

Trade Agreements, Business and Human Rights: The case of export processing zones



Andrew Lang

Department of Law, London School of Economics

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Corporate Social Responsibility Initiative

The Corporate Social Responsibility Initiative at the Harvard Kennedy School of Government is a multi-disciplinary and multi-stakeholder program that seeks to study and enhance the public contributions of private enterprise. It explores the intersection of corporate responsibility, corporate governance and strategy, public policy, and the media. It bridges theory and practice, builds leadership skills, and supports constructive dialogue and collaboration among different sectors. It was founded in 2004 with the support of Walter H. Shorenstein, Chevron Corporation, The Coca-Cola Company, and General Motors.

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For Further Information

Further information on the Corporate Social Responsibility Initiative can be obtained from the Program Coordinator, Corporate Social Responsibility Initiative, Harvard Kennedy School, 79 JFK Street, Mailbox 82, Cambridge, MA 02138, telefax (617) 496-5821, email CSRI@ksg.harvard.edu.

The homepage for the Corporate Social Responsibility Initiative can be found at: <http://www.hks.harvard.edu/m-rcbg/CSRI/>.

EXECUTIVE SUMMARY

Since at least the 1980s, there has been a rapid expansion in the number and size of Export Processing Zones (EPZs) across many parts of the developing world. This proliferation has been of some concern to many within the human rights movement, primarily because of some evidence of low and deteriorating labor standards within these zones. Successive reports on the outcomes of EPZs published by international organizations such as the ILO, the OECD and the World Bank, show a mixed overall picture of the impact of EPZs on wages, working conditions, rights of association and gender discrimination in the workplace – but also provide evidence of some egregious examples of serious violations of these and other fundamental labor rights in some circumstances. These reports provide a similarly mixed picture of the economic outcomes of EPZ experiments, in terms of export development, employment, dynamic spillover effects, and growth.

The human rights impacts of EPZs include more than labor issues. Where EPZ projects attract large numbers of migrant workers, the availability of essential facilities – housing, water, electricity, medical and educational services – can fail to keep pace with demand. The movement of migrant workers can also lead to the rapid introduction and spread of communicable diseases, with consequent impacts on the right to health. The sheer scale of some EPZ projects can cause significant disruption to local communities during the initial construction phase. The rights to life and health of individuals living and working in the vicinity of EPZ projects may also be affected by any environmental damage caused by economic activity within the EPZ. There is also some anecdotal evidence of emerging human rights issues relating to the trend towards the private management and operation of EPZs.

There are still significant gaps in the available data on the human rights impacts of EPZ projects. In particular, there is a need for additional research on human rights impacts of corporate activity in EPZs, outside the employment relationship, and beyond the issues specified in the corpus of internationally recognized labor rights. Adequate data on these broader issues – relating to health, housing, social dislocation as well as a range of civil and political rights – is lacking, in large part due to the labor rights emphasis of those institutions and NGOs which have traditionally focused on EPZs. Host countries of EPZs should be encouraged to establish institutionalized monitoring mechanisms to help gather data on the human rights impacts of EPZs. These monitoring mechanisms should be adequately staffed and resourced, and should cover the entire gamut of internationally recognized human rights, including, in appropriate circumstances, rights-related environmental effects.

While trade liberalization can drive improvement in human rights conditions, it does not suffice unless it is accompanied by *flanking regulation* by the host state, which puts in place adequate social protections for impacted individuals and communities, and ensures an equitable distribution of the gains from trade. In the EPZ context, perhaps the most obvious example of such flanking regulation is labor legislation to implement

internationally recognized labor rights, alongside adequate mechanisms of investigation, adjudication and punishment to make these legislative frameworks effective. In addition, strengthened labor market regulation should in most cases also be accompanied by stronger and more elaborate environmental standards and monitoring. Host states should also carefully consider and plan for the infrastructural (health, education, water, sanitation, housing) needs of the workers employed in the EPZ as well as surrounding communities. All of these measures ought to be accompanied by well-resourced, careful, ongoing monitoring of the human rights situation in and around EPZs, and updated and revised where appropriate. These flanking policies should be embedded in the design of an EPZ project at an early stage, and be treated by host states as integral parts of the project.

Importantly, however, the effective integration of human rights concerns into trade policy decision-making means more than just the addition of flanking social regulation. For many human rights advocates, it also means that human rights are posited much more explicitly and directly as the ultimate aim of all economic decision-making. In the EPZ context, this may require that project developers explicitly assess in advance the human rights implications of the choices that confront them – and make those choices on the basis of those human rights assessments. Furthermore, policy-makers could be required to identify and explain in some detail the precise human rights improvements which a particular EPZ project is expected to bring – in the short term and long term, and for particular groups and for the population as a whole. Mechanisms could in appropriate circumstances be established to ensure a degree of public accountability in respect of these goals.

In his most recent report to the UN Human Rights Council, the Special Representative of the UN Secretary-General on Business and Human Rights (Special Representative), Professor John Ruggie, reiterated the need to study the constraining effect which trade agreements may have on the ability of states to implement their human rights obligations, including their duty to protect individuals from corporate human rights abuses [Special Representative's 2009 report to the Human Rights Council, described further below]. The concern is a real and relevant one, particularly given the constraints which international trade law can place on other aspects of states' activity relevant to their human rights obligations. However, in the specific context of policies to address human rights issues in EPZs, this problem appears less serious. It is hard to imagine any clear and unambiguous case of any measure required by the host state's duty to protect, which is prohibited under WTO law.

Another question which arises is how to create an international environment which encourages, facilitates, and, where necessary, provokes host states to do more to fulfill their duty to protect in respect of human rights abuses occurring in and around EPZs. Specifically, some have argued that trade agreements may be a useful tool in this regard, and there has been considerable pressure to include labor issues in trade agreements in a variety of different ways. There has been considerable debate within the human rights community itself about the appropriate place of human rights conditionality in trade relations. On the one hand, human rights law ought to discourage

the use of unilateral trade sanctions, where they are imposed for purely protectionist purposes, or where they have an unjustifiable negative incidental impact on human rights, or where they are targeted so broadly as to unjustifiably affect non-violating firms operating out of EPZs. On the other, trade conditionality for human rights purposes can be a useful tool, provided it is accompanied by institutions and forums for routinised dialogue with the exporting state, is imposed as a last resort after more cooperative solutions have failed, is as targeted as possible, and is based on multilateral standards.

Looking forward, three issues in particular present themselves. First, the key challenges for human rights in EPZs seem primarily to be at the level of implementation rather than normative development. One of the primary tasks for the international human rights movement, therefore, must be to assist in generating the governance capacity in many parts of the developing world to address human and labor rights issues in the context of EPZs before they arise. Second, as many developing countries redesign their EPZ regimes to ensure compatibility with WTO law over the coming decade, it will be important to ensure that human rights voices are adequately represented in debates about the strategic direction of EPZ policy, and that EPZ regimes are re-embedded within new and stronger domestic governance regimes which pay closer and more systematic attention to human rights concerns. Third, the trend towards private sector management of EPZ should be closely monitored, as it may present particular human rights challenges in some contexts.

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1. INTRODUCTION

Since at least the 1980s, there has been a rapid expansion in the number and size of Export Processing Zones (EPZs) across many parts of the developing world. In their typical form, EPZs are geographically delimited areas created by a host state, which offer certain economic incentives to export-oriented businesses to physically locate within the zone. Broadly speaking, the purpose of creating such zones is to boost local employment, generate additional export income, diversify the host country's export base, and to facilitate industrial upgrading through technology transfer and foreign investment. In recent decades, they have been used by many developing countries to help manage a larger strategic transition from a highly protected, inward-oriented domestic economic policy, to a liberalized, globally integrated, outward-oriented domestic economy.

As EPZs proliferated through the developing world during the 1980s and especially the 1990s, they began to attract considerable attention from human rights institutions and organizations. These institutions and organizations were interested in EPZs primarily because of some evidence of low and deteriorating labor standards within these zones – particularly in those zones which hosted businesses in the textiles, apparel and footwear sectors, where low labor costs were perceived as an important means of securing international competitiveness. As a result, there is by now a considerable body of research cataloguing the labor rights record of businesses operating within EPZs, both positive and negative. EPZs remain squarely on the international human rights agenda as a source of ongoing concern.

This paper draws on this existing work in exploring the relationship between trade agreements, business and human rights based on the Protect, Respect and Remedy Framework for dealing with business and human rights, first set forth by the Special Representative in 2008 and then unanimously welcomed by the UN Human Rights Council. Now widely referred to as the UN Framework, it rests on three pillars: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.¹ This paper focuses on the implementation and operationalization of the Framework's first pillar, the State 'duty to protect' in the context of EPZs. What implications might the duty to protect have for host countries wishing to establish an EPZ, or to review the operation of their existing EPZ regimes? How might human rights concerns be more effectively integrated into the design and implementation of EPZ projects?

Importantly then, the topic of EPZs has been chosen not just for its intrinsic importance, but also as a window more broadly into how the Framework might have relevance for the global trading system. In his 2009 Report to the Human Rights Council, the Special

Representative recalled the need to understand and specify the relationship between trade agreements and the subject matter of his mandate.² This echoes calls from other international human rights bodies for greater understanding of the relationship between the global trade system and the promotion and protection of human rights. EPZs are a useful case study through which to examine this relationship: on the one hand, this is an area in which corporate abuses of human rights are not uncommon; on the other, contemporary EPZs are very much the product of developing countries' desire to integrate into the global trading system. In that sense, corporate and governmental activity affecting the enjoyment of human rights in and around EPZs is deeply shaped by the trade policy context in which it occurs.

In examining the human rights situation in EPZs, therefore, special attention will be paid to the relevance of trade agreements and trade policy. In what ways are the human rights impacts of EPZs shaped by the domestic trade policy context in which they arise? Do the trade and economic policy objectives which countries pursue through EPZs bring them into conflict with their human rights obligations? Do international trade agreements make it more difficult for host countries to fulfill their duty to protect in respect of EPZs? Conversely, can trade agreements encourage and assist countries to fulfill this duty? The paper therefore has a dual aim: first, to examine human rights problems around EPZs from the perspective of the State duty to protect; and second, to use the case study of EPZs to explore the broader relationship between trade policy and trade agreements on the one hand and the subject matter of the Special Representative's mandate on the other.

The paper proceeds as follows. Part 2 recalls the key elements of the state duty to protect as it has been elaborated by the Special Representative. Part 3 introduces the reader to the nature, history and rationale of EPZs as a tool of trade policy. Part 4 examines the human rights impacts of EPZs, focusing primarily on the criticisms which have been made of EPZs from a human rights perspective. Part 5 looks at measures which a host state may wish to use to fulfill its duty to protect and looks at whether international trade rules and institutions may obstruct the use of these measures. Part 6 addresses the opposite question: whether and to what extent trade agreements may assist in creating an international environment conducive to the fulfillment of the host state's duty to protect against human rights abuses in EPZs by third parties. Part 7 briefly looks ahead, and highlights two emerging issues in the context of EPZ policy which may be of particular interest to human rights advocates – the spread of private sector management of EPZs, and the major changes to EPZ regimes which may occur over the next decade as a result of the implementation of WTO obligations.

2. THE STATE DUTY TO PROTECT

As noted above, the policy framework which the Special Representative has proposed as a basis for moving the business and human rights agenda forward rests on three core pillars: the State duty to protect, the corporate responsibility to respect and access to effective remedies. This paper focuses on the first of these three pillars – the State

duty to protect – as it has been elaborated in the Special Representative’s 2008 and 2009 reports to the Human Rights Council. This section briefly provides the author’s account of some relevant elements of the duty to protect based on the Special Representative’s work to date, in order to provide context for the later discussion. Further detail on the content of the duty to protect is set out in some detail in the Special Representative’s own reports.

The State duty to protect is founded in international human rights law: ‘international law provides that States have a duty to protect against human rights abuses by non-State actors, including by business, affecting persons within their territory or jurisdiction’.³ In the context of EPZs, the simple implication is that host states cannot establish an EPZ without at the same time putting in place mechanisms to protect workers, their families, and others in surrounding communities, against activities of businesses and others operating in the EPZ which undermine their enjoyment of human rights. Indeed, this responsibility may be particularly acute in the context of EPZs because the incentives which host states give to businesses in EPZs can incidentally enable and facilitate precisely the kinds of business practices which undermine human rights protections.

The State duty to protect is a ‘standard of conduct, and not a standard of result’.⁴ In other words, the duty to protect is a duty to take appropriate steps to prevent corporate-related interference with human rights and to ‘investigate, punish and redress it where it occurs’⁵ – with the implication that, where all reasonable or appropriate steps have been taken to protect individuals against human rights abuses in the context of EPZs, the state will not be liable where such interference nevertheless occurs.⁶

The Special Representative has consistently stressed that there is no single means of fulfilling this duty, that the precise content of the duty will depend on the context and the nature of the human rights at issue, and that states have considerable discretion in determining their preferred means of implementation. Nevertheless, he has noted a number of common tools and approaches available to states, three of which are particularly relevant in the present context.

The first and most obvious means of implementing the duty to protect is through establishing binding domestic legislation/regulation of corporate actors to prohibit activity which directly or indirectly undermines fundamental human rights norms. The need for comprehensive legislation has been particularly emphasized in the labor context, with international human rights bodies recommending that States ‘legislate to prohibit discrimination, forced labor, child labor and unsafe working conditions’.⁷ International guidance suggests that such legislative frameworks should furthermore be accompanied by adequate mechanisms of investigation, adjudication, and punishment to ensure that they are effective. International human rights mechanisms including the UN human rights treaty bodies and regional bodies, which monitor implementation of human rights treaties, have recommended: ‘in most cases that abuse is prohibited by law, that alleged violations are properly investigated, that the State brings perpetrators to justice and that victims are provided with an effective remedy’.⁸

A second, complementary mechanism for implementing the duty to protect is ‘consistent, independent monitoring by States of third party compliance, even before abuse has been alleged’.⁹ They include not only *ex post* assessment of the social and environmental consequences of (for example) development projects, but also *ex ante* impact assessments before the project is undertaken.¹⁰ Such monitoring mechanisms should be adequately staffed and resourced. Third, the Special Representative has noted that the duty to protect may also be fulfilled through the adoption of various kinds of ‘promotional measures’,¹¹ including educational measures to raise awareness of potential human rights issues.¹²

One issue which has been raised in the context of the Special Representative’s mandate, and which is particularly relevant in the context of EPZs, is the question of home state extra-territorial jurisdiction – that is, the extent to which states can or should regulate the activities abroad of corporations incorporated in their jurisdiction or otherwise connected to them. On the one hand, the Special Representative has noted in the past that this issue represents ‘a relatively small part of an extremely broad mandate’,¹³ and has expressed the view that while international law remains murky on the issue, guidance from international human rights bodies suggests that states are not *required* to exercise extraterritorial jurisdiction over business abuse.¹⁴ At the same time, he has also noted that the same guidance suggests that human rights treaties do not *prohibit* such extraterritorial action, provided certain preconditions are met, and that there has been a steady increase in the exercise of extraterritorial jurisdiction over the last two decades. He has more recently argued that there are ‘strong policy reasons for home states to encourage their companies to respect rights abroad’.¹⁵ He has said, furthermore, that extraterritorial jurisdiction should not be viewed in binary terms, but can be broken down into a variety of measures, distinguished along one axis by whether they are genuinely extraterritorial measures or more properly characterized as domestic measures with extraterritorial effect, and along a second axis according to whether they are public policies, prescriptive regulations, or enforcement action. There are therefore at least “six broad types of measures with differing extraterritorial reach — not all of which are equally controversial or as likely to trigger objections and resistance.”¹⁶

The issue of domestic and international policy coherence or policy alignment has also consistently arisen through the work of the Special Representative relating to the duty to protect. One of the primary reasons for the inadequate fulfillment of the State duty to protect – and one of the primary obstacles to progress in this area – is the lack of adequate mechanisms of ‘policy alignment’ within governments.¹⁷ In the context of EPZs, this means that government agencies overseeing various aspects of policy relating to foreign investment, export promotion, or development policy typically do not systematically take into account the impact of their decisions on the human rights obligations of their governments. The Special Representative refers to this as ‘horizontal’ incoherence:

where economic or business-focused departments and agencies that directly shape business practices - including trade, investment, export credit and insurance, corporate law, and securities regulation - conduct their work in isolation from and largely uninformed by their Government’s human rights agencies and obligations.¹⁸

The call for better integration of human rights and various aspects of economic policy echoes very similar comments of international human rights bodies, particularly in the trade policy context. As early as 1998, for example, the Committee on Economic, Social and Cultural Rights (CESCR), which monitors States Parties’ implementation of the International Covenant on Economic, Social and Cultural Rights, called for ‘more systematic consideration of the impact upon human rights of particular trade and investment policies’,¹⁹ while the High Commissioner for Human Rights has consistently noted the ‘need to improve dialogue between human rights, trade [and] finance ... practitioners and, specifically, social sector and trade/finance ministries at the national level’.²⁰

Before examining the implications that the duty to protect might have in the EPZ context, it is necessary to provide some background on the nature of EPZs, and to provide an overview of their typical function within trade and development policy.

3. EXPORT PROCESSING ZONES²¹

i. What is an EPZ?

While there is no single definition of Export Processing Zones, one useful definition identifies the following three core features: (a) a defined geographical area in a state’s territory, which (b) constitutes a single administrative unit, in the sense that it is managed by a single entity, and (c) provides certain benefits and incentives to businesses which choose to operate within the area.²²

The nature of the investment incentives provided to businesses which locate in an EPZ can vary from country to country and zone to zone, but some relatively standard measures include:

- *Preferential tax treatment.* Companies which locate in EPZs may benefit from holidays, rate reductions or rebates on income taxes, sales taxes on both inputs and outputs, taxes on capital, and other forms of direct and indirect taxation.
- *Preferential duty treatment.* Companies within EPZs will typically be exempt from export duties, both in respect of their products and their waste byproducts. In addition, they will typically receive exemptions or drawbacks on import duties and customs fees for a wide range of their inputs: raw materials and intermediate inputs processed in the production of exports; capital goods used in export production; parts and spares; and so on.
- *A liberal regulatory environment.* For example, EPZ enterprises may be granted exemptions from restrictions on the repatriation of profits and on foreign exchange convertibility.
- *Enhanced physical infrastructure:* Companies located within EPZs may enjoy infrastructural advantages as compared to the rest of the host state. This may include the provision of improved roads, telecommunications networks including data networks, water and sanitation services, and in some cases local housing, banking, postal, and educational institutions. It may alternatively (or in addition) include the provision of such services and infrastructure at less-than-market rates.
- *Direct subsidies.* Some governments or EPZ operators may also provide assistance for education and training or direct financial subsidies to companies operating within EPZs based on their performance.
- *Other incentives* such as export promotion services and streamlined administrative procedures for imports to and exports from the area are often available to companies operating within EPZs.

Sometimes, these incentives will be provided unconditionally, simply as a result of the presence of the business in the EPZ. On other occasions the incentives – or permission to locate in the EPZ itself – will be made conditional upon certain criteria such as export performance, technology transfer requirements, local employment, or local content requirements.

It is important to remember, however, that the nature of EPZs has changed over time. Traditionally, EPZs took the form of industrial estates of 100 hectares or less, which were relatively isolated from the domestic economy – in physical terms, in terms of the special regulatory regimes which applied to them, and in terms of their weak economic linkages with the domestic economy. Permission to operate within these zones was tightly controlled by governmental agencies. Economic activity in these early zones often consisted of light manufacturing and other processing in sectors such as apparel, textiles, and footwear and was largely (in many cases exclusively) oriented towards production for export. In recent decades, however, this traditional model has been modified in a number of ways. For example, the exclusive export orientation of EPZs has in some cases been relaxed so that domestic sales are permitted, and companies oriented towards production for the domestic market are permitted to enter the zone. Furthermore, the notion of an EPZ as a physically limited space has been challenged by the development of ‘single factory EPZs’ which provide incentives to individual

companies regardless of location, as well as by the establishment of EPZs which cover very large geographical areas.²³ The traditional focus on light manufacturing and assembly operations has also changed in some of the more recent zones, which are now host to high technology industries, electronics and chemicals companies, financial services firms, IT and software services companies – as well as a range of commercial operators providing services of all kinds to these companies and their employees. There have also been efforts to better integrate EPZs with domestic economic activity.

This evolution of the nature and objectives of EPZs has been accompanied by a proliferation of new terms to describe them. The World Bank, for example, distinguishes EPZs (including single factory and hybrid EPZs) from Free Trade Zones, Freeports and Enterprise Zones.²⁴ To these categories the ILO adds Special Economic Zones, Information Processing Zones, and Financial Services Zones.²⁵ Others use terms from 'industrial free zones', 'export free zones', 'maquiladora', and 'duty free export processing zone' to 'foreign trade zone' and 'free zone'.²⁶ While these different terms reflect some important differences between different kinds of zones, these differences are less relevant for the purposes of this paper, and the generic term of EPZ will be used.

ii. Policy objectives of EPZs and their connection with trade law and policy

Why might a country wish to establish an EPZ? There are a variety of schools of thought on the desirability of EPZs as part of a country's development policy, but it is possible to extract from them all a fairly standard catalogue of claimed benefits which EPZs are designed to bring to the host country:²⁷

- *Employment effects.* Many EPZ projects have as one of their key objectives the creation of jobs to address high levels of domestic unemployment. Put simply, foreign enterprises which establish businesses in EPZs and employ locals to staff their production facilities create domestic jobs which may otherwise not exist.
- *Additional foreign exchange.* As exports from firms operating within an EPZ grow over time so too do their foreign exchange earnings. While some of this foreign exchange will be used to purchase imported inputs or capital goods, will leave the country in the form of repatriated profits, or will sit in foreign currency accounts, some of it will be converted into domestic currency to pay wages, to purchase inputs, and so on.²⁸ For many developing countries, new sources of foreign exchange have in the past been – and still are – important because economy-wide lack of foreign exchange earnings has led to significant restrictions on imports, including imports of capital goods vital for economic growth and development.
- *Demonstration effects.* In short, the idea here is that domestic firms are able to learn from the example provided by foreign firms operating within an EPZ and emulate them as they create and extend their own businesses. This may mean observing and copying the production processes and managerial methods employed by foreign firms, or it may involve the exploitation of new market

intelligence gleaned from the foreign firms – such as the identification of economic opportunities in foreign markets and access to supply chains which are already linked in to host country EPZs. In either case, the presence of foreign firms attracted by EPZ incentives acts as a catalyst for domestic entrepreneurial activity.

- *Technology transfer.* The establishment of foreign firms in an EPZ can in some circumstances lead to technology transfer to the domestic economy through a variety of methods. For example, foreign firms wishing to outsource some of their production may assist in the establishment of domestic firms, including through the injection of capital and manufacturing technology. More generally, foreign firms operating within the EPZ have an incentive to ensure that their locally sourced inputs meet their customers' requirements and will therefore sometimes work with those local firms to upgrade their production techniques and processes.²⁹
- *Upgrading of the workforce.* Employment in EPZs can – in the right circumstances – lead to a broad 'upskilling' of the workforce of the host country, as employees of foreign firms operating within the EPZ learn new skills on the job.³⁰ These new skills may relate to production techniques, knowledge of which can be transferred to domestic firms as employees move between foreign and domestic firms,³¹ or they may relate to training at managerial level, which can lead to a more entrepreneurial environment in the host country.³²

The earliest EPZs were sometimes created in the context of a largely inward-looking trade policy and had very limited and specific economic objectives, such as relieving domestic unemployment problems or generating foreign exchange. Tunisia's EPZs and Mexico's *maquiladora* (at least until the 1980s) are often cited as examples.³³ In this context, the EPZ was not a precursor to wholesale liberalization of the host country's trading regime but acted rather as a 'safety valve'³⁴ – a way of harnessing some of the benefits of foreign trade and investment while continuing to shield the remainder of the domestic economy from international competition.

By contrast, the vast bulk of the EPZs created since the 1980s have been established in the context of the transition in many developing countries towards liberal, outward-oriented trade and economic policies. As is well known, the 1980s and 1990s were a period during which much of the developing world sought actively to integrate into the global economy after decades of pursuing economic development through inward-oriented industrial policy and highly protected domestic markets. The establishment of EPZs has turned out to be a very useful tool in facilitating and managing this transition. Most obviously, by attracting foreign investors in export-oriented industries, EPZs simultaneously provided a conduit for the inward flow of foreign capital and an impetus for the host country's increased integration into the global trading system. Moreover, they provided a useful means for countries to diversify their export base and build new comparative advantages in the lead-up to the full liberalization of their domestic trade policy environment – indeed, the control that governments usually had over which industries were permitted to set up in EPZs make them a particularly attractive tool in this regard. Speaking broadly, EPZs in this period have been embedded in an overall

strategy of trade and investment liberalization – they can be thought of as beachheads of liberalization, offering small ‘oases’³⁵ of liberal regulatory and commercial environments which in principle both prepared the way for broader economy-wide reforms and helped to ensure that developing countries integrated with the global economy on improved terms. Taiwan and Korea are perhaps the best examples of this kind of EPZ strategy. China is currently pursuing a variant of this model, in which EPZs are used to experiment with different kinds of hybrid market-oriented policy reforms which may then be introduced (if successful) into the broader domestic economy.

It will be clear, then, that EPZs are a creature of trade policy in the sense that they are designed to facilitate the insertion of a country into the global trading system. They help to expand and diversify the export base of the host country, shape the kinds of import and export flows which result from liberalization of the domestic trading environment, and in that way help set the terms for the host country’s integration into the global trading system. Furthermore, EPZs are creatures of the host country’s domestic law and policy. Despite their close connection with broader trends towards trade liberalization, they are in no way required or established by operation of WTO law, regional trade agreements, or any other body of international law.

Nevertheless, international trade law can affect the design and operation of EPZs in a number of ways. First, there are a number of WTO obligations which may limit the kinds of incentives which host countries can provide to business in EPZs – for the reason that such incentives may in fact unfairly distort pre-existing patterns of international trade. There is currently a lively debate on the ways in which developing countries may have to change their EPZ programs over the coming decade to conform to WTO obligations.³⁶ Second, the success or failure of EPZs can be significantly affected by regional trade agreements and other preferential market access schemes in place between the host country and its primary export markets. Some RTAs and preference regimes extend preferential access to goods produced in EPZs, leading to significantly higher levels of foreign investment in those EPZs.³⁷ Others do not, or are hampered by complex and restrictive rules of origin which undermine the availability of preferential market access.³⁸ Third, there are also examples of EPZ regimes being seriously undermined by the conclusion of an RTA between the host country’s major trade partner and a third country.³⁹ In such cases, foreign investors operating in an EPZ may choose to relocate to the country with better access to foreign markets. The phasing out of the Multifibre Arrangement at the end of 2004 caused similar issues for many textile and clothing businesses operating out of EPZs in the developing world.⁴⁰

iii. Fifty years of experience with EPZs

The size, number, economic significance, and geographic spread of EPZs has grown considerably since the first ‘modern’ EPZ was created in Ireland in 1959. Before the 1970s, EPZs were mainly found in industrialized countries and were not as common as they are today, with around 79 such zones in 25 countries.⁴¹ Since then, they have primarily spread across the developing world, initially in East Asia and Latin America,

then through to South Asia, the Middle East, and sub-Saharan Africa.⁴² There was an explosion of EPZs during the 1990s, particularly with the liberalization of central and eastern European economies, and they are now found in well over 100 countries across the entire world – though the bulk of activity is now concentrated in Asia (especially China), the Pacific, and the Americas.⁴³ Depending on the definition used, there are now between 2000 and 3500 EPZs globally, in well over 100 countries,⁴⁴ with roughly \$200bn annually in exports in 2008.⁴⁵

As noted above, the nature of the industries operating from EPZs has also diversified over time. Historically, the textile, footwear, and apparel sectors have dominated, but more recently there has been some degree of diversification into areas such as electronics, pharmaceuticals, leather goods, and automotive components.⁴⁶ Furthermore, as the ILO notes, in the more successful countries, production in EPZs has ‘evolved from initial assembly and simple processing activities to include high-tech and science parks, finance zones, logistics centers, and even tourist resorts.’⁴⁷

How successful have EPZs been as a whole over this period? As might be expected, the picture is mixed, with much depending on the specific policy and economic context in which the EPZ is implemented, and one’s measure of ‘success.’ On the employment side, it is necessary to distinguish the *direct* employment effects of EPZs (the number of jobs created within the EPZ itself) from their *indirect* employment effects (the number of jobs created outside the EPZ, but as a result of the existence of the EPZ). While there are some exceptional cases,⁴⁸ the overall picture on the direct employment side is not particularly positive. The World Bank has concluded the ‘direct employment impact of zones is marginal’,⁴⁹ while the ILO’s estimate is that EPZs account for less than 0.5% of total global employment, and for less than 3% of employment in most individual countries with EPZs.⁵⁰ As to indirect employment effects, they vary greatly between EPZs, and it has proved difficult to obtain accurate data. Best estimates suggest that indirect employment might amount to up to 77 million jobs worldwide.⁵¹ On this basis, the OECD observes that ‘while EPZs do not present a solution to unemployment’, they are ‘nonetheless a viable source of employment creation.’⁵²

In terms of export development, there are many examples of EPZs which have significantly boosted the overall exports of their host countries,⁵³ and at least one study has shown that EPZs can contribute in significant ways to the diversification of the export base of the host country.⁵⁴ However, in respect of *net* export growth generated by EPZs, which depends on backward linkages (that is, the extent to which export firms source their inputs locally), the picture is significantly less positive. The most commonly cited success stories are Taiwanese, Korean, Indonesian, and Mauritian EPZs, which in some cases reached net export ratios of around 60%.⁵⁵ But a more common figure is 10-20%, with some cases far lower.⁵⁶

The dynamic benefits of EPZs – including demonstration effects, technology transfer, and workforce upgrading – are both potentially the most important and the most difficult to measure. There are as yet few comprehensive studies of these dynamic benefits, and as a result, it is impossible to properly assess the success of EPZs in this respect.

The anecdotal evidence is again mixed. Some employers in EPZs, for example in Sri Lanka, Mexico, Madagascar, and China, provide internal training programs to upgrade the technical and vocational skills of their employees.⁵⁷ It seems also there has been significant industrial upgrading as a result of EPZs established in Korea, Taiwan, Malaysia, and the Philippines.⁵⁸ At the same time, there are many more EPZ operations where this kind of industrial upgrading has not occurred to an appreciable extent. In particular, critics argue that in many EPZs – for example, those concentrating on manufacturing in the textiles and apparel sector – on-the-job learning is minimal, as the assembly processes are low technology and require few industrial skills, and in many cases, the skills learnt are rarely transferable to other kinds of industries.⁵⁹ In such cases, it is argued that the establishment of EPZs does not lead to a broader development of the skills of the local workforce but instead perpetuates an over-reliance on “dead-end” simple assembly operations’.⁶⁰

Against the general economic benefits which EPZs can bring must be set the budgetary costs of building and operating an EPZ. There can be significant initial costs in building the infrastructure necessary to service an EPZ.⁶¹ Furthermore, many of the government-run EPZs set up during the 80s and 90s run at an operating loss as a result, for example, of providing subsidized utilities and underpriced rents to tenant EPZ firms.⁶² In addition, the tax holidays and exemptions granted to EPZ firms – and the duty drawbacks and exemptions provided in respect of their inputs – can be a major cost for host countries in terms of revenue foregone.⁶³ Similarly, there can be significant revenue implications when duty free goods imported into the EPZ ‘leak’ into the domestic economy. Finally, the ongoing regulation of EPZs can in some circumstances impose significant costs on the host state.

In part as a result of these costs, there seems to be a general trend towards privately run EPZs, with more than half of all zones worldwide now being privately owned and operated.⁶⁴ Within this model, private operators typically assume the bulk of the initial costs of zone development (other than external infrastructure requirements) as well as the ongoing costs of managing and operating the zone and run the project on a profit-making basis.⁶⁵ Public agencies retain regulatory responsibility, including establishing and enforcing social, environment and other regulatory frameworks in the EPZ. The World Bank strongly favors the use of private zones of this type, noting that they ‘tend to have a better package of social and environmental facilities than government-owned zones’, and tend to ‘offer better facilities and amenities, command higher prices and attract higher-end types of activities’.⁶⁶

4. THE HUMAN RIGHTS IMPACTS OF BUSINESS OPERATIONS IN EPZs

This section briefly surveys some of the criticisms which have been made of EPZ projects from a variety of human rights organizations and institutions. These can be divided for convenience into two broad types, with the first type relating to the treatment

by EPZ firms of their workers. There is a large amount of high quality data on these aspects, in part as a result of close monitoring by the International Labor Organization (ILO) and transnational labor unions such as the ICFTU. The second type of human rights criticism goes beyond labor rights issues, and refers to broader spillover effects of EPZ projects, not only on the lives of workers outside the employment relationship, but also on surrounding communities. The literature on these broader spillover effects is considerably smaller – but that should be understood more as an indication of the priorities and particular mandates of those institutions which have been studying EPZs most closely, rather than an indication of their relative seriousness.

i. Labor rights and employment issues

The labor rights record of EPZs varies considerably from project to project and country to country. On the one hand there have been well-documented instances of labor rights abuses in EPZs, with international human rights bodies such as CESCR consistently raising labor rights issues in respect of EPZs as an issue of concern.⁶⁷ On the other hand, it is also true that many 'export processing zones are well-managed industrial zones where responsible firms offer good working conditions and higher wages than elsewhere in the economy'.⁶⁸

Some of the best documented issues have to do with workers' freedom of association and the effective recognition of their right to collective bargaining.⁶⁹ These are particularly significant issues, as restrictions on the formation and operation of unions can preclude political action on the entire gamut of labor rights. Sometimes, the problem is at the legislative level, as governments operate under the assumption that 'union-free zones ... attract greater investment'.⁷⁰ The ILO has noted, for example, that as of 2008, Pakistan, China, and Nigeria still had legal restrictions on freedom of worker association in EPZs.⁷¹ Workers in Bangladesh's EPZs were also legislatively denied the right to organize until 2006. In other cases, obstacles to union organizing in EPZs, similar to the situation outside EPZs, emanate from a variety of corporate/private practices, including 'the unjust dismissal, suspension, transfer and blacklisting of trade union officials and members [and] ... sometimes even resort to physical violence to prevent workers from forming and joining trade unions of their choosing'.⁷² Some of the most extreme examples of anti-union repression in EPZs catalogued by the ICFTU include the use of attack dogs to subdue works in Namibia, death threats issued to Bangladeshi workers by the managing director of a factory, and removing union representatives from a workplace at gunpoint.⁷³ It is not clear, however, precisely what proportion of EPZs are marred by these problems, and there is at least some evidence that the position is improving over time.

On the question of wages, most studies of pay in EPZs agree that they are roughly comparable to out-of-zone wages and perhaps a little higher. The ILO's 2008 survey of the literature concludes that 'wage rates have not been found to be below those outside EPZs',⁷⁴ and notes that workers in EPZs are likely to have greater benefits such as health care and social security than those outside.⁷⁵ This result has been replicated in a variety of other contexts.⁷⁶

Four qualifications, however, should be made to this generally positive picture. First, the aggregate data may conceal a great deal of variation in wage rates in different contexts. Madani, for example, sets out a variety of examples in which wages in EPZs were lower than elsewhere in some countries for prolonged periods in the 1970s and 80s (though this position has changed since).⁷⁷ Second, there is strong evidence of gender discrimination in wages.⁷⁸ While the exact figures might be a matter of some dispute, it is clear that many employers in EPZs tend to prefer women workers in part because of the lower wages they command. The feminization of the workforce in many EPZs is a widely noted phenomenon – women often account for over 70% and sometimes over 90% of EPZ jobs, particularly in low-skill industries⁷⁹ – and it remains important, despite its projected decline in coming years.⁸⁰ Third, it has been noted that the mere fact that wages are higher than elsewhere in the country does not necessarily imply that they are decent or livable wages. Fourth, a common finding of many country case studies of EPZs is that ‘excessive overtime is consistently a problem in EPZ workplaces’.⁸¹ The ILO suggests that the reasons for this include poor supply chain management, periods of peak seasonal demand, and last-minute adjustments caused by poor quality control in the production process – along with the low wages paid to workers, which means that overtime is typically considered an important part of their overall pay.⁸² The ICFTU notes that in some cases (eg, Madagascar) overtime is paid at the same rate as normal pay.⁸³

The question of health and safety in the workplace implicates not only labour rights issues but also the human rights to life and health. While the ILO has recently discerned an upward trend in the health and safety standards applied in EPZ workplaces,⁸⁴ the track record of many EPZs in this respect is poor. Many of the industries which typically locate in EPZs – such as those in the textile and apparel sector – face seasonal peaks in demand for their goods and very tight market-imposed deadlines. This, combined with poor management practice,⁸⁵ has had significant effects on health and safety in EPZ workplaces, as the World Health Organization has explained:

EPZs have been associated with high levels of machine-related accidents, dusts, noise, poor ventilation, and exposure to toxic chemicals. Job stress levels are also high, adding further risk. It has been reported that accidents, stress, and intense exposure to common hazards arise from unrealistic production quotas, productivity incentives and inadequate controls on overtime. These factors create additional pressure to highly stressful work, resulting in cardiovascular and psychological disorders. In the young women who often work in EPZs, the stress can affect reproductive health, leading to miscarriage, problems with pregnancies, and poor fetal health.⁸⁶

Other health issues arise from more extreme forms of mistreatment of workers, including widely-publicized instances of factory managers locking employees within factories in order to combat a perceived risk of theft, with disastrous consequences in case of fire. In other cases, employers have denied workers the provision of medical treatment and sick leave,⁸⁷ or put restrictions on the use of sanitary facilities by workers.⁸⁸ These issues are exacerbated by the high proportion of migrant and transient

workers in EPZs, who, due to the temporary nature of their job, may be more inclined to take on dangerous jobs or work in unsuitable conditions.

In respect of the elimination of employment discrimination in EPZs, the most important issues relate to gender discrimination. In addition to the wage discrimination issue mentioned above, women workers face discrimination in hiring and firing practices. This has been most fully documented and publicized in the context of forced pregnancy tests – either at the point of hiring, where pregnant women are discriminated against in hiring decisions, or during employment, where pregnancy can lead to forced redundancies. The evidence suggests that such practices occurred for example in EPZs in the Philippines and in Mexico's *maquiladora*, though it has since been outlawed by the Mexican government.⁸⁹ The Committee on the Elimination of Discrimination against Women (CEDAW), which monitors States Parties' implementation of the Convention on the Elimination of All Forms of Discrimination Against Women, has been particularly vigilant in respect of the treatment of women in EPZs. It has, for example, noted women's lack of access to social security and health care services in Vietnamese EPZs,⁹⁰ regularly expressed concern about the prevalence of pregnancy testing in Mexico's *maquiladora*,⁹¹ and drawn attention to the sexual harassment of women and other violations of women's labour rights in Guatemalan, Nicaraguan, and Honduran *maquiladora*.⁹²

There are some circumstances in which labor standards are explicitly lower in EPZs than in the remainder of the country. The ICFTU gives the examples (current as of 2005) of Bangladesh, Kenya, Pakistan, and Togo, which put specific legislative restrictions on rights to organize, and standards for hiring and firing practices within EPZs,⁹³ while CESCR has also expressed concern about derogations of domestic labor law in Kenyan, Panamanian, and Indian EPZs.⁹⁴ This is presumably a result of the intense competitive pressure which developing countries face in attracting foreign investment, and is based on the perception of the host country that a flexible labor environment is one of the attractions of their EPZs for potential investors. To the extent that this is one reason for the existence of labor rights abuses in EPZs, then it is worth noting that the liberalizing effect of trade agreements intensifies that competitive pressure and would therefore seem in principle to add to the problem.

However, the consensus view is that the explicit lowering of labor standards in EPZs as a response to competitive pressure is neither good policy nor a general trend and is, in fact, a comparatively rare phenomenon.⁹⁵ It is quite clearly the unanimous position of all international organizations that to attempt to compete internationally solely on the basis of low wages and low labor standards is a poor development strategy, which is unlikely to achieve the host country's development objectives in the long run. While it is true therefore that trade agreements can intensify the competitive pressure which host governments feel, there is nothing in trade agreements which expressly determine the particular strategies which those governments pursue in response to that pressure.

A more common reason for the existence of labor rights abuses in EPZs has to do with the inadequate enforcement of existing labor standards. CEDAW, for example, has

drawn attention to the ‘weak enforcement of laws to protect women workers in ... export processing zones’ in Sri Lanka, while CESCR has done the same in respect of inadequate labor inspection regimes in EL Salvador.⁹⁶ Such inadequate enforcement may be again be the result of a perceived need to keep regulation weak to attract and maintain foreign investors – but, as many have noted, it is also just as likely to be a result of inadequate resources. Bangladesh, for example, has a total of only just over 100 labor inspectors responsible for the entire country. In the Dominican Republic, inspectors do not have the transportation resources to conduct on-site inspections of EPZs, and in any case find their resources focused on labor rights abuses outside of zones, which can often be worse.⁹⁷ While noting that there are few systematic studies of capacity and regulatory resources in this area, the ILO concludes that ‘the existing evidence suggests that there is wide variation in the resources available to labor inspectorates throughout the world, with many lacking adequate resources, funding, staff, and transportation resources’.⁹⁸

ii. Human rights impacts beyond the employment relationship

While most attention thus far has been placed on labor rights issues in EPZs, a full human rights agenda must be broader than that, and include consideration of the impacts of state and corporate practices within EPZs on the entire gamut of internationally recognized human rights, not only of workers but also of the variety of individuals and communities impacted by the operation of the EPZ.

For example, EPZs commonly attract a large number of migrant workers, since local communities are unlikely to fully satisfy the demand for workers associated with a successful EPZ. Unless the developer of the zone – whether public or private – has accurately estimated the level of influx of migrants, and planned carefully for their arrival, then it is quite possible that the expansion of housing facilities for workers and their families, as well as essential services such as water and electricity, fail to keep pace with demand. In severe cases, this can negatively impact the rights of workers and their families to an adequate standard of living, including the rights to housing and water, as well as the right to education. The World Confederation of Labor, for instance, has noted examples of situations in which the rapid expansion of EPZs has outstripped the ability of local authorities to supply public schools and sanitation infrastructure.⁹⁹ Others have observed the poor and overcrowded conditions that workers are often required to live in, sometimes in temporary structures.¹⁰⁰ Furthermore, even where planning is adequate, the sheer scale of some EPZ projects can cause significant disruption to local communities during the initial construction phase. CESCR, for example, has noted with concern that development projects including ‘the designation of large areas as tax-free special economic zones’ in India have ‘resulted in the displacement of millions of families, most of whom have not received adequate compensation and rehabilitation’.¹⁰¹

The prevalence of migrant workers – often young women looking for employment – in and around EPZs raises particular human rights issues. It is very often difficult to track such migrant workers to ensure that they are obtaining adequate medical care and that

they are working and living in appropriate conditions. Furthermore, the movement of migrant workers – both internally and from foreign countries – can also lead to the rapid introduction and spread of communicable diseases, with consequent impacts on the right to health. Medical facilities and health care in these communities can be inadequate. In addition, migrant workers are in many circumstances dislocated from their spouses, parents and children, potentially disrupting their family life.

The rights to life and health of individuals living and working in the vicinity of EPZ projects may also be affected by any environmental damage caused by economic activity within the EPZ. Like any large-scale industrial project, production facilities operating within EPZs can give rise to problems of water and air pollution. Attention to the environmental impacts of EPZs probably first arose in the context of Mexican *maquiladora*, as the growth of these plants ‘far outpaced the ability of border cities such as Tijuana and Juarez to provide necessary waste treatment infrastructure and facilities’,¹⁰² and pollution became a significant problem for local communities. The dumping by some firms of untreated liquid waste in local bodies of water had significant health and economic effects for local communities who used these water supplies for drinking water, irrigation purposes, and for fish.¹⁰³ Others have noted environmental effects of EPZs in the Caribbean¹⁰⁴ (including the Dominican Republic¹⁰⁵) and the Philippines.¹⁰⁶ The World Bank has suggested that the structural causes of these environmental problems are threefold: lack of adequate environmental protection regulation, lack of monitoring and enforcement of the laws which do exist, and lack of education and awareness-raising about environmental risk on the part of factory owners and local populations.¹⁰⁷

There is anecdotal evidence of emerging human rights issues relating to the trend towards the private management and operation of EPZs noted above. Some NGOs have observed that the delegation of management authority over the EPZ to private (often foreign) companies can in practice lead these private operators to exert a degree of *de facto* political control over the geographic territory of the EPZ. This can have a number of effects. It can, for example, make it more difficult for NGOs and others to monitor human rights conditions within a zone. It can undermine the operation and enforcement of domestic law within these zones, where an explicit day-to-day government presence is removed. To the extent that private operators exercise a form of *de facto* political authority on the ground, there is typically little transparency in decision-making, and little local participation in it. Depending on the attitude of the private operator, the trend towards private management may even lead to the stifling of political action of all kinds within the EPZ and in surrounding communities, perhaps especially where the private operator is foreign and does not have a good understanding of local concerns and tensions. That said, these are emerging issues identified in the course of discussions with NGOs working in the area, and it remains to be seen how prevalent (if at all) these problems are or will become in the future.

iii. The need for additional monitoring and assessment

In order to analyze and address the human rights impacts of corporate activity in EPZs, it is crucial to have adequate and up-to-date information on the nature and extent of these impacts, along with a set of institutionalized mechanisms for monitoring and reviewing them on an ongoing basis. As noted above, this already exists to a certain extent in respect of labor rights issues relating to EPZs, largely as a result of the efforts of the ILO and labor rights organizations, such as the ICFTU, who produce periodic reports on these issues, both at a general level, as well as on a country-by-country basis. As a variety of international human rights bodies have observed, however, these mechanisms should nevertheless be augmented by additional monitoring and assessment procedures at the national level.¹⁰⁸ More pressing still is the need for additional research on human rights impacts of corporate activity in EPZs, outside the employment relationship, and beyond the issues specified in the corpus of internationally recognized labor rights. Adequate data on these broader issues – relating to health, housing, social dislocation as well as a range of civil and political rights – is lacking, in large part due to the labor rights emphasis of those institutions and NGOs which have traditionally focused on EPZs.

Host countries of EPZs should be encouraged to establish institutionalized monitoring mechanisms to help gather data on the human rights impacts of EPZs. Indeed, the Special Representative has already noted more generally that the adoption of such monitoring mechanisms can be one important tool for the implementation and operationalization of states' duty to protect.¹⁰⁹ International human rights bodies have suggested that these monitoring mechanisms should be adequately staffed and resourced, and should cover the entire gamut of internationally recognized human rights, including, in appropriate circumstances, rights-related environmental effects.¹¹⁰ In addition to ongoing monitoring, they should also include *ex ante* human rights impact assessments of EPZ projects prior to approval. Although the primary duty in this respect is on the host state itself, there is no reason to think that these processes of human rights monitoring, review, and assessment need to be the exclusive domain of host state institutions – private actors may also be called upon to help supply information on potential human rights impacts, and even the importing state could also do so in appropriate circumstances.¹¹¹ The host state could, for example, require private developers of EPZs to conduct a human rights impact assessment of the project as a condition of planning permission. Indeed, whether or not the host State imposes any such requirements, private developers themselves as part of their corporate responsibility to respect under the UN Framework's second pillar should take steps to assess and prevent potential adverse human rights impacts related to their activities. This includes knowing who they are doing business with in the EPZ and encouraging those partners to respect rights. The host state could similarly require private operators to monitor and regularly report on human rights practices in the zone, as a condition of ongoing licensing approval. Businesses operating within the EPZ could in principle be required to contribute to the cost of such assessment. Others have suggested that a tripartite organization (involving representatives from civil society, business and the

state) may be the most appropriate and legitimate organization to conduct human rights assessments.

5. THE DUTY TO PROTECT AND THE QUESTION OF POLICY COHERENCE IN THE CONTEXT OF EPZs

In light of the potential for these and other human rights issues to arise in the context of EPZs, this section now turns to consider the operationalization of the host state's duty to protect against human rights abuses by businesses operating in EPZs. As is commonly noted, human rights need to be much more closely integrated into all stages of the design and implementation of trade and development policy generally. Governmental agencies tasked with overseeing and implementing trade and development policy too rarely systematically and explicitly consider the potential human rights consequences of their decisions. There is, generally speaking, too little co-ordination and communication between such governmental agencies and their counterparts in various fields of social policy, including human rights. This is no doubt just as true in the context of EPZ projects as it is in relation to other aspects of trade and development policy. But while the general need for greater policy coherence at the national level is readily accepted, it is less easy to determine precisely what policy coherence could and should look like in practice. As an initial matter, it may be useful to distinguish measures which might be broadly categorized as 'flanking' social regulation, and measures which relate more specifically to the integration of human rights concerns into the design and operationalization of the economic aspects of EPZ policies.

i. Flanking policies

One element of policy coherence is the close coupling of social regulation with the implementation of economic policy. In the present context, that means that the design and establishment of EPZ policies and projects must be accompanied by strong social regulation by the host state, which puts in place adequate social protections for individuals and communities impacted by such projects. This has most recently been re-emphasized by the present Director-General of the WTO, Pascal Lamy, who has noted that trade liberalization 'does not suffice unless it is accompanied by policies designed to correct the imbalances between winners and losers', as well as by 'social policies, whether to secure redistribution or provide safeguards for the men and women whose living conditions are disrupted by changes in the international division of labor.'¹¹²

As indicated by Lamy, perhaps the most obvious example of such flanking regulation is labor legislation to implement internationally recognized labor rights.¹¹³ In fact, there is no magic to the search for policy responses to labor rights problems associated with EPZs, and there is a familiar range of regulatory and other technologies which are commonly proposed to address them. There should, for example, be clear and comprehensive labor legislation protecting workers in EPZs, prohibiting sexual harassment, wage discrimination, other forms of gender discrimination, and unsafe working conditions. The right to organize should likewise be enshrined in law. More

generally, labor regulation applicable in EPZs ought to be harmonized with that applicable in the rest of the country. Furthermore, this legislative framework should be accompanied by adequate mechanisms of investigation, adjudication and punishment to make them effective. In particular, host states should ensure that labor inspection regimes are adequately resourced and trained to effectively implement and enforce labor market regulation in EPZs. Where necessary, host states should be provided with international assistance and training to 'strengthen their capacity to regulate labor issues in a way that attracts investment without undermining labor standards'.¹¹⁴ Moreover, these legislative technologies could where appropriate be accompanied by new forms of regulation which are less 'top-down' in nature. The ILO has for example set out a 'pedagogical' approach to labor regulation, whereby 'regulators help firms come into compliance by spreading best practices and working with firms to problem solve',¹¹⁵ with the aim of actively improving the willingness and capacity of firms to raise labor standards. Similarly, education of workers on the nature and extent of their existing rights also constitutes an important part of comprehensive strategies to deal with labor rights abuses.

Other kinds of flanking policies will be necessary to address the various other kinds of non-labor human rights issues identified in the Part 4 above. For example, strengthened labor market regulation should in most cases also be accompanied by stronger and more elaborate environmental standards and monitoring, to prevent and address the human rights consequences of environmental pollution and degradation. When designing EPZ projects, host states should carefully consider and plan for the infrastructural needs of the workers employed in the EPZ as well as surrounding communities. This should extend to ensuring the availability of adequate housing, water and sanitation services, health and medical services, as well as educational services where appropriate. While these need not of course necessarily be supplied directly by government, it remains the responsibility of the host state to ensure that adequate provision is made in respect of all such services. Communities displaced or dispossessed in the process of developing an EPZ should be provided with adequate compensation and rehabilitation. Importantly, where the private sector is enlisted to operate and manage an EPZ project, the host state should still maintain an active regulatory presence in the EPZ itself, and still retains full responsibility for the human rights situation in and around the EPZ project. In addition to these specific measures, more general institutions and procedures ought to be established to ensure that affected populations are aware of their rights, and that alleged human rights abuses are promptly investigated and effectively remedied where appropriate. Furthermore, all of these measures ought to be accompanied by well-resourced, careful, ongoing monitoring of the human rights situation in and around EPZs, and updated and revised where appropriate.¹¹⁶

It is important that these flanking policies be embedded in the design of an EPZ project at an early stage, and be treated by host states as equal in their significance to the more directly economic aspects of the project. They should be treated as integral parts of the project. In fact, such flanking regulation can be an important precondition for the success of an EPZ project. While the integration of a developing country into the global

trading system through an EPZ regime can in principle lead to significant social gains and important advances in both developmental and human rights terms, these positive outcomes are by no means automatic. The nature, extent and sustainability of these gains depend on the terms on which that integration takes place. Domestic social regulation on the part of the host state plays an important part in setting those terms, by helping to ensure that the project does not actively undermine the enjoyment of human rights of all kinds in the host country's territory, that the economic objectives of the project translate into the expected social benefits, and that these benefits are distributed in the fairest, most sustainable and most appropriate way.

ii. Policy coherence beyond flanking regulation

Importantly, however, the existence of strong flanking regulation as an accompaniment to a program of trade liberalization implemented through EPZs does not exhaust the meaning of policy coherence in this context. Policy coherence cannot solely entail that the exclusive economic orientation of traditional decision-making around EPZs needs to be supplemented by an additional set of (social) considerations, to be addressed by an additional set of regulatory measures. The effective integration of human rights concerns into such decision-making also requires a more fundamental re-orientation of the economic side of policy-making itself. The point may be made clearer by an example. The human rights situation of workers in EPZs would no doubt be significantly improved by the establishment and effective enforcement of strong labor regulation. But their human rights situation would also be at least as affected by strategic economic decisions – regarding the kinds of industries which the host state seeks to attract to the EPZ, the basis on which those industries seek to compete for international markets, the extent to which the EPZ becomes linked to the domestic economy over time, the skills they learn during the course of their employment, and so on. Indeed, over the longer term, it may in many cases be that the latter kinds of 'purely economic' issues have a greater influence on human rights conditions in EPZs than the presence or absence of adequate labor market regulation. The point is that if policy coherence is to mean anything, it must mean the integration of human rights concerns explicitly into this economic side of decision-making, rather than solely the supplementation of this economic decision-making with flanking social regulation.

One way of doing this, which seems to have attracted widespread support amongst the human rights community and which may hold some promise, has been to ensure that the promotion of human rights is posited much more explicitly and directly as the ultimate aim of all economic decision-making. This basic move has a number of implications in the EPZ context. For example, it requires that decision-makers explicitly assess in advance the human rights implications of the choices that confront them – and to make those choices on the basis of those human rights assessments. Human rights impact assessments, on the basis of agreed methodologies, ought therefore to be integrated into the process of designing EPZ projects. Furthermore, policy-makers should be required to identify and explain in some detail the precise human rights improvements which a particular EPZ project is expected to bring – in the short term and long term, and for particular groups and for the population as a whole. Mechanisms

could in appropriate circumstances be established to ensure a degree of public accountability in respect of these goals, such as the publication of human rights-based targets, and the establishment of independent monitoring mechanisms to assess progress towards them.

Tentatively, integrating human rights concerns into the design of EPZ investment incentives may actually imply some more unusual and radical measures in some circumstances. As noted above, host states offer firms a variety of economic benefits as incentives to locate their production within EPZs, and this is done in expectation of the economic and social benefits that such investment may bring. One possibility for integrating human rights concerns into EPZ design, then, may be to institute a form of 'human rights conditionality' in respect of those incentives. The core idea here is that the host country government may wish to condition the receipt by firms of their promised economic incentives on the achievement of certain social or human rights objectives – or compliance by EPZ firms with certain human rights standards. For example, tax and other incentives provided to EPZ firms could be withdrawn in cases of extreme, repeated, or flagrant violations of human rights norms. Human rights norms and compliance mechanisms could be inserted into the contractual arrangements established between investing firms and EPZ operators (whether public or private) when permission to enter is granted.

While of course there may be numerous difficulties associated with this, it is worth noting that conditionality of roughly this sort is not without precedent. Indeed, conditions of all kinds are routinely placed on investors as a condition of investment permission, including in the context of EPZs. For example, an early form of such conditionality included a variety of obligations sometimes imposed on EPZ investors, particularly during the 70s and 80s, such as: local content requirements (requiring investors to purchase a certain percentage of their inputs from domestic suppliers in order to facilitate backward linkages); minimum investment obligations; and minimum employment requirements. For a number of reasons, including their tendency to impose unsustainable and unattractive commercial costs on investors, such obligations are significantly less used now than they once were.¹¹⁷ More recently, however, other kinds of social conditionality have been suggested. For example, the ILO advocates actively encouraging EPZ firms to provide on the job training to employees, or install health clinics and provide other essential services for their employees, through a system of incentives or regulation imposed as a condition of entry to the EPZ.¹¹⁸

Speculatively, there is in principle an argument to be made that the state duty to protect may in some circumstances require some form of social conditionality of this kind. In one sense, host country governments are in fact implicated from the start in all practices which occur within EPZs: host states have after all designed and maintained the legal and regulatory framework which encourages the establishment of business operations, and they establish the incentives which make their activity economically viable on an ongoing basis. If host states establish these incentives knowing that they have inadequate resources to (say) enforce their labor laws, there is at least an argument that they have facilitated, or provided the enabling environment for, corporate abuse of

human rights. If one were to take this view, the duty to protect against human rights abuses by firms operating within EPZs may imply an obligation to withdraw the enabling incentives that the host state provides to such firms where abuse is proved. At the least, it may imply an obligation to make the initial provision of incentives conditional on assurances of compliance with human rights norms.

iii. Trade agreements as constraints on the fulfillment of the duty to protect

In his most recent report to the Human Rights Council, the Special Representative reiterated the need to study the constraining effect which trade agreements may have on the ability of states to implement their human rights obligations, including their duty to protect individuals from corporate human rights abuses.¹¹⁹ The concern is a real and relevant one, particularly given the constraints which international trade law can place on other aspects of states' activity relevant to their human rights obligations. In the present context, however, these concerns appear to be less serious. For one thing, it is quite clear that the 'flanking' policies noted above are highly unlikely to be practically constrained by trade agreements. As a general matter, and provided it is done in a non-discriminatory way, trade agreements do not set upper limits on the ability of governments to set and enforce their own labor standards, nor their ability to conduct regular labor inspections of exporting firms, nor any other aspect of the operation of their labor policy. The same might be said of many of the measures which governments might consider by way of response to the broader community-wide social and environmental consequences of EPZs, such as: the establishment and enforcement of national environmental laws to address pollution problems, the provision of housing and services infrastructure to address infrastructure bottlenecks, and the upgrading of medical treatment and health care to address health problems in communities around EPZs. Provided these measures are put in place in a non-discriminatory way, and they respond to real social problems, it is very difficult to imagine them being the subject of dispute settlement proceedings within the WTO.

The position is perhaps not quite so clear when it comes to some of the forms of 'social conditionality' just described in the section above. There are certainly some situations in which such conditionality could be prohibited by WTO law – though frankly it is not clear how significant these legal difficulties may be in practice. For example, I described local content requirements as a form of social conditionality, and it is clear that this kind of condition is contrary to GATT Article III, since it provides an advantage to local producers of inputs over their foreign competitors. But the permissibility of explicitly *human rights based* conditionality (where certain economic benefits are available to investors on the basis of compliance with certain human rights related standards and obligations) is less clear. Although the risk that such conditionality violates WTO law is probably very slim, there are perhaps one or two imaginable situations in which a violation might occur. The core concern is that the differential application of human rights conditions to two different foreign firms within an EPZ – whether because different conditions are applied to them, or because these conditions are enforced against one and not the other, or simply because one complies with these conditions and another

does not – may be treated as discriminatory under WTO law. To summarize a technical and somewhat unclear area of WTO law:

- If the firms in question are manufacturers of goods, a violation of GATT Article I (most favored nation treatment¹²⁰) might be alleged, but only if (i) as a result of the structure of the industry in which they operated and the nature of the production networks in which they are embedded, the two firms tend to import goods from a small number of predictable countries, so that discrimination between firms can be equated with discrimination between goods, and (ii) the more restrictive of two presently competing interpretation of the term ‘unconditionally’ in GATT Article I is preferred, according to which any kind of condition unrelated to the nature of the product itself is impermissible.¹²¹
- If the firms in question were service providers, a similar argument could be made of a violation of GATS Article II (MFN). Here, there would be no need to demonstrate the equivalent of step (i) in the previous paragraph, as discrimination between service suppliers is itself prohibited under that Article. The existence of discrimination in this case would turn on the proper interpretation of ‘less favorable treatment’, in particular whether differential treatment on the basis of something other than protectionism could constitute such less favorable treatment. In light of recent jurisprudence, this seems unlikely.¹²²

In both cases, defenses under GATT Article XX and GATS Article XIV would in principle also be arguable. For example, both of these Articles most relevantly permit measures ‘necessary to protect human, animal or plant life or health’ and measures ‘necessary to protect public morals’, provided such measures do not constitute ‘arbitrary or unjustifiable discrimination’ or a ‘disguised restriction on international trade’.

In summary, then, it is hard to find any clear and unambiguous case of any measure which might be required by the host state’s duty to protect, which is prohibited under WTO law. This appears to contrast with the position under international investment law, as investigated in earlier submissions to the Special Representative.¹²³

6. FACILITATING FULFILMENT OF THE DUTY TO PROTECT: A ROLE FOR TRADE AGREEMENTS?

There is another direction from which we can approach the question of the relationship between trade agreements and the subject matter of the Special Representative’s mandate. One conclusion which can be drawn from the discussion so far is that, on the whole, any failure by host states to fulfill their duty to protect in respect of human rights abuses relating to EPZs cannot on the whole be attributed to obstacles imposed by international trade law, but rather is largely a function of the policy priorities, regulatory capacity, and resource constraints of the host state itself. One question which then arises is whether and how to create an international environment which encourages,

facilitates, and, where necessary, provokes host states to do more to fulfill their duty to protect in respect of human rights abuses occurring in and around EPZs.

More specifically, there is a considerable literature and debate on the question of whether trade agreements can be used as a mechanism to fulfill this facilitative function. In a 2008 report on the latest trends and policy developments in EPZs, for example, the ILO offered a possible mechanism to address labor standards in EPZs by, 'creating incentives, for example under ... trade agreements, for firms to comply with fundamental labor rights'.¹²⁴ The same issue has also specifically been raised in submissions to the Special Representative.¹²⁵

The political context in which this debate has arisen is well known. For some decades, particularly in the United States, organized labor has been relatively opposed (with greater or lesser intensity at different times) to trade liberalization, and has tended to mobilize in opposition to the negotiation of multilateral and regional trade agreements. One of the issues consistently raised in the context of this opposition has been the issue of working conditions and labor standards in the export industries of certain parts of the developing world – both as a problem in itself, and in the context of concern about the generally negative effect which trade liberalization can have on domestic labor protections in the developed world. The argument is consistently raised that trade agreements ought to include some measures to combat this perceived lowering effect – perhaps through the inclusion of labor standards as part of the trade agreement, or a variety of other softer measures. For their part, developing countries object strongly to the 'linkage' of trade and labor issues, primarily for the reason that they see labor activism in this regard as potentially undermining their comparative advantage, and even in some cases as a cover for more protectionist impulses. Since at least the middle of the 1990s, working conditions in EPZs in developing countries have been at the heart of this controversy.

The political sensitivity of this debate is matched only by its longevity and persistence. It is very likely that as trade agreements proliferate and the business and human rights debate progresses, the question of the extent to which trade agreements can and should be used as a tool in the promotion of a business and human rights agenda will continue to arise. The present section aims to lay out some of the issues as they relate to labor rights issues in the context of EPZs, and offers some initial responses.

It is clear that international human rights law encourages the creation of an international order in which everyone's human rights can be fully realized, and encourages forms of international cooperation for the advancement of human rights. It is perhaps not so clear how international cooperation through the medium of international trade agreements might contribute to this project, specifically in the context of addressing human rights abuses in and around EPZs. In short, the core idea is that, where the host (exporting) state fails to take adequate action to protect the human rights of its population in the context of EPZs, the *importing* state can take measures to encourage or assist the host state to improve its human rights record in this regard. The importing state is commonly in a special position to exert pressure of this kind for a variety of reasons: because it

can use access to its markets to gain leverage over the exporting country, because its ongoing trading relationship can create spaces for interaction and dialogue in which human rights issues can be raised with the host state on a routine basis, and because the nature of the relationship between the two countries gives the importing state a special and legitimate interest in trade-related human rights issues in the exporting state.

There are four main ways in which human rights issues have so far been incorporated into trade relationships to facilitate the exertion of such pressure by the importing state, most of which are still at a relatively early stage. First, the institutional machinery associated with trade agreements can on occasion provide space for international supervision and monitoring of human and labor rights issues as they relate to EPZs. The most commonly cited example is the WTO's Trade Policy Review Mechanism (TPRM), which establishes a periodic peer review mechanism of each WTO Members' trade policies and practices in light of their wider economic and development policies. The frequency of these reviews varies depending on the country's share of world trade: every two years for the EC, US, Japan and China; the next sixteen largest countries every four years; and every six years for the remainder (with longer periods permitted under certain conditions). In some instances, labor rights issues relating to EPZs have been raised in the context of these reviews. The EC and the US, for example, both raised reports of violations of workers' rights in El Salvador's EPZs.¹²⁶ Similar issues were raised in Mauritius' review in 2001. Notably, the ICFTU releases reports on the labor rights conditions in WTO Members to coincide with the WTO's own trade policy reviews.¹²⁷ In addition, although it is not strictly a monitoring process, labor rights in China's EPZs were raised as a topic of negotiation and scrutiny in the context of that country's accession to the WTO.¹²⁸ It is not clear how far the TPRM adds to other forms of periodic international scrutiny already operating in other parts of the international system, including the ILO and the human rights treaty bodies, but there is an argument that, over time and in conjunction with other international surveillance mechanisms, it may help to facilitate a country's own internal monitoring capabilities. However, the utility of the TPRM in this regard is undermined somewhat by the relatively infrequency of WTO trade policy reviews, particularly in the case of least developed countries.

Second, some developed countries' unilateral trade preference regimes have long contained provisions relating to labor rights. The core idea here is that the preference-granting country can use the 'carrot' of preferential access to its markets to provide exporting countries with an additional incentive to address labor and other human rights issues – in their EPZs and more generally. The US GSP scheme, for example, has since its inception required a determination that a developing country in question 'has taken or is taking steps' to ensure 'internationally recognized rights' within its territory, before preferences are extended, and as a condition of their maintenance. Similar provisions were included in the 1991 Andean Trade Promotion Act and the African Growth and Opportunity Act in 2000.¹²⁹ On occasion, the US has invoked these provisions specifically in the context of labor rights abuses in EPZs. The prime example is Bangladesh, which changed its labor laws as they applied to EPZs after the US threatened to withdraw its preferential access under the US GSP scheme from 2004-

2005 as part of an ongoing periodic review. But other examples exist: Liberia repealed a prohibition on strikes in order to have its preferences reinstated in 2006, while Uganda enacted comprehensive labor reform in response to GSP and AGOA review.¹³⁰ The EC's new (from 2006) GSP+ scheme also includes human and labor rights as part of its eligibility conditions: an applicant has to ratify and implement 16 specified human rights conventions,¹³¹ as well as accept regular monitoring and review of implementation.¹³² The EC takes account of the views of the ILO in determining adequate compliance with labor rights conventions.¹³³ It is currently considering the withdrawal of preferences for Sri Lanka, after a recent investigation of the human rights situation in that country.

Third, there has been a trend over the last decade or so to include labor provisions of different kinds in regional and bilateral trade agreements. In the negotiating phase of such agreements, this gives countries significant leverage to extract commitments from their trade partners to improve their domestic human rights record – and, to the extent that these commitments are made legally binding and subject to some form of dispute resolution, gives those same countries the opportunity to enforce such commitments later on, for example in the context of human rights abuses in and around EPZs. The EC, Canada, and the US, for example, all now consistently include some labor-related provisions in their free trade agreements. The EC's Economic Partnership Agreements, at least in their draft form, contain commitments to a variety of ILO conventions on core labor standards.¹³⁴ The United States in particular has quite a long and developed practice of incorporating labor rights in some form into its bilateral trade agreements, and currently has at least 13 such agreements experimenting with a variety of models of linkage.¹³⁵ The original NAFTA model put labor issues in a separate side agreement, requiring each party to effectively enforce its own labor laws, and provides for consultations and dispute settlement in the cases of certain kinds of alleged violations, potentially leading to the imposition of a monetary fine.¹³⁶ Canadian free trade agreements with Chile and Costa Rica both largely followed this model. Since then, labor rights issues have migrated into the main body of the trade agreement,¹³⁷ and labor provisions have been made subject to the same dispute settlement mechanisms as other provisions within the trade agreement.¹³⁸

Fourth, there have been some attempts – all aborted – to negotiate labor issues in the context of the WTO. In the second half of the 1990s, for example, there was an attempt to begin negotiations within the WTO on core labor standards, and attempts to include some form of 'social clause' within the WTO Agreements. One result was the conclusion of the Singapore Declaration in 1996, in which all WTO members re-affirmed their commitment to the observance of internationally recognized core labor standards, but emphasized that the administration and monitoring of those standards is the proper domain of the ILO, rather than the WTO. Another result has been an intense political sensitivity around the discussion of labor issues within the WTO, particularly amongst developing countries who view such talk as leading in the direction of a real threat to their access to developed countries markets. No social clause, nor any mention of labor rights, has been included in the WTO agreements and the prospects for any movement in that direction are very slim indeed. However, that does not exhaust the issue of the treatment of labor issues within the WTO, as it leaves the question of the WTO

compatibility of unilateral trade sanctions adopted by a Member in response to labor rights violations in the territory of another Member, on which there is a considerable literature.¹³⁹ Given the more recent move towards softer use of market power through preference regimes and regional agreements, this question may have lost some of its immediacy, but it is worth noting that there is considerable doubt that such measures could ever be consistent with the GATT. Without delving into the technicalities of the relevant WTO law, much would depend on (i) whether there is an implicit ‘territoriality’ requirement in Articles XX(a) and (b) permitting countries to take measures solely in respect of health and morality issues connected to their own territory;¹⁴⁰ (ii) whether labor rights issues fall within the proper interpretation of either ‘public morals’ or ‘human health’ in GATT Articles XX(a) and (b) respectively; and (iii) whether trade sanctions could be considered the ‘least trade restrictive means’ of bringing pressure to bear on a foreign country to resolve its labor rights issues.¹⁴¹

Broadly speaking, then, trade agreements are beginning to be used to develop a set of legal and institutional tools through which (developed) importing countries can wield some degree of influence over the human rights situation in EPZs in foreign (developing) countries – by providing incentives for host states to fulfill their human rights obligations in the context of EPZs, establishing forums and procedures through which the human rights situations applicable in EPZs are scrutinized by importing countries on a routine basis, and even providing a variety of additional hard and soft sanctioning mechanisms where flagrant violations of human rights norms in EPZs are found to occur. But how promising are these tools as potential mechanisms for enhancing the human rights situation in EPZs globally, and for facilitating the willingness and ability of host states to fulfill their duty to protect in the context of EPZs? To what extent can and should they be a significant part of efforts amongst the human rights community to create an international environment which encourages and facilitates the fulfillment of host states’ duty to protect in the context of EPZs?

It may be useful to distinguish between forms of trade-labor linkage which amount to ‘conditionality’ – that is, explicitly conditioning access to the importing state’s markets on compliance by the host state with human rights norms - and those which take a different form. In the latter camp we might put the various monitoring and supervision mechanisms established by trade agreements to oversee labor rights in export industries, as well as those labor rights guarantees in trade agreements which are subject to softer forms of enforcement such as consultations (rather than the withdrawal of trade concessions). Broadly speaking, while these latter forms of linkage have been criticized by some in the human rights community as ineffective, they do, at least, have the potential to make a positive impact on human rights within EPZs, and they have been considerably less controversial than explicit trade conditionality.

On the other hand, explicit conditionality in trade agreements – such that a violation of labor rights in one country permits its trading partners to impose trade sanctions and market access restrictions against it – has always been highly controversial.¹⁴² Those in favor argue: **pragmatically**, that the threat of withdrawal of market access can in some circumstances be a very effective form of leverage on foreign countries who are

laggards on labor rights issues; **morally**, that in principle a country ought not to accept on their markets products which have been made in violation of core labor standards, because to do so helps both to sustain and to condone such violations; and **economically**, that trade with countries with low labor standards undermines the relative and absolute wages and conditions, as well as jobs more generally, of workers in the importing country. They suggest that, provided sanctions are targeted, and based on multilaterally determined violations of universally agreed labor rights, there can be few legitimate objections to the practice. They also tend to draw a clear distinction between positive conditionality (such as labor-based preference regimes) and negative conditionality (regimes of trade sanctions), with the former usually presented as the preferable option.

Those against the use of trade conditionality to deal with labor rights abuses express concern that it will lead to protectionist-inspired trade restrictions dressed in altruistic language; that trade sanctions in particular are a blunt instrument for achieving labor rights outcomes and tend to cause significant damage including to the very people they are designed to protect; and that over-zealous application of conditionality mechanisms will erode the comparative advantage of many developing countries particularly in those sectors in which they have attracted foreign investment based in part on relatively low local wage costs.

At first glance, the use of trade power by one country to address human rights problems occurring in EPZs in foreign countries may seem to be the rough equivalent in the trade context of the extraterritorial enforcement of human rights norms against corporations doing business overseas, or more broadly international cooperation in the business and human rights field – a question which the Special Representative has considered as part of his work, as noted above.¹⁴³ Extraterritoriality in the business and human rights domain remains controversial. In the trade context there are further reasons to remain cautious. This is because there are at least three specific problems which arise in the trade context which do not arise – or at least not to the same extent – in the context of direct extraterritorial regulation of companies abroad.

The first problem is that there are a variety of local constituencies which derive immediate economic benefits from the imposition of trade sanctions on foreign countries, prominently including local import-competing industries and other groups whose economic fortunes are related to those industries' future. While on the one hand, this might help to provide an impetus for garnering political support for addressing human rights concerns in foreign countries, it also raises the risk of mixed motives in the imposition of trade sanctions, and in particular the capture of the mechanism by groups focused primarily on objectives other than the promotion of human right abroad. This risk of capture does not arise to the same extent in the context of extraterritorial application of human rights norms to hold corporations accountable for their actions overseas.

A second and related problem concerns the institutional context in which decisions about trade conditionality are typically made. The decision to suspend market access –

whether the suspension of trade preferences or the imposition of trade sanctions, or in a different context the decision not to go ahead with a free trade agreement – is typically a political decision made within the political branches of government. Experience suggests that such decisions can in many cases be subject to considerations which do not directly relate to the human rights situation under consideration. There is a risk of arbitrariness and discrimination, in the sense of unequal application of standards across countries, and in the sense that in most cases clear and detailed reasons are not provided to support the decision.

Third, trade conditionality is a relatively blunt instrument. Direct extraterritorial application of human rights norms to overseas conduct of companies through legislation or adjudicative action also has significant weaknesses in terms of effective access to remedy, but the sanction or proceeding can at least generally be targeted against the specific corporate actor responsible, in respect of a specific act of wrongdoing, and it is more likely that the remedy can be tailored to respond to the needs of those who have suffered as a result of the wrongdoing. This is much more difficult in the trade context. While targeting trade sanctions against the specific industries (or firms or products) in which human rights abuses are alleged to occur is possible, most proposals and practice in this area use, or propose the use of, trade restrictions in a much more blunt way, against all or a large proportion of products imported from countries in which labour rights abuses occur. It is clear that the human rights impact of such measures is ambiguous, on the one hand providing an incentive for the exporting country to enforce human rights standards, and on the other, undermining the livelihoods and employment of many people, who may depend for export-derived income to stay out of poverty. Even in the case of targeted sanctions, the incidental impact of sanctions on poorer and marginalized individuals and communities can be hard to predict and contain.

In light of these challenges, there may be an argument that human rights law ought in fact to discourage the use of unilateral trade sanctions in some circumstances – such as where there is a reasonable likelihood that they are being imposed for purely protectionist purposes, or where they have an unjustifiable negative incidental impact on the human rights, or where they are targeted so broadly as to unjustifiably affect non-violating firms operating out of EPZs. Even preference programs incorporating human rights conditionality may be problematic in some circumstances, especially where the relevant rights are selectively and arbitrarily chosen, and where conditionality is unequally or arbitrarily enforced against particular developing countries. That said, it would be wrong to conclude that trade conditionality can never be useful in responding to corporate abuses of human rights in the context of EPZs, and human rights law just as clearly does not impose a blanket prohibition on the use of trade sanctions or human rights-based trade preferences, presumably provided it does not constitute an interference in another state's domestic affairs. But where such conditionality is employed, it should normally be accompanied by a variety of safeguards and qualifications. For example, if an importing country establishes a mechanism permitting it to take trade measures against an exporting country on the basis of its human rights record, it ought in the normal case also to establish institutions and forums for routinised dialogue with the exporting state, to ensure that the exporting state is given an

opportunity to be heard and to present evidence before a final decision is made. Sanctions, or the withdrawal of preferences, should typically be imposed as a last resort, after more cooperative solutions such as technical assistance have been tried and have failed. Decisions to impose sanctions should be based on multilaterally agreed human rights norms, and should in the normal case be reserved for only the most egregious violations of such norms, which have already been subject to international condemnation. Trade sanctions in response to violations of human rights in EPZs should be as targeted as possible, so that spillover effects on innocent parties such as non-violating firms operating out of the same EPZ, or individual workers themselves, are minimized or eliminated.

It is relevant to recall finally, that – regardless of the position under international human rights law – there is a genuine legal issue whether human and labour rights conditionality in trade relations is consistent with WTO law. In the case of human rights-based trade sanctions (which are not specifically authorized by the Security Council), the legal position depends almost entirely on the interpretation of GATT Article XX(a) and GATS Article XIV(a), on which we have at present little relevant jurisprudence.¹⁴⁴ In the case of human rights conditionality in unilateral preference regimes, the position is somewhat clearer. Such preference regimes are permitted in WTO law under the terms of the so-called Enabling Clause, which exempts ‘non-reciprocal’ and ‘non-discriminatory’ preference regimes in favor of developing countries from the requirements of WTO law, provided that they ‘respond positively to the development, financial and trade needs of developing countries’.¹⁴⁵ These phrases were interpreted by the WTO’s Appellate Body in 2004 in respect of the EC’s earlier GSP regime and different commentators have formed different views on the likely compatibility of labor and human rights conditionalities in preference regimes in light of that decision.¹⁴⁶

7. LOOKING AHEAD

On the basis of the experience of the last two decades or so, the human rights challenges around EPZs are unlikely to be resolved rapidly, and EPZs are likely to remain on the international human rights agenda for some time. The ILO will no doubt, appropriately, maintain its role as the lead international human rights body working in the area. The key challenges seem primarily to be at the level of implementation rather than normative development. Although policy tools are constantly evolving and new ideas are always welcome, contemporary thinking on the basic contours of an appropriate response to the labor rights and other human rights challenges around EPZs are relatively straight-forward, and are probably unlikely to change radically soon. The key problem is developing the governance capacity at the domestic level to effectively implement these policy tools. Many of the institutional suggestions noted above – such as the development of comprehensive monitoring regimes, the effective integration of human rights concerns into trade policy-making, new mechanisms of dialogue and cooperation between relevant social and economic governmental agencies, and so on – require a high level of institutional capacity. One of the primary tasks for the international human rights movement, therefore, must be to assist in generating the governance capacity in many parts of the developing world to address

human and labor rights issues in the context of EPZs before they arise. This will no doubt in some cases involve a key role for both NGOs and the private sector.

In addition to this general task, there are two more specific issues which may emerge as key challenges for human rights work on EPZs over the coming decade. The first returns us to the realm of trade agreements. I noted above that some aspects of many contemporary EPZ regimes appear to be at least potentially incompatible with provisions of WTO law, and that there is an emerging discussion on the precise nature of that incompatibility and the ways they might be resolved.¹⁴⁷ Indeed, some commentators have suggested that WTO rules will be one of the major factors driving change in the nature and operation of EPZs over the coming decade. Perhaps, this change will be at the level of technical design rather than strategic direction: Creskoff and Walkenhorst, for example, argue that compliance with the WTO's SCM Agreement will typically require the removal of any export requirements currently imposed on foreign firms, the removal of restrictions on the ability of corporations within EPZs to sell their products on the domestic (host country market), and in some cases 'extending benefits such as tax reduction to all businesses irrespective of location or sector'.¹⁴⁸ The World Bank notes that incentive schemes may have to be altered so that they do not 'primarily benefit a specific firm, industry or other interest',¹⁴⁹ and that requirements relating to local content, export performance and foreign exchange restrictions will have to be removed.

However, the need to bring EPZ regimes into compliance with WTO law seems at least as likely to prompt some countries towards a strategic rethink of the place and role of EPZs in their overall development policy. This represents both an opportunity and a challenge for the human rights movement. Decisions made at this strategic level may in fact over the long term have a much more significant impact on the social consequences of EPZ regimes than other kinds of policy changes and innovations currently being advocated to ameliorate the human rights situation in EPZs. It follows that human rights considerations ought to be taken into account at this strategic level, and that human actors and institutions ought also to be focusing on making a contribution at that level. This may involve closely monitoring strategic developments in EPZ policy at a national level, conducting (or advocating for) human rights impact assessments of new strategic initiatives, and developing their own views on what new strategic directions are likely to be most beneficial from a human rights point of view. More generally, it will be important over the coming decade to ensure that human rights voices are adequately represented in those debates about the strategic direction of EPZ policy, and that EPZ regimes are re-embedded within new and stronger domestic governance regimes which pay closer and more systematic attention to human rights concerns.

Second, and finally, human rights bodies working on EPZs may need to closely monitor the human rights impact, both actual and potential, of the trend towards private sector management and operation of EPZ projects. The World Bank has identified a number of benefits of this shift towards private sector management, and its strong encouragement will no doubt lead to a further entrenchment of privately owned and operated zones.

Furthermore, it is conceivable that the need to bring EPZ regimes into compliance with WTO law may also reinforce this trend – since the activities of private sector operators of EPZs are in the normal case beyond the scope of WTO discipline. As noted above, however, there are at least some initial suggestions that this trend towards private sector management may present particular human rights challenges in some contexts. Generally, it will be important to ensure that the delegation of management authority to private sector operators does not lead in practice to an erosion or absence of the public sector regulatory role in respect of EPZs. The experience of the move towards private sector management in other areas of public administration has shown that in many cases it requires an enhancement of the governance and oversight capacity of the public sector, rather than its withdrawal, if the human rights of affected populations are to be adequately protected.

¹ Business and Human Rights: Towards operationalizing the “protect, respect and remedy” framework”, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/11/13, 22 April 2009, at para 2 (“2009 Report”).

² 2009 Report, above n1, para 28ff (“2009 Report”).

³ “Protect, Respect, Remedy: a Framework for Business and Human Rights”, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, A/HRC/8/5, 7 April 2008, at para 18 (“2008 Report”).

⁴ 2009 Report, above n1, at para 14.

⁵ Ibid.

⁶ “State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries: Addendum”, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporation and other business enterprises, John Ruggie, Human Rights Council, 4th Sess., U.N. Doc. A/HRC/4/35/Add.1, 13 February 2007, at para 8 (“2007 Report, Addendum 1”).

⁷ 2007 Report, Addendum 1, above n6, at para 44.

⁸ 2007 Report, Addendum 1, above n6, at paras 39, 42.

⁹ 2007 Report, Addendum 1, above n6, at para 40.

¹⁰ 2007 Report, Addendum 1, above n6, at para 46.

¹¹ Ibid.

¹² 2008 Report, above n3, at para 29.

¹³ “Corporate responsibility under international law and issues in extraterritorial regulation: summary of legal workshops”, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporation and other business enterprises, A/HRC/4/35/Add.2, 15 February 2007, at para 38 (“2007 Report, Addendum 2”).

¹⁴ “Business and Human Rights: mapping international standards of responsibility and accountability for corporate acts”, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporation and other business enterprises, A/HRC/4/35, 19 February 2007, at para 15 (“2007 Report”).

¹⁵ 2009 Report, above n1, at para 16.

¹⁶ See, eg, Ruggie, “Keynote Presentation at EU Presidency Conference on the ‘Protect, Respect and Remedy’ Framework”, Stockholm, 10-11 November 2009, available at <http://www.reports-and-materials.org/Ruggie-presentation-Stockholm-10-Nov-2009.pdf>, 5 (“Stockholm Presentation”).

¹⁷ 2008 Report, above n3, at para 33ff.

¹⁸ 2009 Report, above n1, at para 18.

¹⁹ Committee on Economic, Social and Cultural Rights, “Statement on globalization and its impact on the enjoyment of economic and social rights”, 1 May 1998, reproduced in (1999) 6(4) *International Human Rights Reports* 1176.

²⁰ Report of the High Commissioner for Human Rights, “Human rights, trade and investment”, E/CN.4/Sub.2/2003/9, 2 July 2003, para 62.

²¹ There have been a number of relatively recent efforts to comprehensively map the nature, extent, and operation of EPZs in the global economy. This section merely extracts a number of relevant observations from these existing reports to provide a brief overview of the present state and historical development of EPZs. See, eg, World Bank, *Special Economic Zones: Performance, Lessons Learned, and Implications for Zone Development* (2008), available at [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/SEZpaperdiscussion/\\$FILE/SEZs+report_April2008.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/SEZpaperdiscussion/$FILE/SEZs+report_April2008.pdf) (“World Bank 2008”); International Labour Organization, William Milberg and Matthew Amengual, *Economic development and working conditions in export processing zones: A survey of trends* (2008), available at http://www.ilo.org/public/libdoc/ilo/2008/108B09_25_engl.pdf (“ILO 2008a”); International Labour Organization, *Labour and social issues relating to export processing zones* (1998) (“ILO 1998”); ILO, Report of the InFocus Initiative on export processing zones (EPZs): Latest trends and policy developments in EPZs (2008), available at http://www.ilo.org/public/libdoc/ilo/GB/301/GB.301_ESP_5_engl.pdf (“ILO 2008b”); Madani, *A Review of the Role and Impact of Economic Processing Zones* (1999), available at http://econ.worldbank.org/external/default/main?pagePK=64165259&theSitePK=469372&piPK=64165421&menuPK=64166093&entityID=000094946_99121405305212 (“Madani”); Engman et al., *Export processing Zones, Past and Future Role in Trade and Development* (OECD, 2007), available at <http://puck.sourceoecd.org/vl=2945600/cl=18/nw=1/rpsv/cgi-in/wppdf?file=514bd48h62q4.pdf> (“Engman”); Takayoshi Kusago and Zafiriz Tzannatos, *Export Processing Zones: A Review in Need of Update* (1998), available at <http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/9802.pdf> (“Kusago”).

²² See generally World Bank 2008, above n211.

²³ World Bank 2008, above n211, at 11.

²⁴ *Ibid.*

²⁵ ILO, *Types of zones: An evolutionary typology*, available at <http://www.ilo.org/public/english/dialogue/sector/themes/epz/typology.htm>.

²⁶ See generally Kusago, above n211, at 5; Madani, above n21 at 4, 12; ILO 1998, above n21; Engman, above n21, at 10.

²⁷ See generally ILO 2008a, above n21, para 5; World Bank 2008, above n21, at 17, 19ff, 54; Engman, above n21, at 15, 17ff, Annex C; Kusago, above n21, at 6ff.

²⁸ See, eg, Peter G. Warr, “*Export Processing Zones: The Economics of Enclave Manufacturing*”, 65(4) *WORLD BANK RESEARCH OBSERVER* 77-8 (1989) (“Warr”).

²⁹ Engman, above n21, at 31-2; Madani, above n21, at 32. For a skeptical view of the technology transfer effect of EPZs, see Aradhna Aggarwal, *Impact of Special Economic Zones on Employment, Poverty, and Human Development* 12ff (2007), available at http://www.icrier.org/pdf/Working_Paper_194.pdf (“Aggarwal”), at 13ff.

³⁰ See Aggarwal, above n29, for a review of relevant literature.

³¹ Engman, above n21, at 34 gives the example of Korea. See also Aggarwal, above n29, at 14ff.

³² Madani, above n21 at 42.

³³ See Pierre Cling and Gaele Letilly, *Export Processing Zones: A threatened instrument for global economy insertion?* 6 (2001), available at http://www.dial.prd.fr/dial_publications/PDF/Doc_travail/2001-17.pdf (“Cling and Letilly”), at 7.

³⁴ Madani, above n21, at 17.

³⁵ Madani, above n21 at 16; Engman, above n21, at 37.

³⁶ Eg, Stephen Creskoff and Peter Walkenhorst, *Implications of WTO Disciplines for Special Economic Zones in Developing Countries* (2009), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2009/04/06/000158349_20090406164735/Rendered/PDF/WPS4892.pdf (“Creskoff”); Engman, above n21; Cling and Letilly, above n33; Robertson, “EPZs and the WTO SCM Agreement” in Grynberg (ed), *WTO at the Margins: small states and the multilateral trading system* (CUP, 2006), Chapter 19; Granados, “Export Processing Zones and Other Special Regimes in the Context of Multilateral and Regional Trade Negotiations” INTAL-ITD Occasional paper 20, December 2003, available at http://condc05.iadb.org/intal/aplicaciones/uploads/publicaciones/i_INTALITDSTA_OP_20_2003_Granados.pdf; Sargent and Matthews “Combining Export Processing Zones and Regional Trade Agreements” (2001) 29(10) *World Development* 1739-52; Torres, “Free Zones and the World Trade Organization

Agreement on Subsidies and Countervailing Measures”, (2007) 2(3) *Global Trade and Customs Journal* 217-23.

³⁷ Engman, above n21, at 41.

³⁸ Ibid.

³⁹ See, eg, Madani, above n21; Engman, above n21; Sargent and Matthews, above n36.

⁴⁰ Eg, ILO 2008b, above n21, at para 10.

⁴¹ ILO 2008b, above n21, at para 6.

⁴² World Bank 2008, above n21, at 23; Engman, above n21, at 11-2.

⁴³ Engman, above n21, at 11-2, Annex B.

⁴⁴ ILO 2008b, above n21, at para 6.

⁴⁵ World Bank, 2008, above n21, at 23.

⁴⁶ World Bank 2008, above n21, at 2, 21, 24ff; Boyenge, *ILO Database on export processing zones* (ILO, 2007), available at http://www.ilo.org/public/libdoc/ilo/2007/107B09_80_engl.pdf (“ILO 2007”); ILO, *Employment and Social Policy in respect of export processing zones*, GB.386/ESP/3, March 2003, available at http://www.ilo.org/public/libdoc/ilo/GB/286/GB.286_esp_3_engl.pdf, paras 3,6 (“ILO 2003”); Kusago, above n21, at 8ff.

⁴⁷ ILO 2008b, above n21, at para 5.

⁴⁸ For example, jobs in EPZs in the Dominican Republic went from 500 in 1970 to 200,000 in 2008; Chinese EPZs employ at least 30 million workers and contributed 49% of total employment growth in that country between 2002 and 2006. ILO 2008b, above n21, at para 19. And, Vietnam had almost 1 million workers in its EPZs, up almost 800% from 2002. ILO, 2008a, above n21, at Table 5.

⁴⁹ World Bank 2008, above n21, at 34.

⁵⁰ ILO 2008b, above n21, at para 20. Again, there are some important exceptions, particularly among small countries – Mauritius is the textbook example, with 18% of employment in EPZs.

⁵¹ World Bank 2008, above n21; ILO 2003, above n46.

⁵² Engman, above n21, at 29.

⁵³ ILO 2003, above n46, at para 6; ILO 2008b, above n21, at para 7 also gives good figures on mixed export performance since 2003.

⁵⁴ Cling and Letilly, above n33, at para 50; See also ILO 2003, above n46, at para 5.

⁵⁵ Eg, World Bank 2008, above n21, at 37; ILO 2008a, above n21, at 20ff; Engman, above n21, at 27.

⁵⁶ Madani reports that Bangladeshi and Jamaican zones in the 1990s achieved a ratio of net to gross exports in only the range of 10-20%. Madani, above n21, at 24. This includes the wages of local workers, and if they are excluded, the ratio of locally sourced inputs to foreign sourced inputs can be surprisingly low – the ILO notes, for example, that in the Dominican Republic in 2004, ‘after 30 years of EPZ presence and robust growth in EPZ exports and employment, EPZs purchased 0.0001 per cent of material inputs from the domestic market’. ILO, 2008a, above n21, at 21.

⁵⁷ ILO 2008b, above n21, at para 24; Kusago, above n21 at 13-4; Aggarwal, above n29, at 12-3.

⁵⁸ Kankesu Jayanthakumaran, “Benefit-Cost Appraisals of Export Processing Zones: A Survey of Literature”, 51(1) *Development Policy Review* (2003), 36. See also Sinclair, “Export Processing Zones: An Ingredient for Successful Liberalization”, Working Paper, The Maxwell School of Syracuse University (May 2001), cited in World Bank 2008, above n21, at 44.

⁵⁹ ILO 2003, above n46.

⁶⁰ World Bank 2008, above n21, at 36.

⁶¹ The \$25m dam built by the Philippine Bataan EPZ is the most cited example. See, eg, World Bank 2008, above n21, at 39 and Warr, “Export Promotion via Industrial Enclaves: The Philippines’ Bataan Export Processing Zones”, (1987) 23(2) *The Journal of Development Studies* 220-41.

⁶² World Bank 2008, above n21, at 38-9.

⁶³ One of the difficulties of assessing the extent of this cost, however, is in determining what the level of tax receipts would have been in the absence of the EPZ. There will always be the argument that tax holidays granted to foreign firms (though not domestic firms relocating to EPZs) are largely revenue neutral to the extent that such firms would not have located in the EPZ were it not for the incentive. Some argue, in addition, that the transfer pricing practices of foreign firms operating in EPZs may make the question largely moot in any case, as (on this view) any tax liabilities which were imposed could be relatively easily avoided. Revenue losses from tax holidays should also be offset against new tax receipt

from income taxes on workers in EPZs, as well as fees and service charges for use of the land in the EPZ.

⁶⁴ See, eg, World Bank 2008, above n21, at 2, 45ff.

⁶⁵ See World Bank 2008, above n21, at 2-3, for a brief overview of the different types of public-private divisions of responsibilities which have been experimented with.

⁶⁶ World Bank 2008, above n21, at 46.

⁶⁷ In addition to the references below see for example E/C.12/NIC/CO/4 (2008), at para 15.

⁶⁸ See Sarah Perman et al., *Behind the Brand Names: Working Conditions and Labour Rights in Export Processing Zones* (2004), at 7, available at <http://www.icftu.org/www/PDF/EPZreportE.pdf> ("Perman/ICFTU 2004"); See also Raymond Robertson et al, *Globalization, Wages, and the Quality of Jobs: Five Country Studies* (2009), at 40-1.

⁶⁹ Eg, International Metalworkers' Federation, *Annual Survey: Grim global catalogue of anti-union repression* (2005), available at <http://www.icftu.org/displaydocument.asp?Index=991222870&Language=EN> ("ICFTU 2005").

⁷⁰ Gopalakrisnan, *Freedom of association and collective bargaining in export processing zones: Role of the ILO supervisory mechanisms*, Working paper, International Labour Office, International Labour Standards Department, Geneva (2007), at 1.

⁷¹ ILO, 2008a, above n21, at 33.

⁷² Gopalakrisnan, above n70.

⁷³ ICFTU 2005, above n69.

⁷⁴ ILO, 2008a, above n21, at 13.

⁷⁵ ILO, 2008a, above n21, at 13.

⁷⁶ Cling and Letilly, above n33, at 19; Jayanthakumaran, above n58, at 59. Aggarwal's careful study of Indian EPZs concludes that "there is little evidence to support the argument that low wages are widely prevalent in the zones due to lax attitude of the authorities towards labour laws". Aggarwal, above n29, at 24.

⁷⁷ Madani, above n21, at 45.

⁷⁸ Perman/ICFTU 2004, above n68, at 11; ILO, 2008a, above n21, at 13. The International Metalworkers' Federation has suggested that 'typically, women's wages are 20 per cent to 50 per cent lower than those of males working in the same zones'. International Metalworkers' Federation, *Export processing zones- Globalisation's great deceit*, available at <http://www.imfmetal.org/index.cfm?l=2&c=8459> ("Globalisation's great deceit").

⁷⁹ ILO, 2008a, above n21, at 13.

⁸⁰ *Ibid.*

⁸¹ ILO, 2008a, above n21, at 56.

⁸² *Ibid.*

⁸³ Perman/ICFTU 2004, above n68, at 12.

⁸⁴ ILO, 2008a, above n21, at 35.

⁸⁵ ILO 2003, above n46, at para 25.

⁸⁶ Loewenson, *Globalization and occupational health: a perspective from southern Africa*, 79 *Bulletin of the World Health Organization* (2001), available at http://www.scielo.org/scielo.php?script=sci_arttext&pid=S0042-96862001000900012. See also Perman/ICFTU 2004, above n68, at 13.

⁸⁷ Perman/ICFTU 2004, above n68, at 8.

⁸⁸ Perman/ICFTU 2004, above n68, at 12-3.

⁸⁹ Perman/ICFTU 2004, above n68, at 12. See also ILO 2003, above n46, at para 21.

⁹⁰ CEDAW/C/VNM/CO/6 (2007), at para 23.

⁹¹ Eg, CEDAW/C/MEX/CO/6 (2006), at paras 30-31; A/57/38(SUPP) (2002), at para 441.

⁹² CEDAW/C/GUA/CO/6 (2006), at para 29; CEDAW/C/GUA/CO/7 (2009), at para 29; CEDAW/C/HON/CO/6 (2007), at para 28; CEDAW/C/NIC/CO/6 (2007), at para 23. See also A/57/38(SUPP) (2002), at para 56, in respect of Fiji's special economic zones.

⁹³ Perman/ICFTU 2004, above n68, at 8.

⁹⁴ E/C.12/KEN/CO/1 (2008), at para 17; E/C.12/1/ADD.64 (2001), at para 4; E/C.12/IND/CO/5 (2008), at para 63.

⁹⁵ ILO 2008a, above n21, at 12; See also Cling and Letilly, above n33; ILO 2003, above n46, at para 22.

⁹⁶ A/57/38(SUPP) (2002), at para 290; E/C.12/SLV/CO/2 (2007), at paras 14, 32. See also CEDAW/C/GUA/CO/6 (2008), at para 30.

⁹⁷ ILO 2008a, above n21, at 58-9.

⁹⁸ ILO 2008a, above n21, at 32.

⁹⁹ Reported at the World Confederation of Labour, International Seminar on Free Trade Zones, Caracas, Sep. 2002, referred to in ILO 2003, above n46, at para 23.

¹⁰⁰ *Globalisation's great deceit*, above n78.

¹⁰¹ E/C.12/IND/CO/5 (2008), above n94, at para 31.

¹⁰² World Bank 2008, above n21, at 41.

¹⁰³ Eg, Roy and Debnath, *Plagued by pollution*, 4 March 2005, available at <http://www.thedailystar.net/2005/03/04/d5030401011.htm>.

¹⁰⁴ L. Dunn, "Education of Women Workers in Caribbean Export Processing Zones: Challenges and Opportunities", (1994) 6 *Labour Economics*.

¹⁰⁵ Madani, above n21, at 50.

¹⁰⁶ Broad and Cavanagh, *Plundering Paradise: The Struggle for the Environment in the Philippines* (University of California Press, 1994)

¹⁰⁷ Madani, above n21, at 51.

¹⁰⁸ CEDAW has, for example, on a number of occasions called for more information gathering in respect of the treatment of women in EPZs: eg, A/56/38(SUPP) (CEDAW, 2001), at para 314; and CEDAW/C/COL/CO/6 (CEDAW, 2007), at para 28; and CEDAW/C/SLV/CO/7 (2008), at para 18 and surrounding.

¹⁰⁹ 2007 Report Addendum 1, above n6, at para 40.

¹¹⁰ 2007 Report Addendum 1, above n6, at para 46.

¹¹¹ One example may be importing state participation in monitoring bodies set up under bilateral and regional trade agreements (see further Part 6 below). Labor interests in the importing state can in some circumstances have an interest in pressuring importing states to take such monitoring more seriously than they otherwise might. Other examples may be where there is direct governmental involvement in the import of goods from EPZs – for example in the context of government procurement, where some assessment of the human rights conditions associated with the production of the procured goods sometimes occurs.

¹¹² Speech by Pascal Lamy, 'Globalization and trade opening can promote human rights', 5 June 2009, University of Geneva, transcript at http://www.wto.org/english/news_e/sppl_e/sppl128_e.htm.

¹¹³ See generally ILO 2008a, above n21.

¹¹⁴ ILO 2008b, above n21, para 49.

¹¹⁵ ILO 2008a, above n21, at para 55.

¹¹⁶ 2007 Report Addendum 1, above n6, at para 40.

¹¹⁷ World Bank 2008, above n21, at 49.

¹¹⁸ ILO 2003, above n46, at 19.

¹¹⁹ 2009 Report, above n1, at paras 28-37.

¹²⁰ Put simply, the most favored nation principle requires WTO Members not to discriminate in their trading relations as between their different trading partners.

¹²¹ See generally WTO disputes *Indonesia – Autos*, WT/DS54/R, Panel Report, adopted 23 July 1998.; *Canada – Autos*, WT/DS139/AB/R, Appellate Body Report, adopted 19 June 2000.

¹²² See *EC – Asbestos*, WT/DS135/AB/R, adopted 12 March 2001, para 100.; *Dominican Republic – Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, para 96.; *EC – Biotech*, WT/DS291-3/R, adopted 21 November 2006, at paras 7.2499-2517.

¹²³ See generally the reports and material referred to at <http://www.business-humanrights.org/SpecialRepPortal/Home/Materialsbytopic/Investment>.

¹²⁴ ILO 2008b, above n21, para 49.

¹²⁵ Eg, Submission to Professor John Ruggie from Professor Susan Ariel Aaronson, available at <http://www.reports-and-materials.org/Aaronson-submission-to-Ruggie-2-Apr-2008.pdf>.

¹²⁶ Aaronson and Zimmerman, *Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking* (CUP, 2008), at 53 ("Trade Imbalance").

¹²⁷ See <http://www.icftu.org/list.asp?Language=EN&Order=Date&Type=WTOReports&Subject=ILS>.

¹²⁸ Trade Imbalance, above n126, at 14.

¹²⁹ William Clatanoff, "Labor Standards in Recent U.S. Trade Agreements", (2005) 5(2) *Richmond Journal of Global Law and Business* 109.

¹³⁰ See eg, Statement by Timothy Reif Before the House Committee on Ways and Means Subcommittee on Trade, 17 November 2009, available at <http://www.ustr.gov/about-us/congressional-affairs/congressional-hearings-and-testimony/2009/november/statement-timothy->.

¹³¹ The relevant Conventions are the International Covenant on Civil and Political Rights; International Covenant on Economic Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Prevention and Punishment of the Crime of Genocide; Convention concerning Minimum Age for Admission to Employment (No 138); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182); Convention concerning the Abolition of Forced Labour (No 105); Convention concerning Forced or Compulsory Labour (No 29); Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No 100); Convention concerning Discrimination in Respect of Employment and Occupation (No 111); Convention concerning Freedom of Association and Protection of the Right to Organise (No 87); Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No 98); International Convention on the Suppression and Punishment of the Crime of Apartheid.

¹³² Bartels, "The WTO Legality of the EU's GSP+ Arrangement" (2007) 10(4) *Journal of International Economic Law* 869-86.

¹³³ See, eg, World Trade Organization, Committee on Trade and Development, WT/COMTD/N/4/Add.3, (2006) at para 3.

¹³⁴ See the chapter by Marceau in Bethlehem et al., *Oxford Handbook of International Trade Law* (OUP, 2009), at 562.

¹³⁵ They include provisions in free trade agreements with Jordan, Singapore, Chile, Australia, Morocco, Central America/Dominican Republic, Bahrain, Oman, Peru, Colombia, Panama and Korea.

¹³⁶ For a review of some of the experience under this agreement see Elliott and Freeman, *Can Labor Standards Improve Under Globalization?* (Peterson Institute, 2003), chapter 4.; ILO 2003, above n46, at para 10.

¹³⁷ The free trade agreement between the US and Jordan is one example.

¹³⁸ The free trade agreements the US has negotiated with Chile and Singapore are examples.

¹³⁹ See, eg, Cleveland, 'Human Rights Sanctions and International Trade: A Theory of Compatibility', (2002) 5 *Journal of International Economic Law* 133.

¹⁴⁰ See *US-Shrimp*, WT/DS56/AB/R, Appellate Body Report, adopted 21 November 2001, para 133.

¹⁴¹ This in particular might be doubted, though one view is that the more the sanctions are targeted at the products and/or firms which are directly related to labor rights abuses (rather than targeting all products from the offending country), the more likely it may be that the measure will satisfy the 'necessity' test in Article XX.

¹⁴² For an introduction to the various positions in the debate around trade and labour standards, including the question of conditionality, see for example: Trebilcock and Howse, *The Regulation of International Trade*, 3rd ed., (Routledge, 2005), Chapter 17; Elliott and Freeman *Can Labor Standards Improve under Globalization?*, (Institute for International Economics, 2003), Chapter 4; Blackett, "Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation" (1999) 31(1) *Columbia Human Rights Law Review* 1; Cleveland, above n139; Compa and Diamond (eds), *Human Rights, Labor Rights and International Trade* (UPenn Press, 1996).

¹⁴³ See 2007 Report Addendum 2, above n13. Note, of course, that trade sanctions are not strictly extraterritorial in the sense of extending prescriptive jurisdiction outside one's territory. In that sense, there is nothing extraterritorial whatsoever about stopping goods at one's border. The term is used a little more loosely here and is in line with the Special Representative's recognition that extraterritoriality is not a binary matter, but may include domestic measures with extraterritorial implications.

¹⁴⁴ See eg, Cleveland, above n139.

¹⁴⁵ World Trade Organization, *Differential and more favorable treatment reciprocity and fuller participation of developing countries*, available at http://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm, especially clause 3(c) and footnote 3.

¹⁴⁶ Eg, Marceau, above n134, and Bartels, above n1322. There are a number of comments in that case in which the Appellate Body did seem to suggest that it may be favorably disposed to such conditionalities: see. *EC – Tariff Preferences*, WT/DS246/AB/R, Appellate Body Report, adopted 20 April 2004, at para 182.

¹⁴⁷ Above n36 and accompanying text.

¹⁴⁸ Creskoff above n36, at p.37.

¹⁴⁹ World Bank 2008, above n21, at 54.