

**THE IMPACT OF INTERNATIONAL TRADE AND INVESTMENT POLICIES ON
THE LABOUR RIGHTS OF EXPORT PROCESSING ZONES' WORKERS: THE
CASE OF KENYA**

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DECLARATION

I, Gladys Wanjiru Mwariri, hereby declare that this dissertation is original and has never been presented in any other institution. I also declare that any secondary information obtained and used has been duly acknowledged in this dissertation.

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DEDICATION

This dissertation is dedicated to my family, nuclear and extended. You believe in me and inspire me to succeed in life. My pursuit for higher education and specifically for a human rights career has been through your encouragement. For selflessly supporting me, I dedicate this work to all of you.

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LIST OF ABBREVIATIONS

AB	Appellate Body
ACHPR	African Charter on Human and Peoples' Rights
COTU	Central Organisation of Trade Unions
DSU	Dispute Settlement Unit
EPZ	Export Processing Zones
EPZA	Export Processing Zones Authority
ESAF	Enhanced Structural Adjustment Facility
FDI	Foreign Direct Investment
FKE	Federation of Kenya Employers
GATT	General Agreement on Trade and Tariffs
GDP	Gross Domestic Product
GNP	Gross National Product
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICJ	International Court of Justice
ILC	International Labour Commission
ILO	International Labour Organisation
IMF	International Monetary Fund
IUTC	International Trade Union Confederation
IUTU	International Union of Trade Unions
KHRC	Kenya Human Rights Commission
KIHBS	Kenya Integrated Household Budget Survey
KNCHR	Kenya National Commission on Human Rights
LDC	Least Developed Countries
MLHRD	Ministry of Labour and Human Resource Development
NGO	Non-Governmental Organisation
NYS	National Youth Service
OECD	Organisation on Economic Co-operation and Development
PCIJ	Permanent Court of International Justice
SAC	Structural Adjustment Credit
SAP	Structural Adjustment Programmes
TTWU	Tailors and Textile Workers Union
UDHR	Universal Declaration on Human Rights
WRC	World Rights Consortium
WTO	World Trade Organisation

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CHAPTER 1: INTRODUCTION

1.1 Background of the study

International trade and investment regime is now largely controlled by the World Trade Organisation (WTO) which was established in 1995 to replace the 1947 General Agreement on Trade and Tariffs (GATT). The WTO operates through a system of trade agreements which have been negotiated and signed by its members.¹ These agreements provide the legal rules for international commerce and are binding on governments. They provide limits under which the members are to carry out their trade.

It has been argued that WTO does not protect human rights, including labour rights.² There is no WTO Agreement dealing with labour standards.³ Bal⁴ argues that making labour standards a condition for availing product to the market constitutes a non-tariff barrier to trade and goes against the requirements of WTO to liberalise trade and eliminate barriers to trade.⁵ It is however worth noting that Article XX of GATT provides exceptions to the non-discrimination principle, so long as the measures taken are 'necessary to protect public morals and to protect human, animal or plant life or health.' Labour rights are assumed to fall under the above exceptions.⁶

The International Labour Organisation (ILO) on the other hand sets international labour standards to ensure the protection of labour rights. The latest has been the adoption of the 1998 ILO Declaration on Fundamental Principles and Rights at Work⁷ which covers four major areas, also referred to as core labour rights. Those rights are backed by conventions and include; freedom of association and the right to collective

¹ WTO Agreements available at < www.wto.org/english/docs_e/legal_e/final_e.htm > (accessed on 1 October 2007).

² S, Bal 'International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT' (2001) *Minnesota Journal of Global Trade* 62.

³ A, Guzman 'Trade Labour Legitimacy' (2003) 91 *California Law Review* 885.

⁴ Bal (n 2 above).

⁵ Art I of GATT 1947.

⁶ R, Howse 'The World Trade Organisation and the Protection of Workers' Rights' (1999) 3 *Journal of Small and Emerging Business Law*, 131.

⁷ The Declaration aims at ensuring that social progress goes hand in hand with economic progress and development.

See <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagenam e=DECLARATIONTEXT> (accessed on 1 October 2007).

bargaining,⁸ freedom from forced and compulsory labour,⁹ abolition of child labour¹⁰ and the elimination of discrimination in the workplace.¹¹

Kenya is a member of both ILO¹² and WTO.¹³ It has favoured trade at the expense of the protection of labour rights. Some international financial organisations, such as the World Bank and International Monetary Fund (IMF), have also contributed to the current state of affairs by pressurizing the Kenyan Government to liberalise its trade as a precondition for advancement of loans. The liberalisation has been carried out in disregard of Kenya's obligations under international human rights law.

1.2 Statement of the problem

Kenyan economic policies were changed in early 1980s on realisation that economic controls were not working for the country. In 1990, Kenya established the Export Processing Zones (EPZs) as a means of attracting foreign investment. The Government offered incentives ranging from tax exemptions, unrestricted foreign ownership and employment, freedom to repatriate any amount of earnings, to exemption from the provisions of the Factories Act¹⁴ (which incorporates some of the ILO standards into domestic law).

Recently, Kenya, being one of the East African Community members, was one of the countries which underwent the WTO trade policy review.¹⁵ It is also among the group of countries which oppose the proposal by developed countries that labour rights should be part of discussions in the WTO trade negotiations.¹⁶

⁸ ILO Conventions 87 and 98.

⁹ ILO Conventions 29 and 105.

¹⁰ ILO Conventions 138 and 182.

¹¹ ILO Conventions 100 and 111.

¹² Kenya became a member of ILO in 1964.

¹³ Kenya became a member of WTO on 1 January 1995.

¹⁴ In 1991, the Minister for Finance published a gazette notice pursuant to Sec 29(2) (h) of the Export Processing Zones Act Cap 517 of the Laws of Kenya, exempting EPZs from the provision of the Factories Act Chapter 514 Laws of Kenya.

¹⁵ The WTO Trade Policy Review took place on 25 and 27 October 2006.

¹⁶ Singapore Ministerial Conference. See http://english.thewto_e/minist_e/min96_e/labstand.htm (accessed on 21 October 2007).

Some of the implications of such policies have been that the EPZ workers are denied the right to healthy and safe working environment, provision of protective equipment, non-discrimination in terms of remuneration between the men and women for equal work done and freedom of association. Moreover, some of the EPZs have also been going into bankruptcy, leading to dismissal of workers without pay.¹⁷

Accordingly, there have been rampant industrial actions by EPZ workers who have been complaining against pathetic working conditions as well as massive violation of labour rights. The ability and willingness of Kenyan Government to protect its workers has thus been wanting.

1.3 Justification for the study

Although the Kenyan EPZs were established with the aim of creating jobs, earning foreign currency and attracting foreign direct investment, they have not achieved the purpose for which they were established. Instead, they have been characterised by violations of workers rights.¹⁸

According to the Kenyan Government, the exports at the EPZs rose by 4.3% in 2006 and contributed to the Gross Domestic Product (GDP) which expanded by 6.1% in the same year.¹⁹ This economic growth has not translated to economic development of the workers at the EPZs.

This study is therefore necessary to audit the existing legal and policy framework for labour protection in Kenya and to determine the extent to which the labour rights of EPZ workers are protected. It is also necessary to establish whether the EPZs are beneficial to Kenya, identify ways in which the labour rights of EPZ workers can be

¹⁷ Kenya Human Rights Commission 'Manufacture of poverty: The Untold Story of EPZs in Kenya' (2004) 18.

¹⁸ H, Obwocha, the Minister for Planning and National Development, 'Key Findings on the Socio Economic Characteristics and on Poverty Estimates from the Kenya Integrated Household Budget Survey (KIHBS)' (May 2005-May 2006) available at <<http://www.cbs.go.ke/speeches/minister/pdf/Launch%20of%20KIHBS%20Basic%20Report.pdf?SQMSESSID=3d855668454e60a8ea251ba1d2262566>> (accessed on 25 October 2007).

¹⁹ H, Obwocha, the Minister for Planning and National Development, 'Economic Survey 2007' (May 2007) available at <<http://www.cbs.go.ke/downloads/pdf/ES2007.pdf?SQMSESSID=565a4ccd5d358de8b677b9c4feac799c>> (accessed on 25 October 2007).

protected as well as hold the Kenyan Government accountable for the violations of labour rights at the EPZs in breach of its obligation under both national and international human rights law.

1.4 Objectives of the study

1. To discuss the place of labour rights in the international trade and investment regime.
2. To discuss the Kenyan legal and policy framework for labour rights.
3. To discuss the impact of increased liberalisation of trade and attraction of investment on labour rights of EPZ workers in Kenya.
4. To suggest possible ways of ensuring that the labour rights of EPZ workers are protected while at the same time leaving Kenya competitive at the international market.

1.5 Research questions

The fundamental question that this dissertation intends to answer is:

1. To what extent do international trade and investment policies do affect the labour rights of EPZ workers in Kenya. In answering this question, the dissertation will be guided by the following sub-questions:
 - a. What is the place of EPZs in the WTO regime? Has the establishment of EPZs been beneficial to the host countries?
 - b. What is the legal, institutional and policy framework for protection of labour rights in Kenya? Has it been effective in protecting the EPZ workers?
 - c. To what extent is Kenya liable for the violation of labour rights of its citizens by the action of non-state actors?
 - d. How can Kenya ensure that in its trade and investment policies, the labour rights of EPZs workers are protected while at the same time it remains competitive at the international market?

1.6 Methodology

This study is informed by both primary and secondary sources. Primary sources such as the ILO Conventions, the General Agreement on Trade and Tariffs (GATT) 1947,

the Constitution of Kenya (Kenyan Constitution),²⁰ the Employment Act,²¹ the Regulation of Wages and Conditions of Employment Act,²² the Trade Disputes Act,²³ Trade Unions Act,²⁴ the Export Processing Zones Act,²⁵ and the Factories and Other Places of Work Act (the Factories Act)²⁶ will be used. Secondary Sources consist of books, published articles and academic materials from the Internet.

The study will be descriptive, analytical and prescriptive. It will describe how the EPZs were formed and how they operate. It will then analyse the existing legal and policy framework in Kenya and establish the extent to which it has protected EPZ workers. Further, the study will prescribe legal and policy framework which will guarantee the protection of the labour rights of the EPZ workers.

1.7 Literature review

Many authors have written on how uncontrolled trade liberalisation impacts on labour rights in general.²⁷ They have not however specifically demonstrated the impact on the labour rights of EPZs workers. This dissertation focuses on Kenya's EPZs to demonstrate the impact of international trade policies on the labour rights of workers at those zones.

In his article,²⁸ Peter Barnacle acknowledges that there is little or no express recognition of labour rights in the WTO multilateral agreements and the investment

²⁰ Kenya's constitution was introduced at independence on 12 December 1963.

²¹ Chapter 226 of the Laws of Kenya.

²² Chapter 229 of the Laws of Kenya.

²³ Chapter 234 of the Laws of Kenya.

²⁴ Chapter 233 of the Laws of Kenya.

²⁵ Chapter 517 of the Laws of Kenya.

²⁶ Chapter 514 of the Laws of Kenya.

²⁷ M, 'The Prospective Role of Economic and Social Human Rights in the Law of International Trade Liberalization and Economic Integration: Globalization and Human Rights: Looking Out for the Welfare of the Worst Off' (2000) 35 *New York University Journal of International Law and Politics* 201; S, Charnovitz 'The Universal Declaration of Human Rights at 50 and the challenge of Global Markets: The Globalization of Economic Human Rights' (1999) 25 *Brooklyn Journal of International Law* 113.

²⁸ P, Barnacle 'Promoting Labour Rights in International Financial Institutions and Trade Regimes' (2004) 67 *Saskatchewan Law Review* 629.

agreement. He also notes that even though most member states of ILO have accepted the ILO Constitution, they have been opposed to the idea that international trade must be subject to, and conducted through, compliance with labour rights.

In their article,²⁹ Robert Howse and Makau Mutua propose that, in cases where trade policies lead to the violation of human rights, the trade policies must be interpreted to be consistent with the former. This dissertation will go further to suggest that in case where a good labour laws exist, such laws should be expanded in their application to address such conflict, a factor the authors did not address.

Question has always been raised as to the position of EPZs in the WTO regime. Howse³⁰ argues that some incentives given by host countries to investors at the EPZs amounts to subsidies and hence illegal. He acknowledges that the WTO agreements have not directly mentioned EPZs and that there has been no decided case indicating whether exemption of EPZs from the labour laws amounts to the prohibited subsidies.

Countries establish EPZs with an aim of achieving specific goals which includes attracting foreign direct investment, creating employment for their citizens, earning foreign currency, transfer of technology among other. According to Jauch³¹ not all EPZs have been able to achieve the goals for which they were established. EPZs in Africa, except for few countries, have had no or little impact on the development of their host countries. By looking at Kenya as a case study, this dissertation demonstrate that, EPZs are sometimes not the best tools to development and that, to some extent, they cost the host country more than they earn it.

²⁹ R, Howse & M, Mutua 'Protecting Human Rights in a Global Economy: for the World Trade Organization (2000) available at <www.ichrdd.ca/english/publications/globalisation/> (accessed on 12 March 2007).

³⁰ R, Howse 'The World Trade Organisation and the Protection of Workers' Rights' (1999) 3 *Journal of Small and Emerging Business Law*, 131.

³¹ H, Jauch 'Export Processing Zones and the Quest for Sustainable Development: A Southern African perspective' (2000) available at <<http://www.larri.com.na/papers/EPZ>> (accessed on 20 May 2007).

1.8 Overview of the chapters

Chapter one will lay the foundation for the subsequent chapters by setting out the contents of the research, identifying the problem and outlining the methodology. Chapter two will discuss place of labour rights in the international trade and investment regime. It will also look at relationship between WTO and EPZs, whether the establishment of EPZs is beneficial to the host countries as well as the challenges of enforcing labour rights at the international level.

Chapter three will look at the establishment of EPZs in Kenya, the situation of labour rights in the Kenyan EPZs and whether the existing legislation and policies accord the necessary protection to EPZs workers. It will also establish Kenya's responsibility at the international level for the violation of labour rights of EPZs workers. Chapter four will conclude the study and draw up recommendations.

CHAPTER 2: THE CASE FOR HUMAN RIGHTS IN INTERNATIONAL TRADE AND INVESTMENT REGIME: A CONCEPTUAL FRAMEWORK

2.1 Introduction

The debate on the link between international trade and human rights has remained controversial in 'global economic governance'.³² It reflects a conflict between two points of view.³³ The first view, which is supported by most of the developed countries, holds that, countries which do not adopt labour standards acquire an unfair competitive advantage in the international market over countries that ratify the international human rights instruments relating to labour standards.³⁴

The second view, which developing countries ascribe to, is that the proposals that labour rights should be treated as an unfair trade practice, 'amounts to protectionism and infringes on their sovereignty and improperly strips them of their comparative advantage.'³⁵

The above debate is based on the assumption that ratification of international labour rights instruments improves the conditions of labour and that such improvement translates to an increase in the cost of production.³⁶ It should be noted that ratification is a political act which, in most cases, does not translate or reflect the labour standards of the countries undertaking the ratification and may not affect a country's competitiveness at the international market.

2.2 The place of EPZs in the WTO regime

2.2.1 WTO's trade liberalisation mandate and EPZs

The main objective³⁷ of establishing the WTO was to aid in the liberalisation of trade by reduction and subsequent eliminations of tariffs and other barriers to trade.³⁸

³² Charnovitz (n 27 above).

³³ Howse (n 30 above).

³⁴ Bal (n 28 above).

³⁵ n 34 above.

³⁶ R, Flanagan 'Labour Standards and International Competitive Advantage' (2002) available at <http://www.iza.org/iza/en/papers/transatlantic/1_flanagan.pdf>(accessed on 1 October 2007).

³⁷ Other Objectives of the WTO include: Acting as a forum for negotiations, dispute settlement as well as a forum for governments to negotiate trade agreements.

Article I.1 of GATT provides that 'any advantage, favour, privilege or immunity' accorded to one member of WTO should be extended equally to all members.³⁹ This has been referred to as the Most-Favoured Nation Principle, which means that 'no WTO member should be discriminated against by another member's trade regime,'⁴⁰ and forms the foundation of the trading regime.

Although non-discrimination is the general rule, the WTO also recognises the need for specific exceptions from the general rule to address special concerns, including those of developing countries. The preamble to the Agreement Establishing the WTO indicates that WTO is also meant to ensure developing countries and Least Development Countries (LDCs) have a share in the international market. The preamble thus provides:

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development.

Accordingly, the WTO has adopted measure geared at aiding the developing countries as well as the LDC. Such measures include:

...extra time for developing countries to fulfil their commitments; provisions designed to increase developing countries' trading opportunities through greater market access (e.g. in textiles, services, technical barriers to trade); provisions requiring WTO members to safeguard the interests of developing countries when adopting some domestic or international measures (e.g. in anti-dumping, safeguards, technical barriers to trade); provisions for various means of helping developing countries (e.g. to deal with commitments on animal and plant health standards, technical standards, and in strengthening their domestic telecommunications sectors); Legal assistance.....⁴¹

³⁸ The Marrakesh Agreement Establishing the WTO (the Agreement Establishing the WTO) signed in 1994 and is available on <http://www.wto.org/english/docs_e/legal_e/04-wto.doc> (accessed on 1 October 2007).

³⁹ General Agreement on Tariffs and Trade 1947.

⁴⁰ J, Dugard 'International Law: A South African Perspective' edition 3 (2005), Juta and Company Ltd, South Africa.

⁴¹ WTO, 'Developing Countries: How the WTO deals with the Special Needs of an increasingly important group' available at <http://www.wto.org/english/thewto_e/whatis_e/tif_e/utw_chap6_e.pdf> (accessed on 20 October 2007).

The combination of Structural Adjustment Programmes (SAPs) (particularly privatization, removal of exchange control), liberalization of international trade have made encouraging Foreign Direct Investment (FDI), the chief development strategy for many LDCs. It is against this background that EPZs have been established to attract FDI.

Accordingly, in an effort to increase their competitive edge in attracting FDI,⁴² developing and LDCs have kept the cost of production as low as possible. Such countries have endeavoured to provide 'public goods' at low cost to investors in form of incentives, as a means of luring investors into their territories.⁴³ Importance has been placed on labour as incentive to investment.

It should also be noted that the establishment of the EPZs and the reliance of labour as an incentive is based on the assumption that unlike capital and goods, labour is immobile.⁴⁴ This presumption acknowledges that while foreign investors can move their capital and goods wherever the conditions are favourable, labour (workers) does not have such an advantage.⁴⁵ This explains why workers are likely to remain in their countries even when the working conditions are unfavourable. Hirschman elaborates this by stating that:

[i]f labour were as mobile a factor of production as capital or technology, regulatory competition between jurisdictions might well ensure a close to optimal domestic policy equilibrium with respect to labour rights given that trans-boundary externalities are not nearly as pervasive in this area as, for example, with environment. However, when workers cannot move and are disempowered domestically, labour rights policy outcomes may well not accurately reflect their preferences.⁴⁶

⁴² Flanagan (n 36 above).

⁴³ D, Zaheer 'Breaking the Deadlock: Why and How Developing Countries should accept Labour Standards in the WTO' (2003) 9 *Stanford Journal of Law, Business and Finance* 74. See also A, Nov 'The 'Bidding War' to Attract Foreign Direct Investment: The Need for a Global Solution' (2006) 25 *Virginia Tax Review* 835.

⁴⁴ Nov (n 43 above).

⁴⁵ R, Sarna 'The Impact of Core Labour Standards on Foreign Direct Investment in East Asia' (2005) *The Japan Institute for Labour Policy and Training* 14 available at <<http://www.jil.go.jp/profile/documents/Sarna.pdf>> (accessed on 1 October 2007).

⁴⁶ A, Hirschman 'Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States' (1970) as quoted in Howse (n 36 above) 154.

2.2.2 Legality of EPZs under WTO regime

There have been questions about the place of EPZs in the WTO regime and whether their creation could be considered an export subsidy and therefore prohibited under the WTO. Some scholars⁴⁷ have argued that EPZs are as a result, an illegitimate trade-distorting incentive that could be impermissible under WTO rules.⁴⁸

It should be noted that the WTO do not directly address the concept of EPZs,⁴⁹ but its Agreement on Subsidies and Countervailing Measures (Subsidies Agreement) does present some regulatory and policy issues of note. Article 3 of the Subsidies Agreement prohibits subsidies contingent on export performance, including those illustrated in Annex I (Article 3.1(a)) of the Subsidies Agreement.

There are two exemptions on the prohibition of the use of export subsidies.⁵⁰ The first exemption relates to LDCs and developing countries with a Gross National Product (GNP) per capita of less than US\$ 1000 per year.⁵¹ These countries are therefore allowed to provide export subsidies but lose this exemption when they graduate from LDCs status or have a GNP of over US\$1000 per year.

The second exemption is provided for under Article 27(2) (b) of the Subsidies Agreement and relates to 'other developing countries member' that were given a period of exemption in order to allow them time to phase out subsidies gradually.⁵² In accordance with the Subsidies Agreement, the period of exemption was to end on 1 January 2003 from which date those countries were prohibited from providing certain export subsidies including those provided in the context of EPZ producing goods for export. They were also required to revise their laws relating to the establishment of EPZs and as such, some EPZs were expected to be phased out.

⁴⁷ Nov (n 43 above).

⁴⁸ n 5 above.

⁴⁹ The WTO agreements do not mention export processing zones, free trade zones or the like anywhere in the agreements. In addition, no case has been brought before the WTO or the GATT dealing specifically with export processing zones or free trade zones.

⁵⁰ Art 27(2) of the Subsidies Agreement which relate to 'Special and Differential Treatment of Developing Country Members'.

⁵¹ The LDCs and developing countries exempted from the Art 3 of the Subsidies Agreement are listed under Annex VII of the Subsidies Agreement.

⁵² Art 27(4) of the Subsidies Agreement provides for the manner in which the developing countries should phase out the subsidies.

Accordingly, a group of developing countries made a request, under Article 27(4) of the Subsidies Agreement, to have the transition and phase out period extended till the end of 2015. On 13 July 2007, the WTO's Committee on Subsidies (the Subsidies Committee) adopted a draft decision for the extension of export subsidies until the end of 2013 with a two year phase out period. In granting their request, the Subsidies Committee argued that these developing countries needed the policy space to maintain these programmes⁵³ as they were alleged to 'play an important role in economic development programmes of developing country members'.⁵⁴

It should be noted that the Subsidies Agreement does not state whether labour incentives amount to export subsidy. It seems to be concerned, mainly, on tightly-defined financial exemptions under its Article 1 and tends to ignore the labour incentives notwithstanding the evident financial benefits they afford the companies concerned. There has also been no precedent in other WTO Agreements prohibiting the use of exemptions from labour legislation in EPZs.⁵⁵ The only thing that would be prohibited is the provision of more favourable treatment to national companies as compared to foreign companies,⁵⁶ which is not the case in EPZs or to give more favourable treatment to some foreign companies rather than to others,⁵⁷ which normally is not the case either.

On the face of these provisions, it is not likely that sloppy labour laws or non-enforcement of labour laws in EPZs would constitute an export subsidy and thereby prohibited under the Subsidies Agreement. However, other incentives common in EPZs such as duty free status and tax exemptions could be regulated under the Subsidies Agreement. The illegality of the EPZs therefore depends on whether the incentives offered by host countries to EPZs fit within the definition of 'export subsidies' under Article 1 of the Subsidies Agreement.

⁵³ Ordinarily, attraction of investment is based on subsidising export production by multinational companies, forgoing tax receipts and the repression of human rights. As a result, it is hard to see what advantages it brings for development in the countries concerned.

⁵⁴ Art 27(1) of the Subsidies Agreement.

⁵⁵ Howse (n 30 above).

⁵⁶ This would be contrary to the principle of Most-Favoured Nation Treatment provided for under Art I of GATT 1947.

⁵⁷ This would be contrary to the National Treatment Principle provided for under Art II of GATT 1947.

2.3 The establishment of EPZs and their presumed impact on growth and development of the host countries

The trend of establishing EPZs was started by the creation of the Shannon Free Zone in late 1950s in Ireland. The zone that now boasts over 100 international manufacturing companies and employs about 7300 people.⁵⁸ It was the success of this zone that encouraged many countries to create their own EPZs in the hope that the incentives would encourage industrial development.⁵⁹ Recent years have been marked by worldwide proliferation of EPZs. The number of EPZs has grown from '79 in 1975 to 3000 in 2002.'⁶⁰ In addition, the number of countries with one or more EPZs has grown from 25 in 1975 to 116 in 2002.⁶¹

According to the Organisation for Economic Co-operation and Development (OECD):

The major reason for the proliferation in the use of this policy tool is the seeming success of EPZs in some countries and the confluence of four trends: a) the increasing emphasis on export-oriented growth; b) the increasing emphasis on FDI-oriented growth; c) the transfer of production of labour intensive industries from developed countries to developing countries; and d) the growing international division of labour and incidence of global production networks.⁶²

Different countries have adopted different names for their 'EPZs' or similar zones. The same holds for analysts and their definitions of what constitutes an 'EPZ'. Kusago and Tzannatos⁶³ have presented a list on terminology that has been used

⁵⁸ See '45 Years in Action: World's First Duty-Free Zone' available at <<http://www.shannon-dev.ie/AboutUs/45YearsinAction/WorldsFirstDutyFreeZone/>> (accessed on 20 October 2007).

⁵⁹ K, McCourt 'Manufacturing of Poverty' *Pambazuka* available at <www.pambazuka.org> (accessed on 28 July 2007).

⁶⁰ International Confederation of Free Trade Union, 'Export Processing Zones Symbols of Exploitation and a Development Dead End' available at <<http://www.icftu.org/www/pdf/wtoepzreport2003-en.pdf>> (accessed on 1 October 2007).

⁶¹ n 60 above.

⁶² Working Party of the Trade Committee 'Export Processing Zones: Past and Future Role in Trade and Development' the OECD, Trade policy working Paper No.53 para 56 available at <[www.oilis.oecd.org/oilis/2006doc.nsf/linkto/td-tc-wp\(2006\)39-final](http://www.oilis.oecd.org/oilis/2006doc.nsf/linkto/td-tc-wp(2006)39-final)> (accessed on 1 October 2007).

⁶³ T, Kusago & Z, Tzannatos (1998), 'Export Processing Zones: A Review in Need of Update', Social Protection Discussion Paper No.9802, World Bank.

interchangeably ranging from industrial free zones/EPZs,⁶⁴ free trade zones, free ports,⁶⁵ special economic zones⁶⁶ to *maquiladoras*.⁶⁷

There is however, no general consensus on the definitive characteristics of EPZs. ILO characterised EPZs as 'industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being re-exported'.⁶⁸ With developments in information technology, 'imported material' would also include 'electronic data' today, as well as, call centres located in zones.⁶⁹

According to Madani, EPZs are characterised by:

Unlimited, duty-free imports of raw, intermediate input and capital goods necessary for the production of exports; less governmental red-tape; more flexibility with labour laws for the firms in the zone than in the domestic market ; generous and long-term tax holidays and concessions to the firms; above average (compared to the rest of the host country) communications services and infrastructure. It is also common to for countries to subsidize utilities and rental rates.⁷⁰

Unlike their characteristics, there is an overall consensus on the goals of establishing EPZs. Some EPZ promoters have argued that, thanks to such zones, 'foreign investors have been encouraged to invest in countries that would not be the natural choice for direct foreign investment.'⁷¹ According to Mutti:⁷²

⁶⁴The term is used to refer to EPZs in Ireland, Taiwan (China), Malaysia, Dominican Republic, Mauritius, Kenya, Hungary available at <<http://www.ilo.org/public/english/dialogue/sector/themes/epz/typology.htm>>(accessed on 1 October 2007).

⁶⁵ This term has been used to described the EPZs in Hong-Kong (China), Singapore, Bahamas Freeport, Batam, Labuan and Macao available at <<http://www.ilo.org/public/english/dialogue/sector/themes/epz/typology.htm>>(accessed on 1 October 2007).

⁶⁶ The term is used to refer to EPZS in China (southern provinces, including Hainan and Shenzhen) available at <<http://www.ilo.org/public/english/dialogue/sector/themes/epz/typology.htm>> (accessed on 1 October 2007).

⁶⁷ D, Madani 'A Review of the Role and Impact of Export Processing Zones' (1999) available at <siteresources.worldbank.org/INTRANETTRADE/Resources/MadaniEPZ.pdf> (accessed on 1 October 2007).

⁶⁸ International Labour Organisation 'What are EPZs' (2007) available at <<http://www.ilo.org/public/english/dialogue/sector/themes/epz/epzs.htm>> (accessed on 1 October 2007).

⁶⁹ n 68 above.

⁷⁰ Madani (n 67 above).

⁷¹ R, Bolin 'Why Export Processing Zones are Necessary' (2004) *World Export Processing Zones Authority* available <www.wepso.org> (accessed on 1 October 2007).

EPZs can provide employment opportunities and foreign exchange earnings in a host country. They serve as a useful model of the role marketing and information networks play in allowing closer integration into the world economy. EPZs also are a potential source of training and learning by doing, an avenue for technology transfer, and a source of management expertise that can spill over into the rest of the economy.⁷³

While many EPZs have had a positive impact on the economy of the host country, not all EPZs have been successful. For instance, in Africa, with the exception of few countries such as Mauritius, Tunisia and Egypt, 'the EPZs have played no or a negligible role in both the static and dynamic contribution to growth and development.'⁷⁴ The benefits have been limited in the following ways:

First, the investors usually limit their activities in the EPZs to simple processing operations, thus limiting the transfer of technologies and skills; secondly, most jobs are poorly paid, low quality and involve few skills; thirdly, only a very small share of the foreign currency earnings generated remain in the country; fourthly, the foreign investments are not secure and can be withdrawn from the country with relative ease, as seen with the numerous companies that have left the EPZs of various countries to relocate in China, where there is particularly little respect for workers rights; and finally, the investors often import all they need and source very little from the local market.⁷⁵

EPZ host countries incur two types of costs: first, the direct costs of establishing EPZ infrastructure and subsidized services; and second, the indirect costs in the form of foregone government revenue and national income as a result of exemptions from taxes, import and export duties.⁷⁶ In addition, EPZ jobs are not always new jobs. Sometimes, they are 'created at the expense of existing jobs outside the zones.'⁷⁷

While there are well documented success stories, many EPZs have not managed to achieve their objectives of attracting FDI, promoting trade and generating new

⁷² J, Mutti 'Export Processing Zones: Removing Trade and Tax Obstacles to Growth' (2003) 28 *Journal of the Flagstaff Institute* available at <www.wepza.org> (accessed on 1 October 2007).

⁷³ n 62 above, paras 48-57.

⁷⁴ EPZs in Africa (2004) *Foreign Direct Investment* available at <www.fdimagazine.com/news/fullstory.php/aid/856/EPZs_in_Africa.html> (accessed on 1 October 2007).

⁷⁵ n 60 above.

⁷⁶ n 62 above.

⁷⁷ Jauch (n 31 above).

employment.⁷⁸ Even in countries where FDI increased after the establishment of EPZs, such an increase may not be necessarily as a result of the establishment of the EPZs. FDI may have increased even in the absence of EPZs.⁷⁹

2.4 The challenges of enforcing labour rights

There exist many international instruments protecting labour rights.⁸⁰ The reality, however, is that, despite the existence of those rights, workers have not been able to enjoy them to the fullest. According to Lagan:

. [this is] because these documents have been enacted and signed through the international political system. . . . and since that system has not yet found an effective way to enforce international political undertakings, little is actually done to enforce these agreements. Most of the enforcement of international human rights standards has been limited to the monitoring, reporting, and publicizing of human rights standards in an attempt to persuade countries to abide by their international agreement. But since governments generally only infringe on their own citizens' rights, nations usually have little incentive to confront other nations on their human rights standards and human rights violations, and since hardly any country is free from human rights abuses, international political action by states is usually avoided.⁸¹

It is therefore clear that the non-enjoyment of labour rights is not due to shortage of labour standards but rather the nature of the rights themselves as well as the institutions responsible for enforcing the existing standards.⁸² The international human instruments have placed a lot of faith on national legislation to give effect the provisions of international instruments. Unfortunately, the national legislation have been unable to meet this mandate leaving workers unprotected from violation.

⁷⁸ n 62 above, para 6.

⁷⁹ OECD Para 44.

⁸⁰ By 2005, the ILO had developed 185 Conventions determining international standards for various aspects of work and environment.

⁸¹ J, Lagan 'Trade & Human Right: Did Your Jeans Enslave Children? Child Labour in International Trade (2002) 2 *Asper Review of International Business and Trade Law*, 159.

⁸² The United Nation High Commissioners for Human Rights as quoted by G, Mugwanya 'Realising Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System' (1999-2000) 10 *Indiana International and Comparative Law Review*, 40.

2.4.1 Nature of labour rights

This involves the identification of the nature of the norms as a challenge to their implementation. This is based on the realisation that, unlike civil and political rights, the implementation level of the labour rights is very low. The rights have not been given priority and have been ignored at the detriment of workers.

2.4.1.1 Are labour rights human rights?

Human rights are commonly understood as being those rights which are inherent in the mere fact of being human and without which, people cannot live in dignity.⁸³ The concept of human rights is based on the belief that every human being is entitled to enjoy her/his rights regardless of legal jurisdiction or other localising factors such as ethnicity, nationality or sex.⁸⁴ These rights are conceptualised as based on inherent human dignity and are inalienable in character.⁸⁵

Labour (equated largely with 'workers') rights are a group of legal rights which those who are in employment situations are entitled to enjoy.⁸⁶ They relate to labour relations between workers and their employers, usually derived from labour and employment law. These rights are meant to ensure that those in employment enjoy the highest standard of living. They include the right to adequate and non-discriminatory remuneration, to associate, organise and to collectively bargain on terms and conditions, to limited working hours, to safe and healthy working conditions and to social security.⁸⁷

The basic labour rights have been widely regarded as amounting to human rights.⁸⁸ They have been incorporated in foundational international human rights instruments

⁸³ The Preamble of the Universal Declaration of Human Rights (UDHR).

⁸⁴ Art 2 of the UDHR.

⁸⁵ Kenya National Commission on Human Rights 'Labour and Human Rights' (2007) 6 *Nguzo za Haki*, 6.

⁸⁶ Asian Development Bank, 'Core Labour Rights Handbook' available at <<http://www.adb.org/Documents/Handbooks/Core-Labor-Standards/CLS-Handbook.pdf>> (accessed on 25 October 2007).

⁸⁷ n above, pg 6.

⁸⁸ Howse (n 30 above) 131.

such as the Universal Declaration of Human Rights,⁸⁹ the International Covenant on Civil and Political Rights (ICCPR),⁹⁰ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁹¹

In addition to recognition under the Inter-American and European regional human rights systems, the African Charter on the Human and Peoples' Rights (ACHPR) also recognises labour rights as human rights.⁹² All these instruments guarantee the right to freedom of association, including the right to form and join trade unions,⁹³ and the right to freedom from discrimination⁹⁴.

The ILO's 1998 Declaration of Fundamental Principles and Rights at Work enumerates a short list of core international labour standards which are defined more fully in eight background Covenants that are incorporated by reference: freedom of association and collective bargaining,⁹⁵ the elimination of forced labour,⁹⁶ the elimination of child labour,⁹⁷ and the elimination of discrimination in employment.⁹⁸

A landmark Supreme Court of Canada decision of 8 June 2007⁹⁹ also ruled that the 'right to collective bargaining is protected by the Charter of Rights and Freedoms and is a fundamental aspect of Canadian society.' According to McLachlin C.J., and Bastarache, Binnie, LeBel, Fish and Abella JJ:

⁸⁹ Arts 20, 23 and 24 of the UDHR.

⁹⁰ Art 22 of ICCPR.

⁹¹ Arts 7 and 8 of UDHR.

⁹² Art 15 of the ACHPR provide for the right to work under equitable and satisfactory conditions as well as the right to receive equal pay for equal work. Art 16 of ACHPR recognises the right to free association. These rights are recognised as human rights and have been provided for under Chapter I of the ACHPR titled 'human and peoples' rights.'

⁹³ Arts 20 and 23 of the UDHR; Art 22 of the ICCPR and Article 8 of the ICESCR.

⁹⁴ Arts 2 and 7 of the UDHR; Art 3 of the ICCPR and Arts 3 and 7(c) of the ICESCR.

⁹⁵ n 8 above.

⁹⁶ n 9 above.

⁹⁷ n 10 above

⁹⁸ ILO 'Fundamental Rights at Work: Overview and Prospects' Doc. 122, at 67 (2001), available at <www.ilo.org/public/english/dialogue/actrav/publ/122/122e.pdf> (accessed on 22 September 2007).

⁹⁹ *Health Services and Support – Facilities Sub-sector Bargaining Association and Others v British Columbia* (2007) SCC 27 available at <<http://scc.lexum.umontreal.ca/en/2007/2007scc27/2007scc27.html>> (accessed on 30 September 2007).

The Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.....Recognizing that workers have the right to bargain collectively as part of their freedom to associate reaffirms the values of dignity, personal autonomy, equality and democracy that are inherent in the Charter.¹⁰⁰

Accordingly, this decision recognises that collective bargaining is a human right for all workers, and it affirms that labour rights are human rights. It demonstrates that labour rights complement, promote and enhance fundamental human rights values such as 'equality, democracy, dignity and personal autonomy.'¹⁰¹

2.4.1.2 The debate on core labour rights

In 1998, more than 170 ILO members identified four standards as 'fundamental principles and rights at work'¹⁰² that all countries should promote, regardless of their level of development.¹⁰³ These core standards include freedom of association and the right to organize and bargain collectively, the abolition of forced labour, the elimination of child labour, and non-discrimination in employment.

Some authors, such as Langille, are opposed to the idea of core labour rights. Langille argues that, the new concentration on core labour rights has the effect of ranking labour rights. Such ranking 'undermines the existing regime from within by narrowing its focus, weakening the legal status of the core rights, relegating the "non-core" to a second-class status, watering down its 'enforcement' mechanisms, and so on.'¹⁰⁴ Accordingly, states have concentrated on the enforcement of the 'core' rights at the detriment of the other labour rights.

The consensus in adopting the Declaration is an indication of the importance that states place on those core rights at the expense of the other labour rights. This also

¹⁰⁰ n 99 above, pg 3.

¹⁰¹ n 99 above, pg 4.

¹⁰² The 1998 ILO Declaration on the Fundamental Principles and Rights at Work.

¹⁰³ K, Elliott 'Labour Standards, Development, and CAFTA' (2004) *International Economics Policy Briefs* available at<<http://www.petersoninstitute.org/publications/pb/pb04-2.pdf>> (accessed on 20 October 2007).

¹⁰⁴ B, Langille 'Core Labour Rights: True Story (Reply to Alston)' (2005) 16(3) *European Journal of International Law* 409-437. See also P, Alston 'Facing Up to the Complexities of the ILO's Core Labour Standards Agenda' (2005) 16(3) *European Journal of International Law* 467-480.

explains why, most constitutions of the world, protect rights such as the freedom of association as opposed to the right to work in safe and healthy environment. This attitude has informed policy making to an extent that labour rights of EPZ workers have not been prioritised. It has become easy for state to sacrifice them in the name of attracting investment.

2.4.2 Institutional problems

Various international human rights instruments create institution to ensure the enforcement of labour rights. However, the workers have been unable to access those rights because of the weakness inherent in those institutions. The weakness is either because their mandate is limited by the instruments creating them or by the mere lack of resources.¹⁰⁵

2.4.2.1 To what extent have labour rights been incorporated in the WTO regime?

The WTO has little to say about labour practices and workers' rights.¹⁰⁶ Although, many WTO agreements have been concluded to facilitate international trade,¹⁰⁷ those agreements lack accepted labour and human rights standards that are inextricably linked to the production of goods.¹⁰⁸ The absence of such agreements has led to great disparities in how goods are produced in different countries. The attempt to include labour rights in the WTO Agreements in terms of 'a social clause' has been resisted as being a protectionist measure that is likely to be abused by members of WTO.¹⁰⁹

Ordinarily, enforcement of labour laws would be interpreted as amounting to a discriminatory trade restriction which is prohibited under Art. I and XI of GATT 1947.

¹⁰⁵ n 104 above.

¹⁰⁶ A, Guzman 'Trade, Labour, Legitimacy' (2003) 91 *California Law Review* 885.

¹⁰⁷ WTO Agreements available at <www.wto.org/english/docs_e/legal_e/final_e.htm>(accessed on 1 October 2007).

¹⁰⁸ The GATT contains no explicit provision either permitting or requiring trade action against labour rights violations.

¹⁰⁹ Elliott, K and Freeman, R 'Can Labour Standards improve under Globalisation?' (2003) *Peterson Institute of International Economic* Available at <http://www.petersoninstitute.org/publications/chapters_preview/338/5iie3322.pdf> (accessed on 25 October 2007).

However, Article XX of GATT contains general exceptions which allow states to deviate from the WTO principles for purposes of public policy and which could be used to cover some labour rights violations. The exemptions are listed as being for protection of public morals,¹¹⁰ the protection of human, animal or plant life or health¹¹¹ and the prohibition of prison labour¹¹² among others. This provision authorizes governments to apply, otherwise illegal measures when such measures are necessary to deal with the listed social or economic policy problems, relieving the contracting parties from the obligations imposed by GATT.

According to Howse,

....the Appellate Body of the WTO (AB) held that nothing in the basic structure of GATT would prevent the imposition of otherwise GATT-inconsistent trade measures directed at other countries' policies, provided that such measures could be justified under the one of the exceptions in GATT Article XX. The exceptions include, inter alia, the broad rubric of 'public morals.' This has the effect of putting the ball squarely in the WTO's 'court' with respect to the legal treatment of trade sanctions for labour rights purposes.¹¹³

Article XX cannot, however, be interpreted as accommodating 'general social or economic considerations but rather as an express policy decision to allow measures considered harmful to market access when a sufficient social or economic policy justification exists.'¹¹⁴ The reasons must relate to an exception specifically listed in the provision.

Accordingly, there are various reasons why the WTO has been found to be an inappropriate avenue of addressing human rights violations. Firstly, enforcement mechanism used within the WTO Dispute Settlement Understanding (DSU) system may not be effective in dealing with violation of labour rights. For instance, under Article 19.1 of the DSU, a state found in violation of its obligations under any WTO Agreement is required to 'bring the measure into conformity with that agreement' failure to which such state may be required compensate an aggrieved party or be suspended from the WTO. Unfortunately, Article 22 of the DSU provides that such

¹¹⁰ Art XX (a) of GATT.

¹¹¹ Art XX (b) of GATT.

¹¹² Art XX (e) of GATT.

¹¹³ Howse (n 30 above).

¹¹⁴ Howse (n 30 above).

compensation is 'voluntary' and the complaining member must 'agree not only to be compensated [but also] to the specific amount thereof'. Suspension of a member from the WTO is never resorted. Therefore, the dispute settlement under the WTO, being on a voluntary basis backed by a threat of suspension, may not be effective in dealing with a violation of labour rights.

There are also doubts whether WTO related trade-measures, such as economic sanctions, are actually feasible in the enforcement of human rights standards. Such measures may not necessarily lead to enforcement of human rights and on the contrary, may aggravate the situation.¹¹⁵ For example, general economic embargos usually harm the population of the target country by reducing the supply of their economic needs, whereas the political elite responsible for the violations, maintains the necessary monetary resources and ways of overcoming such embargoes.

Another weakness of the WTO System in the context of enforcement of core labour standards is that individuals who have suffered from such violation do not have standing to sue the host State before the WTO dispute settlement body and seek compensation. Article 3.7 of the DSU provides that only member States have the right to bring a case under the WTO dispute settlement regime. This means that, although the host State may be condemned by concerned member states under a formal complaints procedure, under the WTO System, those who are truly injured and complaining about the host state's non-compliance of observance of core labour standards would have no direct recourse to reprimand the behaviour of the host State.

In addition, the failure of the Doha Ministerial Declaration in addressing labour standards is a reflection of WTO's reluctance in dealing with labour issues. The Doha Declaration stated that the WTO members:

...reaffirm our declaration made at the Singapore Ministerial Conference regarding internationally recognized core labour standards. We take note of work under way in the International Labour Organization (ILO) on the social dimension of globalization.¹¹⁶

¹¹⁵ Guzman (n 105 above).

¹¹⁶WTO, Doha Ministerial Declaration, para. 8, adopted Nov. 14, 2001, available at <<http://www.wto.org/english/thewto/uscore/e/minist/uscore/e/min01/uscore/e/mindecl/uscore/e.htm>> (accessed on 1 October 2007).

2.4.2.2 Enforcement of labour rights under the ILO

ILO is the premier body in the development of international standards for the protection of labour rights. It was formed in 1919 as part of the League of Nations to protect worker's rights and was later incorporated into the United Nations. It is a tripartite body whose constituents are governments, employers and employees (workers).¹¹⁷ Since its formation, the ILO has maintained and developed a system of international labour standards¹¹⁸ aimed at promoting opportunities for women and men to obtain decent and productive, in conditions of freedom, equity, security and dignity.¹¹⁹ These standards are contained mainly in ILO Conventions which are legally binding once ratified by member states. The Conventions are supplemented by specific recommendations which provide more detailed guidelines on how they may be applied, although these can also be autonomous from any convention.¹²⁰

The ILO like any other international body suffers some weaknesses. First, it does not have power to issue sanctions to its member states that violate labour rights.

Secondly, like the WTO system, individuals do not have standing to file a complaint to initiate an ILO investigation of alleged infringement of labour rights. However, unlike the WTO system, trade unions have the rights to file a representation under Article 24 of the Constitution of ILO (the ILO Constitution) against a state, as long as the accused state has ratified the concerned ILO Convention.

Despite those weaknesses, the ILO has some tools at its disposal that makes it better placed as a principal monitoring body of labour rights. According to Elliott and Freeman:

In addition to setting standards, the ILO has three tools for improving conditions. It supervises compliance with global labour conventions and publicizes violations of standards to shame countries into improving matters. It gives technical assistance to labour ministries and other agencies, unions and employers' groups to improve the implementation of labour standards.

¹¹⁷ Art 7 of the Constitution of the ILO (ILO Constitution).

¹¹⁸ Available at <www.ilo.org/public/english/about/mandate.htm> (accessed on 15 September 2007).

¹¹⁹ Preamble to the ILO Constitution.

¹²⁰ n 85 above, page 7.

And it can punish countries that do not comply with their commitment through an enforcement mechanism that, until the 1990s [Burma Case], the organisation had rarely used.¹²¹

Article 24 of the ILO Constitution enables the ILO to initiate investigation of alleged abuse of workers' rights in EPZs and to address those issues directly. Under Article 26 of the ILO Constitution, ILO, through its Governing Body, can lodge a complaint after the commencement of investigation. Depending on the nature of the issues at hand, this would then lead to the appointment of a Commission of Inquiry ('Commission')¹²² which is required to prepare a report on findings and make recommendations.¹²³

Following the issuance of the Commission's report, Article 29 of the ILO Constitution provides that the concerned governments may either accept the recommendations of the Commission or submit the complaint to the International Court of Justice (ICJ). If the ICJ is asked to review the complaint, Articles 31 and 32 of the ILO Constitution provide that the ICJ's decision, to affirm, vary or reverse the Commission's findings, will be final.¹²⁴ If the governments involved fail to comply with the recommendations of the Commission or the decision by the ICJ, Article 33 of the ILO Constitution allows the Governing Body to 'recommend to the Conference such actions it may deem wise and expedient to secure compliance therewith'.

Based on the above analysis of the procedure under the ILO, it can be stated that ILO remains the competent organisation to monitor workers' rights globally and to ensure their compliance.¹²⁵

2.4.2.3 The possible linkage between the ILO and the WTO in the enforcement of labour rights

Having discussed the role each of the WTO and ILO play in promoting and protecting labour rights, a question then arises as to whether or not the two institutions should be linked together. At the moment, it is clear that the conflict over trade and labour

¹²¹ Elliott & Freeman (n 109 above).

¹²² Art 26(3) of the ILO Constitution.

¹²³ Art 28 of the ILO Constitution.

¹²⁴ Art 31 of the ILO Constitution.

¹²⁵ Elliott (n 103 above).

will not be resolved anytime soon. The ILO is unable to tackle the relevant trade issues¹²⁶ and there is no sign that the WTO is prepared to address the problem.¹²⁷ States are deeply divided over the issue, with developing countries firmly opposed to any linkage, and many developed states in favour.¹²⁸

However, like the ILO Declaration, the WTO, as demonstrated through its Singapore Declaration, does not condemn all 'labour-rights-related trade measures,'¹²⁹ but only those that are associated with 'protectionist purposes' or that put into question the 'comparative advantage' of, in particular, low-wage, developing countries.¹³⁰ According to Howse:

The idea that labour rights issues are simply a matter for the ILO, therefore, ignores the existing and continuing role the WTO has been playing in constraining one important instrument available to improve compliance with core labour rights: trade measures aimed at punishing non-compliance with core labour rights. At least until very recently GATT/WTO jurisprudence (albeit developed in other contexts, such as trade and environment) evoked constraints that may go far beyond what is needed to prevent abuse of labour rights for 'protectionist purposes.'¹³¹

Each institution has its strengths and weaknesses in its potential ability to enforce labour rights. Consequently, the most viable option is for a stronger structure of coordination between the two institutions to condemn the use of EPZs that undermine fundamental rights. This will involve a mixture of strategies, 'including international treaties and institutions, transnational cooperation among governmental actors, national state regulation, transnational NGO activism, transnational litigation, consumer boycotts, and voluntary codes'.¹³² Such coordination does not 'remove the role of enforcing labour standard from the ILO to the WTO.'¹³³

¹²⁶ Guzman (n 105 above).

¹²⁷ n 116 above.

¹²⁸ Guzman (n 105 above).

¹²⁹ Howse (n 30 above).

¹³⁰ n 16 above, para 4.

¹³¹ Howse (n 30 above).

¹³² R, Wai, 'Countering, Branding, Dealing: Using Economic and Social Rights in and around the International Trade Regime' (2002) 14 *European Journal of International Law*, 43

¹³³ Elliott & Freeman (n 109 above).

2.5 Conclusion

In this Chapter, we have discussed the place of labour rights in the trade debate. It is clear that although many governments and corporations continue to oppose any linkage between trade and labour rights, there is a growing recognition that the international economy and the international labour rights movement share a common goal: workers who earn a living wage, who labour with autonomy in conditions that respect basic health and safety, in turn become consumers who can purchase what they want.

Despite the existence of success stories about the operations of EPZs, we have come to a conclusion that, not all EPZs, especially those in Africa, have achieved the purpose for which they were established. Many of them have been marked by violation of workers rights with no or less benefits to their host countries. Kenya falls under this category as will be demonstrated by the next Chapter.

CHAPTER 3: THE SITUATION OF LABOUR RIGHTS IN THE KENYA'S EPZs

3.1 Introduction

As has been demonstrated in the previous chapters, the increased power and influence of the Multinational Corporations (MNCs) in global trade, coupled with pressure from donors and developed countries to adopt a free trade strategy,¹³⁴ have seen most developing countries 'shift their economic policies in an effort to attract foreign direct investment.'¹³⁵ To achieve this, developing countries and LDCs have come up with incentives not only to compete with each other, but also to create conducive environment for investors. It is on this background that Kenya established its EPZs.

In addition to enjoying tax and duty exemptions, infrastructure, subsidised services and relaxed labour laws, the labour process under such arrangements is characterised by '...'casualised' or 'informalised' work and flexible working days or hours to meet the needs of the employers or business cycle.'¹³⁶ Wages paid depend on profits made by the business, hence the preference for a workforce that is expendable when the need arises. At the end of the day, the consequence of offering these incentives shifts the social cost to the citizens and workers.¹³⁷ This will be demonstrated by looking as Kenyan EPZs as a case study.

3.2 The establishment and operations of EPZs in Kenya

3.2.1 History of EPZs in Kenya

The first structural adjustment loan that Kenya signed with the World Bank in March 1980¹³⁸ and the first standby agreement signed with the IMF¹³⁹ in October of the

¹³⁴ n Manufacture of poverty, pg 11

¹³⁵ Chang, H 'Foreign Investment Regulation in Historical Perspective-Lessons for the Proposed WTO Agreement on Investment' (2003) *Global Policy Forum* available at <<http://www.globalpolicy.org/soecon/ffd/2003/03historical.htm>> (accessed on 27 October 2007).

¹³⁶ n 17 above, pg 11.

¹³⁷ n 136 above.

¹³⁸ S, O'Brien & T, Ryan, 'Aid and Reform in Africa: Kenya Case Study' (1999) a paper produced for the World Bank research project on 'Aid and Reform in Africa' available at <<http://www.worldbank.org/research/aid/africa/kenya2.pdf>> (accessed on 25 October 2007). The World Bank gave Kenya US\$55 million under the Structural Adjustment Credit (SAC).

same year marked the beginning of Structural Adjustment Programmes (SAPs) and trade liberalisation era in the country. In 1982, Kenya signed the second structural adjustment loan and standby agreement subject to conditions of 'fiscal discipline, trade liberalisation, further devaluation of the shilling, interest rates reforms and sector reforms.'¹⁴⁰ The Government, in its 1986 Sessional Paper No.1 on Economic Management for Renewed Growth,¹⁴¹ stated that its intention was to remove qualitative restrictions, reduce tariffs and establish flexible exchange rate regime.

With globalisation, and increased donor conditionalities requiring Kenya to liberalise trade, the Kenyan Government adopted legislative measures to liberalize the economy and attract foreign direct investment. The measures included the enactment of the Export Processing Zones Act in 1990,¹⁴² which established the EPZs. The EPZs are managed by the Export Processing Zones Authority (EPZA) established under the Export Processing Zones Act.¹⁴³ The Export Processing Zones Act defines an EPZ as:

...a designated part of Kenya where any goods introduced are generally regarded, insofar as import duties are concerned, as being outside the customs territory but are duly restricted by controlled access...¹⁴⁴

Like most other EPZ host countries, the Kenyan Government hoped that the EPZs would attract foreign investment to Kenya and boost the country's manufacturing capacity.¹⁴⁵ It also expected the creation of jobs, transfer of technology, development of backward linkages, earn the country foreign currency and lead to diversification of export products and markets.¹⁴⁶

¹³⁹ O'Brien & Ryan (n 138 above).

¹⁴⁰ D, Manda 'Globalisation and the Labour Market in Kenya' (2004) Discussion paper Series DP/31/2004, *Kenya Institute for Public Policy, Research and Analysis (KIPPRA)* 7.

¹⁴¹ Sessional Papers are policy papers prepared by Ministries and submitted to the Parliament for approval.

¹⁴² n 25 above.

¹⁴³ n 25 above, sec 3.

¹⁴⁴ n 25 above, sec 2.

¹⁴⁵ The preamble of the Act states that it was established '..... to provide for the establishment of export processing zones and the Export Processing Zones Authority; to provide for the promotion and facilitation of export oriented investments and the development of enabling environment for such investment...'

¹⁴⁶ n 17 above, pg 15.

Section 29 of the Export Processing Zones Act provides the EPZ investors with incentives ranging from tax exemptions, exemptions from export and import duties, unrestricted foreign ownership and employment, freedom to repatriate any amount of earnings to the exemption from stamp duty on some legal documents. Even though the EPZ firms are not explicitly exempted from observing some labour laws, except the Factories Act,¹⁴⁷ there has been reluctance on the part of the Kenyan Government to ensure the enforcement of labour laws at the EPZs. In addition, trade unions were until 2003 restricted from organizing and recruiting EPZ workers for purposes of negotiations and collective bargaining.¹⁴⁸

Although Kenya spent a lot of money on promotion of EPZs, only about 2,800 new jobs were created in the first five years of their establishment.¹⁴⁹ The Kenyan government then attempted to resuscitate the EPZ with additional incentives. One strong inducement in the early years of the EPZ program was full currency convertibility. The EPZ program still remained stagnant until the 'United States initiated the African Growth and Opportunity Act (AGOA) in 2000, giving Kenyan exports duty and quota-free access to the United States.'¹⁵⁰

In 2005, the number of gazetted EPZs had increased to 43¹⁵¹ from 41 in 2004 while the number of operational enterprises decreased from 74 in 2004 to 68. The total employment attributable to EPZ was '50,735 persons with local direct employment standing at 38,051 persons and an estimated 12,684 indirect jobs in subcontracting and supplies.'¹⁵² The bulk of employment came from the garment enterprises with a proportion of 90.0%.¹⁵³

¹⁴⁷ n 14 above.

¹⁴⁸ n 146 above.

¹⁴⁹ Jauch (n 31 above).

¹⁵⁰ R, Rolfe, D, Woodward & B, Kagira 'Footloose and Tax Free: Incentive Preferences in Kenyan Export Processing Zones' (2003) available at < <http://www.essa.org.za>> (accessed on 1 October 2007).

¹⁵¹ 41 are privately owned and operated, while 2 are public. 13 zones are located in Nairobi, 21 in Mombasa, 3 in Athi River (Mavoko), 3 in Kilifi, 1 each in Voi, Malindi and Kerio Valley.

¹⁵² EPZA 'Annual Report' (2005) available at <www.epzakenya.com/UserFiles/File/EPZ%20Annual%202005.pdf> (accessed on 1 October 2007).

¹⁵³ n 152 above.

EPZ firms mainly manufacture garments¹⁵⁴ but also a wide variety of other products including pharmaceuticals, chemicals, electronic, dartboards and plastics.¹⁵⁵ Some are also engaged in agro processing and printing.¹⁵⁶

International Union of Trade Unions (IUTU) characterises EPZs as places where:

...many of the workers are subjected to harsh conditions with little respect for health and safety requirements, long working hours including forced overtime and an extremely high pace of production. EPZs are notorious for the suppression of trade union rights and forced overtime work. Typically, governments either exempt such zones from labour legislation or do not take action against the breaches in labour law, especially when it comes to working hours and trade union rights.¹⁵⁷

This has been the case for Kenya. Although statistics indicate that the establishment of EPZs actually led to the creation of employment, the quality of the work has left a lot to be desired.¹⁵⁸ The goal of attracting investment has been pursued at the detriment of Kenyan workers, as investments have not translated into improvement of the lives of the workers in the EPZs. There is substantial evidence, as will be demonstrated in this Chapter, that basic human rights are being abused and that low wages and long hours are contributing to what the Kenya Human Rights Commission (KHRC) has referred to as 'manufacture of poverty.'¹⁵⁹

3.2.2 Legislative and administrative policies governing the EPZs in Kenya

Kenya's labour laws and practices were largely inherited from the colonial regime whose primary objective was to exploit local resources using cheap labour.¹⁶⁰ The statutes that were enacted after independence didn't change much and to date there has been only minimal changes to those statutes despite transformations in the

¹⁵⁴ D, Taylor 'In a situation like this, who cares about human rights?' (2005) *Inter Press Service* available at <www.ipsnews.net>(accessed on 28 July 2007).

¹⁵⁵ n 152 above.

¹⁵⁶ n 152 above.

¹⁵⁷ International Trade Union Confederation 'WTO Promotes EPZs, Ignores Workers' Rights' (2007) available at <www.scoop.co.nz/stories/WO0707/S00380.htm> (accessed on 1 October 2007).

¹⁵⁸ n 62 above.

¹⁵⁹ n 17 above.

¹⁶⁰ J, Omolo 'The Textiles and Clothing Industry in Kenya' as quoted in H, Jauch 'The Future of the Textile and Clothing Industry in Sub-Saharan Africa' 2006 *Bonn: Friedrich-Ebert-Stiftung*.

workplace and employment situations brought about by the alterations in the global and local environments.¹⁶¹ The framework of current labour laws is driven by minimums rather than ideals which an employee and more so an employer has to abide by.

Currently, there are numerous pieces of legislation that regulate the broad labour relations in Kenya. Those pieces of legislation include the Constitution of Kenya,¹⁶² the Employment Act,¹⁶³ the Regulation of Wages and Conditions of Employment Act,¹⁶⁴ the Workmen's Compensation Act,¹⁶⁵ the Trade Disputes Act,¹⁶⁶ Trade Unions Act,¹⁶⁷ and the Factories and Other Places of Work Act (the Factories Act).¹⁶⁸

It should be noted that all these legislation do not have a direct impact on the EPZs. Although the EPZs are not directly exempted from the provisions of those Acts, the government of Kenya has failed to enforce those Acts at the EPZs. In some cases, as will be shown below, the enforcement of legislation does not help because the legislation are too inadequate to protect the rights of the EPZ workers.

First, Kenya still has the independence constitution that contains very few provisions that can be said to protect EPZ workers. Such rights include the right to non-discrimination,¹⁶⁹ freedom of association,¹⁷⁰ freedom from slavery and forced labour¹⁷¹ and the freedom from torture and degrading treatment.¹⁷² There are 'claw-back' clauses contained in some of those rights which further limit the rights.

¹⁶¹ n 160 above.

¹⁶² n 20 above.

¹⁶³ n 21 above.

¹⁶⁴ n 22 above.

¹⁶⁵ Chapter 236 of the Laws of Kenya.

¹⁶⁶ n 23 above.

¹⁶⁷ n 24 above.

¹⁶⁸ n 26 above.

¹⁶⁹ n 20 above, sec 82.

¹⁷⁰ n 20 above, sec 80.

¹⁷¹ n 20 above, sec 73.

¹⁷² n 171 above.

Secondly, the exemption of EPZs from the provisions of the Factories Act¹⁷³ meant that labour inspectors were not permitted to inspect factories that were set up under the Export Processing Zones Act. Although, the exemption was reversed in 2003, it is not clear whether the inspectors have been allowed into the EPZs.¹⁷⁴

Thirdly, there have been further changes in the law that add to the insecurity faced by workers. The enactment of Finance Act No. 4 of 1994 led to the amendment of certain provisions of the Employment Act and the Regulation of Wages and Conditions of Employment Act. The amendment introduced the concept of 'retrenchment'¹⁷⁵ which allows employees to be laid off at the discretion of their employer with no or minimum financial compensation and no union involvement.¹⁷⁶ The concept of retrenchment was introduced by the World Bank and IMF through the SAPs which sought 'to reduce the government spending on wages through reduction of staff numbers with a view of improving economic growth through efficiency of resources utilisation.'¹⁷⁷

The only legislation that has a direct impact on the EPZs is the Export Processing Zones Act. It is the legislation under which the EPZs are established as well as the EPZA, which is the regulatory body regulating the activities of the EPZs. The Export Processing Zones Act is designed specifically on the premise of encouraging investments in return for expected benefits and is therefore silent on the rights of workers at the EPZs. The 8 amendments to the Export Processing Zones Act including amendment numbers 12 of 1990, 14 of 1991, 7 of 1993, 6 of 1994, 8 of 1997, 5 of 1998, 4 of 1999 and 6 of 2001 have all addressed the EPZ operators and developers, and totally ignored the rights of workers.¹⁷⁸

¹⁷³ n 14 above.

¹⁷⁴ Manufacture of Poverty, pg 22.

¹⁷⁵ Retrenchment is a concept that was begun by the World Bank. It means scaling down active manpower to reduce operational costs and thus maintain equilibrium and maximise profit. This exercise was meant to effect the reduction of the civil service by 55,171. Of these 12,842 were expected to be re-deployed. The residual number of 42,329 was to be sent home though the functions they performed was expected to be contracted out or privatised

¹⁷⁶ n 17 above, pg, 18.

¹⁷⁷ n 176 above.

¹⁷⁸ n 17 above, pg 22

Kenya's post colonial governments had been reluctant to make radical changes on existing laws to remedy the situation, until 2001 when a Task Force on Labour Law Review (the Task Force)¹⁷⁹ was established to review the country's labour laws. The Task Force submitted its final report to the Attorney General in April 2004 and recommended that the current labour legislation be repealed and five new laws be enacted namely: the Employment Bill, to replace the current Employment Act and the Regulation of Wages Act; the Labour Relations Bill, to replace the Trade Unions Act and the Trade Disputes Act; the Occupational Safety and Health Bill, to replace the Factories and Other Places of Work Act; the Work Injury Benefits Bill, to replace the Workmen's Compensation Act and the Labour Institutions Bill to establish labour institutions that currently exist under the Acts marked for repeal.

The five Bills were enacted into law on 22 October 2007. Under Kenyan Law, such Acts are only applicable when the Minister in charge, in this case the Minister for Labour, indicates the date they come into effect through a Gazette Notice. There is no time limit given under Kenyan Law under which the Minister must Act. In some cases, bills have been delayed for years.

3.3 Violation of labour rights at the Kenyan EPZs.

The EPZs in Kenya are mainly characterised by unfair and restrictive labour practices including low wages, inadequately compensated overtime, sexual harassment and the violation of the organisational rights of workers.¹⁸⁰

In acknowledging that EPZs may not be necessarily beneficial to host country, the KHRC reported that:

...it is clear that the [Kenyan] government loses significant amount of revenue from the sector, the social costs of these investments do not deserve the protection they enjoy from the government..... the kind of jobs offered by the EPZ sector are indeed 'poverty job' because, while they are better than nothing, the low wages and enslaving work patterns perpetuate poverty and stifle worker's ability to develop their careers or to sustain responsible social relations with spouses and children... at the end of the day, a worker at EPZ sector leads a

¹⁷⁹ The Task Force was established under Gazette Notice No. 3204 of 2001.

¹⁸⁰ n 160 above.

hand-to-mouth life, has no time to acquire training to venture into other fields of employment, and remain lonely and miserable when relations inevitably become strained.¹⁸¹

The state of affairs in the EPZ can be attributed to a number of reasons, ranging from socio-economic to legal. The current labour law regime is not only archaic, but it is also a far cry from the set international standards, some of which Kenya has ratified and those it has not.¹⁸² The protection of labour rights in Kenya is such that, rights that one expect to be provided for in the Kenyan legislation are not provided for at all, those that are provided for are inadequate while those that have been protected by law are not effectively enforced or generally complied with.¹⁸³

Regardless of the type of activities that the EPZs are engaged in, the nature of complaints has been similar in all the EPZs in Kenya. In this section, we highlight the human rights violations which are common in all the EPZs. We will do this by analysing reports by World Right Consortium (WRC)¹⁸⁴ on its finding on the complaints lodged against Sino link Garments Manufacturing Kenya (Sino Link) and Rising Sun limited Kenya (Rising sun). The reason for relying on Sino Link and Rising Sun is because they are involved in garment manufacturing¹⁸⁵ and represent some of the EPZs that have been of no direct benefit to Kenya. In 2005, the two EPZs did not source any materials from Kenya, they imported everything from Hong Kong, did not train any of its employees and are 100 % foreign owned (Chinese and Sri Lanka respectively). The two EPZs employ a high number of workers and have been accused of massive violation of labour rights.¹⁸⁶

3.3.1 Freedom of association

The freedom of association is recognised by the Kenyan legislation as well as in the international human rights instruments that Kenya is party to. For instance, the right

¹⁸¹ n 17, p 15.

¹⁸² n 17, pg 21

¹⁸³ J, Dwasi 'Kenya: A Study In International Labour Standards and their Effect on Working Women in Developing Countries: The Case for Integration of Enforcement Issues in the World Bank's Policies' (1999) 17 *Wisconsin International Law Journal* 347.

¹⁸⁴ World Rights Consortium 'Re Sino Link Garment Manufacturing (Kenya): Findings, Recommendations and Status Report' (2006) available at <http://www.workersrights.org/Reports/Sinolink_Report_3-8-06.pdf>(accessed on 1 October 2007).

¹⁸⁵ This sector accounts for the 90% of the total EPZ exports.

¹⁸⁶ n 152 above.

is provided for under Article 20(1) of the ILO Conventions on Freedom of Association and Right to Collective Bargaining¹⁸⁷ as well as Article 23(4) of the UDHR. While Article 20(1) of the UDHR grants the right to peaceful assembly and association, Article 23(4) is emphatic that everyone has the right to form and join trade unions for the protection of his or her interests.¹⁸⁸

Both the Kenyan Constitution and the Trade Union Act recognise the right of workers and employers to establish or join associations of their choice, save for the members of the disciplined forces (the army, the police and National Youth Service (NYS)).¹⁸⁹ The Trade Union Act, as buttressed by section 80 (2) (d) of the Kenyan Constitution, makes the registration of trade unions the prerogative of the Registrar of Trade Unions. It allows the registrar to refuse the registration of new trade unions where he or she is of the view that the applicants are well protected under existing unions.¹⁹⁰ In this way, the government decides whether representation by one trade union in any given industrial sector is 'sufficient' and in effect bars registration of new trade unions in certain sectors, thereby affecting the freedom of employees to join unions of their own choice.

Workers at the EPZs have for a long time been prohibited from joining or forming any organisation that represents them on matters relating to their employment. As has been revealed by the KHRC,¹⁹¹ 'workers are always threatened with being fired from their places of work should they defy such a rule and form a trade union.' Any attempt at unionisation of this workforce is resisted and blocked using all manner of tactics including, but not limited to, 'denial of the right to reasonable access, harassment, intimidation and termination of the services of workers.'¹⁹²

According to the report by WRC, workers at Sino Link were prevented from joining a trade union. When the workers joined the Tailors and Textile Workers Union (TTWU), Sino Link refused to recognise it despite TTWU being supported by more than 51%

¹⁸⁷ n 8 above.

¹⁸⁸ See also Art 22(1) of the ICCPR and Art 8(1)(a) of the ICESCR.

¹⁸⁹ Sec 3 of the Trade Dispute Act and Sec 80 (2) (c) of the Kenyan Constitution.

¹⁹⁰ Section 16(1) of the Trade Union Act.

¹⁹¹ n 17 above, pg 32.

¹⁹² n 17 above, pg 6.

as required by the law.¹⁹³ The Workers went on strike to protest against non-recognition of TTWU and massive violation of their labour rights. The workers who participated on the strike were 'subjected to the use of violence and threats of violence by riot police acting at the behest of company management in retaliation for workers' exercise of protected associational rights. Some of the employees were even pressured to resign from the TTWU.'¹⁹⁴ This refusal to respect workers' rights to collectively bargain terms and conditions of work, despite lawfully constituted representation by the union, represents a clear-cut violation of workers' right to bargain collectively under applicable codes of conduct.¹⁹⁵

The workers called upon the government to intervene and ensure that their rights were protected. Instead of addressing the root causes of the strike, the government ignored the pleas of the striking workers and supported the investors at the EPZs. The Minister for Trade and Industry described the strike as 'an act of hooliganism and primitive act of cowardice and irresponsible behaviour.'¹⁹⁶ The police were then called in to disperse demonstrating workers. The Central Organisation of Trade Unions (COTU) also distanced itself from the strike because the unions in the EPZs had at the time not been legally recognised by the factories.¹⁹⁷

Explaining the government attitude towards the whole issue, Ken Opada stated:

The strikes that engulfed the EPZs in Nairobi and Athi River highlighted significant abuses intrinsic to such investment arrangements. Faced with loss of investment as orders were cancelled and threats to relocate to more favourable environments in Madagascar, the government chose to overlook the workers' grievances in favour of investors' demand that costs be kept down.¹⁹⁸

Without a definite forum through which to address their industrial disputes, most of the workers were dismissed for taking part in the strike, and to date some are yet to receive their benefits. New and reinstated employees continue to toil under the watchful eye of production supervisors.

¹⁹³ n 23 above, sec 5(2).

¹⁹⁴ n 184 above.

¹⁹⁵ n 184 above.

¹⁹⁶ K, Opada 'Investor Dollar versus Workers Rights' (2003) *Global Policy Forum* available at <www.globalpolicy.org> (accessed on 1 October 2007).

¹⁹⁷ n 184 above.

¹⁹⁸ n 196 above.

Although some EPZs have allowed their workers to join TTWU, majority of them remain resistant to trade union activities leaving many of the EPZs workers unrepresented. It has been difficult for unrepresented EPZs workers to air their grievances because of various handles.

First, the Trade Dispute Act promotes only tripartite arrangement of Government, COTU and Federation of Kenyan Employers (FKE).¹⁹⁹ The Act also anticipates a situation where all the employees are represented²⁰⁰ thereby ignoring the majority of employees not represented by these organisations and specifically excludes workers who are not represented by any organisation.²⁰¹

In addition, an application to the Industrial Court²⁰² can only be made by members of a trade union. Employees who are not members of a trade union are therefore disadvantaged since individual labour disputes are dealt with by the ordinary courts. Not only do they suffer from stiffer 'formality and rigidity of procedure in the ordinary courts, they are also not entitled to reinstatement as this can only be granted by the Industrial Court.'²⁰³

Section 17 of the Trade Disputes Act stipulates that the award or decision of the Industrial Court shall be final. Whereas the policy objective of this provision was ensuring finality in trade dispute settlement, this policy runs counter to the spirit and intent of the Kenya Constitution. The Kenyan Constitution establishes the High Court of Kenya as a superior court of record with supervisory powers over all subordinate courts in Kenya. The provision of Section 17 to the Trade Disputes Act seeks to create an autonomous Industrial Court not subject to the supervisory powers of the High court. This is unconstitutional.

The disregard of the right of EPZ workers to join or form trade unions or to enjoy the protections of the Trade Union Act, has led to poor and exploitative working

¹⁹⁹ Order 2 (a) of the Trade Disputes (Establishment of Industrial Court) Order established under the Trade Disputes Act.

²⁰⁰ Rule 11(1) (iii) of the Industrial Court (Procedures) Rules established under the Trade Disputes Act.

²⁰¹ n 85 above.

²⁰² The industrial Court is established under the Trade Disputes Act.

²⁰³ n 23 above, sec 15.

conditions. Accordingly, Kenya has failed in guaranteeing the freedom of association as provided for under the Kenyan Constitution and the international human rights mentioned above.

The new Labour Relations Act, 2007 essentially maintains the *status quo*. The Act does not provide for the freedom to register and join trade union of one's choice. Further, the Act ignores workers in the informal sector vis-à-vis unionisation.

3.3.2 Right to work under safe and healthy conditions

This right is recognised in various international human rights instruments to which Kenya is a party²⁰⁴ as well as national legislation. This right places an obligation on the employer to provide safe drinking water, resting place, sick leave, protective clothing, as well as good ventilation, drainage and sanitation.²⁰⁵

Section 50(1) of the Factories Act requires companies to provide and maintain a readily accessible first-aid box or cupboard. Under Section 50(4) of the Factories Act:

Each first-aid box or cupboard shall be placed under the charge of a responsible person, who shall always be readily available during working hours, and a notice shall be affixed in every workroom stating the name of the person in charge of the first-aid box or cupboard provided in respect of the room.

The Employment (Sanitary) Rules²⁰⁶ and section 18(1) of the Factories Act require employers to avail sufficient, safe and clean sanitary facilities. Section 18(1) of the Factories Act states that:

..... where persons of both sexes are or are intended to be employed (except in the case of factories where the only persons employed are members of the same family dwelling there), such conveniences shall afford proper separate accommodations for persons of each sex.

The EPZs were, until 2003, generally exempted from the provisions of the Factories Act. The effect of this exemption was that, investors at the EPZs had no obligation to provide such facilities, adhere to health standards or ensure safety at the EPZs. It

²⁰⁴ Art 23(1) of the UDHR; Art 7(b) of the ICESCR.

²⁰⁵ n 25 above, Part IV.

²⁰⁶ Legal Notice No. 159 of 1977.

also meant that the government inspectors from the Ministry of Labour could not access the EPZs to inspect and verify that the above facilities were provided. In addition, the limited number of government inspectors means that even after the exemption was lifted, the EPZs still remain not inspected.²⁰⁷ Accordingly, workers at the EPZ continue to work under unsafe and unhealthy conditions.

According to WRC, some of the claims against Sino Link included the fact that it locked its workers inside the factory during shifts of late night and overnight overtime or in certain production areas. This behaviour is as a result of 'paranoia among employers who fear theft on the part of the workers'²⁰⁸ and has created a potential for grave medical emergencies and fire hazards. WRC further states that Sino Link did not also provide or brief its employees with information on possible escape routes to be used in case of an emergency.

In addition, Sino Link was also accused of not providing transportation to employees who work late, that medical personnel and equipment in the factory are not sufficient, that toilets are poorly maintained and place workers at the risk of contracting diseases. In addition, Sino Link did not provide its workers with protective clothing contrary to section 53 of the Factories Act. According to WRC, masks and uniforms were 'typically provided only in advance of scheduled visits from buyers.'²⁰⁹ When uniforms were provided in such cases, the costs of these items were deducted from workers' wages.²¹⁰

The failure to provide safe and healthy conditions of work for workers was a general problem at the EPZs and not just Sino Link. According to KHRC,

Many factories in the EPZs have their own clinics where employees are sent to be treated for minor illnesses. In many cases it materialised that these clinics are run by untrained staff and are not able to meet demand. Most workers are not given sick leave and they have to buy medicines prescribed by the factory clinics. Workers also reported that even when injured at work many factories deduct hospital transport costs from their salaries. There were many

²⁰⁷ n 60 above.

²⁰⁸ n 60 above.

²⁰⁹ WRC 'Preliminary Report: Worker Rights Consortium Inquiry into Alleged Labour Rights Violations at Rising Sun Kenya EPZ' (2006) available at <<http://www.workersrights.org/Freports/Rising%20Sun%20Preliminary%20Report%2011-13-06.pdf>> (accessed on 24 October 2007).

²¹⁰ n 60 above.

reports of poor sanitary conditions in the factories and a lack of protective equipment or training for handling chemicals and machinery. many women complained that factory clinics carried out compulsory pregnancy tests and then laid off all who were found to be pregnant..... As most factories do not provide any form of statutory maternity leave in women take the absolute minimum time off but still have no security that they will get their jobs back. No factories have any form of child care provision adding to the burden placed on women with children.²¹¹

With the exemption removed in 2003, it is still not clear the extent to which the provision of the Factories Act have been implemented at the EPZs or whether the government inspectors have verified that the required facilities have been installed in the EPZs are required by the law. What is clear is the fact that, the Factories Act is ineffective in protecting the labour rights of the EPZ workers as strict enforcement mechanisms do not exist within the Act.

3.3.3 Freedom from unlawful dismissal

In 2006, Rising Sun dismissed approximately 1,270 workers. According to WRC, ‘the allegations of unlawful terminations concerned a series of events that occurred between May 30 and 1 June 2006.’²¹² It all started when a production officer assaulted a female employee after an order was not completed on time. Despite the supervisor being reported to the Labour office as well as to the Kenya Police, nothing was done to him. This prompted the workers at the EPZs to demonstrate, a fact that led to dismissal of all the workers who were suspected to have participated in the strike. The dismissed workers were not given any notices or the reasons for their dismissal as required by law.

Under the Employment Act, employers are to provide to the worker they intend to dismiss, a letter containing the reason for the dismissal. Prior to dismissal, workers must be provided the opportunity to hear and answer charges against them.

At the time of the mass dismissal, Rising Sun neither provided a letter of dismissal or an explanation to workers as to the reason for their dismissal nor did it provide workers with an opportunity to hear or answer charges against them. In addition, Rising Sun did not provide any opportunity for workers to have union representation

²¹¹ n 209 above.

²¹² n 209 above.

in addressing any alleged inappropriate actions. Instead, it simply pinned a notice on the factory gate, addressed to 'all unionized former employees of Rising Sun Kenya,' stating that the workers were summarily dismissed, without indicating any reason for the dismissal.

When the matter was brought to the Industrial Court, Rising sun alleged that the workers had been violent and destroyed property hence the reason for their dismissal. The Industrial Court declared the termination unlawful, based on the issues raised above, and ordered Rising Sun to reinstate the workers it had unlawfully dismissed. Rising Sun has so far ignored the Industrial Court order. It has neither reinstated the unlawfully dismissed workers nor compensated them. Instead, it opted to hire replacement workers under the status of 'casual employment.'²¹³

The new Employment Act 2007 introduces the concept of unfair termination. It defines what amounts to unfair termination,²¹⁴ lists grounds that do not be constitute reasons for dismissal²¹⁵ and generally prohibits unfair termination.²¹⁶

However, its section of 47 forbids advocates from representing a party in the proceedings before a labour officer. In addition, like in the current Act, section 50 of the Employment Act 2007 denies the Subordinate Labour Courts or the National Labour Court the power to require employers to reinstate employees whose contracts have been unfairly terminated. Accordingly, these sections should be amended to accord workers the necessary protection of law.

3.3.4 Working hours

According to Section 5 of the Regulation of Wages (Tailoring, Garment Making and Associated Trades) Order,²¹⁷ the general working hours are 52 per week, but the normal working hours usually consist of 45 hours of work per week, Monday to Friday 8 hours each, 5 hours on Saturday. Collective agreements may modify the working

²¹³ n 209 above.

²¹⁴ Sec 45(2) of the Employment Act, 2007.

²¹⁵ Sec 46 of the Employment Act, 2007.

²¹⁶ Sec 45(1) of the Employment Act, 2007.

²¹⁷ Legal Notice No. 169 of 1972.

hours, but generally provide for weekly working hours of 40 up to 52 hours per week. Under section 8 of the Employment Act, every employee is entitled to at least one rest day in every period of seven days.²¹⁸ Any work that workers perform beyond the regular workweek is overtime. All overtime work must be carried out voluntarily by each employee and compensated at a rate of 1.5 the normal hourly rate.

The maximum working hours per week are not adhered to due to the challenge of targets based on 'very tight delivery deadlines imposed by the buyers.'²¹⁹ The number of hours worked depends on the workload.²²⁰ The workers at the EPZs are usually forced to work long hours and are paid poorly. According to a report by WRC, workers at Sino Link complained of having been forced to perform overtime work on a frequent basis, and that this work was either under-compensated or uncompensated, in violation of Kenyan law. The report by WRC reveals that:

.....workers [at Sino Link] were unlawfully required to perform mandatory overtime in order to complete their production quotas, typically for one to two hours per day; that workers were unlawfully denied payment for these extra hours, as their supervisors would clock-out the workers' time cards prior to the extra hours; and that workers were also often made to work on Sundays, without payment. Finally, our investigation found that expatriate factory management had on repeated occasions addressed workers with demeaning language.²²¹

To the extent that overtime is unpaid, forced overtime can be likened to forced labour and therefore constitutes a direct violation of the Kenyan Constitution,²²² country's labour laws, especially the Regulation of Wages and Conditions of Employment Act which provide for payment for all overtime hours worked, as well as international human law.²²³

High poverty levels and the reality in Kenya that the existing laws do not accord EPZ workers the required protection have made the workers persevere and submit to

²¹⁸International Labour Organisation 'National Labour Law Profile: Kenya' (2006) available at <<http://www.ilo.org/public/english/dialogue/ifpdial/info/national/ken.htm#1#1>> (accessed on 1 October 2007).

²¹⁹ n 60 above.

²²⁰ n 17 above, pg 30.

²²¹ n 184 above.

²²² n 20 above, sect 73.

²²³ Art 8 of ICCPR, ILO Conventions 29 and 105 relating to abolition of forced labour. See also Art 5 and 24 of UDHR.

increasingly poor and exploitative working conditions, 'knowing very well from constant reminders of employers that there are many out there more than willing to take up their positions.' The fear of loss of employment in these harsh economic times in Kenya has led to a culture of silence among workers. As a result, the working conditions have been on the downwards trend over the years.²²⁴

According to KCHR:

.....the average monthly wages in EPZs range from Kshs.3,800 for basic tasks including sewing and tailoring tasks, to about Kshs.6,000 for jobs such as quality control. This does not even take into consideration the poverty threshold for a family and many of the workers have insufficient to provide for the basic food, housing, and medical needs of their immediate families....In order to supplement their income workers often rely on being paid overtime. However many reported that despite the fact that they were frequently forced to work overtime they often do not get paid for it.

3.3.5 Freedom from discrimination and sexual harassment

Women at the workplace usually experience many problems and forms of discrimination ranging from 'sexual harassment, denial of leave to nurse a sick baby and dismissals when the women become pregnant, discrimination in remuneration to very long hours of working in situations injurious to their health and well being.'²²⁵ The situation is compounded by the lack of ways of channelling complaints about these problems and by the fact that the workplace is an area that has traditionally been male dominated, especially at the higher managerial levels where policy issues are discussed.

This is the case in the Kenyan EPZs. According to KHRC, EPZs prefer employing women as opposed to men. Their arguments are that women are 'easier to work with, patient, keen and careful hence less mistakes and rejects,' unlike men who are 'aggressive, easily bored and always looking for trouble.'²²⁶ . KHRC further stated that preference is given to 'young, unattached, poor and illiterate women who will

²²⁴ n 17 above, pg 20.

²²⁵ Karega, R 'Violence against Women in the Workplace in Kenya: Assessment of Workplace Sexual Harassment in The Commercial Agriculture and Textile Manufacturing Sectors in Kenya' (2002) *International Labour Rights Fund* available at<<http://www.laborrights.org/projects/women/KenyaReportFinal-5-14.pdf>> (accessed on 1 October 2007).

²²⁶ n 17 above, pg 8. See also n 184 above.

easily give in to work-based exploitation and accept low pay.²²⁷ Accordingly, the number of women at the EPZs account for over 70% of the workforce.²²⁸

Despite their large numbers, many women experience sexual harassment at the EPZs. This has been caused by various factors ranging from the fact that the management of companies are male dominated, economic situation of the women workers to job insecurity.²²⁹ The wages paid at the EPZs are insufficient and only 'perpetuate poverty and accentuate women's vulnerability to sexual and psychological violence.' This vulnerability is what makes most female EPZ workers yield to workplace sexual harassment 'as it is considered as a strategy for safeguarding one's job and as a way of earning extra money.'²³⁰

Sexual harassment takes various forms. The most common form of harassment is sexual coercion, whereby women are pressured to have sex with managers and supervisors in exchange for promotion, retention, placement in less labour intensive sections of the production line, salary increments, or bonuses.²³¹ In describing how supervisors in the EPZs make sexual advances at women, Karega states that:²³²

.....supervisors request women workers to remain behind after work, either to perform extra work or because they claim there is something wrong with their work..... a supervisor retains the check-in card of the female worker they wish to sexually exploit. By retaining the card, the female worker is compelled to go to the supervisor to retrieve it by the end of the day. Supervisors are also known to hold back overtime pay of the women they wish to abuse. Thus when the worker goes to ask for this pay at the end of the day, the male supervisor tells the female worker that he would like to have a sexual affair with her. Once the woman goes to the supervisor's office to check what happened to her pay, then the supervisor expresses his sexual intent to the woman. Should the woman deliberately refuse, then the pay is retained..... Supervisors also use the excuse of poor work of women workers they intend to abuse. In this case, a woman would be asked to remain after work. It is during this time that the supervisor tells her that he has a sexual interest in her.

²²⁷ n 17 above, pg 6.

²²⁸ n 17 above, pg 38.

²²⁹ n 228 above.

²³⁰ n 225 above.

²³¹ n 228 above.

²³² n 225 above

Female supervisors are also sexually abused by their managers or their male colleague. The women who resist unsolicited and unwanted sexual advances are usually dismissed, given hard work to do, forced to work for extra hours with no payment for the overtime, constantly accused of doing poor job, registered as absent from work even when they have worked or even lose a promotion or salary increment.²³³ WRC report on Sino Link also indicates that women are also addressed in abusive and degrading language.

Although some female workers consent to these sexual advancements due to the material benefits they bring, most women take them to be a severe violation of their rights and inherent dignity. According to Jane Dwasi:

Harassment traps women in situations where they are helpless and desperate. Sexual harassment is demoralizing. It seriously undermines the capability of a woman to efficiently perform her work in the place of employment, and takes away her self-confidence and motivation.²³⁴

It is unfortunate that the existing labour laws do not have express provisions prohibiting sexual harassment or discrimination. For instance, both the Employment Act and the Regulation of Wages and Conditions of Employment Act do not address gender inequality and workplace violations such as sexual harassment and discrimination.

Although, the Sexual Offences Act²³⁵ provides for sexual harassment, it only envisages sexual harassment in public offices committed by public officers. It does not, therefore, prohibit sexual harassment by private persons in private domain where the vice is rampant. It can therefore be said not to accord the necessary protection to persons working at the EPZs.

In addition, it was only in 1997 that the Kenyan Constitution was amended to include a specific prohibition of discrimination on the basis of gender.²³⁶ The Kenyan Constitution does not however expressly prohibit sexual harassment. One can only

²³³ n 183 above..

²³⁴ n 183 above..

²³⁵ Act No. 6 of 2006.

²³⁶ Section 9 of Act No. 9 of 1997.

rely on the provision relating to prohibition of inhuman and degrading treatment or punishment²³⁷ to bring a claim on sexual harassment.

The new Employment Act 2007 addresses the problem of discrimination²³⁸ as well as sexual harassment.²³⁹ It defines what amounts to sexual harassment and requires employers, where their employees are twenty or more in number, to issue a policy statement on sexual harassment upon consultation with the employees or their representative.²⁴⁰ However, the Act does not provide for penalty, fine or imprisonment, should one be found guilty of sexual harassment.

3.3.6 Improper use of casual employment status

A casual worker is defined in section 2 of the Employment Act, as 'an individual the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.' Engagement of workers on casual terms for more than three consecutive months without transition into permanent employment is therefore illegal.

However, it should be noted that the Employment Act merely describes casual workers and mentions situations in which they cannot benefit only rather than entrenching their rights. The only recognizable right of a casual worker is embodied in Section 5 (2) (a) wherein a casual employee is entitled to his wage at the end of the day.

According to the WRC report on Sino Link, while workers are given recruitment letters showing that they are casual workers, they are not paid at the end of the day as required by law.²⁴¹ Instead they are paid once every fortnight or 'on a convenient date mutually agreed upon'. The company also 'reserves the right to transfer you to other department for the factories' and the 'right to change or modify the contract

²³⁷ Sec 74 of the Kenyan Constitution.

²³⁸ Sec 5 of the Employment Act, 2007.

²³⁹ Sec 6 of the Employment Act, 2007.

²⁴⁰ Sec 6(1) and sec 6(2) of the Employment Act, 2007.

²⁴¹ Section 5 of the Employment Act.

without assigning any reason for such changes or modifications'. In most cases such changes or modifications amount to termination.²⁴²

The WRC also noted that Rising Sun hired production workers on casual status.²⁴³ This system was adopted after June 2006 and was to replace workers who had gone on strike demanding the recognition of their trade union as well as improvement of conditions of work. The new workers, according to WRC, 'have been employed on casual status for well over three months, representing a clear violation of the law. The workers are in effect regular and permanent employees, but they are deprived of the legally mandated benefits accorded regular employees.'²⁴⁴

It should be noted that the problem of permanent casual status is not confined to Rising Sun and Sino Link. Indeed, the practice has been identified as a key and frequent means through which employees rights are violated in Kenyan EPZs. According to the KHRC:

Casual workers in all EPZ factories are issued with punch cards for at least one month. If their services are not required the following day, they are just informed at the lunch break to see the finance officer by the end of the day, and not to come the following day. They surrender the punch card, and if there is another time, they have to apply for employment afresh. After such abrupt end of engagement, they are often told to come to the gate every morning to find out if there is work.....in most instances, much casuals work continuously for several months, even years....

Casual workers are not unionisable and hence difficult for them to access the courts since there are no rights attached by the Environment Act to their employment. This explains the scarcity of cases against the EPZs.²⁴⁵ In addition, the national minimum wage, which is reviewed on a regular basis by the Minister of Labour and Human Resource Development (MLHRD), does not improve the conditions of casual or piece workers as they fall outside the formal employment regime.²⁴⁶ Casual workers, by virtue of their nature of employment, do not access the benefits available to

²⁴² n 184 above.

²⁴³ n 209 above.

²⁴⁴ n 209 above.

²⁴⁵ The casual workers lack a trade union to represent their grievances and they also lack contracts on which to base their claims. Their low wages ensure that they are unable to afford legal representation.

²⁴⁶ n 85 above, pg 11.

employees employed on a permanent basis. Such benefits include medical cover, annual leave and statutory deductions.

The justification given by the investors or employers at the EPZs for hiring casual workers is that it is a good way of identifying and controlling ‘trouble makers’.²⁴⁷ The EPZs have also argued that, by the nature of their business which is highly depended on orders from buyers, it is very difficult to hire employees on a permanent basis because of the uncertainties surrounding the placement of orders.

The new Employment Act, 2007 makes laudable provisions regarding the conversion of casual labour to a term of contract. The Act provides for conversion ‘where a casual worker works for a period or a number of working days which amount in the aggregate to the equivalent of three months or more;’²⁴⁸ or ‘which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months.’²⁴⁹ Under the Act, a casual worker is also entitled to one paid rest day after a continuous six day working period and such rest day or any public holiday.

3.4 What recourse do Kenyan EPZ workers have at the international level?

We have so far established that the inadequacies in the Kenyan legal system mean that, EPZ workers are left without the necessary legal protection at the national level. In determining whether the EPZ workers have recourse at the international level, it is necessary to examine whether, there is state responsibility on the part of Kenya.

3.4.1 General state responsibility under international law

The International Law Commission (ILC), in its Draft Articles on Responsibility of States for Internationally Wrongful Acts (the Draft Articles), provides that ‘every internationally wrongful act of a state entails the international responsibility of that state.’²⁵⁰ The Draft Articles further provides that a state can only be held responsible

²⁴⁷ n 184 above.

²⁴⁸ Section 9(1)(a) of the Employment Act, 2007.

²⁴⁹ Section 9(1)(b) of the Employment Act, 2007.

²⁵⁰ Art 1 of the

when two elements have been proved namely, that 'the conduct is attributable to the state and that it constitutes a breach of international obligation of the state.'²⁵¹

An action or omission can be attributed to a state either directly or indirectly. The responsibility is direct if it is done by an organ of state;²⁵² by a person or entity not an organ of state but empowered to exercise elements of governmental authority;²⁵³ by a person or entity acting on the instructions of, or under the direction of the state²⁵⁴ and extends beyond official acts performed within the scope of the duty.²⁵⁵ The responsibility is indirect where a state fails to prevent human rights violation by non-state actors, what would be called 'liability by omission'.

Courts have established that, it is no defence to a violation of international law that the conduct in question is permitted by the municipal law of the defendant state.²⁵⁶ As Judge Lauterpacht stated in the *Norwegian Loans Case*.²⁵⁷

National legislation...may be contrary... to international obligations of the state. The question of conformity of national legislation with international law is matter of international...it is not enough for a state to bring a matter under the protective umbrella of its legislation..... in order to shelter it effectively from any control by international law.

The state responsible for an internationally wrongful act is under an obligation to cease the wrong,²⁵⁸ if it is continuing, and to offer assurances and guarantees of non-repetition.²⁵⁹ Secondly, the responsible state is under an obligation to make full reparation for the injury caused by the wrongful act.²⁶⁰ In the *Chorzow Factory case*, the Permanent Court of International Justice (PCIJ) declared:

²⁵¹ Art 2 of the Draft Articles.

²⁵² Art 4 of the Draft Articles.

²⁵³ Art 5 of the Draft Articles.

²⁵⁴ Art 8 of the Draft Articles.

²⁵⁵ Art 7 of the Draft Articles.

²⁵⁶ n 251 above.

²⁵⁷ 1957 International Court of Justice Reports 9, 37.

²⁵⁸ Art 30 (a) of the Draft Articles.

²⁵⁹ Art 30(b) of the Draft Articles.

²⁶⁰ Art 31 of the Draft Articles.

The essential principle contained in the actual notion of an illegal act....is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish a situation which would in all probability, have existed if the act had not been committed. Restitution in kind, or if this not possible, payment of a sum corresponding to the value which restitution in kind would bear...²⁶¹

The Draft Article recognises three kind of reparation: restitution, compensation and satisfaction.²⁶² Compensation covers 'any finally assessable damage including loss of profits insofar as it established.' Compensation also includes non material damage, such as pain and suffering, mental anguish and humiliation. Satisfaction as opposed to compensation or restitution consists of an acknowledgement of the breach in international law, an expression of regret or a formal apology.

3.4.2 State responsibility for human rights violations

Although private actors are mandated to ensure the protection of human rights and can therefore be held liable for their violation,²⁶³ the protection of human rights remains exclusively the responsibility of states. International human rights law places four levels of duties on the part of the state. These include the duty to respect, protect, promote, and fulfil human rights. These obligations entail a combination of negative and positive duties.²⁶⁴ The African Commission on Human and Peoples' Rights (African Commission) stated in the case of *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria (SERAC Case)* that:

the obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights....the obligation to protect ...requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an *effective* interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.the obligation of the State to promote the enjoyment of all human rights....[requires]....the State [to] make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.²⁶⁵

²⁶¹ PCIJ, Series A, No.17, 4 at 47 (1928).

²⁶² Art 34 of the Draft Articles.

²⁶³ See United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.

²⁶⁴ ACHPR Comm. No. 155/96 (2001).

²⁶⁵ n 254 above, para 44.

According to Article 1 of the African Charter on Human and Peoples Rights (ACHPR) governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties. This has been referred to by many authors as the 'due diligence principle'.²⁶⁶

The duty to protect requires states to take a positive action in fulfilling their obligation under human rights instruments. This was the position in the case of *Velásquez Rodríguez v. Honduras*²⁶⁷ where the Inter-American Court of Human Rights held that when a State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens.

3.4.3 Responsibility of Kenya for violation of labour rights of EPZ Workers

Having established that labour rights amounts to human rights, and that state responsibility for violation of internal obligation is present if the act or omission can be attributed to state and that the act or omission amounts to an obligation of international law, Kenya's legislation do not accord the EPZs workers the necessary protection. In addition, the Kenyan Government has failed to respond when the workers sought its indulgence. The violations taking place at the EPZ can therefore be attributed to the Kenyan Government.

It is not enough that the Kenyan Government has enacted into law bills that address labour concerns or that it has provided enforcement agencies. The fact that the Kenyan Government has failed to ensure the implementation of human rights standards geared at protecting the EPZ workers makes it liable.

Article 16 of the Draft Articles states that, 'there is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation.' In this case, Kenya has failed to meet its obligations under both national and international human rights law. In addition, the Kenya

²⁶⁶ S. Fariar 'State Responsibility for Human Rights Abuses by Non-State Actors' (1998) 92 *American Society for International Law and Proceedings* 299.

²⁶⁷ Judgment of July 19, 1988, Series C, No. 4

Government has failed to provide local remedies which EPZ workers could invoke on claim of violation of labour rights.

Generally, the plea of necessity 'precludes the wrongfulness of an act which otherwise does not conform to a state's international obligations.'²⁶⁸ The Kenyan Government may argue that it lacks resources to monitor and enforce labour rights or that being not a developing country it had no choice but to offer incentives in EPZs to attract investment and subsequently improve the condition of living of its citizens. This plea would not succeed because, this study has already proved that the EPZs have been of no benefit to Kenya and their sustenance is not justified. In addition, the Kenyan Government has not justified why the EPZ workers are given less legal protection as compared to the rest of the labour force. Such discriminatory treatment can not be justified as out of necessity. Moreover, the existent of other investors outside the EPZs is an indication that incentives offered at the EPZs are not the only factors that investors consider. Finally, the Kenyan Government has deliberately allocated less funds to the MOLHD accounting for the low number of government inspectors.

3.5 Conclusion

This Chapter has demonstrated that, economic growth does not necessarily amount to economic development of the workers. The Kenyan EPZs have been of negligible benefit to Kenya as a host country and have instead led to mass violation of labour rights.

Kenya's inability or failure to intervene at the EPZs makes it liable at the international level. The situation of at the EPZs has been aggravated by the existence of weak labour laws which the Kenyan government is reluctant to enforce at the EPZs.

Some of the new statutes, for example the Labour Relations Act 2007, have borrowed heavily from existing statutes which are themselves inadequate.

²⁶⁸ Art 25 of the Draft Articles.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 Conclusion

The previous Chapters have demonstrated the integral link between trade liberalisation and the enjoyment of human rights. They have also acknowledged that, although world trade system produces employment for many workers in the developing countries, the same may have detrimental effect on the enjoyment of labour rights, if not properly regulated. They have also demonstrated that the weakness of the Kenyan labour laws have also contributed to the exploitation and suffering of EPZ workers.

4.2 Recommendations

In order to deal with the current menace of labour rights violations, responsibility lies with various sectors ranging from the Kenyan Government, the consumers of EPZs' products, donor community, the EPZs, the civil society and the workers at the EPZs.

Having established Kenya's responsibility for violation of labour rights of EPZ workers, a complaint against Kenyan Government should be lodged at the African Commission. The African Commission serves as the right avenue because, the African Charter being one of the instruments it enforces, recognises labour rights and allows anybody to lodge a complaint before it. The African Commission is empowered to enforce other international human rights instruments that Kenya has ratified.

Accordingly, the complaint should seek from the African Commission for orders that: the Kenyan Government be required to stop the continuance of the labour rights violations at the EPZs; that it amends its labour laws and policies to be in conformity with its obligation under international human rights law. This should include the adoption of a new constitution, implementing the new statutes with amendments where necessary as well as ratifying the 1948 ILO Convention No. 87 relating to the Freedom of Association and Protection of the Right to Organise.

The African Commission should further require the Kenyan Government to compensate all workers who were unfairly dismissed while the government never intervened. Increased resource allocation to the MOLHD should be demanded to ensure that EPZs are frequently inspected for compliance with both national and

international law. The African Commission should also require the Kenyan Government to report on the steps it intends to take to rectify the current situation at the EPZs. This should be followed by a subsequent report on the extent of the implementation of the suggested steps.

Further, the Kenyan Government policy towards investment should shift its focus from protecting investors to addressing issues in the EPZ sector that touch on poverty reduction, gender equity, sustainable development and corporate accountability. These efforts should be embedded on the principle of marketing Kenya as a destination of ethical business.

The consumers of EPZs' products must demand that the products they consume are produced without undue abuse of workers rights; that they have been produced in ethical working conditions. The buyers also have a responsibility of implementing realistic deadlines so as not to exert unnecessary pressure on the EPZ. Such unrealistic deadlines explain why the statutory working hours are not adhered to.

Based on their increased power and influence at the global trade, the Multinational Corporations have a role that should be explored. Such corporations should be used to exert pressure on the Kenyan Government to ensure there is compliance of labour rights. For instance, since the Kenyan Government relies heavily on financial and technical aid from the World Bank and IMF to carry out its development programmes, those institutions should require adherence to certain labour standards as a prerequisite for their lending activities and award of contracts.

The ongoing discussions by East African Countries on the harmonisation of the labour laws regimes and employment policies would ensure that the existing labour laws are not weakened and guaranteed the rights of workers.

The Kenyan Government should re-examine the incentive package accorded to the EPZs vis-à-vis the benefits from such investments. The objectives of establishing EPZs should be set as benchmarks, and the Kenyan Government should use them in deciding whether or not to grant, continue or withdraw incentives. Only those EPZs that achieve the set objectives should benefit from the incentives. The EPZs should also be required to adopt and enforce codes of conduct that provide fair wages and fair working conditions for workers.

Finally, the workers and the civil society organisations should monitor the adherence of labour rights. They should report violations to the relevant authorities and the general public should be made aware of it.

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