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The Boundaries of the ILO: A Labor Rights Argument for Institutional Cooperation

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THE BOUNDARIES OF THE ILO: A LABOR RIGHTS ARGUMENT FOR INSTITUTIONAL COOPERATION

INTRODUCTION

A simplistic though not inaccurate historical view of the economic theories of the Twentieth Century discloses a pendulum-like movement between free-market and regulatory extremes.[1] As the century began, the Industrial Revolution had fostered confidence that open markets and global trade would bring prosperity to all nations. The consequent *laissez faire* approach to economics spread quickly. Less than two decades later, enthusiasm abated as the United States sunk into the Great Depression and bread-lines and poverty grew in Europe. Heavy state regulation such as the New Deal and more overtly socialist programs abroad were enlisted to bring this excess back in check. Wider and deeper regulation mounted for most of the middle decades of the century. Inevitably, this trend also lost its momentum as hyper-inflation and stagflation crippled the American economy and Communist regimes worldwide began to collapse. Encouraged by what is now known as the Information Revolution and globalization, the pendulum swung back yet again, into the free market euphoria of the "booming" 1990s.

Today, as that "boom" seems more like a bubble and its legacy is marked with scandal and fraud, there are calls for greater corporate governance and economic regulation. As we look abroad for the root causes of terrorism, hatred and ignorance, we find entire populations unemployed, uneducated and disenfranchised, changed mostly for the worse by the unregulated forces of globalization. History suggests we may be beginning a swing back towards centralized regulation and economic governance. Yet, we now find ourselves in a truly global economy, where the size and power of regulated entities often allows them to influence, choose among, and even control would-be regulators. Consequently, we are forced to ask today: who can regulate a global economy, and how?

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1. For the following historical narrative, I rely on DANIEL YERGIN & JOSEPH STANISLAW, COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY (1998) and the related Public Broadcast Systems television broadcast, transcripts, interviews, and resources, which are available at http://www.pbs.org/wgbh/com andingheights/lo.htm.

The difficulty of regulating a global economy has been nowhere more evident than in the attempt to enforce international labor rights. The International Labor Organization ("ILO"), a specialized agency of the United Nations ("UN") created for the purpose, has proven largely ineffective in enforcing compliance with even the core universal standards it has delineated. Recently there have been mounting calls to find other means to enforce compliance. Perhaps loudest have been those that wish to see economic sanctions and/or benefits "linked" to compliance.[2] In such a regime, compliance with the ILO standards would be rewarded with benefits offered through the International Monetary Fund ("IMF"), World Trade Organization ("WTO") or bilateral agreements, and violations punished with sanctions through the same.[3]

Proposals for such linkage systems are various, and are accompanied by arguments just as varied in opposition.[4] It is the purpose of this Note to offer a labor rights-based argument for the necessity of cooperation among international regulatory institutions, be it through such linkage systems or other means. While there has been much scholarship addressing the issue from the trade perspective,[5] little has been offered from the labor perspective. I will argue that because any right is only

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2. *See, e.g.*, C. O'Neal Taylor, *Linkage and Rule-Making: Observations on Trade and Investment and Trade and Labor*, 19 U. PA. J. INT'L ECON. L. 639 (1998) (discussing the origins of, arguments for and difficulties with trade-labor linkages). While other solutions have been theorized, perhaps steeper obstacles face these efforts. *See, e.g.,* Andrew Banks & John Russo, *The Development of International Campaign-Based Network Structures: A Case Study of the IBT and ITF World Council of UPS Unions*, 20 COMP. LAB. L. & POL'Y J. 543 (1999) (suggesting that increased cooperation among unions across international borders will spread labor organization and create pressure on employers to bring their conditions into compliance with international standards). *See also* Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987 (1995).

3. *See, e.g.*, *Symposium: The Boundaries of the WTO*, 96 AM. J. INT'L L. 1 (2002). I will refer later to several papers delivered at this recent symposium which dealt with the question of linkage. *See infra* Part IV.B.

4. For a "taxonomy" of linkage regimes and means and discussion of some criticisms, see David W. Leebron, *Symposium: The Boundaries of the WTO: Linkages*, 96 AM. J. INT'L L. 5, 11 (2002).

5. *See, e.g.*, *Symposium*, *supra* note 3.

meaningful as balanced against other rights and interests, the legal, social and economic framework necessary for protecting labor rights is as properly a subject for economic and human rights institutions as it is for labor institutions. This framework by definition exceeds the boundaries and capacities of the ILO, and so the assistance of other institutions must be enlisted. Further, proposals to link economic benefits, human rights and labor protections on the regulatory plane may not seem so radical when it is observed that they are already inextricably intertwined in the lives of those they effect.

Part I will discuss briefly what labor rights are, both in concept and content. Giving an overview of the history of labor rights and labor rights institutions in the United States and at international law, I will demonstrate that labor rights occupy a unique position at the nexus of economic interest and human rights. Due to this position, a government's obligations to protect labor rights will necessarily involve providing more than just labor-specific regulations.

In Part II, I will first show how the United States has attempted to strike balances between labor rights and other rights, particularly those that have been used to obstruct the exercise of labor rights. While international law has, at least in principle, struck this balance in a manner more favorable to workers than it is in the United States, its lack of effective compliance mechanisms renders this ambitious stance ineffective (and perhaps even insulting to those workers who look to it for protection). The difference between the "positive" and "negative" obligations the ILO imposes on governments shows the root of this difficulty. For the ILO to effectively enforce these standards, it will have to deal with a variety of domestic labor and legal situations without the balancing test found in the American system. I will use the extreme example of Export Process Zones ("EPZs") to demonstrate these difficulties.

In Part III, I will give an overview of the history and purpose of EPZs. I will argue that, though the labor conditions in EPZs strikingly resemble those conditions present when the United States Supreme Court ("Supreme Court") carved back the property rights of employers to protect labor rights, many foreign legal systems offer no means by which this balance can be struck. However, when EPZs are reintegrated into domestic social and legal frameworks, and employers and employees are put in the same position vis-à-vis the government, labor and

human rights conditions tend to improve. I will argue that this trend is promising because it demonstrates that by approaching labor, human and economic rights and interests as inextricably related, conditions which foster prosperity and the protection of these rights thrive more easily.

In Part IV, I will incorporate the observations of the first three Parts into the debate on linkage systems. I will argue that the international regulatory community must recognize that the "positive" obligations the ILO impose upon governments by necessity encompass issues not purely labor-oriented. Violations of these obligations should be treated as violations of international human rights and/or international trade regulations, but should not be, as they currently are, treated as neither. Without cooperation with other international institutions, that is, without some form of linkage, the problems facing the ILO will not easily be overcome.

In conclusion, I will argue that respect for labor rights, which do uncomfortably straddle the generic categories of economic and human rights, involves respect for human rights, but also bears directly upon economic privilege. To see the three as inextricable may be the only way to secure them all, and it is incumbent upon the international community to recognize this.

I. LABOR RIGHTS – DEFINITIONS AND ORIGINS

A. Labor Rights Defined

The very assertion of such a thing as a labor right creates a difficulty in categorization: it is unclear whether labor rights are more properly considered economic or human rights. At first glance, labor does appear to be an intrinsically economic activity. Labor costs and conditions are intimately linked both with an employer's revenues and an employee's individual, familial and communal welfare.[6] In this context, labor is a legitimate economic issue and consequently a reasonable subject of trade laws, regulations and treaties.[7] Further, put alongside

6. Thomas I. Palley, *The Economic Case for Labor Standards: A Layman's Guide*, 2 RICH. J. GLOBAL. L. & BUS. 183 (2001).

7. Robert C. Shelburne, *The Trade-Labor Linkage: Issues and Prospects at* Office of International Economic Affairs, Bureau of International Labor Af-

the freedom from torture, slavery and summary execution, one would not easily recognize labor as a *fundamental* human right, if a human right at all. These other freedoms seem much more basic and fundamental than the right to organize or collectively bargain for employment contracts. As has been observed in a slightly different context, "[w]ithout adequate conditions for the use of freedom, what is the value of freedom? First things come first: there are situations…in which boots are superior to the works of Shakespeare."[8] Put otherwise, labor rights will mean little to peoples whose lives and well-being are daily put in jeopardy.

Still, the Universal Declaration of Human Rights does declare that "[e]veryone has the right to form and to join trade unions for the protection of his interests."[9] We need not follow it to its conclusion to agree with the insight of Marxist economic theory that labor is not just another commodity.[10] In fact, the United States Congress agreed in 1914 and explicitly exempted labor from anti-trust laws because "[t]he labor of a human being is not a commodity or article of commerce."[11] Instead, labor is the means by which individuals define themselves, provide for themselves and their families, and contribute to and create their communities. Consequently, it should be a consideration *before*, not among, purely economic factors. Thus, labor, constitutive of human identity, dignity and self-reliance,[12] seems properly protected as a human right.

However, considering labor a human right completely separated from economic considerations is not without its disadvantages. Perhaps the greatest challenge to international human

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fairs, U.S. Department of Labor, *at* http://www.dol.gov/ilab/programs/oiea/LS_AS SA2.htm (last visited Oct. 23, 2003).

8. Isaiah Berlin, Two Concepts of Liberty, *reprinted in* FOUR ESSAYS ON LIBERTY 124 (Oxford University Press 1988) (1958).

9. Universal Declaration of Human Rights. Adopted by the U.N. General Assembly, 10 December 1948. G.A. Res 217A, U.N. GAOR, 3rd Sess., Pt. I, Resolutions, at 71 U.N. Doc. A/810 (198).

10. KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO 53 (VERSO 1998) (1848). *See also* KARL MARX, WAGE LABOUR AND CAPITAL (IMPORTED PUBLICATIONS, INC. 1976) (1891).

11. The Clayton Act, 15 U.S.C. § 17 (2001).

12. *See, e.g.,* Hannah Arendt, *The Revolutionary Tradition and Its Lost Treasure*, *in* ON REVOLUTION (1963). *See also*, Richard Rorty, *Back to Class Politics*, *in* PHILOSOPHY AND SOCIAL HOPE (1999).

rights today is the lack of effective enforcement and compliance mechanisms.[13] Various mechanisms for enforcing labor rights on their own have been proposed, but none have thus far proven effective.[14] The most prominent proposal has been to "tie" or "link" respect for labor rights (and human rights in general) to economic carrots and sticks.[15] Supporters argue that labor and human rights violators will be more likely to remedy their violations and comply in the future if their economic well-being is at stake.[16] The voices in support of such regimes continue to multiply in force and number, but not without equal opposition.[17]

Therefore, considering labor rights as only a matter of economic interest or as strictly a human rights issue both seem untrue to what is actually at stake when individuals assert them. It is both economic and human well-being that is secured or put in jeopardy when workers' labor rights are enforced or violated. It is perhaps more accurate, then, to consider labor rights as occupying an area of convergence between economic interest and human rights, a unique category unto themselves.[18] Rather than a difficulty, this uncomfortable status may in fact point up a valuable lesson: economic and human rights policies are inextricably connected, and to ignore this is to perpetuate a fallacy that continues to have devastating effects on the devel-

13. *See* Terry Collingsworth, *The Key Human Rights Challenge: Developing Enforcement Mechanisms*, 15 HARV. HUM. RTS. J. 183 (2002).

14. *See* Van Wezel Stone, *supra* note 2.

15. *See* Taylor, *supra* note 2; Elissa Alben, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410 (2001); Jagdish Bhagwati, *Symposium: The Boundaries of the WTO, Afterword: The Question of Linkage*, 96 AM. J. INT'L L. 126 (2002).

16. Taylor, *supra* note 2.

17. Luc Demaret, International Confederation of Free Trade Unions, *The Social Clause is Still an Objective*, Trade Union World, May 23, 2000, *available at* http://www.icftu.org/displaydocument.asp?Index=991213959&Language=EN (advocating for the inclusion of a "social clause" in all WTO procedures and agreements that would require adherence to labor rights).

18. The interdependence of economic interest and human rights has not gone unnoticed. *See* DECLARATION CONCERNING THE AIMS AND PURPOSES OF THE INTERNATIONAL LABOUR ORGANISATION, OCT. 9, 1946, art. III, 62 Stat. 3554, 15 U.N.T.S. 104 ("[A]ll human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.").

oping world.[19] Only by seeing labor as the engine of both social and economic prosperity does one properly understand the responsibilities one bears in shaping labor policies.

B. Labor Rights as Legal Protections

Several lists have been proposed to clearly enumerate the specific rights and liberties that occupy this area of convergence.[20] To whom these rights extend, against whose intervention they guarantee protection, and the types of activities they cover are all subjects of debate in domestic and international law. However, it would be fair to name the following as a fairly uncontroversial list of rights, even if disputes remain as to their scope and application:

1. The Freedom of Association
2. The Right to Organize
3. The Right to Collective Bargaining
4. The Right to Equal Opportunity and Treatment

Each of these rights is explicitly recognized by the ILO Charter and Mandate.[21] In the United States, some of these rights are granted explicitly in the National Labor Relations Act ("NLRA"),[22] while others are derived from basic rights granted elsewhere.[23]

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19. For a discussion of various justifications of labor rights and labor unions, see Peter Levine, *The Legitimacy of Labor Unions*, 8 HOFSTRA LAB. & EMP. L.J. 529 (Spring 2001).

20. *See, e.g.*, National Labor Relations Act, 29 U.S.C.A. § 157 (1998).

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Id.

21. The International Labor Organization Mandate, *available at* http://www.ilo.org/public/english/about/mandate.htm [hereinafter ILO Mandate].

22. The National Labor Relations Act, 29 U.S.C. § 157 (1935).

23. For example, the Freedom of Association is derived from the First Amendment to the United States Constitution, U.S. CONST. amend. I; the

1. Labor Rights in the United States

Nothing explicitly resembling a labor right is to be found anywhere in the United States Constitution or the Bill of Rights.[24] Instead, the beginning of the labor movement and the federalization of labor rights in the United States can be traced to the passage of the Clayton Act of 1914.[25] The Clayton Act, responding to worker's protests and unrest, exempted labor unions from the Sherman Anti-trust Act's prohibition of monopolies and trusts.[26] Yet, it was not until President Wilson's War Labor Board that the federal government officially recognized the "right of workers to organize in trade unions and to bargain collectively through chosen representatives."[27] Though lacking enforcement provisions, subsequent Depression Era and New Deal governmental initiatives addressed labor issues and added protections by curbing the power of the courts to issue injunctions and restraining orders against strikers.[28] Finally, on July 5, 1935, Senator Robert F. Wagner's NLRA was signed into law, creating the first enforceable guarantee of labor rights in the United States.[29]

The federalization of labor rights effected by the passage of the NLRA also put an end to the phenomenon known as the

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Freedom from Forced Labor is explicit in the Thirteenth Amendment to the United States Constitution, U.S. CONST. amend. XIII, § 1; and the Right to Equal Opportunity and Treatment is derived from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, U.S. CONST. amend. XIV, § 1 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–17 (1994 & Supp. V 1999).

24. It has been argued that labor rights, though today accepted at the international level as human rights, were never considered as such in the United States, and that American labor policy has and continues to suffer because of it. *See, e.g.,* James A. Gross, *Human Rights Perspective on the United States Labor Relations Law: A Violation of the Right of Freedom of Association*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 65 (1999).

25. The Clayton Act, 15 U.S.C. § 17 (2001). *See also* Thomas I. Palley, *The Economic Case for Labor Standards: A Layman's Guide*, 2 RICH. J. GLOBAL. L. & BUS. 183 (Fall 2001).

26. The Sherman Act, 15 U.S.C. §§ 1–7 (1994).

27. The First Sixty Years: The Story of the National Labor Relations Board (1935-1995) *at* http://www.nlrb.gov/publications/first60yrs/60yrs_entirepub.html [hereinafter The First Sixty Years].

28. *See, e.g.*, Norris-LaGuardia Act, 29 U.S.C. §§ 101–05 (2002); National Industrial Recovery Act of 1933, 15 U.S.C.A. §§ 701–13 (West 2001)).

29. The First Sixty Years, *supra* note 27.

"race to the bottom."[30] At the beginning of the century, labor standards varied substantially from state to state in the United States.[31] States which kept their labor standards low were more attractive to employers, and to compete states actually began to *lower* their standards.[32] Labor began to organize and put pressure on state governments to improve working conditions. This pressure was quickly neutralized when employers threatened or actually did move to states with lower standards. The economic interest of employers in the United States kept down and even lowered the abysmal labor conditions of employees, which further deteriorated their social conditions and living standards generally.[33] This "race to the bottom" persisted until the NLRA and the Fair Labor Standards Act of 1938[34] were passed, federalizing labor standards. The pressure organized labor had kept on the federal government combined with a growing uneasiness about free-market economics generally to end the race to the bottom by raising the permitted bottom nationwide.[35] Of course, the grant of these rights did not end organized labor's struggle in the United States; as we shall see in the next section, many disputes, in and out of court, were to follow.

2. International Labor Rights

Perhaps one of the oldest continuously existing international organizations, the ILO was founded in 1919 under the Treaty of Versailles and became the first specialized agency of the UN in 1946.[36] In its Declaration of Fundamental Principles and Rights at Work, the ILO explicitly sets forth many of the basic labor rights delineated above: "freedom of association, the right to organize, collective bargaining, abolition of forced labor, and

30. Van Wezel Stone, *supra* note 2, at 992.

31. Bradley A. Harsch, *Finding a Sound Commerce Clause Doctrine: Time to Evaluate the Structural Necessity of Federal Legislation*, 31 SETON HALL L. REV. 983, 1015 (2001).

32. *Id.*

33. For a stark depiction of these effects, which would undoubtedly be considered today as mass human rights violations if nothing else, see UPTON SINCLAIR, THE JUNGLE (1905).

34. Fair Labor Standards Act of 1938, 29 U.S.C. § 206 (1994).

35. Christopher L. Erickson & Daniel J.B. Mitchell, *The American Experience with Labor Standards and Trade Agreements*, J. SMALL & EMERGING BUS. L. 41 (1999).

36. The ILO Mandate, *supra* note 21.

equality of opportunity and treatment."[37] However, its history has shown that violations are not easily remedied.[38]

Complaints may be brought to the ILO through three mechanisms. A member state (and, importantly, not an individual) may bring a complaint under the ILO's Article 26 Complaint Procedure if it feels another member state has failed to comply with the ILO Constitution.[39] A commission is then formed and, if a violation is found, a report is issued to the offending state recommending it conform its practices to the ILO Constitution and relevant provisions.[40] Theoretically, when an offending member state refuses to comply, the complaining member state may then refer the matter to the International Court of Justice, though this has never happened. In fact, in its ninety-three years only six complaints brought under Article 26 have resulted in the commission issuing a report.[41]

The second mechanism for lodging complaints is through the ILO's Fact-Finding and Conciliation Commission on Freedom of Association ("FFCC") and Committee on Freedom of Association ("CFA"). The FFCC operates in a similar manner to the Article 26 provisions, but only receives complaints relating to freedom of association violations which have been referred to it by the ILO's Governing Body or the UN, not by individuals. Further, complaints will not be considered without the violating state's consent.[42]

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37. *Id.*

38. For example, even violations of the prohibition on the worst forms of child labor cannot form the basis for suits in violation of the "law of nations," as provided for in the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994). These standards are neither the subject of treaties, nor so widely accepted so as to be considered customary law. The prohibition on forced labor is an exception. However, plaintiffs have successfully sued under the Alien Tort Claims Act for labor-related violations involving forced labor along with torture, murder and rape. *See, e.g.*, Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997); Nat'l Coalition Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997).

39. ILO Constitution, Chapter II, Article 26, (1948), *available at* http://www.ilo.org/public/english/about/iloconst.htm. *See also* ILO Explanation of Article 26 Complaint Procedures, *available at* http://www.ilo.org/public/english/standards/norm/enforced/complnt/art26_2.htm#icj (last visited Oct. 1, 2003).

40. *Id.*

41. *Id.*

42. *Id.*

Finally, the CFA allows individuals and non-governmental organizations ("NGOs") such as trade unions to bring complaints against member states for violating their freedom of association. Complaints may be brought to the CFA regardless of whether the offending member state has ratified the specific convention allegedly violated. If a violation is found, a recommendation is issued to the member state outlining what measures should be taken to conform its practices to the standards promulgated by the ILO.[43] Although the CFA may "follow up" to see if recommendations have been enacted (and this only when the underlying convention has been ratified by the offending member state), the ILO lacks any enforcement mechanism to enforce compliance. Instead, recommendations sit "on the books" for decades as the member state continues to violate the ILO Constitution and disregard the committee's findings.[44]

Under the ILO Constitution, every member state is obligated both to respect the rights delineated in the ILO charter and subsequent conventions in its own operations *and* to ensure that employers in its jurisdiction respect them.[45] These obliga-

43. *Id.*

44. *E.g.*, CFA Case No. 1523, Complaint Against the Government of the United States Presented by the United Food and Commercial Workers International Union (UFCW), The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the International Federation of Commercial, Clerical, Professional and Technical Employees (FIET), ILO Report No. 284 (Vol. LXXV, 1992, Series B, No. 3). This recommendation was issued in November of 1999 and the United States to this day has not even addressed how compliance might be brought about. For a further discussion see Gross, *supra* note 24 (describing other United States labor laws which violate ILO standards). *See also* HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKER'S FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (Aug. 2000); Testimony of Kenneth Roth, Executive Director, Human Rights Watch before the Senate Committee on Health, Education, Labor, and Pensions (June 20, 2002). I will return to CFA Case 1523 *infra* Part II.B regarding the balancing necessary between labor and property rights.

45. *See, e.g.,* Convention Concerning Freedom of Association and Protection of the Right to Organise, Convention Number 87 (1948), art. 11 ("Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize."). *See also* CFA Case No. 1512, Complaint Against the Government of Guatemala Presented by The International Confederation of Free Trade Unions (ICFTU) and the Latin American Central of Workers (CLAT) 3.10.1989 ILO

tions could be considered "negative" and "positive": the former obligate the state to refrain from taking any official actions or passing or maintaining any laws that would violate ILO standards; the latter obligate the state to intervene in the activities of those within its jurisdiction to ensure that they also comply. Unfortunately, violations of both types are too commonly found by the ILO.[46] While some governments are cited for direct violations of their negative obligations (e.g., carrying out illegal arrests and detentions of union-organizers, or maintaining laws excluding workers from mandatory protections[47]), violations of positive obligations often involve failures to secure protections not readily recognized as labor-related, but which are nonetheless necessary for the full exercise of labor rights (e.g., failure to investigate or adjudicate death threats by non-governmental individuals, or to provide due process for complaints[48]).

Report No. 275 (Vol. LXXIII, 1990, Series B, No. 3) at para. 398. In this case, the CFA held that:

> [F]acts imputable to individuals do bring into play the State's responsibility owing to the State's obligation to prevent violations of human rights. Consequently, governments should endeavour to meet their obligations regarding the respect of individual rights and freedoms, as well as their obligation to guarantee the right to life of trade unionists.

Id. I will use the terms "positive" and "negative" to denote these two obligations throughout.

46. *Compare id.* at para. 394 (reminding government of Guatemala that the competent government authorities must recognize a local trade union), *with* CFA Case No. 1233, Complaint Against the Government of El Salvador Presented by The World Federation of Trade Union (WFTU) and the International Confederation of Free Trade Unions (ICFTU) 27.9.1983, ILO Report No. 233 (Vol. LXVII, 1984, Series B, No. 1), Interim Report (1983) at para. 682 (reminding government of El Salvador that its responsibility is not only to respect human and labor rights in its own operations, but that "freedom of association can only be exercised in conditions in which fundamental human rights, and in particular those relating to human life and personal safety, are fully respected and guaranteed").

47. *See, e.g.*, CFA Case No. 1826, Complaint Against the Government of the Philippines, Presented by The Trade Union Congress of the Philippines (TUCP) 27.3.1995 ILO Report No. 302 (Vol. LXXIX, 1996, Series B, No. 1) (Illegal arrest and detention of trade union leaders; harassment, threats and acts of intimidation against trade union members by government officials and management in order to stop union activities).

48. *See, e.g.,* CFA Case No. 1512, *supra* note 45, at para. 398.

Importantly, positive obligations impose upon governments responsibilities that are not limited to the workers and employers in their jurisdiction. For example, putting an end to illegal arrests and summary executions of union organizers requires reforming the domestic police and judicial systems, something beyond simple labor law.[49] Yet, expanded positive obligations are what the ILO must require to secure worker's rights.[50] It is also a glaring indication that labor rights are part of — and depend on — a broader base of protections, including human and social rights for workers.

As another example, the freedom of association is perhaps the most essential right given to workers because it allows for the fulfillment and exercise of all others labor rights.[51] Indeed, the ability to keep workers from associating with one another and/or labor organizers has proven to be one of the most effective methods used by employers to keep their workers from organizing.[52] Such practices stand as absolute obstacles to the

49. *See, e.g.*, CFA Case No. 1233, *supra* note 46.

50. *Id.*

51. It could be argued that the freedom from forced labor is even more fundamental than the freedom of association or any of the other freedoms listed above. However, this freedom is a 'freedom from' or negative freedom, that is, a guarantee to be free from the actions of others. The other freedoms are 'freedoms to' or positive freedoms, that is, freedoms to be exercised by their possessors. *See* Berlin, *supra* note 8. This distinction is admittedly less than air-tight. However, forced labor, akin to slavery and other crimes against humanity, is increasingly accepted as prohibited by customary international law, allowing for violations to be actionable under the Alien Torts Claim Act in the United States and other "law of nations" jurisdictional provisions. *See e.g.*, *Doe*, 963 F. Supp. 880. Since the prohibition of forced labor has become at least in that manner "enforceable," I will concentrate on the other, positive liberties collected under the heading of labor rights.

52. *See, e.g.*, CFA Case No. 2090, Complaint Against the Government of Belarus by The Belarus Automobile and Agricultural Machinery Workers' Union (AAMWU), the Agricultural Sector Workers' Union (ASWU), the Radio and Electronics Workers' Union (REWU), the Congress of Democratic Trade Unions (CDTU), the Federation of Trade Unions of Belarus (FPB), the Belarusian Free Trade Union (BFTU), the International Confederation of Free Trade Unions (ICFTU) and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) 16.6.2000 ILO Report No. 324 (Vol. LXXXIV, 2001, Series B, No. 1) (2000) at para. 205 (alleging government authorities interfered with trade union activities and elections, including denying access to the workplace to officers of the branch union).

improvement of labor conditions if ignored or enforced by the government. Yet, these types of violations abound.[53] In response, the ILO is faced with the impossible situation of asking these governments to comply with internationally recognized *labor* rights when it is aware that the offending nation often has not the *social*, *legal* or *economic* infrastructure to do so. The respect of these rights is made impossible because there are no other relative rights or interests against which they could be balanced, and it is simply outside the ILO's ability to require their creation.

It is thus unsurprising that the ILO, though designated as the sole international organ responsible for the area, has had such difficulty in securing the basic labor rights to which it claims all workers are entitled.[54] Enforcement devices other than the linkage systems which form the substance of this discussion have been equally ineffective in enforcing these standards. While litigation brought by aggrieved parties under various municipal provisions has been somewhat effective in remedying those particular transgressions for which there is jurisdiction, it cannot be a viable means of broad-based regulation.[55] Such *ad hoc* litigation only applies to certain, limited types of breaches and is not pervasive enough to be a deterrent or incentive for governments to respect labor standards. A "bottom-up" approach has also been proposed in the form of international unionization of the labor forces under a particular international corporation or within a particular industry.[56] This approach faces obstacles as well. For instance, workers are often kept in isolated areas, cordoned off by barbed wire and armed guards, making it impossible for union organizers to

53. *Id.*

54. *See* Jean-Michel Servais, *Labor Law and Cross-Border Cooperation among Unions*, *in* TRANSNATIONAL COOPERATION AMONG LABOR UNIONS, 44, 56–59 (Michael E. Gordon & Lowell Turner eds., 2000); *See also The Realization of Economic, Social and Cultural Rights*, U.N. ESCOR Sub-Comm. on Prevention of Discrimination and Protection of Minorities, 47th Sess., Item 8., U.N Doc. E/CN.4/Sub.2/1995//11 at para. 108 [hereinafter The Realization of Economic, Social and Cultural Rights].

55. *See e.g.*, *Doe,* 963 F. Supp. 880; Doe v. Exxon Mobile, No. 01–1357 (D.D.C. filed June 20, 2001). For a discussion of various campaigns brought in courts, see also Legal Initiatives for Corporate Accountability *at* http://www.laborrights.org/projects/corporate/index.html.

56. *See* Van Wezel Stone*, supra* note 2, at 1007–08.

physically reach them, much less assist in organizing them into collective bargaining units.[57]

The need for an enforceable system of international labor standards has become all the more dire in the increasingly competitive global labor market.[58] Like that which arose in the early part of the twentieth century among the various states in the United States, there is fear that a new "race to the bottom" will begin (if it has not started already), now involving competition between nations in the global labor market. [59] Particularly since the advent of EPZs, host counties — usually those considered "developing" — have used their cheap and plentiful labor resources to attract foreign investors, usually from developed countries. This has created a competitive market among countries that is governed by the same incentives to lower labor standards as were found in the United States at the beginning of the Twentieth Century.[60] Those concerned with this development have looked to the ILO for a global analogue to the federal government to set out and enforce standards for all nations, thus raising the bottom worldwide. However, stark differences exist among the legal systems found in the United States and in the states the ILO often finds in breach of its

57. Dorsati Madani, The World Bank, A Review of the Role and Impact of Export Processing Zones (1999), *available at* http://www1.worldbank.org/ wbie p/trade/othertrade/files/MadaniEPZ.pdf.

58. *See, e.g.*, ILO, Tripartite Meeting on Labour Practices in the Footwear, Leather, Textiles and Clothing Industries, Geneva, 16-20 October 2000 para. 5, *available at* http://www.ilo.org/public/english/dialogue/sector/techmeet/tmlfi 00/tmlfin.htm (discussing competition in these industries creating a "race to the bottom" for worker's wages and conditions).

59. *See id.*; *The Race to the Bottom*, National Labor Commission, *at* http://www.nlcnet.org/brochure/page1.htm (last visited Oct. 19, 2000).

60. EMPLOYMENT, LABOUR AND SOCIAL AFFAIRS COMMITTEE, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, LABOUR MARKET AND SOCIAL POLICY- OCCASIONAL PAPER NO. 43: INTERNATIONAL TRADE AND CORE LABOUR STANDARDS: A SURVEY OF THE RECENT LITERATURE 21–24 (2000), *available at* http://www.olis.oecd.org/olis/2000doc.nsf/c5ce8ffa41835d64c125685d005300b0/c125692700623b74c125696e0056ca76/$FILE/00083851.DOC. *See also* ILO, DECENT WORK RESEARCH PROGRAMME, THE EFFECTS OF CORE WORKERS RIGHTS ON LABOUR COSTS AND FOREIGN DIRECT INVESTMENT: EVALUATING THE "CONVENTIONAL WISDOM" (2001) (arguing that even if, as some studies suggest, countries with lower labor standards have not in fact attracted more foreign direct investment than those with higher labor standards, the *perception* among countries competing in the global labor market that they do is enough to warrant fears of a "race to the bottom").

standards. To understand the difference will be to understand why the ILO alone is insufficient to secure these rights.

II. BALANCING LABOR AND OTHER RIGHTS: DIFFICULTIES HERE AND ABROAD

The ability to weigh competing interests asserted by employers and employees has proven essential to the effective enforcement of labor rights. Inherent in striking that balance is the recognition of the interdependence of these interests. However, the governments of developing countries tend to be more sympathetic (if not in a symbiotic relationship) with employers. Even where there is some semblance of governmental impartiality, the just balance between the two is not an uncontroversial issue. Observing how this essential balance has been struck in the United States, the problems facing other nations (and facing the ILO in addressing their violations) become apparent.

A. Balancing Labor and Other Rights in the United States: Babcock *and* Lechmere

As explored above,[61] in the United States, labor rights are not direct constitutional protections, but are the product of economic and political pressures, and thus have often been trumped by other, longer-established rights. Ten years after the passage of the NLRA and the creation of the National Labor Relations Board ("NLRB"), the Supreme Court was asked to consider whether employers could prohibit their employees from distributing and receiving unionizing information to one another on the employer's property.[62] In *Republic Aviation Corp. v. NLRB*, the Supreme Court held that the employees' right to self-organize, as guaranteed under the NLRA, was more essential than the employer's right to control the use of his property.[63] The Court affirmed the Board's decision that the employer's prohibition of the distribution of union information on its premises constituted an "unreasonable impediment on the freedom of communication essential to the exercise of its employees' right

61. *See supra* Part I.B.
62. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
63. *Id.* at 801.

to self-organization."[64] However, the Court made clear that this decision applied only to the exercise of rights by employees.

In 1956, the Supreme Court was asked to strike a similar balance, this time between an employer's right to exclude non-employees from its property and an employee's freedom of association. *NLRB v. Babcock & Wilcox Co.*[65] combined several factually similar NLRB cases for appeal on this question. In the case actually involving Babcock & Wilcox Co. (Babcock), the United Steelworkers of America, CIO (USA) had been trying to organize employees that worked at a factory, owned by their employer, on an isolated one hundred acre tract of land.[66] Almost all of the employees drove to work and parked in a company lot next to the fenced-in plant area. The parking lot could be reached only by a one hundred yard-long driveway connecting it to a public highway.[67] This driveway was mostly on company-owned land, except where it crossed a thirty-one foot-wide public right-of-way adjoining the highway. Union organizers had been attempting to distribute literature from this right-of-way.[68] Babcock had claimed the unconditional right to exclude all non-employees from its property, including these non-employee organizers.

The Supreme Court observed that, "[o]rganization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."[69] Neither property nor organizational rights are to be considered complete or absolute, and one will have to yield to the other. The Court went on to find that while "[n]o restriction may be placed on the employees' right to discuss self-organization *among themselves*…no such obligation is owed nonemployee organizers."[70] Instead, "an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of commu-

64. LeTourneau Co. of Georgia, 54 N.L.R.B. 1253 (1944).
65. NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).
66. *Id.* at 106–07.
67. *Id.* at 107.
68. *Id*. at 107.
69. *Id*. at 112.
70. *Id*. at 113 (emphasis in original).

nication will enable it to reach the employees with its message."[71]

The Court reached this decision by maintaining a distinction between the rights given to employees and the rights given to non-employee organizers. Though it recognized that "the right to exclude from property has been required to yield to the extent needed to permit the communication of information on the right to organize" in circumstance in which "the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels,"[72] it did not find the situation at bar to be such a case. The Court's decision thus constituted a victory for employers, allowing them to prohibit union organizers except in the most extreme circumstances.

The "alternative channels of communication" test pronounced by the Court remained in effect for over fifty years before the Supreme Court revisited the issue. In 1992, the Supreme Court was again asked to determine whether an employer could exclude non-employee union organizers from its property in *Lechmere, Inc., v. NLRB.*[73] The question in this case was the nature of the circumstances required for the application of the *Babcock* exception.[74] In *Lechmere*, the location of the work site and employees' living arrangements were less remote than those in *Babcock*: the worksite was a retail store on a major highway and the workers lived in a nearby metropolitan area.[75] The case could easily have been decided upon the rule enunciated in *Babcock*. Yet, Justice Thomas, writing for the majority, seized upon the occasion to unnecessarily narrow the ruling in *Babcock* to apply only,

> where the location of a plant and living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them. Classic examples include logging camps, mining camps, and mountain resort hotels … where employees, by virtue of their employment, are

71. *Id*. at 112.
72. *Id*. at 113.
73. Lechmere, Inc., v. NLRB, 502 U.S. 527 (1992).
74. *Id*. at 529.
75. *Id.* at 529, 540.

> isolated from the ordinary flow of information that characterizes our society.[76]

The Court thus pared back an already narrow rule to apply only to the most truly remote employment locations. The Court struck the balance such that an employer's property right trumps the right of employees to learn from and be reached by non-employee organizers unless it is absolutely impossible to reach them otherwise. This sacrifice of labor rights to property rights has not gone unnoticed.[77] Indeed, in his dissenting opinion Justice White notes that

> If employees are entitled to learn from others the advantages of self-organization, it is singularly unpersuasive to suggest that the union has sufficient access for this purpose by being able to hold up signs from a public grassy strip adjacent to the highway leading to the parking lot."[78]

Non-employee organizers have proven indispensable because, unlike employees, they do not depend on the employer for their livelihood and are unafraid to take the initial steps toward organizing. However, for their activities to be fruitful, they must have access to the workers in person, not just the ability to communicate or publish to them from afar. It is not an issue of freedom of speech or press, but of freedom of association, and it is, after all, the association that is essential.[79]

Nonetheless, the *Babcock* exception, as narrowed in *Lechmere*, remains the law of the United States. While in substance there is plenty which could be criticized,[80] these cases are important for this discussion for a number of other reasons. First, the Court's analysis in each finds labor rights as spheres of non-interference, enmeshed in a legal framework occupied by other competing rights and interests, such as the employer's property

76. *Id.* at 539.

77. *See, e.g.*, Gross, *supra* note 24, at 94.

78. *Lechmere*, 502 U.S. at 534 (White, J., dissenting).

79. Property rights and freedom of speech have found themselves in conflict in areas other than labor rights disputes. *See, e.g.*, Pruneyard v. Robins, 447 U.S. 74 (1980).

80. The purpose of this paper is not to critique U.S. labor policy, though this can certainly be done with respect to the *Lechmere* decision and other policies. *See generally* Gross, *supra* note 24. *See also* Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529 (2002).

right to exclude. The claimants of these rights and interests stand in the same relation to the Court. The only question is what should be done when the two rights are incompatible, when the exercise of one frustrates or denies the exercise of the other. The Court attempts to resolve the conflict by allowing the exercise of one except when it would make the exercise of the other impossible, not merely inconvenient or inefficient.

This rather simple and familiar analysis utterly depends on the availability of other rights, namely property rights, to be scaled back in accommodation of the competing labor rights. As such, this balancing explicitly recognizes the interdependence of these rights. Yet this recognition is not easily found outside of the United States. Without it, international labor regulation remains hamstrung.

B. Balancing Labor and Other Rights at International Law: ILO Complaints

In 1992 the United Food and Commercial Workers ("UFCW") and the AFL-CIO filed a claim against the government of the United States with the ILO's CFA, charging, among other complaints, that the *Lechmere* decision would have "a devastating impact on freedom of association rights for workers in the United States" and that it had "struck down all recent NLRB precedents which maintained a balance between organisational rights provided for in section 7 of the NLRA and property interests."[81] The UFCW argued that the Supreme Court had "declared that private property will assume absolute priority over rights of freedom of association, whenever union organisers are involved."[82] After considering the matter, the CFA agreed with the UFCW and issued a recommendation which included a request that the United States "guarantee access of trade union representatives to workplaces, with due respect for the rights of property and management, so that trade unions can communicate with workers, in order to apprise them of the potential advantages of unionization."[83]

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81. CFA Case No. 1523, *supra* note 44, at 36, 40.

82. *Id*.

83. *Id.* at 55. The United States has taken no steps to adopt these recommendations, nor, as noted *supra* I.C, does the ILO have any enforcement mechanism.

While in this case the CFA's language resembles the Supreme Court's balancing approach (just tipping the balance in the other direction), this has more to do with the domestic law of the United States than the jurisprudence of the ILO. In its recommendations, the CFA "requests *the Government* to guarantee access of trade union representatives to workplaces."[84] The CFA thus appeals to the government's positive obligations under the ILO Convention and relevant charters "to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise."[85] This type of appeal is possible because there exists in the United States the legal framework which would allow the enactment of these reforms. For example, had the Supreme Court held the other way in *Lechmere*, or had Congress subsequently enacted legislation bringing the labor laws of the United States into compliance with the ILO, such measures would not have enlarged *worker's labor rights per se*, but instead would have curtailed *employer's property rights*. This takes for granted what cannot be in other nations, namely, that a system of property rights exists which allows the government, in discharging its positive obligations, to ensure the employer's compliance.

III. THE CHALLENGE OF EXPORT PROCESSING ZONES

In answering complaints against governments with various rights regimes, the type of balancing test used in *Babcock* and *Lechmere* is usually not available or useful to the ILO. It would be beyond the scope of the present discussion to explore the varied private property regimes and legal systems in effect in the many countries the ILO has found to be in violation of freedom of association principles. However, it is informative to examine how the ILO has dealt with an extreme case, EPZs. In such remote situations, often found around mines, plantations, and textile and electronics factories, it seems even the narrowed *Lechmere* rule would apply. In many of these situations, the entire worksite and surrounding area is separated from the rest

84. CFA Case No. 1523, *supra* note 44, at 40 (emphasis added).

85. ILO Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organise, art. 11, 68 U.N.T.S. 17 (July 9, 1998).

of the community.[86] Yet, not only are there no local union organizers to reach the workers, but unions from other nations are kept out, often forcibly, by the employer and/or the government. How the ILO has attempted to deal with such extreme situations will therefore be instructive as to why the ILO has been ineffective (on its own) in bringing such violating countries into compliance with its standards.[87]

A. A Brief History and Definition of EPZs

The first EPZ is often traced to a tax- and custom-free zone created around the airport in Shannon, Ireland in 1959.[88] In the 1970s, EPZs began springing up in every corner of the globe.[89] An EPZ can be defined as "a clearly delineated industrial estate which constitutes a free trade enclave in the customs and trade regime of a country, and where foreign manufacturing firms producing mainly for export benefit from a certain number of fiscal and financial incentives."[90] Most often EPZs are strictly separated from the rest of the host country, surrounded by fences, barbwire and/or armed guards.[91] Non-employees are strictly excluded from the property.[92] By keeping the EPZ separated from the rest of the nation, the government of the host country can control (and restrict) "osmosis between the EPZs and the host nation."[93] To some degree necessary to guard against smuggling, this controlled segregation and insulation

86. ILO, SECTORAL ACTIVITIES PROGRAMME, TRIPARTITE MEETING ON LABOUR PRACTICES IN THE FOOTWEAR, LEATHER, TEXTILES AND CLOTHING INDUSTRIES, GENEVA, 16-20 OCT. 2000, NOTE ON THE PROCEEDINGS para. 28, *available at* http://www.ilo.org/public/english/dialogue/sector/techmeet/tmlfi00/tmlfin.htm (noting that because EPZs were traditionally set up "outside the purview of national laws and practices the result was a second class 'country' within a country").

87. Of course the question then arises whether an ideal but unenforceable policy is better than an imperfect but enforceable one.

88. Michael Gordon, *Export Processing Zones*, *in* TRANSNATIONAL COOPERATION AMONG LABOR UNIONS 66 (Michael Gordon & Lowell Turner eds., 2000).

89. *Id*.

90. International Labor Organization/United Nations Centre on Transnational Zones, *Economic and Social Effects of Multinational Enterprises in Export Processing Zones* (1988) *cited in* The Realization of Economic, Social and Cultural Rights, *supra* note 54, at 85.

91. *Id. at* 65; MADANI, *supra* note 57, at 64.

92. *Id*.

93. *Id.*

also chokes off the potential benefit that might flow from the EPZ back to the host nation (often referred to as "backward linkage"[94]) and keeps the laws of the host nation from extending to the EPZ.[95]

B. One Unfulfilled Promise of EPZs: "Backward Linkage"

As conceived by the IMF, World Bank, ILO and other international financial organizations, EPZs have several long- and short-term goals.[96] First, in the short-term, EPZs are supposed to bring jobs to countries long mired in poverty and unemployment.[97] It is clear that most EPZs have proven extremely effective in achieving this short term goal.[98] Even though valid criticisms may be voiced regarding the type of jobs gained, their effect on other industries in the host country, and the conditions of employment at those jobs, it is beyond dispute that employment rates in host countries have risen remarkably since they introduced the EPZ.[99]

Second, in the short- and, hopefully, long-term, EPZs are designed to bring foreign direct investment to countries with historically little trade activity and improve their participation in exchange and export agreements.[100] In the main, EPZs have been so successful in achieving this goal that candidates for office in countries facing low foreign investment often campaign with promises to create EPZs if elected.[101]

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94. ILO, BUREAU FOR MULTINATIONAL ENTERPRISE ACTIVITIES, EXPORT PROCESSING ZONES: ADDRESSING THE SOCIAL AND LABOUR ISSUES, *at* http://www.transnationale.org/pays/epz.htm (last visited on Sept. 27, 2003).

95. MADANI, *supra* note 57, at 43–50.

96. SPECIAL ACTION PROGRAMME ON SOCIAL AND LABOUR ISSUES IN EXPORT PROCESSING ZONES, LABOUR LAW AND LABOUR RELATIONS BRANCH, ILO, SPECIAL ACTION PROGRAMME ON SOCIAL AND LABOUR ISSUES IN EXPORT PROCESSING ZONES [hereinafter ISSUES IN EXPORT PROCESSING ZONES], WHY SET UP AN EPZ?, *at* http://www.ilo.org/public/english/dialogue/govlab/legrel/tc/epz/setup.htm (last visited on Sept. 27, 2003) (Setting out these three main and other related objectives for EPZs).

97. *Id.*

98. *But see* MADANI, *supra* note 57, at 34 (noting that while highly successful in creating jobs in some host countries, EPZs have often exacerbated unemployment rates in host countries by forcing out other would-be employers).

99. *Id.* at 35.

100. *Id.* at 34.

101. *Id*.

Finally, this influx of trade and investment is meant to "foster linkages between foreign and local enterprises and industries"[102] and stimulate the economies of developing countries by having the benefits of the export-specific industries flow back into the rest of the economy.[103] Unfortunately, EPZs have thus far failed remarkably in achieving this long-term goal.[104]

Various reasons have been given as to why there has been such minimal backward linkage. First, the types of products manufactured in EPZs are generally to be sold in highly industrialized markets and so "bear little if any relation to the needs or requirements of the people of the host country."[105] Aside from the products not being desirable (or legal) in domestic markets, the skills learned by the workers in the EPZ are also unlikely to be transferable to non-EPZ employment. Second, the work done in EPZs generally does not rely on materials found in the host country.[106] There is therefore little opportunity for the EPZs to spin off support industries and markets.[107] Third, most EPZs have remained fenced-off enclaves with little physical connection to the host country, keeping the infrastructure supporting the EPZ from reaching or benefiting the host country.[108] Fourth, the governments of the EPZ host countries, typically the only entities that can take advantage of opportunities for fostering backward linkages, have not done so.[109]

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102. *Id. See also* Press Release, ILO, Export Processing Zones Growing Steadily Providing a Major Source of Job Creation: Labor/Productivity Problems Continue to Mount, ILO to Hold Tripartite Meeting of Experts, Sept. 28, 1998, *available at* http://www.ilo.org/public/english/bureau/inf/pr/1998/34.htm.

103. MADANI, *supra* note 57, at 30–34.

104. Gordon, *supra* note 88, at 69.

105. The Realization of Economic, Social and Cultural Rights, *supra* note 54, at para. 59.

106. MADANI, *supra* note 57, at 64.

107. *Id.*

108. *Id.*

109. ISSUES IN EXPORT PROCESSING ZONES, ARE THEY EFFECTIVE?, *available at* http://www.ilo.org/public/english/dialogue/govlab/legrel/tc/epz/effectiv.htm (last visited Oct. 1, 2003). The ILO provides the following anecdote to illustrate the role government can play in fostering backward linkages.

> For example, hard disc manufacturers in one country we visited cannot find a local dry cleaner capable of washing the overalls used in clean rooms, and they are therefore forced to fly the overalls to Singapore to be cleaned to the required specifications. There should be an agency which identifies such potential links and assists local en-

Perhaps the greatest obstacle to effective backward linkage is also the greatest financial incentive that attracts foreign producers to EPZs: cheap wage labor. Many EPZs are used primarily for their labor, such as when United States corporations ship component parts to EPZs only for them to be assembled and returned. Competition among EPZs has thus centered on labor costs, keeping labor standards low and working conditions, more often than not, abysmal.[110] Pollution, hazardous conditions and "catastrophic industrial accidents" are commonplace.[111] Long hours result in "burn-out" at an early age.[112] This, coupled with a decrease in alternative domestic employers, results in a general downturn in the overall quality of life for employees.[113]

These labor conditions are present even where the laws or regulations of the host country prohibit such conditions outside the EPZ. Indeed, EPZs run by governments are often explicitly exempt from these regulations,[114] and even when they are not, the working standards inside the EPZ rarely conform to those required by the domestic law.[115] Employers either ignore complaints of violations or do not have sufficient resources or personnel to address them.[116] Denial of freedom of association and union participation is often even *advertised* to would-be manufacturers to attract their business.[117] Where the law does not explicitly forbid freedom of association, the physical isolation of

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terprises to procure the technology and skills required to supply zone investors.

Id.

110. Gordon, *supra* note 88, at 71. *See also,* CFA Case No. 1480, Complaint Against The Government of Malaysia Presented by the International Confederation of Free Trade Unions (ICFTU), and the Malaysian Trades Union Congress (MTUC), 72 ILO Report No: 265 (Vol. LXXII, 1989, Series B, No.2) at para. 585 (noting that government's sudden decision not to allow for a union in the electronics sector was probably taken under pressure from foreign investors in that sector).

111. *Id. See also* The Realization of Economic, Social and Cultural Rights, *supra* note 54, at para. 61.

112. *Id.* at paras. 53, 108.

113. *Id.*

114. Gordon, *supra* note 88, at 73 (*citing* INDUSTRY DEVELOPMENT DIVISION, WORLD BANK, EXPORT PROCESSING ZONES (1992)).

115. Gordon, *supra* note 88, at 73–4.

116. *Id.*

117. *Id.*

the EPZ precludes non-employee union organizers from reaching the employees.[118] EPZ employers also refuse to hire employees that are known to be union organizers,[119] and deny non-employee organizers access to the EPZ area.[120] Thus, *de jure* or *de facto*, the laws of the host nation do not reach into the EPZ. Inevitably, when labor rights are denied on economic grounds, other human rights violations are not unusual.[121]

C. Labor and Property Rights in EPZs

Traditionally EPZs have been entirely owned, operated, and controlled by the host government.[122] This has meant that the property status of the territory of the EPZ has remained rather ambiguous. The land is considered government or public land, outside of private interest, and the government retains complete and unconditional control. The land is then rented by the government to manufacturers that wish to set up operations there.[123] Offering such services relieves foreign investors of the burden of having to "master the intricacies of the local real estate and construction markets, if they exist."[124] However the physical area has consequently remained something of a no-man's land, where the normal rights and responsibilities that attend property ownership do not necessarily apply. Instead, through the conditions of their leases with the government, EPZ developers may be exempted from many of those regulations

118. *Id.* at 75.

119. The Realization of Economic, Social and Cultural Rights, *supra* note 54, at para. 65.

120. ILO, COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS, GENERAL REPORT para. 110 (1999), *available at* http://www.ilo.org/ilolex/cgilex/pdconv.pl?host=status01&textbase=iloeng&docment=14&chapter=4&query=epz&highlight=on&querytype=bool&context=0#1.

121. *See, e.g.*, *Anti-Union Repression Still on the Rise Worldwide*, ICFTU Online, (June 18, 2002), *at* http://www.icftu.org/displaydocument.asp?Index=991216 167&Language=EN&Printout=Yes (reporting anti-union crack-downs in various EPZs involving illegal and brutal arrests, imprisonment and even murder).

122. *Id.* at 67.

123. *See, e.g.*, Export Processing Zones Act, (ACT No. XXXVI OF 1980) as modified up to Dec. 1994, § 7(a) (Bangl.), *available at* http://natlex.ilo.org/txt/E94BGD01.htm.

124. Peter L. Watson, *Export Processing Zones: Has Africa Missed the Boat? Not Yet!*, 17 AFRICA REGION WORKING PAPER SERIES 11 (May 2001), *available at* http://www.worldbank.org/afr/wps/wp17.pdf.

that would apply to host country property owners[125] and few (if any) responsibilities vis-à-vis their workers.

Once workers enter the EPZ, it is not exactly that they are stripped of their protections — indeed, the ILO Convention extends its protections to all peoples, even if their government has not ratified the treaty.[126] Rather, these protections become meaningless against the absolute rights of their employer.[127] With the employer in such a close, practically symbiotic relationship with the government, the employee is put in an impossible position. In such a situation, how can the ILO demand that labor rights be respected where there is no legal system to protect them?[128]

Let us return briefly to Justice Reed's observation in *Babcock* that "[o]rganization rights are granted to workers by the same authority, the national government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other."[129] The important point in this context is

125. For example, in Bangladesh and Pakistan, local EPZ legislation explicitly exempts employers in EPZs from labor protections and prohibits the exercise of rights (e.g., to organize) granted to workers in the host country. Servais, *supra* note 54 at 47; Export Processing Zones Authority Ordinance, § 4 (1980) (Pak.) (PAK-1980-L-50073) (prohibiting strikes in the EPZ); Bangladesh Export Processing Zones Authority Act, § 11(a)(f), (ACT No. XXXVI OF 1980) (1980) (Bangl.) (exempting EPZ employers from, among other laws, The Industrial Relations Ordinance, 1969 (XXIII of 1969)).

126. ILO, INTERNATIONAL LABOUR STANDARDS AND HUMAN RIGHTS, MEMBER STATE OBLIGATIONS*, at* http://www.ilo.org/public/english/standards/norm/howused/obligats/ index.htm (last visited Sept. 27 2003).

127. *Anti-Union Repression Still on the Rise Worldwide*, International Confederation of Free Trade Unions, June 18, 2002, *available at* http://www.icftu.org/displaydocument.asp?Indes=991216167Language=EN&Printout=Yes.htm.

128. *See, e.g.*, CFA Case No. 1289, Complaint Presented by the Employees' Union of Esperanza Del Peru S.A. — Clinica San Borja Against the Government of Peru, ILO Report No. 238, (Vol. LXVIII, 1985, Series B, No.1) (alleging police intervention on the pretext of protecting the property of the undertaking, in order to intimidate the workers); CFA Case No. 1300, Complaint Presented by the World Federation of Trade Unions Against the Government of Costa Rica, ILO Report No:238, (Vol. LXVIII, 1985, Series B, No.1) (alleging orders were given to the police to guarantee the continuation of work, ensuring the safety of workers who did not wish to join the strike and protecting the property of the Banana Company of Costa Rica).

129. *Babcock*, 351 U.S at 112.

that the property owner and worker, along with their respective rights, should stand in the same relation to the government. A court is then able to balance their rights against one another. Yet in EPZs, the worker's right of association stands in a void, unbalanced and unbalanceable. This continues to be the situation, at least in government-controlled EPZs.

D. Private EPZ Ownership: Toward Integration and Rights Systems

Time and experience have begun to show that governments are inefficient EPZ managers.[130] Government-controlled zones, which tend to be strictly closed off from the host country, have seen the least amount of backward linkage.[131] Further, when governments both manage the EPZ *and* look for incentives to compete with other EPZ hosts, they are more likely to agree to ban union activity, lower the minimum wage, or make other concessions to investors that are not in the best interests of their workers.[132]

Spurred by international and domestic pressure to improve their efficiency (and labor conditions), many countries have begun to privatize their EPZ operations.[133] Some countries have delegated the management of the EPZ to a government commission which may then designate any land, public or private, an EPZ. The commission may then assign an EPZ developer to sell or lease the land to private or public firms.[134] While some have argued that governments should take an entirely hands-off approach,[135] a consensus has formed that governments should keep intervention to a minimum, that is, stay only as involved as is necessary to maintain an efficient and stable design, provide the legal framework and bureaucracy necessary to encourage private investment, and ensure compliance.[136]

Perhaps the greatest advantage to privatizing an EPZ is that it no longer remains an enclave separate and apart from the

130. MADANI, *supra* note 57, at 66.
131. *Id.* at 67.
132. *Id.*
133. *Id.*
134. Export Processing Zone Act, Ch. 232B(6) (Belize).
135. *See, e.g.*, Sergio Bermudez, *The Case for Private Free Zones* in PUBLIC VS. PRIVATE FREE TRADE ZONES (Richard L. Bolin ed., 1993).
136. MADANI, *supra* note 57, at 68–69.

rest of the host country. As it is opened to private industry, the EPZ area retains the customs and duty exemptions that make it attractive to foreign investments, but becomes reintegrated into the host country's legal, economic and social systems, increasing opportunities for backward linkages.[137]

Reintegration opens many opportunities for the host country, such as providing the services that improved labor conditions will require.[138] As a recent World Bank report on EPZs in Africa notes, "[i]n Panama, in the Dominican Republic, and in Tangiers, EPZ management is private and has responded well in terms of providing the requisite facilities and services."[139] In contrast "in Africa, where public sector management has a poor track record in providing facilities and services, it would be prudent to insist upon private management for EPZs — either by concessioning the development and management of the EPZ or, at least, by contracting out its management."[140]

Ironically, while many advocates for better conditions and rights within EPZs come at the problem from a socialist tact,[141] some persuasive arguments have been made that a strong regime of property rights may be essential not only to improve labor conditions but to open opportunities for greater democratization, wealth distribution and prosperity in general.[142] For example, the Peruvian economist Hernando De Soto has argued that property rights systems are necessary preconditions for capital markets to work.[143] By allowing individuals to lay claim

137. *Id.* at 77.

138. For example, the Mauritius EPZ has begun to offer day care for the children of workers, provided by citizens of the host country. *Day Care Centers in Mauritius*, World Bank, *at* http://www.worldbank.org/children/africa/kampala/epzmaur.html (last visited Sept. 27, 2003). Such programs provide backward linkages both in terms of improving the conditions of the workers and providing for parasitic employment opportunities for the host country's other citizens.

139. Watson, *supra* note 124.

140. *Id*.

141. *See, e.g.*, Liz Mantell, *Bangladesh Government Spends on Investors Rather than Hospitals and Schools*, World Socialist Website, International Committee of the Fourth International, Apr. 3, 1999, *available at* http://www.sws.org/articles/1999/apr1999/bang-a03.shtml.

142. *Interview with Hernando De Soto*, Public Broadcast System, Mar. 30-31, 2001, *available at* http://www.pbs.org/wgbh/commandingheights/shared/minitextlo/int_hernandodesoto.html.

143. *Id.*

to intangible financial titles (credit, securities, mortgages, etc.) a robust property system gives the traditionally disenfranchised a way to improve their conditions without requiring a substantial initial asset base.[144] Unfortunately, countries in the developing world rarely have such systems. Instead, the state owns and controls most if not all property, and the people in such states have few opportunities to grow or develop; the transitory nature of the verb "developing" as applied to such nations is rendered suspect where the possibility of making that transition is foreclosed.[145]

To bring De Soto's argument to bear on the problem at hand, when EPZs remain owned and controlled by governments, the government dispossesses both EPZ workers and other citizens of their rights. Privatizing EPZs in a sense democratizes them by fostering responsible property regimes, social programs, worker's protections and other reforms. Early evidence gives reason to be hopeful. Privatization of EPZs "shows a positive link between freedom of association and better economic stability and productivity by improving the motivation of workers" and promotes "sustainable distribution of income and wealth."[146] Where governments, instead of cordoning off the EPZ zone with soldiers and barbed wire, provide the physical and social infrastructure needed to make the zone more efficient and competitive, worker's conditions inside (and the social conditions outside the EPZ) improve.

This provides hope, at least, that privatization will extend the legal regimes of the host country to the EPZ just as the economic benefits of the EPZ extend to the host country. Reintegrated EPZs would thus place workers and employers in the same relationship to the government. This would benefit the workers in terms of improved conditions, the host country through better distribution of wealth, and would be done without removing the economic benefits for employers.

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144. HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 12 (June Abbott trans., Harper & Row, 1989).

145. *Id.* at 244–45.

146. *International Labor Conference, Provisional Record,* ILO, 88th Sess., 6th Sit., Agenda Item 11 (2000), at 5, *available at* http://www.ilo.org/public/engl ish/standards/relm/ilc/ilc88/pdf/pr-11-am.pdf (last visited Oct. 1, 2003).

IV. THE BOUNDARIES OF THE ILO: INSTITUTIONAL LIMITS

The variety of factors at play in the success of reintegrating EPZs (themselves a heterogeneous bunch) into their host countries (which are equally diverse in their legal, social and economic situations) precludes, at least in this context, making sharp conclusions about the total effects of EPZ reintegration. However, in the sort of laboratory EPZs provide, we see labor rights abused when removed from social and legal systems, and protected when reintegrated. The ILO's experience with EPZ violators demonstrates that workers suffer when their governments do not balance their labor rights against the competing rights of their employers. Having no power over the interests which infringe labor rights, the ILO is unable to remedy these violations.

A. The Negative and Positive Obligations

Though at first glance they appear to be the most troubling cases, those countries which explicitly allow for labor rights violations in their EPZs are perhaps the easiest to address in terms of legal obligations. For example, Pakistan had, since the CFA began issuing recommendations in 1983, maintained laws explicitly exempting EPZs from the labor protections extended to workers in the host country.[147] Unionizing and striking were banned in its EPZs, all of which were government-owned undertakings.[148] In one of its many recommendations the ILO reprimanded the Pakistani government, reminding them that "Article 2 of Convention No. 87…provides that workers without distinction whatsoever shall have the right to establish organisations of their own choosing."[149] The ILO requested that the government amend its laws to include EPZ workers in their labor protections and refrain from such activities as would be inconsistent with what we have called its "negative" obligations. [150] However, Pakistan continued to ignore the ILO's demands.[151]

147. CFA Case No. 1353, Complaint Against the Government of Pakistan Presented by The Trade Unions Action Committee (TUAC) ILO Report No: 253 (Vol. LXX, 1987, Series B, No.3).

148. *Id.* at para. 84.

149. *Id.* at para. 92.

150. CFA Case No. 1726, Complaint against the Government of Pakistan presented by the International Federation of Building and Wood Workers

After years of violations and repeated ILO declarations that it "deplore[d] that the Government violated its obligations arising from Conventions Nos. 87 and 98,"[152] in 2000, the ILO finally threatened to request the World Bank and IMF to suspend assistance to Pakistan if it continued to maintain laws that denied freedom of association to workers in EPZ and other industries.[153] While there are no direct accounts of the effect this warning had on the government's policy position, it is probably no coincidence that shortly thereafter Pakistan announced to the ILO that it would redraft its laws concerning EPZs to allow unionizing and otherwise take action to conform their laws to the relevant ILO resolutions.[154] This then appears to be one case where linkage, or at least the threat of linkage, did in fact work to force a chronic violator to comply. Of course, it may well be that Pakistan amended its laws without any intention to enforce them, and merely turned their *de jure* violations into *de facto* violations.

More difficult than these negative obligation cases are those involving a government's derogations from their positive obligations to ensure that domestic employers comply with its laws. In such cases the ILO must do more than simply request the nation to revise its laws; indeed the host country may already be in *de jure* compliance. While the liable party is still the government, it is less clear what actions it should take in order to "ensure that…"[155]

(IFBWW), the International Confederation of Free Trade Unions (ICFTU) and the All Pakistan Federation of Labour (APFOL) ILO Report No. 294, (Vol. LXXVII, 1994, Series B, No. 2) at para. 419(b).

151. *Id.*

152. CFA Case No. 2006, Complaint against the Government of Pakistan presented by the All Pakistan Federation of Trade Unions (APFTU) and the Federation of Oil, Gas, Steel and Electricity Workers (FOGSEW-Pakistan) ILO Report No. 318, (Vol. LXXXII, 1999, Series B, No. 3) at para. 352(a).

153. *ILO Warning to Government*, DAGENS ARBETE, Jan. 25, 2000, *available at* http://www.dagensarbete.se/home/da/home.nsf/pages/9C5E7C3AF112D31341256874003 ED1A9?OpenDocument.

154. CFA Case No. 2006, *supra* note 152, at Report No. 323, para. 430; CEACR: INDIVIDUAL OBSERVATION CONCERNING CONVENTION NO. 87, FREEDOM OF ASSOCIATION AND PROTECTION OF THE RIGHT TO ORGANISE, 1948 PAKISTAN (Ratification: 1951) (2002).

155. *E.g.*, *see* CFA Case No. 2006, *supra* note 152, at Report No. 323, para. 43(e) ("The Committee requests the Government to take the appropriate

For instance, a 2001 complaint against the government of Nicaragua alleged that employers in the Chentex EPZ had dismissed employees who were attempting to form a union.[156] Further, when remaining employees engaged in a protest against these dismissals, they too were fired.[157] Here the problem was not the relevant legislation, which appears to have been in compliance with the ILO standards.[158] Instead, there was a systematic derogation of the government's positive obligation to protect against violations. In this case the ILO's recommendation read in part:

> (b) The Committee requests the Government to ensure that trade union rights can be freely exercised at CHENTEX Garments S.A. without the workers being subject to reprisals for their legitimate trade union activities.
>
> (c) The Committee is bound to emphasize the importance of the principle that both employers and trade unions bargain in good faith and make every effort to reach an agreement. In accordance with this principle, the Committee reminds the Government that appropriate measures should be taken to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of the terms and conditions of employment by means of collective agreements.[159]

The language used by the Committee here points up in vivid detail the problems facing the ILO in enforcing compliance with positive obligations. First, were the government to comply with the request in paragraph (b), what actions would it have to take? It would seem to require government supervision of the employment practices in the EPZ, probably involving a police presence, certainly guarantees of due process for employees

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measures to ensure that the rights of the [Union]… are restored to them without delay.").

156. CFA Case Nos. 2092, 2101, Complaints against the Government of Nicaragua presented by the "José Benito Escobar" Trade Union Confederation of Workers (CST) and the International Textile, Garment and Leather Workers' Federation (ITGLWF) ILO Report No. 324, (Vol. LXXXIV, 2001, Series B, No. 1).

157. *Id.*

158. *Id.*

159. *Id.* at para. 733(c).

when such freedom is denied, and other legal reforms. These actions are clearly outside the scope of what is considered "labor law," and move into the realm of human rights law.

Indeed, several of the union-organizing employees that were terminated in the Chentex EPZ have subsequently filed suit in the United States against their former employer for violating "universally recognized labor rights."[160] In their complaint, the employees allege that Chentex and — through their negligence — the government of Nicaragua, have violated customary international human rights law.[161] It is important to note that they have alleged *human rights* violations, not labor violations *per se*. They argue that certain labor rights have in fact gained such universal acceptance as to be considered human rights at customary international law.[162] It is yet to be seen if they will prevail in their argument, but essential here is that, in an attempt to enforce what the ILO has been unable to, the employees have been forced to enlist other areas of international law, particularly human rights law.

Regarding paragraph (c), what would it look like to ensure that EPZ operators or employers "bargain in good faith?" The lack or laxity of labor regulation in the EPZ was most likely one reason the employer was initially attracted to setting up operations there. In addition, the economic trade interests aligned against the workers are staggering. For instance, it has subsequently been disclosed that the United States Military had been placing large orders for clothing manufactured at the Chentex EPZ even as United States diplomats denounced the violations.[163] Further, the operator of the Chentex EPZ is a Taiwanese company and the Taiwanese government has provided massive economic assistance to the Nicaraguan government since

160. Docket Report, Tercero v. C & Y Sportswear, Inc., CV00-12715-MN (CTx) (C.D. Cal. filed Dec. 5, 2000).

161. At customary international law, the actions of non-state actors are imputable to the government as well. *See, e.g.*, Valasquez Rodriguez Case, 4 Inter-Am. C.H.R. (ser. C) No. 4, (1988) (judgment), at para. 166. The government thus has what we have called a positive obligation to prevent and redress human rights violations that take place within its jurisdiction.

162. *Tercero*, *supra* note 160.

163. *See, e.g.*, Don Turner, Willard A. Workman & Ira Arlook, *International Trade and Labor: Leveling Up or Down*, 35 J. MARSHALL L. REV. 227, 250 (2002).

the EPZ was set up.[164] With these powers aligned against the workers, it is hard to imagine there being any bargaining in good faith without additional pressure from the workers' side, calculated to neutralize the imbalance. It is clear the ILO is without the means to apply such pressure. This case then serves as a perfect illustration of the intricate web that domestic human rights, labor rights and economic structures form. It is simply *outside the competency* of the ILO to ensure that reforms in economic and human rights policy are made, though they are necessary to guarantee compliance with its standards.

B. The Linkage Debate: What is "Trade-Related?"

At a recent symposium several scholars gathered to discuss whether creating linkage regimes was a legitimate use of the WTO.[165] While there were disagreements on many issues, one recurrent question was what types of issues are proper for the WTO to consider, that is, what issues are "trade-related."[166] Some argued for a strict definition, basically limiting its scope to those matters it already handles.[167] Others saw room for a more open definition but did not think the WTO's resources were capable of handling more than the issues arising under the current narrow definition.[168] Still others argued that linkage, though perhaps not in any formalized system as proposed for the WTO, already exists, and it is for the international community to find adequate institutional responses to accommodate it.[169] This later argument proceeded from the observation that there are at present international institutions dedicated to specific issues at international law, and linkage questions arise only where an issue falls between the explicit jurisdictions of these institutions.[170]

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164. *Id*.

165. *Symposium*, *supra* note 3.

166. Joel P. Trachtman, *Symposium: The Boundaries of the WTO, Institutional Linkage: Transcending "Trade and…"*, 96 AM. J. INT'L L. 77, 89 (2002).

167. Debra P. Steger, *Symposium: The Boundaries of the WTO, Afterword, The "Trade and…." Conundrum – A Commentary*, 96 AM. J. INT'L L. 135, 140 (2002).

168. Jagdish Bhagwati, *Symposium: The Boundaries of the WTO, Afterword, The Question of Linkage*, 96 AM. J. INT'L L. 126, 130 (2002).

169. Trachtman, *supra* note 166, at 92.

170. *Id.* at 80.

This is an accurate description of the situation in which we have found international labor rights. On the one hand, when violations are due to the broader economic policies of the offending government and its financial relationships with employers, as in the Chentex EPZ, compliance with labor standards would require reforms that simply exceed labor issues. Companies and host countries have an economic interest in keeping labor prices down, and exert considerable (and usually unchecked) pressure to ensure that they are. On the other hand, when violations are due to, or at lease exacerbated by, the inadequacy of the legal and social structures in the offending state, compliance would require governmental reform that also exceeds simple labor issues and involves human rights protections that are properly the subject of international human rights law. In the latter case, compliance is no less of a problem.[171] However, only in the former case are there carrots and sticks available to encourage the reforms necessary for labor compliance. It is not simply because these remedial mechanisms are available that trade becomes a necessary partner in enforcing compliance; it is also because, as we saw in the Chentex EPZ case, trade and economic pressure, if not harnessed and used as forces to ensure labor compliance, risk becoming forces *against* compliance.

Further, the question of what is trade-related only appears from the WTO side of the debate: Is the WTO a proper venue for linkages? Indeed, there are a variety of other linkage systems available, including IMF, World Bank, and bilateral conditions.[172] The question from the labor rights perspective is not whether the WTO or any of these other particular institutions is competent, or has proper jurisdiction over labor rights; it is whether the ILO *alone* has the institutional jurisdiction and competency over all the conditions necessary to ensure the effective protection of its own labor standards.

CONCLUSION

Labor rights, when enforceable and meaningful, exist in a web of other rights, interests and protections. The ILO cannot ensure that these other rights or interests are balanced against labor rights, but will surely fail in its own purpose when they

171. *See*, *e.g.,* Collingsworth, *supra* note 13.
172. *See* Leebron, *supra* note 4.

are not. A lesson comes from our initial observation that labor rights sit uncomfortably between human and economic rights and interests: true economic progress and development requires the betterment of non-economic conditions. International regulatory institutions must learn this lesson if the benefits of globalization are to be distributed amongst all affected. This means that international institutions, though specialized in particular areas, must cooperate with one another to address the equally important areas where their particular concerns conflict. Instead, the tendency has been for institutions to narrowly define their areas of concern, and the resulting gaps have been exactly where violations are rampant.

The balancing approach used in the United States carves back the rights of others which would otherwise interfere with the exercise of labor rights. At international law, the ILO is competent, in fact, was formed to decide when a labor right is being infringed by another; but in practice, it is not competent to, and does not have the power to, carve back that other, infringing right. These infringing rights are most often economic ones, such as property rights and trade interests. It follows that for international labor rights to be protected, the ILO must be able to work with the institutions who regulate these infringing rights. Therefore, the question is not whether there should be linkage between labor (or other human) rights and economic privilege, but whether the international regulatory community at large, including the ILO, will recognize the interconnection that already exists in practice, and accordingly create suitable mechanisms to regulate that interconnection.

The era of globalization is still young, and there is reason to be hopeful that through better cooperation, the ILO will find the partnerships it needs to secure labor rights, and further economic and social conditions globally.

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