

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

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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.

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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.² Countries that are trying to grow economically invest their limited resources in market-oriented policies, often at the expense of worker rights.³

As countries strive to develop, they are increasingly turning to regional integration for their economic growth strategy.⁴ By forming

2. See Jack I. Garvey, *AFTA after NAFTA: Regional Trade Blocs and the Propagation of Environmental and Labor Standards*, 15 BERKLEY J. INT'L L. 245, 245, 249 (1997); see also Maria Lorena Cook, *Regional Integration and Transnational Labor Strategies Under NAFTA*, in REGIONAL INTEGRATION AND INDUSTRIAL RELATIONS IN NORTH AMERICA 142, 142 (M.L. Cook & H.C. Katz, eds., 1994) (“the internationalization of the economy has tended to weaken labor movements . . .”).

3. Reed M. Wood, *Funding Workers' Rights: OECD Development Assistance and the Promotion of ILO Labor Standards in the Developing World* 35 (Sept. 22, 2006) (prepared for U.N.C. Workshop on Labor Rights and Multinational Production, UNC–Chapel Hill) (“as a country develops economically its level of respect for core labor standards declines.”); Ajit Singh & Ann Zammit, *Labour Standards and the ‘Race to the Bottom’: Rethinking Globalization and Workers’ Rights from Developmental and Solidaristic Perspectives*, 20 OXFORD REV. ECON. POL’Y. 85, 85, 87 (2004); Daniel Berliner, Anne Greenleaf, Milli Lake & Jennifer Noveck, *Building Capacity, Building Rights? State Capacity and Labor Rights in Developing Countries*, 72 WORLD DEV. 127, 127 (2015) (discussing the literature attributing lack of capacity to low labor standards); see Tanja A. Börzel & Vera van Hüllen, *Patching Together a Global Script: The Demand for and Supply of Governance Transfer by Regional Organizations*, in GOVERNANCE TRANSFER BY REGIONAL ORGANIZATIONS: PATCHING TOGETHER A GLOBAL SCRIPT 245, 245–46 (Tanja A. Börzel & Vera van Hüllen, eds., 2015); MARK SHADUR, *LABOUR RELATIONS IN A DEVELOPING COUNTRY* 1 (1994).

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.

4. See Paul A. Smit, *Transnational Labor Relations in SADC*, 6 J. GLOBALIZATION STUD. 14, 14, 26 (2015) (“The proliferation of regional formations indicates a willingness on the part of governments to commit themselves to collaboration around trade issues . . .”); Marianne H. Marchand, Morten Boås & Timothy M. Shaw, *The Political Economy of New Regionalisms*, 20 THIRD WORLD Q. 897, 897 (1999).

regional, economic blocs, countries are able to harmonize markets and weather economic fluctuations more efficiently than if they remained isolated.⁵ These harmonized economic policies are codified through regional integration agreements (RIAs).

Regional integration efforts first concentrated solely on integrating economic policies within regions.⁶ Since the 1990s, however, RIA partners have begun to include socio-political elements into their efforts, including the objective of harmonizing labor rights.⁷

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.”⁸ 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.⁹

The objective to harmonize labor standards is deceptively simple. RIAs are often ratified by countries that are at very different levels of economic development.¹⁰ Those countries that are on the lower end of

5. See KOFI ADDO, *CORE LABOUR STANDARDS AND INTERNATIONAL TRADE: LESSONS FROM THE REGIONAL CONTEXT* 306 (2016).

6. See Pharis J. Harvey, Terry Collingsworth & Bama Athreya, *Developing Effective Mechanisms for Implementing Labor Rights in the Global Economy*, INT’L LAB. RTS. FUND 1, 16 (2000).

7. For an analysis of the evolution of these regional labor efforts, see *id.* at 16–31.

8. See ARTURO BRONSTEIN, *INTERNATIONAL AND COMPARATIVE LABOUR LAW: CURRENT CHALLENGES* 93 (2009).

9. See *id.* at 93–94; Nicola Yeates & Bob Deacon, “Globalism, Regionalism and Social Policy: framing the debate,” *UNU:CRIS Occasional Papers*, U.N.U.: COMP. REGIONAL INTEGRATION STUD. 3 (0-2006/6) (“Since regional formations often entail groups of countries with similar (or at least less diverse) cultural, legal and political characteristics and legacies, agreement on the scope and nature of collaboration may be more feasible and progress can potentially be made more quickly compared with global multilateral negotiations involving a wide diversity of countries.”), available at <http://cris.unu.edu/sites/cris.unu.edu/files/O-2006-6.pdf>; see generally Adelle Blackett, *Beyond Standard Setting: A Study of ILO Technical Cooperation on Regional Law Reform in West and Central Africa*, 32 COMP. LAB. L. & POL’Y J. 443, 450 (2011).

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.*

12. See Anne Trebilock, *Setting the Record Straight about International Labor Standard Setting*, 31 COMP. LAB. L. & POL’Y J. 101, 106–07 (2010); David M. Trubek, Jim Mosher & Jeffrey S. Rothstein, *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 L. & SOC. INQUIRY 1187, 1188 (2000) (“Either way, integration affects industrial relations by exposing national labor markets to global competition, making it harder for states to control labor conditions within their borders.”).

13. U.N. DEV. PROGRAMME, MAKING THE LAW WORK FOR EVERYONE: REPORT OF THE COMMISSION ON LEGAL EMPOWERMENT OF THE POOR 37 (2008).

14. Third International Conference on Financing for Development, *Addis Ababa Action Agenda*, ¶ 1, U.N. Doc. A/CONF.227/L.1 (July 15, 2015), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.227/L.1.

15. See RUMU SARKAR, INTERNATIONAL DEVELOPMENT LAW: RULE OF LAW, HUMAN RIGHTS, AND GLOBAL FINANCE 80, 87–89 (2009).

16. See, e.g., BOB HEPPLE, 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.¹⁷ These institutions instead presume that stronger labor rights stifle employment growth and economic markets.¹⁸ They provide loans and other forms of assistance to strengthen markets, but will in turn impose conditionality.¹⁹ Those conditions typically require strict regulatory and austerity measures.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.²¹

Janine Berg & David Kucera, *Labour Institutions in the Developing World: Historical and Theoretical Perspectives*, in IN DEFENCE OF LABOUR MARKET INSTITUTIONS: CULTIVATING JUSTICE IN THE DEVELOPING WORLD 22–27 (Janine Berg & David Kucera, eds., 2008).

17. See, e.g., BOB HEPPLE, *LABOUR LAWS AND GLOBAL TRADE* 193 (2005); see also Peter Auer, *Security in Labour Markets: Combining Flexibility with Security in Decent Work* 1 (Econ. & Labour Mkt. Papers, ILO, Paper No. 2007/12, 2012); see also Janine Berg & David Kucera, *Labour Institutions in the Developing World: Historical and Theoretical Perspectives*, in IN DEFENCE OF LABOUR MARKET INSTITUTIONS: CULTIVATING JUSTICE IN THE DEVELOPING WORLD 22–27 (Janine Berg & David Kucera, eds., 2008).

18. See WORLD BANK, *WORLD DEVELOPMENT REPORT 2019: THE CHANGING NATURE OF WORK*, 63, para. 249, (June 1, 2018) (working draft), <https://docslide.us/documents/wdr-2019-the-changing-nature-of-work-world-a-very-positive-impact-a-fairly.html>. Recently, the World Bank’s working draft of its World Development Report 2019 reaffirmed the economic theory that “[c]omplex and costly procedures to start a business discourage entrepreneurs . . . Reducing the regulatory burden may encourage formal firms to grow, thus creating steady jobs that could be accessed by certain segments of the poor.” *Id.* See also Adelle Blackett, *Trade Liberalization, Labour Law, and Development: A Contextualization*, at 9, (Int’l Inst. For Labour Studies, Discussion Paper Ser. No. 179, 2007) (citing to the 2005 World Bank report entitled *Doing business in 2005: Removing Obstacles to Growth*), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_193514.pdf; see GERRY RODGERS, EDDY LEE, LEE SWEPSTON, & JASMIEN VAN DAELE, *THE INTERNATIONAL LABOUR ORGANIZATION AND THE QUEST FOR SOCIAL JUSTICE, 1919-2009*, at 23 (2009).

19. See SARKAR, *supra* note 15, at 89.

20. *Id.* at 275.

21. See, e.g., HEPPLE, *supra* note 17, at 17–18; see also Yossi Dahan, Hanna Lerner & Faina Milman-Sivan, *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.²² As part of its mandate, the ILO provides labor-related technical assistance to its member States upon their request.²³ Unlike traditional assistance, ILO assistance aims to stimulate economic development by strengthening labor and industrial relations policies.²⁴ This assistance is provided unconditionally.²⁵

Organization, 34 MICH. J. INT'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 RIGGIROZZI, 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.”).

22. See generally Int'l Labour Org. [ILO] Constitution, annex (May 10, 1944), http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO [hereinafter ILO Const.].

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 . . .”).

24. See, e.g., INT'L LABOUR ORG., ILO DECLARATION ON SOCIAL JUSTICE FOR A FAIR GLOBALIZATION 9–13 (2008) [hereinafter SOCIAL JUSTICE DECLARATION], http://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf.

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.²⁶ In doing so, it must design its programs to harmonize labor and economic policies while taking into account uneven levels of development.²⁷

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.²⁸ This unique design is conducive where the recipient, at the time of consultation, is already capable of holding those consultations.²⁹ 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 countries³⁰ that are all at very different stages of development.³¹ 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.

28. See *infra* p. 13.

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.³² Other Members have consistently ensured weak social-partner participation and social dialogue through years of State-led oppression and exploitative labor laws.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.³⁴ To help SADC Members realize their objectives, the ILO provides various forms of assistance at both levels.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.³⁶ Some of the recipient countries have made notable improvements in their labor laws and practices.³⁷ Others, however, have not.³⁸

This article examines the ILO's development assistance to strengthen labor rights under SADC's RIA initiatives, from the early 2008³⁹ through

31. Jan Bronauer & Ji Yoon, Regional Economic Development in SADC: Taking Stock and Looking Ahead, Rep. No. 25, at 11 (Aug. 2018), available at https://saiaa.org.za/wp-content/uploads/2018/11/saia_report-25_Bronnauer-Yoon_20181102.pdf. For example, while Angola enjoyed an 18 % GDP in 2017, Swaziland's GDP was at 1 %. *Id.*

32. *See generally* Colin Fenwick, Evance Kalula, & Ingrid Landau, *Labour Law: A Southern African perspective*, at 24–25 (Int'l Inst. For Labour Studies Geneva, Discussion Paper Ser. No. 180, 2007).

33. *See id.*

34. For a description of SADC instruments committing its Member States to harmonizing labor standards, see *infra* p. 6. *See also* Fenwick et al., *supra* note 32, at 7–8 (discussing SADC treaties and protocols that aim to harmonize national labor laws).

35. *See infra* pp. 17–18.

36. *See infra* pp. 17–19.

37. *See, e.g.*, Fenwick et al., *supra* note 31, at 7–8.

38. *See, e.g.*, Peter Nanyenya Takirambudde, *Protection of Labour Rights in the Age of Democratization and Economic Restructuring in Southern Africa*, 39 J. AFR. L. 39, 48 (1995).

39. Following the implementation of the SADC-ILO Memorandum of Understanding (MOU) on labor. *See Memorandum of Understanding between the*

2015.⁴⁰ 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.⁴¹ Insufficient labor policies contribute to poverty, while those poverty conditions, in turn,

Southern African Development Community and the International Labour Organization, at 23-25, Official Bulletin, vol. 90, no. 1 (Apr. 19, 2007), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---jur/documents/genericdocument/wcms_440105.pdf

40. In 2015, the United States withdrew trade benefits to Swaziland under its African Growth and Opportunity Act (AGOA) owing to labor rights concerns. See *President Obama removes Swaziland, reinstates Madagascar for AGOA Benefits*, OFF. OF THE U.S. TRADE REPRESENTATIVE (June 2014), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2014/June/President-Obama-removes-Swaziland-reinstates-Madagascar-for-AGOA-Benefits>. It is not possible to distinguish whether positive labor measures undertaken in the country (or even the region, by additional AGOA beneficiaries) were motivated by ILO development assistance, the desire to assuage U.S. concerns over labor rights, or both. This paper therefore assesses the impact of the ILO's assistance prior to that withdrawal.

41. Valentine K. Ntandayarwo, *The Role of Trade Unions in Poverty Alleviation: Priority Agenda for the 21st Century*, in *TRADE UNIONS AND POVERTY: ALLEVIATION IN AFRICA* 27, 33 (Mohammed Mwamadzingo & Ditiro Saleshando, eds. 2003); see also Fumane 'Malebona Khabo, *Collective Bargaining and Labour Disputes Resolution – Is*

contribute to limited employment opportunities and labor rights abuses.⁴² Multilateral organizations acknowledge this intrinsic link.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.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.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.⁴⁶ In 2006, for example, UNESCO held a High-Level Symposium on the Social Policy Dimension of Regionalism.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

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.”).

42. See RODGERS, et al., *supra* note 18, at 23–24; Christian Barry & Sanjay G. Reddy, *International Trade and Labor Standards: A Proposal for Linkage*, 39 CORNELL INT’L 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.”).

43. See OECD, 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. *Id.* at 105.

44. See generally U.N. Dev. Program, *Human Development Report 2000*, at 91 (2000), available at http://hdr.undp.org/sites/default/files/reports/261/hdr_2000_en.pdf.

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

46. See Deacon et al., *Globalisation and the Emerging Regional Governance of Labour Rights*, 32 INT’L J. OF MANPOWER, 334, 335 (2011); see also Int’l Inst. For Labour Studies, *Deepening the Social Dimensions of Regional Integration* at 1 (2008), available at <https://biblio.ugent.be/publication/938779/file/938785>.

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

48. *Id.* (quoting the Buenos Aires Declaration). *See also* the ECOSOC Ministerial Declaration, at para 33 (2006) (calling for “cooperation and coordination, in the pursuit of the goals of full and productive employment and decent work for all.”); World Comm’n on the Soc. Dimension of Globalization, *A Fair Globalization: Creating Opportunities for All*, at 94 (ILO 2004), available at <https://www.ilo.org/public/english/wcsdg/docs/report.pdf>; Franz Christian Ebert & Anne Posthuma, *Labour Standards and Development Finance Institutions: A Review of Current Policies and Activities*, at 1 (Int’l Inst. For Labour Studies, Discussion Paper Ser. No. 204, 2010) (“Increasingly, international bodies have called for DFIs to take into account the promotion of decent working conditions when carrying out their investment operations.”).

49. *See id.*

50. *See* ILO Const., *supra* note 22.

51. *See generally* *How the ILO works*, ILO, <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm> (last visited Nov. 28, 2018).

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.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.⁵³ To supervise the implementation of those standards, the ILO maintains an intricate supervisory machinery.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.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).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.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,

52. See *Declaration on Fundamental Principles*, *supra* note 23, at preamble.

53. See INT’L LABOUR ORG., RULES OF THE GAME: A BRIEF INTRODUCTION TO INTERNATIONAL LABOUR STANDARDS, 11 (ILO 3rd rev. ed. 2014), http://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_318141/lang--en/index.htm.

54. *Id.* at 10.

55. *Id.* at 102–03.

56. *Id.*

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,⁵⁸ as well by development experts.⁵⁹

Dialogue between employers and workers redresses “confrontational attitudes and acrimony . . . [that is typically] associated with the employment relationship.”⁶⁰ Consequently, it “promot[es] industrial peace and ultimately, economic growth.”⁶¹ It also contributes to poverty reduction strategies by, for example, determining minimum wages, housing, “health and safety, education for children, and income distribution.”⁶²

In an RIA, social dialogue among national trade unions and employers enables policy makers to overcome integration challenges.⁶³ Efforts to reduce poverty through integration have, in turn, also created the opportunity for strengthened participation of, and dialogue among, social partners.⁶⁴

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.⁶⁵ 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.”).

62. See, e.g., Mohammed Mwamadzingo, *Poverty Alleviation and the Role of Workers’ Organizations in Africa*, in *TRADE UNIONS AND POVERTY: ALLEVIATION IN AFRICA* 17, 23 (Mohammed Mwamadzingo & Ditiro Saleshando eds., 2003).

63. See Paul Smit, *Regional Labour Standards in the SADC: Is it Possible, Given the EU Experience?*, 2 *J.L., SOC., & DEV.* 165, 172 (2015).

64. See, generally Mwamadzingo, *supra* note 62, at 23.

65. See ADDO, *supra* note 5, at 103–04. The term “social dialogue” is defined by the ILO “to include all types of negotiation, consultation or simply exchange of information between, or among, representatives of governments, employers and workers, on issues of common interest relating to economic and social policy.” See Int’l Labour Office, *Social Dialogue: Finding a Common Voice*, available at <http://www.ilo.org/public/english/dialogue/download/brochure.pdf>.

policy issues.⁶⁶ However, these social partners must be able to carry out that dialogue; they cannot meaningfully contribute to poverty alleviation in a prohibitive atmosphere.⁶⁷

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.⁶⁸ Nevertheless, the results-based framework for traditional development programs treats the standards as a subsidiary social good.⁶⁹ The ILO thus stands alone in providing assistance to countries with a chief labor objective.⁷⁰ To ensure this unique objective, the ILO has

66. See Int'l Labour Office, *Social Dialogue: Finding a Common Voice*, *supra* note 65. Generally, international law acknowledges the crucial role played by various non-State, or social partner, actors in the development and decision-making process. See Laurence Boisson de Chazournes, *A 'Dialogic' Approach in Perspective*, in RESEARCH HANDBOOK IN TRANSNATIONAL LABOUR LAW 65, 65 (Adelle Blackett & Anne Trebilcock eds., 2015).

67. See Mwamadzingo, *supra* note 62, at 22–23.

68. See Int'l Labour Org., *Freedom of Association and Development*, *supra* note 29, at 1.

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.”).

For example, in 2013, the World Bank's World Development Report found that labor regulations and standards had little to no impact on employment. See WORLD BANK, WORLD DEVELOPMENT REPORT: JOBS 258, 261–62 (2013). And most recently, in its 2019 report, the World Bank reiterated its position that such labor regulations could stifle employment and firm growth. See WORLD BANK GROUP, WORLD DEVELOPMENT REPORT 2019: The Changing Nature of Work 114–17 (2019), <http://documents.worldbank.org/curated/en/816281518818814423/pdf/2019-WDR-Report.pdf> (“while regulations address labor market imperfections, they often reduce dynamism in the economy by affecting labor market flows and increasing the length of time spent in both employment and unemployment”).

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.⁷¹

The ILO's Decent Work Agenda is translated into national or region-specific programs through Decent Work Country Programs (DWCPs).⁷² 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.⁷³ This process is set out in Table 1, below.

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).

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.

73. ILO, *PROGRAMME AND BUDGET FOR THE BIENNIUM 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 AFRICA* 9, 13 (Mohammed Mwamadzingo & Ditiro Saleshando eds., 2003).

Table 1: The DWCP Process

Step 1: consult with constituency and other stakeholders;

Step 2: country diagnostic;

Step 3: prepare main country program document;

Step 4: clear outputs

Source: INT'L LABOUR OFFICE, ILO DECENT WORK COUNTRY PROGRAMME: A PRACTICAL GUIDEBOOK (Ver. 4, 2016), https://www.ilo.org/wcmsp5/groups/public/---ed_mas/--program/documents/genericdocument/wcms_561025.pdf

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.⁷⁴ 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

74. See SOCIAL JUSTICE DECLARATION, *supra* note 24, at 12–13.

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 . . .

⁷⁵

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 Bank⁷⁶) or the promotion of monetary cooperation and stability (e.g., the IMF⁷⁷). 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.⁷⁸ Furthermore, the OECD has begun to specifically

75. *See id.*

76. *See* KATHERINE MARSHALL, *THE WORLD BANK: FROM RECONSTRUCTION TO DEVELOPMENT TO EQUITY* 2–4 (Rutledge ed., 2008).

77. *See* Devesh Kapur, *The IMF: A Cure or a Curse?*, 111 *FOREIGN POL'Y* 114, 116 (1998).

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.⁷⁹ 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.⁸⁰ In other respects, some multilateral assistance programs focus on broader human rights.⁸¹ 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.⁸²

2. Design

The ILO's DWCPs are designed in consultation with the national representatives of government, workers, and employers.⁸³ 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).

80. See generally Wood, *supra* note 3, at 9–15.

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.⁸⁴ Their goals are typically quantitative and hence measurable; increases in exports or GDP, for example, may be identified, tracked, and reported.⁸⁵

3. *Advisory Support*

The ILO's assistance includes not only programmatic measures, such as the DWCPs, but also advisory support.⁸⁶ For instance, the ILO holds in-country, high-level meetings and consultations with governments and representatives of workers and employers.⁸⁷ It also advises governments and legislative bodies on drafting legislation and model laws.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.⁸⁹ This guidance identifies laws and practices that need to be revised.⁹⁰ As follow-up, the ILO may offer to hold high-level or technical meetings in country to provide additional assistance to governments.⁹¹ In this respect, the ILO's

84. See Wood, *supra* note 3, at 5–6.

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.”).

86. See INT’L LABOUR ORG., RULES OF THE GAME: A BRIEF INTRODUCTION TO INTERNATIONAL LABOUR STANDARDS, *supra* note 53, at 114–15; see also Sebastian, *supra* note 73, at 13.

87. See generally INT’L LABOUR ORG., RULES OF THE GAME: A BRIEF INTRODUCTION TO INTERNATIONAL LABOUR STANDARDS, *supra* note 53, at 44–45.

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.

89. See INT’L LABOUR ORG., RULES OF THE GAME: A BRIEF INTRODUCTION TO INTERNATIONAL LABOUR STANDARDS, *supra* note 53, at ch. 3.

90. See *id.* at 17.

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.*

95. *See* Paul Smit, *Transnational Labour Relations: A Dream or Possibility in SADC?*, 22 AFR. J. INT'L & COMP. L. 448, 454 (2014).

96. *See SADC Vision*, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY [SADC], <http://www.sadc.int/about-sadc/overview/sadc-vision/> (last visited Sept. 15, 2018).

97. *See* South African Development Community: Towards a Common Future, *SADC Selected Economic and Social Indicators*, 2016, at 2 (2016), available at https://www.sadc.int/files/7315/0996/2411/SADC_-_Selected_Indicators_2016.pdf.

98. *See* SADC, *Southern African Development Community Decent Work Program 2013-2019*, at 2 (2013), available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/genericdocument/wcms_379400.pdf.

99. *See id.*

potential contrasts sharply, however, with the sharp disparities in wealth among its Members.¹⁰⁰ 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.¹⁰¹ 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.¹⁰²

Over the course of the 1980s and early 1990s,¹⁰³ 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.”¹⁰⁴ Many of these programs were conditioned upon market-oriented policies, much to the detriment of labor rights.¹⁰⁵ Those policies included, for example: reduced public-sector employment, decentralized wage systems, and increased labor flexibility, essentially permitting employers to easily terminate their employees.¹⁰⁶

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.

104. See World Bank, *Structural Adjustment and Poverty: A Conceptual, Empirical and Policy Framework*, Rep. No. 8393-AFR, at 22 (Feb. 9, 1990).

105. See *id.*; see also Takirambudde, *supra* note 38, at 40–41.

106. Fenwick et al., *supra* note 32, at 5.

rights.¹⁰⁷ 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.¹⁰⁸ Economically, SADC aims to alleviate poverty and enhance the quality of life through regional integration.¹⁰⁹ Politically, it aims to “promote common political values, systems and . . . institutions.”¹¹⁰ 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.”¹¹¹

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”¹¹² Its objectives pay special attention to “the retention of the tripartite structure”¹¹³ and the “formulation and harmonisation of legal, economic and social policies and programmes”¹¹⁴

107. See Pamhidzai H Bamu & Rutendo Mudarikwa, *Social Regionalism in the Southern Africa Development Community: The International, Regional and National Interplay of Labour Alternative Dispute Resolution Mechanisms*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 455, 458–60 (Adelle Blackett & Anne Trebilcock eds., 2015).

108. See Consolidated Text of the Treaty of the Southern African Development Community, art. 5, (Oct. 21, 2015), available at <https://www.sadc.int/documents-publications/show/4171>.

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).

112. See Charter of Fundamental Social Rights in SADC, art. 2(1), (Aug. 01, 2003), available at <https://www.sadc.int/documents-publications/show/837>.

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 organise and collective bargaining”¹¹⁵ 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.¹¹⁶

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.¹¹⁷ Despite their ratifications, countries did not necessarily transpose those labor standards into national laws or practices.¹¹⁸ 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.¹¹⁹

Many of the SADC Members that refused to secure labor rights witnessed years of industrial instability, whereby discontent workers would disrupt business operations through widescale strikes, and trade unions would gain political favor and eventually challenge national political landscapes.¹²⁰ 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

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.

117. *See* Paul A. Smit, *Transnational Labor Relations in SADC: Regional Integration or Regional Globalization?*, 6 J. GLOBALIZATION STUD. 14, 24 (2015).

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.¹²¹

1. ILO-SADC Memorandum of Understanding

Albeit not a legally-binding instrument, SADC entered into a Memorandum of Understanding (MoU) with the ILO in 1998,¹²² and again in 2007.¹²³ 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.”¹²⁴ This commitment extends to matters concerning “tripartite consultation at regional and national levels” and harmonization of labor legislation.¹²⁵

2. ILO-SADC Decent Work Program

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

121. See Bamu et al., *supra* note 107, at 461–62.

122. See Memorandum of Understanding between the Southern African Development Community and the International Labour Organisation (1998), available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---jur/documents/genericdocument/wcms_440104.pdf.

123. See Memorandum of Understanding between the Southern African Development Community and the International Labour Organization, at 23–25, ILO Off. Bull. Vol. XC, 2007, Ser. A, No. 1 (2007), available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---jur/documents/genericdocument/wcms_440105.pdf.

124. *Id.* at art. 1.

125. *Id.*

126. See *Southern African Development Community Decent Work Program (2013–2019)*, *supra* note 98, at 29.

127. *Id.*

assistance at the national level.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.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.¹³⁰ The countries received IMF and World Bank development assistance,¹³¹ but nevertheless remained classified as authoritarian,¹³² and were accused of lacking the political will necessary to adhere to SADC’s labor commitments.¹³³

128. *Id.* at 30–31.

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.

130. *See* PETER DWYER & LEO ZEILIG, *AFRICAN STRUGGLES TODAY: SOCIAL MOVEMENTS SINCE INDEPENDENCE* 166 (2012).

131. For a listing of all World Bank projects by country, *see* *Where We Work*, WORLD BANK, <http://www.worldbank.org/en/where-we-work> (last visited Nov. 30, 2018). For a listing of all IMF projects and reports by country, *see* *IMF Country Information*, IMF, <https://www.imf.org/en/Countries> (last visited Nov. 30, 2018).

132. *See* Johann Maree, *The Role of Trade Unions in Sub-Saharan Africa in Defending and Promoting Democracy*, at 7, Paper presented at the 16th International Labor and Employment Relations Association World Congress, Philadelphia, PA, July 2–5, 2012, <http://ilera2012.wharton.upenn.edu/RefereedPapers/MareeJohann%20ILERA.pdf>.

133. *See* Smit, *supra* note 63, at 184.

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).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.¹³⁵

The 1980s were characterized by a State autonomy, where the government intensified economic controls and increased social expenditures.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.¹³⁷ Moreover, while some of the State’s economic

134. See Geoffrey Wood, Pauline Dibben & Gilton Klerck, *The Limits of Transnational Solidarity: The Congress of South African Trade Unions and the Swaziland and Zimbabwean Crises*, 54 LAB. HIST., 1, 5 (2013); see also Tawana H. Nyabeze, *Progressive Reform in the New Constitution of Zimbabwe: A Balance Between the Preservative and Transformative Constitution Making Process*, at 1 (Konrad Adenauer Stiftung, Feb. 2015), available at https://www.kas.de/c/document_library/get_file?uuid=fdbc52c2-ec77-2e9b-044d-3347ea28156c&groupId=252038.

135. See generally Lancaster House Agreement, §§ X(1)–(2), Dec. 21, 1979 (providing generally for the right of freedom of association while granting broad exceptions) with *Observation (CEACR) - adopted 2001, published 90th ILC session*, ILO, https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2207564 (noting overly broad powers of the labor authorities to interfere with freedom of association) (last visited Dec. 5, 2018).

136. See Brian Raftopoulos, *The Labour Movement and the Emergence of Opposition Politics in Zimbabwe*, in STRIKING BACK: THE LABOUR MOVEMENT AND THE POST-COLONIAL STATE IN ZIMBABWE 1980-2000, 1, 3 (Brian Raftopoulos & Llyod Sachikonye eds., 2001).

137. *Id.* at 4. See also L. M. Sachikonye, *The Institutional Development of Unions in Zimbabwe*, in STRIKING BACK: THE LABOUR MOVEMENT AND THE POST-COLONIAL STATE IN ZIMBABWE 1980-2000, 89, 92 (Brian Raftopoulos & Llyod Sachikonye eds., 2001).

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

The State established the country's one national trade union, the Zimbabwe Congress of Trade Union (ZCTU), in 1981.¹³⁹ At that time, its role supported the government "by refraining from recommending strike action and by urging workers to support [State] labor policies."¹⁴⁰ The 1985 Labor Relations Act, promulgated by the government, addressed collective bargaining and industrial relations.¹⁴¹ It was, however, heavily criticized by employers' and workers' organizations for being State-dominated.¹⁴² The Act extensively regulated working conditions, such as minimum wages, and "imposed an unwieldy structure of industrial conciliation procedures"¹⁴³ that effectively banned industrial action such as strikes.¹⁴⁴

By the end of the 1980s, the ZCTU had attracted a growing number of supporters.¹⁴⁵ As protests and strikes drew tens of thousands into protest,¹⁴⁶ the union experienced its first real signs of growth¹⁴⁷ and

138. See Guy C.Z. Mhone, *The Impact of Structural Adjustment on the Urban Informal Sector in Zimbabwe*, at 11, 13 (Int'l Inst. For Labour Studies, Discussion Paper Ser. 2, 1995).

139. See Qinisani Bhebe & Mildred Mahapa, *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., *supra* note 134, at 5–6.

140. See SHADUR, *supra* note 3, at 5; See Bhebe, et al., *supra* note 139, at 69; Raftopoulos, *supra* note 136, at 5.

141. Tayo Fashoyin, *Designed to Fail: The Social Partnership Experiment in Zimbabwe*, 34 S. AFR. J. OF LAB. REL. 110, 113 (2010).

142. See Paris Yeros, *The Rise and Fall of Trade Unionism in Zimbabwe, Part 1: 1990-1995*, 40 REV. OF AFR. POL. ECON. 219, 221 (2013); Mhone, *supra* note 138, at 11; see generally Raftopoulos, *supra* note 136, at 5.

143. See Takirambudde, *supra* note 38, at 50.

144. See Raftopoulos, *supra* note 136, at 5.

145. See Fashoyin, *supra* note 141, at 113.

146. See DWYER et al., *supra* note 130, at 167, 182–85.

147. See Richard Saunders, *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).

asserted its independence.¹⁴⁸ It quickly developed a mass power base among the urban working class and, by 1989, began openly challenging the government's policies.¹⁴⁹

In 1990, the government adopted World Bank/IMF reforms and implemented the Economic Structural Adjustment Program (ESAP).¹⁵⁰ 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.¹⁵¹ ESAP, as well as two World Bank SAPs, precipitated high human development costs at the expense of employment protections.¹⁵²

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.¹⁵³ The new Act contained some positive measures, including a collective-bargaining mechanism between workers and

148. See Bhebe, et al., *supra* note 139, at 70; see also Peter Makaye & Constantine Munhande, *Zimbabwe's Socialist Development Experiment 1980-1989*, 18 *IOSR J. HUMAN. & SOC. SCI.* 63, 66 (2013).

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.

152. See Bhebe, et al., *supra* note 139, at 70; see generally Walter Chambati, *Changing Agrarian Labour Relations after Land Reform in Zimbabwe*, in *LAND AND AGRARIAN REFORM IN ZIMBABWE: BEYOND WHITE-SETTLER CAPITALISM* 157, 161 (Sam Moyo & Walter Chambati, eds., 2013); see also World Bank Operations Evaluation Department, *Zimbabwe Country Assistance Evaluation*, Report No. 29058, (May 21, 2004), available at <http://documents.worldbank.org/curated/en/623251468781144014/pdf/290580Zim.pdf> (finding that “[s]ocial progress slowed, per capita incomes declined, and the number of people living in extreme poverty increased.”); UN Development Programme, *Human Development Report – Zimbabwe* (1999), available at <http://hdr.undp.org/sites/default/files/zhdr1999-globalisation.pdf>.

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.¹⁵⁴ Nevertheless, it continued to allow the government to refuse to register trade unions.¹⁵⁵

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.¹⁵⁶ 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.”¹⁵⁷

The ZCTU’s open opposition to the ESAP culminated into a public sector strike in 1996.¹⁵⁸ The government responded by arresting the strike leaders and dismissing the majority of the public sector workers.¹⁵⁹ In 1999, even though the union continued to suffer from internal capacity weaknesses, it still continued to build its membership.¹⁶⁰ The ZCTU elaborated its political campaign and, in May 1999, facilitated the formulation of an opposition political party, the Movement for Democratic Change (MDC).¹⁶¹ The MDC’s popularity grew remarkably quickly, and by 2000, it rivaled the ZANU-PF in every election.¹⁶² The MDC’s proliferating popularity was met, unfortunately, with increasing ruling party violence, and many of its members were killed during election campaigns from 2000-2003.¹⁶³

154. See Lovemore Madhuku, *Trade Unions and the Law*, in *STRIKING BACK: THE LABOR MOVEMENT AND THE POST-COLONIAL STATE IN ZIMBABWE 1980-2000*, 105, 112 (Brian Raftopoulos & Llyod Sachikonye eds., 2001).

155. See *id.*

156. See Wood et al., *supra* note 134, at 6; Raftopoulos, *supra* note 136, at 7.

157. See Raftopoulos, *supra* note 136, at 8.

158. See Yeros, *supra* note 142, at 220–21; Raftopoulos, *supra* note 136, at 10; Bhebe et al., *supra* note 139, at 70.

159. See Raftopoulos, *supra* note 136, at 11.

160. See Yeros, *supra* note 142, at 227–30; Wood et al., *supra* note 134, at 6.

161. See Raftopoulos, *supra* note 136, at 16.

162. See Maree, *supra* note 132, at 16; see also Jonathan Oshupeng Maseng, *Zimbabwe’s Inclusive Government: Platform for Political Battles or for Pursuit of Socio-Economic Development?*, PAN-AFR. VOICES FOR FREEDOM & JUST. (July 08, 2010), <https://www.pambazuka.org/governance/zimbabwe%E2%80%99s-inclusive-government>.

163. See Maree, *supra* note 132, at 15; see also DWYER ET AL., *supra* note 130, at 185; Raftopoulos, *supra* note 136, at 17–18.

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.

165. See Dominic Uzhenyu, *Lack of Social Dialogue, The Force Behind Lack of Social Protection of Vulnerable Working Groups, A Study of Zimbabwe Scenario 3* (presented at 17th ILERA World Congress, Feb. 25, 2015), available at <http://www.ileraworld.com/dynamic/full/IL257.pdf>. As its name suggests, the TNF is made up of government, workers’ representatives, and employers’ representatives. *Id.* It is mandated to discuss and negotiate social and economic matters, including labor legislation. *Id.*

166. See Fashoyin, *supra* note 141, at 115–16.

167. See *id.* at 120.

168. See *id.* at 116–17.

169. ILO, *Labour Law Reform: ILO Capacity Building Workshop – The Report 6* (Nyanga, 2010) (remarks from ZCTU – Cde. E. Mhuriro), available at http://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---sro-harare/documents/meetingdocument/wcms_227711.pdf.

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.

171. See James Muzondidya, *The Opposition Dilemma in Zimbabwe, in THE HARD ROAD TO REFORM: THE POLITICS OF ZIMBABWE’S GLOBAL POLITICAL AGREEMENT* 39, 41 (Brian Raftopoulos ed., 2013).

coincided with ZCTU nationwide events,” which indicated “centralized direction.”¹⁷² SADC leaders persuaded the Government to share power with MDC formations.¹⁷³ This persuasion ultimately concluded in the Global Political Agreement (GPA), establishing an “Inclusive Government,” which was signed in September 2008.¹⁷⁴ Despite initial optimism over the Inclusive Government, in 2011, violence against the ZANU-PF intensified, with parliamentarians detained and social activists beaten and tortured.¹⁷⁵

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.¹⁷⁶ When independence was won in 1968, the role of the chiefs was further strengthened through constitutional arrangements.¹⁷⁷ The constitutional monarchy, based on “tribal

172. ILO, *Report of the Commission of Inquiry*, at art. 26, § 594 (March 2010), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_CO_MPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2508373,en:NO.

173. See Patrick Dzimiri, *African Multilateral Responses to the Crisis in Zimbabwe: A Responsibility to Protect Perspective*, 39 STRATEGIC REV. S. AFR., 50, 65 (2017); see also Nic Cheeseman & Blessing-Miles Tendi, *Power-Sharing in Comparative Perspective: The Dynamics of ‘Unity Government’ in Kenya and Zimbabwe*, 48 J. MOD. AFR. STUD. 203, 204 (2010). For an in-depth analysis of the political developments and power-sharing in Zimbabwe at this time, see generally Derek Matyszak, *Power Dynamics in Zimbabwe’s Inclusive Government*, Research Advocacy Unit (2009).

174. Formation was stalled until 2009. See Adrienne LeBas, *A New Twilight in Zimbabwe? The Perils of Power Sharing*, 25 J. OF DEMOCRACY 52, 54–55 (2014); Dzimiri, *supra* note 173, at 67.

175. See, e.g., Danielle Connolly, *The Global Political Agreement and Democratic Transition in Zimbabwe*, at 3–5 (Oxford Transitional Just. Res. Working Paper Ser., June 27, 2011).

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

178. Khabele Matlosa, *Democracy and Conflict in Post-Apartheid Southern Africa: Dilemmas of Social Change in Small States*, 74 INT’L AFF., 319, 321 (1998).

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).

181. See Freedom House, *Swaziland: A Failed Feudal State: A Freedom House Report*, at 11 (2013).

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.*

186. Martin Fransman, *Labour, Capital and the State in Swaziland, 1962-1977*, S. AFR. LAB. BULL. 58, 77 (1982).

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

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.

191. See, e.g., *Observation (CEACR) - adopted 1990, published 77th ILC session*, ILO,

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_CO MMENT_ID:2081423 (last visited Oct.22, 2018).

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.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.¹⁹⁸ To assuage regional and international concerns, the Swazi government undertook a number of legislative reforms to allow for freedom of speech and assembly.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."²⁰⁰

In 2008, the King signed the Suppression of Terrorism Act, which further hindered workers' efforts to organize.²⁰¹ The Act provided no clear definition of "terrorist act" and, consequently, was able to reach into civil society activities.²⁰² In 2010, the Act was renewed and, according to trade unions, has been used to target trade union activities.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."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."²⁰⁵ In response, the government deregistered the federation that year and set up a rival workers' group, the Swaziland Economic Empowerment Workers Union.²⁰⁶

197. See DWYER ET AL., *supra* note 130, at 197.

198. *Id.*

199. See Wood et al., *supra* note 134, at 11.

200. *Id.*

201. See Freedom House, *supra* note 181, at 23.

202. *See id.*

203. LO/FTF COUNCIL, SWAZILAND – LABOUR MARKET PROFILE, at 9 (2013).

204. *Id.*; See Wood, et al., *supra* note 134, at 12.

205. See Freedom House, *supra* note 181, at 27.

206. See Wood, et al., *supra* note 134, at 12; *see also* Observation (CEACR) - adopted 2012, published 102nd ILC session (2013), ILO (2013), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3084144.

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.²⁰⁷ These countries adopted new constitutions and laws favoring strong government over labor rights.²⁰⁸ 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.²⁰⁹ The ILO also requested both countries to appear before the annual ILC, given the severity of the concerns.²¹⁰

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:P11110_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:P11110_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 2002.²¹¹ 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.²¹² 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."²¹³

Initially, the government refused to appear at the ILC to address the merits of the complaint.²¹⁴ In 2009, however, it permitted the Commission of Inquiry to enter the country.²¹⁵ 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."²¹⁶ 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.²¹⁷

labor rights in question. See INT'L LABOUR ORG., RULES OF THE GAME: A BRIEF INTRODUCTION TO INTERNATIONAL LABOUR STANDARDS, *supra* note 53, at 103.

211. See *Individual Case (CAS) - Discussion: 2002, Publication: 90th ILC session: Zimbabwe*, ILO (2002), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2555881.

212. See generally Commission of Inquiry, *COMPLAINT (article 26) ZIMBABWE - C087, C098*, ILO, (2010), http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMMENT_ID:2508373,en:NO.

213. See *id.*

214. See *Individual Case (CAS) - Discussion: Publication: 97th ILC session (2008), Zimbabwe*, ILO (2008), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2556331.

215. See ILO, *Report of the Commission of Inquiry*, *supra* note 172, at vii.

216. See *id.*

217. See *id.*

The ILO called the government of Swaziland to appear before the ILC in 1996.²¹⁸ The Swazi government attended and defended its laws and practices, claiming that allegations of restrictions on fundamental rights and freedoms were baseless.²¹⁹ The ILC continued to call the Swazi government to explain its labor laws and practices nearly every year from 1996 to 2015.²²⁰ 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.

218. *See Individual Case (CAS) - Discussion: Publication: 83rd ILC session (1996), Swaziland*, ILO (1996), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2555404.

219. *See generally id.*

220. To access those comments, see the ILO's discussion of cases of serious failure, *Case of serious failure (CAS) - Discussion: 2017, Publication: 106th ILC session (2017)*, *Eswatini*, ILO, https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3791597 (last visited Dec. 02, 2018).

Table 2: ILO Assistance (2008-2015)		
Zimbabwe		
In-Country Missions	Advisory Assistance	DWCP
<p>2009: Commission of Inquiry</p> <p>2009: ILO High-Level Mission on Freedom of Association</p> <p>2014: ILO High-Level Mission on Freedom of Association</p>	<p>2009: capacity-building workshop on social dialogue</p> <p>2010: capacity-building workshop on labor law reform and the TNF</p> <p>2010: launch of a technical assistance package to facilitate the recommendations of the Commission of Inquiry.</p> <p>2011: capacity-building courses on freedom of association and the TNF</p> <p>2012: training workshops and capacity-building workshops</p> <p>2013: capacity-building workshop on freedom of association</p> <p>2015: capacity building training</p>	<p>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).</p> <p>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).</p>
Swaziland		
In-Country	Advisory Assistance	DWCP
<p>2010: ILO High-Level Mission on Freedom of Association</p> <p>2014: ILO High-Level Mission on Freedom of Association</p>	<p>2010: Sub-Regional Tripartite workshop on ILO standards</p> <p>2011: capacity-building courses on freedom of association.</p> <p>2013: capacity-building training on freedom of association</p>	<p>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)</p>
<p>Source: See generally ILO CEACR comments for Zimbabwe and Swaziland from 2008 to 2015, available at https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID,P11110_CONTEXT:103336,SC and https://www.ilo.org/dyn/normlex/en/f?p=1000:11110:0::NO:11110:P11110_COUNTRY_ID,P11110_CONTEXT:103183,SC. Information concerning the DWCPs for each country is found at the applicable DWCP years, as referenced <i>infra</i> n. 180–86.</p>		

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

221. *See supra* Table 2.

222. This initial DWCP has been followed up by a DWCP in 2009, and 2012. *See Decent Work Country Programme for Zimbabwe (2006 - 2007)*, ILO https://www.ilo.org/addisababa/information-resources/publications/WCMS_229359/lang-en/index.htm (last visited Oct. 22, 2018).

223. ILO, *Decent Work Country Programme for Zimbabwe*, (2009–2011), available at http://www.africayouthskills.org/images/pdf/lrg/decent_work_country_programme_2009_-_11.pdf [hereinafter 2009 DWCP Zimbabwe].

224. ILO, *Decent Work Country Programme for Zimbabwe*, (2012–2015), available at http://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---sro-harare/documents/genericdocument/wcms_226543.pdf [hereinafter 2012 DWCP Zimbabwe].

225. ILO, *Decent Work Country Programme for Swaziland*, at 10–11 (2010–2014), available at http://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_561068.pdf [hereinafter 2010 DWCP Swaziland].

226. ILO, *Decent Work Country Programme for Zimbabwe*, at 9 (2006–2007), available at https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---sro-harare/documents/publication/wcms_229359.pdf [hereinafter 2006 DWCP Zimbabwe].

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.²²⁸ The resulting DWCP identified as priority the need to strengthen social dialogue in the country.²²⁹ Although the program noted that it had helped the country establish a National Steering committee on Social Dialogue,²³⁰ it also acknowledged that there were "still very glaring decent work deficits under" the social dialogue objective²³¹ and a "dire need to strengthen the institutional structures for social dialogue."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.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

228. 2010 DWCP SWAZILAND, *supra* note 225, at 10–11.

229. *Id.* at 25–26; 35.

230. *Id.* at 16.

231. *Id.* at 19.

232. *Id.* at 16.

233. *See supra* pp. 27–28.

were already represented through the TNF.²³⁴ In 2009, the TNF faced serious setbacks and discontinued holding consultations.²³⁵ 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.²³⁶ 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"²³⁷

In 2013, Zimbabwe continued to face ILO criticism for failing to strengthen its labor laws.²³⁸ 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.²³⁹ In response, the government claimed that resource constraints obstructed concrete progress, but pledged to continue to work towards strengthening its laws and practices.²⁴⁰

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.²⁴¹ Many of its legislative acts

234. 2006 DWCP Zimbabwe, *supra* note 226, at 13.

235. See Uzhenyu, *supra* note 165, at 7.

236. 2009 DWCP Zimbabwe, *supra* note 223, at 15.

237. 2012 DWCP Zimbabwe, *supra* note 179, at 7.

238. See *Individual Case (CAS) - Discussion: Publication: 102nd ILC session (2013), Zimbabwe*, ILO (2013), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3131759.

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.*

241. See *Observation (CEACR) - adopted 2015, published 105th ILC session (2016)*, ILO (2016), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3255910.

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.²⁴² By 2014, the Zimbabwe government, workers, and employers drafted a TNF Bill and the government submitted it to Cabinet.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.²⁴⁴

2. Swaziland: A Case of Challenges

The ILO and Swaziland entered into the DWCP in 2010.²⁴⁵ Unfortunately, trade unions at that time remained small and factional.²⁴⁶ TUCOSWA, which would eventually bring these unions together under one collective voice, would not be formed for two more years.²⁴⁷ While the ILO had helped Swaziland establish a National Steering Committee on Social Dialogue, it conceded at the time of drafting that the

242. See *Observation (CEACR) - adopted 2016, published 106th ILC session (2017)*, ILO (2017), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3297184.

243. See *Zimbabwe*, in *AFRICAN ECONOMIC OUTLOOK 2015: REGIONAL DEVELOPMENT AND SPATIAL INCLUSION 10* (AfDB, OECD, UNDP eds., 14th ed. 2015), available at https://read.oecd-ilibrary.org/development/african-economic-outlook-2015/zimbabwe_aeo-2015-44-en#page1;

244. See *Zimbabwe Millennium Development Goals: 2010-2015 Final Progress Report*, at § 3.9 (2016), available at http://www.zw.undp.org/content/dam/zimbabwe/docs/MDG/UNDP_ZW_MDG_MDGR2000-2015.pdf.

245. 2010 DWCP SWAZILAND, *supra* note 225.

246. See *supra* p. 24.

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.²⁴⁸

TUCOSWA's formation in 2012²⁴⁹ was promising. However, the government immediately deregistered it, effectively preventing it from ever participating in the National Steering Committee.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."²⁵¹

The government adopted the Industrial Relations (Amendment) Act in 2014, which introduced provisions concerning the registration of employers' and workers' federations.²⁵² Nevertheless, in 2014, the Minister of Labor suspended or refused to register all federations and TUCOSWA affiliates.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.²⁵⁴ The government also ordered the dissolution of unions pending the amendment of the Industrial Relations Act.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.²⁵⁶

248. *Id.* at 16.

249. *See* LO/FTF COUNCIL, *supra* note 203, at 4.

250. *See Decent Work Country Programmes in Southern Africa*, NEWSLETTER (ILO, Pretoria, S. Afr.), Apr. 2013, at 7, available at http://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---ilo-pretoria/documents/publication/wcms_230786.pdf.

251. *Id.*

252. *See* Industrial Relations (Amendment) Act, 2014 (Act No. 11 of 2014), 21 *Swaziland Government Gazette Extraordinary* 128, S1 (13 November 2014).

253. *See generally*, *Individual Case (CAS) - Discussion: 2014, Publication: 103rd ILC session (2014) - Swaziland*, ILO (2014), http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3175047.

254. *See generally id.*

255. *See id.*

256. *See Observation (CEACR) - adopted 2014, published 104th ILC session (2015)*, ILO (2015),

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

http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3190152.

257. See *Freedom of Association and Development*, *supra* note 29, at 4.

258. See *supra* pp. 17–23.

259. See *supra* pp. 24–27.

260. See *supra* pp. 28–30.

261. See *supra* p. 28–29.

262. See *supra* p. 24.

263. See *supra* p. 25.

264. See ILO, *Report of the Commission of Inquiry*, *supra* note 172.

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.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.²⁶⁶ Consequently, while that assistance proved effective in Zimbabwe, it was largely disregarded in Swaziland.²⁶⁷

A. Lessons Learned: The Case Against Orthodoxy

Under orthodox theory,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.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

265. *See supra* pp. 23, 25.

266. *See supra* pp. 25–27.

267. *See supra* pp. 27–30.

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.

269. *See supra* pp. 29–31.

practices.²⁷⁰ Swaziland's infrastructure suppressed social-partner participation, and the ILO's assistance had no mechanism to absorb it.²⁷¹

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.²⁷² 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.²⁷³ 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.²⁷⁴ 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

270. See *supra* pp. 30–31.

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 programing.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.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.

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.").

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.²⁷⁷ This may be difficult given that most development programs to enable program monitoring and evaluation require instant and concrete outcomes,²⁷⁸ including those in the ILO.²⁷⁹

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).

279. The ILO’s DWCP are, by definition, “time-bound.” See INT’L LABOUR OFFICE, ILO DECENT WORK COUNTRY PROGRAMME: A PRACTICAL GUIDEBOOK *supra* note 72, at 1 (“The ILO introduced time-bound and resourced country programmes, called Decent Work Country Programmes (DWCPs), in 2004.”).

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.

280. As recognised during the ILO's Africa Regional Meeting, "[t]he involvement of employers' and workers' organizations in the development, implementation, monitoring and evaluation of DWCPs and national development frameworks is vital for their success and ensures that they promote decent work. The ILO must step up its capacity-building work with employers' and workers' organizations" See Report of the Director General, ILO., *Empowering Africa's Peoples with Decent Work – 12th African Regional Meeting, Johannesburg, 11-14 October 2011*, at 83 (2011), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_161396.pdf.

