued a royal decree suspending the constitution and banning all political parties, delegating to himself sole legislative and executive authority.\[179\] In 1977, the King replaced the parliamentary system with the Tinkhundla system—a system in which “parliamentarians are elected outside of the political party system.” Under this system, the monarch may “exercise[] absolute power over the executive and the legislat[ure].”\[180\]

The King died in 1982 without heir or designate.\[181\] “The [monarch] interregnum was [characterized] by a power struggle between royalist modernizers and traditionalists[;] the latter won.”\[182\] Through alleged plotting and “a bizarre sequence of events,” the fourteen-year-old illegitimate son of Sobhuza, Makhosetive, became King Mswati III in 1986.\[183\]

The 1980 Swaziland Industrial Relations Act expressly recognized “the right of trade unions to exist, organize and associate freely.”\[184\] Nevertheless, by the early 1980s, the government began to overly restrict and otherwise interfere with union activity.\[185\] At that time, employer-favored work councils were heavily supported and institutionalized, further hindering effective bargaining between labor and management.\[186\]

\[179\] Id; see also Maree, supra note 132, at 17.
\[180\] Claude Kabema, Swaziland’s Struggle with Political Liberalisation, ELECTORAL INST. S. AFR. RES. REP. no. 3, at 9 (2004).
\[182\] See Wood et al., supra note 106, at 10.
\[183\] Id.; see also Freedom House, supra note 181, at 11; Dwyer et al., supra note 130, at 195.
\[184\] See Takirambudde, supra note 38, at 49
\[185\] See id.
In 1983, the underground People’s United Democratic Movement (PUDEMO) was established to rally popular support for revolutionary change.187 It “was the only active political party in Swaziland between 1983 and 1996.”188 By the late 1980s, political pressure to change the State system was high, and PUDEMO’s efforts, which had begun as clandestine, became more overt.189 Beneath the PUDEMO umbrella, the Swaziland Federation of Trade Unions (SFTU) began to organize youth and civil society groups.190 Despite the increasing trade union activity, the government was able to use its Industrial Relations Act to limit and prohibit political activities, and increasingly imposed other legal restrictions on the right to associate.191

Unsurprisingly, trade unions soon became the platform for political opposition. The SFTU, which had been established in 1983, began gaining momentum in 1997, when it staged a wide-scale action strike.192 Following the strike, the SFTU and PUDEMO joined previous opposition groups to form the Swaziland Democratic Association (SDA).193 The SDA included the SFTU participants, as well as women, church groups and unemployed groups.194

A new Constitution was enacted in 2005, marking a “win” for absolutism over democracy.195 It provided no new rights to civil society or trade unions to participate in the country’s decision-making.196

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187. See Wood et al., supra note 134, at 10; Maree, supra note 132, at 17.
188. See Freedom House, supra note 181, at 37.
189. See Mfaniseni Fana Sihlongonyane, The Invisible Hand of the Royal Family in the Political Dynamics of Swaziland, 2 AFR. & ASIAN STUD. 155, 175 (2003).
190. See DWYER ET AL., supra note 130, at 195–96.
192. See Maree, supra note 132, at 17.
193. Id.
194. Id.
195. See Freedom House, supra note 181, at 12.
196. See Maree, supra note 132, at 18.
Instead, it raised serious questions concerning freedom of association, political rights, and freedoms and the election process.\textsuperscript{197}

By 2006, the political climate had deteriorated to the extent that members of Swaziland’s banned political parties were arrested for anti-government threats.\textsuperscript{198} To assuage regional and international concerns, the Swazi government undertook a number of legislative reforms to allow for freedom of speech and assembly.\textsuperscript{199} The resulting legislation nevertheless contained a proviso that “the [K]ing could suspend these rights if he deemed them contrary to the public interest.”\textsuperscript{200}

In 2008, the King signed the Suppression of Terrorism Act, which further hindered workers’ efforts to organize.\textsuperscript{201} The Act provided no clear definition of “terrorist act” and, consequently, was able to reach into civil society activities.\textsuperscript{202} In 2010, the Act was renewed and, according to trade unions, has been used to target trade union activities.\textsuperscript{203}

Despite the official antagonism, Swaziland’s largest union, the Trade Union Congress of Swaziland (TUCOSWA), was founded in 2012, “bringing together the SFTU, the smaller Swaziland Federation of Labor, and the unaligned Swaziland National Association of Teachers.”\textsuperscript{204} The new federation immediately called for legislative reforms and declared a “total boycott of the national elections in 2013 unless the elections [could be] held under a multiparty system.”\textsuperscript{205} In response, the government deregistered the federation that year and set up a rival workers’ group, the Swaziland Economic Empowerment Workers Union.\textsuperscript{206}

\begin{thebibliography}{10}
\bibitem{197} See Dwyer et al., \textit{supra} note 130, at 197.
\bibitem{198} Id.
\bibitem{199} See Wood et al., \textit{supra} note 134, at 11.
\bibitem{200} Id.
\bibitem{201} See Freedom House, \textit{supra} note 181, at 23.
\bibitem{202} See id.
\bibitem{203} LO/FTF Council, Swaziland – Labour Market Profile, at 9 (2013).
\bibitem{204} Id.; See Wood, et al., \textit{supra} note 134, at 12.
\bibitem{205} See Freedom House, \textit{supra} note 181, at 27.
\end{thebibliography}
B. The ILO in Zimbabwe and Swaziland

Zimbabwe and Swaziland both emerged from colonialism as authoritarian regimes that placed high restrictions on freedom of association and collective bargaining. These countries adopted new constitutions and laws favoring strong government over labor rights. As described below, the ILO’s supervisory bodies noted these failures, which were of particular disappointment after their promising ratifications of ILO Conventions (Nos. 87 and 98) concerning freedom of association and collective bargaining.

1. Concerns of the ILO Supervisory Bodies

The ILO’s supervisory bodies, including the CEACR and the CFA, raised concerns with both Swaziland and Zimbabwe nearly every year following their ratifications of the ILO’s Conventions. The ILO also requested both countries to appear before the annual ILC, given the severity of the concerns.

207. See supra pp. 18–20, 22–23.
208. See supra pp. 20–21, 23–24.
209. In Swaziland, the CEACR has published observations concerning the government’s failure to effectively implement Convention No. 87 since its ratification of the Convention in 1978, and on a nearly annual basis since 1990. The government has also been called before the International Labor Conference on multiple occasions and has had four complaints against it filed by trade unions before the CFA. See ILO NORMLEX, Supervising the Application of International Labour Standards for Eswatini, ILO, https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:COUNTRY_ID,P11110_CONTEXT:103336,SC (last visited Oct. 22, 2018).
In Zimbabwe, the CEACR has published observations on a nearly annual concerning the government’s failure to effectively implement Convention No. 87 since its ratification of the Convention in 2003. The government has also been called before the International Labor Conference on multiple occasions, and has had twelve complaints against it filed by trade unions before the CFA. See ILO NORMLEX, Zimbabwe, ILO, https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:COUNTRY_ID:103183 (last visited (Oct. 22, 2018).
210. Under the ILO’s supervisory system, countries that have failed to implement ratified Conventions are invited to appear before the Conference Committee on the Application of Standards, a tripartite committee of the ILC, to provide information on the
The ILO called the government of Zimbabwe to appear before the ILC in 2002. After its initial appearance, the ILO called upon the government every year until 2008, when the Zimbabwe workers and employers raised a complaint under the ILO’s highest supervisory body, the Commission of Inquiry. As noted by the ILO, it “was the first occasion on which a Commission of Inquiry had arisen out of simultaneous complaints from Workers and Employers delegates to the Conference.”

Initially, the government refused to appear at the ILC to address the merits of the complaint. In 2009, however, it permitted the Commission of Inquiry to enter the country. In its report, the Commission found that the Government of Zimbabwe accepted that ‘things’ had happened, that they were regrettable and that it was important to ensure that such ‘things’ did not happen again. It nevertheless found systematic violations of labor rights against trade unions and issued a list of recommendations for the government to improve its labor laws and practices.

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211. See INT’L LABOUR ORG., RULES OF THE GAME: A BRIEF INTRODUCTION TO INTERNATIONAL LABOUR STANDARDS, supra note 53, at 103.
213. See id.
216. See id.
217. See id.
The ILO called the government of Swaziland to appear before the ILC in 1996. The Swazi government attended and defended its laws and practices, claiming that allegations of restrictions on fundamental rights and freedoms were baseless. The ILC continued to call the Swazi government to explain its labor laws and practices nearly every year from 1996 to 2015. Neither the Swazi worker nor employer delegates requested the Commission of Inquiry.

2. *ILO Assistance in Zimbabwe and Swaziland*

SADCs’ commitment to harmonize and respect labor rights established incentives for its Members to address national labor concerns and opened a possible channel of ILO assistance into Swaziland and Zimbabwe. As set out in Table 2, below, the ILO provided assistance from 2008 to 2015 through in-country missions, advisory assistance, and ILO DWCPs. This assistance aimed to strengthen local capacities to enable freedom of association and social dialogue.


219. See generally id.

Table 2: ILO Assistance (2008-2015)

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<tr>
<th>Zimbabwe</th>
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<th>DWCP</th>
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<td><strong>In-Country Missions</strong></td>
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<td><strong>2009</strong>: ILO High-Level Mission on Freedom of Association</td>
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<td><strong>2009</strong>: capacity-building workshop on social dialogue</td>
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<td><strong>2010</strong>: capacity-building workshop on labor law reform and the TNF</td>
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<td><strong>2010</strong>: launch of a technical assistance package to facilitate the recommendations of the Commission of Inquiry.</td>
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<td><strong>2011</strong>: capacity-building courses on freedom of association and the TNF</td>
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<td><strong>2012</strong>: training workshops and capacity-building workshops</td>
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<td><strong>2013</strong>: capacity-building workshop on freedom of association</td>
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<td><strong>2014</strong>: ILO High-Level Mission on Freedom of Association</td>
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<td><strong>2015</strong>: capacity building training</td>
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<td>DWCP: (2009-2011): “[The] ILO will provide technical and resource assistance in the setting up of a full time TNF secretariat to prepare for meetings of the TNF and follow up on its decisions.” (DWCP, p. 15).</td>
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<td>DWCP (2012-2015): “[s]upport has been extended towards promoting and strengthening of the social dialogue processes under the [TNF], including institutional strengthening for effective dialogue learning from the good cases from the region and the world.” (DWCP, p. 10).</td>
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<td>Swaziland</td>
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<td><strong>In-Country</strong></td>
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<td><strong>2010</strong>: Sub-Regional Tripartite workshop on ILO standards</td>
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<td><strong>2011</strong>: capacity-building courses on freedom of association</td>
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<td><strong>2013</strong>: capacity-building training on freedom of association</td>
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<td>DWCP (2010-2014): prioritizing social dialogue in view of “very glaring decent work deficits.” Also noting that, through ILO assistance, the government had established a National Steering Committee on Social Dialogue. (DWCP, pp. 16, 19)</td>
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As outlined in Table 2, the ILO provided assistance to Swaziland and Zimbabwe through a series of missions and workshops, as well as DWCPs in both countries that were designed to strengthen social dialogue.\(^{221}\) The ILO and Zimbabwe first entered into a DWCP in 2006,\(^{222}\) which was then renewed in 2009,\(^{223}\) and again in 2012.\(^{224}\) The ILO and Swaziland entered into a DWCP in 2010.\(^{225}\)

In the initial ILO-Zimbabwe DWCP, the ILO noted that the United National Development Assistant Framework had called for specialized agencies, including itself, to draw up development programs for that country.\(^{226}\) The DWCP identified as priority the need to continue to strengthen social dialogue in the country, and subsequent DWCPs identified the need to strengthen the capacity of the TNF to enable it to “engage in effective social dialogue and influence socio-economic and labour market policies.”\(^{227}\)

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221. See supra Table 2.
227. 2009 DWCP ZIMBABWE, supra note 223, at 15.
In the ILO-Swaziland DWCP, the ILO noted that it had analyzed the country’s labor and economic situation with the full participation of the social partners and key national stakeholders.\textsuperscript{228} The resulting DWCP identified as priority the need to strengthen social dialogue in the country.\textsuperscript{229} Although the program noted that it had helped the country establish a National Steering committee on Social Dialogue,\textsuperscript{230} it also acknowledged that there were “still very glaring decent work deficits under” the social dialogue objective\textsuperscript{231} and a “dire need to strengthen the institutional structures for social dialogue.”\textsuperscript{232} Despite this “dire need,” the ILO proceeded with designing the DWCP with the social partners, however weak.

C. Impact in Zimbabwe and Swaziland

Between 2008 and 2015, the ILO provided similar assistance in Zimbabwe and Swaziland that aimed to strengthen freedom of association and social dialogue. Through its DWCPs, the ILO worked with the national social dialogue bodies (the TNF in Zimbabwe and the establishment of the National Steering Committee in Swaziland) to ensure consultations and dialogue in the formulation of national policies and strategies.\textsuperscript{233} Despite those similarities, the ILO’s assistance in the countries had a markedly different impact on national labor laws and practices. As discussed below, the ILO’s assistance enabled Zimbabwe to strengthen its laws and practices. In contrast, the Swazi government continued to place severe restrictions on labor rights.

1. Zimbabwe: A Case of Progress

As noted, the ILO and Zimbabwe entered into three generations of DWCPs. When the Program was first designed, in 2005, trade unions

\begin{itemize}
  \item \textsuperscript{228} 2010 DWCP SWAZILAND, supra note 225, at 10–11.
  \item \textsuperscript{229} Id. at 25-26; 35.
  \item \textsuperscript{230} Id. at 16.
  \item \textsuperscript{231} Id. at 19.
  \item \textsuperscript{232} Id. at 16.
  \item \textsuperscript{233} See supra pp. 27–28.
\end{itemize}
were already represented through the TNF. In 2009, the TNF faced serious setbacks and discontinued holding consultations. In designing the DWCP Program that year, the ILO, government, and tripartite stakeholders in Zimbabwe agreed that strengthening the TNF should be a program priority. In 2012, the DWCP noted that the ILO’s assistance in 2010 and 2011 to facilitate the recommendations of the Commission of Inquiry had achieved “remarkable achievements,” including “steps towards harmonization of the labour legislation and the setting up of the TNF secretariat and capacity building on freedom of association and collective bargaining . . . .”

In 2013, Zimbabwe continued to face ILO criticism for failing to strengthen its labor laws. The ILO called the Zimbabwe government before the ILC that year, asking the government to explain why it had failed to adopt legislation or improve the protection of union rights in practice. In response, the government claimed that resource constraints obstructed concrete progress, but pledged to continue to work towards strengthening its laws and practices.

Shortly after the ILC, the Zimbabwe government reported on the labor legislation that had been adopted or was otherwise in the process of tripartite consultations towards adoption. Many of its legislative acts

235. See Uzhenyu, supra note 165, at 7.
236. 2009 DWCP Zimbabwe, supra note 223, at 15.
239. Id. Perhaps in solidarity, the Government representative of Swaziland intervened during this discussion to support the Government’s initiatives thus far and called on the ILO to continue to provide the necessary support to the Government, in particular technical assistance to enhance capacity. See id.
240. See generally id.
and handbooks had been drafted with ILO assistance, and the ILO provided a workshop to involve the social partners in the regional labor legislation harmonization process.\textsuperscript{242} By 2014, the Zimbabwe government, workers, and employers drafted a TNF Bill and the government submitted it to Cabinet.\textsuperscript{243} By 2015, TNF negotiations had resumed and, pursuant to those negotiations, representatives of government, employers, and workers had agreed to review the country’s labor laws together.\textsuperscript{244}

2. Swaziland: A Case of Challenges

The ILO and Swaziland entered into the DWCP in 2010.\textsuperscript{245} Unfortunately, trade unions at that time remained small and factional.\textsuperscript{246} TUCOSWA, which would eventually bring these unions together under one collective voice, would not be formed for two more years.\textsuperscript{247} While the ILO had helped Swaziland establish a National Steering Committee on Social Dialogue, it conceded at the time of drafting that the


\textsuperscript{245} 2010 DWCP SWAZILAND, supra note 225.

\textsuperscript{246} See supra p. 24.

\textsuperscript{247} See supra p. 24. Despite the lack of a strong union presence at the time of negotiations, the ILO DWCP states that it was carried out following a country-situational analysis, with the full participation of the ILO’s tripartite constituents. See 2010 DWCP Swaziland, supra note 225, at 10–11. According to the DWCP, these consultations were “[i]ntensive” and “wide.” Id. at 11.
Committee was not effectively functioning and that Swazi workers could consequently not use it to address labor concerns.\textsuperscript{248}

TUCOSWA’s formation in 2012\textsuperscript{249} was promising. However, the government immediately deregistered it, effectively preventing it from ever participating in the National Steering Committee. \textsuperscript{250} The Committee was therefore unable to operate with the participation of all of the social partners, and implementation of the program was “severely hampered.”\textsuperscript{251}

The government adopted the Industrial Relations (Amendment) Act in 2014, which introduced provisions concerning the registration of employers’ and workers’ federations.\textsuperscript{252} Nevertheless, in 2014, the Minister of Labor suspended or refused to register all federations and TUCOSWA affiliates.\textsuperscript{253} This announcement was made during the implementation of the ILO’s DWCP and following the ILO’s high-level mission, which had been carried out in January that year.\textsuperscript{254} The government also ordered the dissolution of unions pending the amendment of the Industrial Relations Act.\textsuperscript{255} In 2014, the ILO noted that the TUCOSWA was still not registered, and noted with deep concern that TUCOSWA’s lawyer had been arrested and sentenced for defending the union’s challenge to deregistration.\textsuperscript{256}

\begin{itemize}
\item \textsuperscript{248} \textit{Id.} at 16.
\item \textsuperscript{249} \textit{See LO/FTF COUNCIL, supra note 203, at 4.}
\item \textsuperscript{251} \textit{Id.}
\item \textsuperscript{252} \textit{See Industrial Relations (Amendment) Act, 2014 (Act No. 11 of 2014), 21 Swaziland Government Gazette Extraordinary 128, S1 (13 November 2014).}
\item \textsuperscript{254} \textit{See generally id.}
\item \textsuperscript{255} \textit{See id.}
\item \textsuperscript{256} \textit{See Observation (CEACR) - adopted 2014, published 104th ILC session (2015), ILO (2015),}
\end{itemize}
VI. KEY CONSIDERATIONS

The cases of Zimbabwe and Swaziland illustrate how the ILO’s labor-related assistance produces varied results. In countries that have effective social partners and a social dialogue platforms, the ILO is able to hold effective consultations and design an assistance program in accordance with real needs. Where those countries lack effective social partners and social dialogue mechanisms, the ILO is left to design programs without full participation, resulting in weak results.257

Prior to receiving ILO assistance, Zimbabwe and Swaziland shared many similarities, including a common history of colonialism, authoritarian rule, and strong restrictions on freedom of association and collective bargaining.258 They differed, however, concerning the degree of social-partner participation during the design of the ILO’s assistance programs.259 Following ILO assistance in both countries, the similarities in freedom of association and collective bargaining Zimbabwe and Swaziland ended.260

In Zimbabwe, workers and employers had a platform to consult through the TNF.261 Moreover, the worker and employer delegates to the ILO were active and worked together to form the ILO’s first bilateral complaint before the Commission of Inquiry.262 Following up on their expressed concerns, the ILO’s Commission of Inquiry entered the country in 2009.263 It encountered a government that acknowledged that “‘things’ were regrettable, and that it was important to ensure that such ‘things’ did not happen again.”264


258. See supra pp. 17–23.
259. See supra pp. 24–27.
261. See supra p. 28–29.
262. See supra p. 24.
263. See supra p. 25.
In Swaziland, the situation was much more severe. The Swazi government refused to accept the ILO’s criticism, effectively prevented any form of social dialogue or trade union participation, and deregistered the country’s largest union.\textsuperscript{265} Instead of tailoring its development strategy to account for the divergent levels of social dialogue in those countries, the ILO implemented essentially the same assistance.\textsuperscript{266} Consequently, while that assistance proved effective in Zimbabwe, it was largely disregarded in Swaziland.\textsuperscript{267}

A. Lessons Learned: The Case Against Orthodoxy

Under orthodox theory,\textsuperscript{268} the ILO’s assistance in both countries to strengthen the rights to freedom of association, collective bargaining, and social dialogue, should have positively improved the laws and practices in both States. By designing its assistance programs in consultation with the national tripartite stakeholders, this assistance should have given those stakeholders greater autonomy and ownership, which then should have enabled them to strengthen and enforce labor laws and practices.

However, the ILO’s experiences in Swaziland and Zimbabwe call this orthodox theory into question. Whereas Zimbabwe had a platform, albeit weak, to engage in social dialogue during the design and implementation of the ILO’s DWCP, Swaziland did not.\textsuperscript{269} Zimbabwe’s infrastructure enabled the ILO’s development assistance to take form, become ingrained in the national system, and begin inspiring new laws and practices.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{265} See supra pp. 23, 25.
\item \textsuperscript{266} See supra pp. 25–27.
\item \textsuperscript{267} See supra pp. 27–30.
\item \textsuperscript{268} The orthodox approach presupposes the universality of best-practices approaches See generally Tobias Berger & Milli Lake, Human Rights, the Rule of Law, and Democracy, in The Oxford Handbook of Governance and Limited Statehood 416, 425 (Thomas Risse, Tanja A. Börzel & Anke Draude eds., 2018) (distinguishing orthodox and heterodox approaches). This approach would assume that the ILO’s DWCP model would contain the same steps as outlined in Table 1 for all countries. See supra p. 11.
\item \textsuperscript{269} See supra pp. 29–31.
\end{itemize}
\end{footnotesize}
practices. Swaziland’s infrastructure suppressed social-partner participation, and the ILO’s assistance had no mechanism to absorb it.

B. From Orthodox to Heterodox

The ILO’s assistance requires a new kind of thinking. Rather than its traditional orthodox approach and DWCP multi-step process, ILO assistance should take a heterodox approach. This approach would enable the Organization to examine each national circumstance, including assessing the national actors, prior to designing its DWCPs. The ILO’s examination should focus on the balance of power between the State and the social partners and assess whether political resistance is strong enough to preclude effective social-partner participation. If the Organization determines that the social partners are not effective, its assistance should target capacity-building to develop and strengthen an effective platform for social dialogue before progressing towards its DWCP design.

Unfortunately, this approach will be challenging for the ILO. As noted previously, the ILO’s development programs are unique among multilateral institutions such as the World Bank and the IMF. However, in some instances, the very uniqueness that gives the ILO a comparative advantage in providing labor-related assistance ends up hurting the Organization. This is particularly true where, like in

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271. See supra pp. 31–32. A similar situation was observed in the context of the ILO’s harmonization assistance in West and Central Africa, in which critics “stressed that although the ILO has an important role to play on labor law reform, the ILO could do more to ensure that trade unions are actors in the labor law reform process, rather than merely spectators.” Blackett, supra note 9, at 483 (and citations therein).
272. The heterodox approach examines each challenge and situation differently and attempts to recognize the relevant actors and local problems prior to designing a unique solution. See Berger & Lake, supra note 249, at 425.
273. See Banks, supra note 78, at 71–72 nn.72–73; 103–06. See generally Fenwick et al., supra note 34, at 24 (“A lack of capacity among trade unions limits the extent to which they can effectively protect and serve members’ interests at the workplace level.”).
274. See supra pp. 4–5.
Swaziland, the ILO’s consultation-based design and lack of conditionality leave it at the mercy of government-dominated programming.\textsuperscript{275}

The ILO is mandated by its Constitution and Declaration to provide assistance only when that assistance is designed in consultation with the country’s government, workers, and employers.\textsuperscript{276} In theory, that mandate ensures that its assistance program addresses the real demands and needs of the tripartite actors in the country. But in cases where those actors are too weak to be effective, the ILO’s assistance is essentially held hostage: it cannot second-guess the tripartite structure with which its program must be designed, yet must still use the results of those consultations—however dominated by the stronger factions—to form the basis of its programs. Thus, when government regulations and practices effectively preclude trade union participation and social dialogue, the ILO’s consultations cannot truly reflect the needs of workers.

The ILO’s assistance also lacks the strict conditionality of traditional multilateral institutions. This “no strings attached” approach is attractive: countries may request assistance while maintaining flexibility to adjust their markets and labor approaches without fear of having their resources revoked. However, by providing its assistance so generously, the ILO is left with little recourse when recipient countries fail to implement ILO recommendations. The ILO’s supervisory bodies attempt to provide this approach with some teeth by requesting governments to appear at the ILC and to accept ILO high-level missions and by publishing comments highlighting areas of concern. Nevertheless, as the case of Swaziland illustrates, governments are able to control much of this process. They can refuse to appear at the ILC, they can refuse to allow the ILO to visit their countries, and they can dismiss the ILO’s published comments.

\textsuperscript{275} See, e.g., Barry et al., supra note 42, at 143 (noting that the ILO’s promise to bring about consensus on labor standards through technical assistance remains unfulfilled because “incentives or disincentives available to the ILO to apply to countries in order to encourage them to promote labor standards that these countries have endorsed are limited in their effectiveness.”).

\textsuperscript{276} See supra Section III.
Despite these shortcomings, the ILO should nevertheless be able to control the design of its programs. Countries are motivated to receive ILO assistance (and not that of the IMF or World Bank) for a reason. These countries may be driven by their regional commitments to harmonize their labor policies, or they may be driven by their national interest to dispel industrial and political instability stemming from worker and civil discontent. This could be true in countries such as Swaziland and Zimbabwe, where the suppression of labor rights has led to widespread worker strikes, political rivalries, and civil society protests. Regardless of the driver, the requesting countries need assistance that focuses on labor rights. In this area, the ILO holds a monopoly.

The ILO is therefore in a strong position to lay some degree of groundwork prior to providing its labor-related assistance. While it may not be able to impose pre-defined targets or conditionality, it can insist that its assistance (such as resources and trainings) focuses on strengthening and organizing the social partners. Only when the ILO determines that the social partners in a recipient country have real representation and there is an effective social dialogue platform should it begin consultations with those social partners on a DWCP design.

One potential drawback of this prerequisite step is that any real strengthening of a civil society and their social dialogue mechanisms necessarily takes time. This may be difficult given that most development programs to enable program monitoring and evaluation require instant and concrete outcomes, including those in the ILO.

277. See, e.g., Takirambudde, supra note 38, at 40 (“However, democratization, civil society and human rights are not a design but a process.”).

278. See SARKAR, supra note 15, at 275 (“the IMF structural adjustment program required the sovereign debtor country to implement demanding economic stabilization and liberalization measures very quickly.”); Frances Stewart & Michael Wang, Poverty Reduction Strategy Papers within the Human Rights Perspective, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 447, 459 (Philip Alston & Mary Robinson eds., 2005).

However, any amount of time saved by skipping this step, as demonstrated in Swaziland, will result in misdirected assistance and lack of concrete results.²⁸⁰

VII. CONCLUSION

The ILO, as the responsible Organization for providing labor-rights assistance to developing countries, is faced with a dilemma: it aims to empower and mobilize social partners to support labor standards during economic development, but its assistance programs require a certain degree of social-partners capacity at the outset. Unlike traditional development institutions like the World Bank and the IMF, the ILO’s assistance cannot impose strict conditions or outcomes.

The ILO’s task is not simple. Diverse economic capacities among RIA members require programs to address country-specific historical and political trajectories. When those members have suppressed worker rights in favor of State control, worker representatives lack the capacity to effectively engage in social dialogue, and the ILO cannot engage them during its program design consultations.

Prior to designing those programs, therefore, the ILO must first invest its resources (when needed) to strengthen the social dialogue platform and social-partner capacity. This task will be difficult, as it requires preconditions and potential delays. Nevertheless, by constructing its assistance to ensure full and effective consultations at the outset, the ILO’s assistance will have a greater impact on the labor rights in developing countries. In so doing, it will answer the multilateral call for ensuring labor rights within the framework of economic development.
