

**LABOUR RIGHTS AND FREE TRADE ZONES IN MOZAMBIQUE AND NAMIBIA: A CRIPPLING
COCKTAIL?**

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RIGHTS AND DEMOCRATISATION IN AFRICA)

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DECLARATION

I **GERALDINE MWANZA GERALDO** declare that the dissertation **Labour rights and free trade Zones in Mozambique and Namibia: A crippling cocktail?** is my work and that it has not been submitted for any degree or examination in any other university. All the sources used or quoted have been duly acknowledged.

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DEDICATION

This work, like any other I have done in the past, or any other I am yet to undertake is dedicated to the memory of my late father, Mwanza Geraldo, a worthy soldier.

ACKNOWLEDGMENTS

What is a dissertation but a dance of words. As trivial as this statement might make this work out to be, invested in this paper is, not only my energy; but the zeal, faith and knowledge deposited in me by others. Therefore, I would like to extend, as a return on their investment, thanks to everyone who has taught me and supported me throughout this research.

Particular thanks are in order for the following:

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As a mighty woman of faith it would be unforgivable if I did not thank God.

ABBREVIATIONS

ACHPR	-	African Charter on Human and Peoples' Rights
AHRLR	-	African Human Rights Law Reports
CILSA	-	Comparative International Law Journal of Southern Africa
EPZ	-	Export Processing Zone
FDI	-	Foreign Direct Investment
FTZ	-	Free Trade Zone
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
IFZ	-	Industrial Free Zone
ILO	-	International Labour Organisation
IFA	-	International Framework Agreements
IPC	-	Investment Promotion Centre
IMF	-	International Monetary Fund
LaRRI	-	Labour Resource and Research Institute
NePAD	-	New Partnership for African Development
SERAC	-	Social and Economic Rights Action Centre
UDHR	-	Universal Declaration of Human Rights

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I. INTRODUCTION

In an attempt to earn hard foreign currency to foster economic development, Namibia and Mozambique have opted for a seventy-eight year old solution,¹ the establishment of free trade zones (FTZs). According to scholars, not only are they failing to earn the currency they chase, they are paying in an even harder currency, namely, the devastation of an already devastated societal class. The misery of the African proletariat is as visible as the wrinkles on the notion of FTZs; it is certainly not Africa's best kept secret. This fairy tale began around the eighties when African politicians decided to down their economic sorrows in a bar called the Bretton Woods institutions, *inter alia*, the World Bank and the International Monetary Fund (IMF). In this joint the bartender serves one cocktail, trade liberalisation.² The debate, a couple of years down the line, is whether the blend of developing economies and liberal trade policies cripples the full realization of human rights.

This paper reduces the scope of this discussion, by focusing on the interplay between FTZs and labour rights. In other words, it seeks to determine the effects of FTZs on the full realization of labour rights in Mozambique and Namibia.

1.1. Methodological note

In shaping this research into a manageable form, Mozambique and Namibia were chosen as the areas of study. This was done for two main reasons:

1. Firstly, the geographic location of both countries. As both countries are in Southern Africa they subscribe to similar international legal regimes.
2. Secondly, the FTZ regimes of the two countries are congruent. Whilst Namibia established export processing zones (EPZs), Mozambique established industrial free zones (IFZs).³

The data amassed through the research conducted was processed using comparative, descriptive and prescriptive analyses. It must however be noted that there are very few literary sources on the employment practices of FTZs in Namibia and Mozambique. Another challenge was the language barrier, as most documents on Mozambique were written in Portuguese. Nevertheless, the comparative methodology was used mainly for the purpose of counterpoising the national laws, policies and practices. The descriptive and prescriptive were used to outline the content of the policies and practice and to interpret the findings in order to recommend.

¹ The first FTZ was established in Spain in 1929. See Jauch H "The impact of global production systems on trade union strategies: The case of export processing zones (EPZs) in Namibia" (May 2006) <http://www.larri.com.na/papers/EPZ-Ramatex%20paper%202006.doc> (accessed 28 October 2007) 1.

² Above, 2.

³ <http://www.ilo.org/ilolex/english/23e2006.pdf> (accessed 28 October 2007).

1.2. Outline of the argument

Chapter one is the springboard of this paper. It introduces the subject, outlines the methodology and more importantly, defines the operative concepts and links FTZs to labour rights. Chapter two is the theoretical mine. It will explain the chains of cause and effect and consider debates for and against assuming a nexus between FTZs and labour rights. Chapter 3 focuses the discussion by providing an outline of the labour and FTZ policies and practices of Namibia and Mozambique. This chapter also marries the theory and the policies of Namibia and Mozambique. It concludes that FTZs result in violations of labour rights in Namibia but not in Mozambique. The baton in this relay is then passed on to chapter 4, the conclusion, which determines whether the findings in chapter 3 imply that FTZ policies should be abandoned altogether.

Using Aristotle's logical sequence, the syllogism, this paper will argue that trade liberalisation results in the violation of labour rights. FTZs are manifestations of trade liberalisation therefore FTZs violate labour rights, unless there is political will that jealously guards the full realisation of labour rights.

1.3. Is there a need to connect free trade zones and labour rights?

The rationale for this research is simple. Violations of labour rights occur in FTZs and there is no conclusive evidence whether these violations are a consequence of the establishment of FTZs or not. FTZ antagonists, like Jauch, are of the opinion that the creation of FTZs has resulted in:

[T]he establishment of a large number of "working poor" in full-time employment, unable to meet even their basic needs. This is in sharp contradiction to the...stated objective of promoting decent work in line with the International Labour Organisation (ILO) standards. [He states further that; FTZs] do not promote socio-economic development.⁴

On the other hand, FTZ protagonists, for instance Nam, argue that the evidence linking FTZs to violations of labour rights is inconclusive. The author writes that "the small number of empirical studies conducted on the impact of [FTZs] does not provide sufficient information to make a judgment on whether [FTZs] are detrimental to social conditions."⁵ Schulze adds another paradox to the puddle, when he writes that "the success of any free trade zone programme will depend largely on the manner in which the social needs of people working in such zones will be addressed."⁶ This paper seeks to lay the ghost to rest on this question with respect to Namibia and Mozambique.

⁴ Jauch (n 1 above) 11.

⁵ Nam CYJ "Competing for foreign direct investment through the creation of EPZs: The impact on human rights" in De Schutter O (ed) *Transnational corporations and human rights* (2006) 161.

⁶ Schulze HC "The legal implications of the establishment of free trade zones in South Africa" (1998) XXXI *Comparative International Law Journal of Southern Africa (CILSA)* 16. The rationale for this is that the absence of labour rights results in, *inter alia*, absenteeism, high staff turnover and reduced productivity, which in turn results in a limited potential to attract foreign direct investment. See Schulze HC "The free-trade-zones programmes of Namibia and Mauritius and the latest developments in Europe: Lessons for South Africa" (1999) XXXII *CILSA* 187.

1.4. Defining concepts

1.4.1. Labour rights

Labour rights are human rights traditionally thought to fall within the classification economic, social and cultural rights.⁷ Over the years, the scope of this body of rights has expanded and to date, this classification is no longer valid. The distinctive characteristic of the right to work is that it is not only an entitlement to persons by virtue of their humanity, but also by virtue of the fact that they engage in the application of their skill, talent and industry in exchange for remuneration.⁸

The rationale for the expansion of the meaning of the right to work is the trajectory of the labour rights movement. Traditional labour law was premised on the notion that work simply implied a *quid pro quo* between an employer and an employee, capital in exchange for the application of skill, talent and industry.⁹ As justified by Pluralist and Marxist scholarship, law was an instrument to protect the weaker party in the employment relationship, hence the emphasis on collective rights.¹⁰ With changing times labour law transitioned. The commodification of labour ceased and it came to be understood that work is an extension of an individual's personality, therefore it attributed to an individual much more than an economic value.¹¹ As a result thereof, "the employer is constrained in the use or application of the worker's capacity to work not only by the terms of the agreement but also by an obligation not to wrongfully impair the worker's self-respect, dignity or reputation."¹² In 1922, the Transvaal Provincial Division in South Africa recognised the non-material interest of workers' in employment in *Smith v Cycle and Motor Trade Supply Co.*¹³ These individualistic tendencies of labour law were reinforced by the scholarship of Rawls and Dworkin. The former in his theory of justice wrote that "each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system for all," and the latter laid emphasis on the right of all people to equal treatment and respect.¹⁴ Like a hen to its chicks, labour law became protective of its beneficiaries. Ruth Ben-Israel captured the spirit of labour law as follows:

By just belonging to the working class, an employed person as well as the job allocated to him represented the distribution of income, the achievement of status and the promise of social dignity.¹⁵

⁷ This is evident from the fact that they are included in the ICESCR, article 6 and not the International Covenant on Civil and Political Rights.

⁸ "Work may be loosely defined as the application of skills, talents or industry for the purpose of fulfilling particular needs." See Jordaan B "A new organising theme for labour law" in Kalula E & Woolfrey D (eds) *The new labour market: Reconstruction, development and equality* (1995) 180.

⁹ Above 181.

¹⁰ Du Toit D "Towards a critical analysis of law in South Africa" in Kalula & Woolfrey (n 8 above) 163.

¹¹ Jordaan (n 8 above) 181.

¹² Above.

¹³ 1922 TPD 324.

¹⁴ Heepel B "Four approaches to the modernisation of individual employment rights" in Baplain R & Weiss M (eds) *Changing industrial relations and modernisation of labour law* (2001) 186 – 7.

¹⁵ Ben-Israel R "The rise, fall and resurrection of social dignity" in Baplain & Weiss (above) 1.

In the language of human rights the notion the “right to work” is a synonym for social dignity. Goldman defines social dignity in employment as “a person’s employment-related opportunity to develop her or his unique personal attributes and relationships, maintain a sense of substantial self-worth, enjoy at least a moderate degree of financial security, and participate in shaping her or his own communal destinies.”¹⁶ The right to work in human rights parlance is thus an instrument for ordering society, the aim being to make society egalitarian.

The *locus classicus* in the protection of social human rights at work is the Universal Declaration of Human Rights (UDHR). The following extract clearly demonstrates the nature of the protection afforded to employees.

ARTICLE 23.

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

ARTICLE 24.

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

A reading of the text of the UDHR reveals that the right to work guarantees a “threshold of material [and moral] well-being in order to enable the employee to function as a full member of society and to enjoy both the self-respect and the esteem of others.”¹⁷ The measure of whether there is protection of the right to work does not inhere in the provision of the right itself. The litmus test is whether the job enables an employee to “maintain some culturally determined minimum standard of living, below [which] the worker will be subject to feelings of alienation and inferiority.”¹⁸ Other developments that share this reflection are, *inter alia*, article 6 of the International Covenant on Economic Social and Cultural Rights (ICESCR) which outlines the overall objective of protecting employment as ensuring “full and productive employment under conditions safeguarding fundamental political and economic freedoms of the individual;” the 1998 ILO Declaration on Fundamental Principles and Rights at Work¹⁹ which earmarks a set of standards as core labour standards which are inviolable and the 1969 United Nations Declaration on Social Progress and Development. Article 6 of the latter reads:

¹⁶ Goldman A “Cultural and economic perspectives concerning protection of workers’ social dignity” in Baplain & Weiss (above) 9.

¹⁷ Ben-Israel (n 15 above) 2.

¹⁸ Above.

¹⁹ The following are identified as core labour principles and rights:

1. Freedom of association and the effective recognition of the right to collective bargaining;
2. The elimination of all forms of forced or compulsory labour;
3. The effective abolition of child labour; and,
4. The elimination of discrimination in respect of employment and occupation.

Section 2 of the ILO Declaration. <http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE> (accessed 28 October 2007).

Social development requires the assurance to everyone of the right to work and the free choice of employment. Social progress and development require the participation of all members of society in productive and socially useful labour and the establishment, in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of property, of forms of ownership of land and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people.

Article 15 of the African Charter on Human and Peoples' Rights (ACHPR) protects the right to work under equitable and satisfactory conditions and the right to equitable remuneration. Udombana writes that the Charter enjoins states to realize this right through national employment policies that provide opportunities for work, with institutions and techniques to achieve these objectives.²⁰ He adds further, that article 15 when read in conjunction with the preamble, aspires to meet economic, social and cultural needs.²¹ Moreover, the African Commission on Human and Peoples' Rights (African Commission) endorsed the social dignity interpretation of the right to work. Proof thereof is its decision in *Malawi African Association v. Mauritania*,²² wherein it held that "unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being." An even more progressive feature of the African Commission's approach to the right to work is the "integrative interpretive methodology".²³ In *Union Interfricaine des Droits de l'Homme v. Angola*,²⁴ the Commission concluded that mass expulsion of certain West African nationals by the Angolan government threatened the violation of certain egalitarian rights, including the right to work. In *Pagnouille v. Cameroon*,²⁵ the Commission upheld the freedom from discrimination in work, wherein it held that a denial of reinstatement to former professional capacity, despite amnesty to that effect when others who have been condemned under similar conditions have been reinstated, constituted a violation of the right to work under the Charter. In its landmark decision *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*²⁶ the Commission found that embedded in the right to food is the right to work. It held, *inter alia*, that "[t]he right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of other rights, [such as the right to] work."

The nature of the obligation of states with respect to the right to work is as outlined by the African Commission in *SERAC and Another v Nigeria*. There is an obligation to respect which requires states to "refrain from interfering in the enjoyment of all fundamental rights; [the state] should respect right-holders, their freedoms, autonomy, resources, and liberty of their action."²⁷ The obligation to protect requires a state to "take measures to protect beneficiaries of the protected rights against political,

²⁰ Udombana N "Social rights are human rights: Actualizing the right to work and social security in Africa" (2006) 39 *Cornell International Law Journal* 183.

²¹ Above.

²² (2000) AHRLR 149 (ACHPR 2000) para 135.

²³ Udombana (n 20 above) 189.

²⁴ (2000) AHRLR 18 (ACHPR 1997) para 17.

²⁵ (2000) AHRLR 57 (ACHPR 1997) para 29.

²⁶ (2001) AHRLR 60 (ACHPR 2001) para 65.

²⁷ n 26 above, para 45.

economic and social interferences.”²⁸ The obligation to promote human rights requires a state to ensure “that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.”²⁹ Lastly, the obligation to fulfil is “a positive expectation [that the State will] move its machinery towards the actual realisation of the rights.”³⁰ A state’s compliance with the fourfold level of obligations is determined by the nature and implementation of its employment policies. In Udombana’s words, the obligations of states are of “conduct and respect”.³¹

The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right. The obligation of result requires states to achieve specific targets to satisfy a detailed substantive standard.³² The fulfilment of social rights requires the existence of a planned policy of employment ... It involves measures designed to promote full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.³³

1.4.2. Defining and connecting free trade zones to labour rights

FTZs belong to the class of schemes that entered the policy papers of developing countries through the Trojan horse, trade liberalisation.³⁴ The most apt description of these zones stems from the condition given to the free port of Hamburg in 1888. The port “was granted the special privilege of manufacturing on condition that it would not compete with the hinterland industry and would stay export-oriented.”³⁵ As Schulze explains; “free trade zones serve as a focus for infrastructure development of a kind that is considered necessary for export-oriented activities.”³⁶

The significance of the diamond ring that FTZs offer states is not the promise to love and cherish forever and for always, but rather to attract another partner to the relationship. The immediate objective of FTZs is to attract foreign direct investment (FDI) which in the long term promises to metamorphose into social development.³⁷ The idea is that developing countries with their regulation-laden economies should designate zones as areas of free trade. In these untrammelled economic tracts bureaucratic red tapes are broken down through incentives.³⁸ These incentives range from tax holidays to lower administrative and establishment costs.³⁹ In certain countries, particularly developing countries, incentives have translated into lax labour laws, and at times to no labour laws.⁴⁰ Reason being, the most

²⁸ Above, para 46.

²⁹ Above.

³⁰ Above, para 47.

³¹ Udombana (n 20 above) 187.

³² Above.

³³ Above, 188.

³⁴ Schulze HC “Free trade zones at the beginning of the 21st century” (2002) XXXV *CILSA* 199.

³⁵ Schulze (n 6 above) 2.

³⁶ Above, 1.

³⁷ Schulze (n 34 above) 199.

³⁸ Above, 198 – 9.

³⁹ Above.

⁴⁰ Nam (n 5 above) 163.

valued comparative advantage of developing countries is cheap labour and cheap labour is considered to be a pull factor for investors.⁴¹ Heeples summarises the cycle as follows:

It is said that the liberalisation of trade and investment within a regional economic area or internationally, by removing barriers on the movement of goods, services and capital, throws the labour and welfare systems of the states into competition with each other. This leads to a process of market selection by which states adopt the most efficient form of regulation. *Countries with low labour costs will attract investment; this in turn leads to greater demand for labour, higher wages and improved working and living conditions.* (My emphasis)⁴²

There are different types of FTZs. Namibia uses an EPZ⁴³ and Mozambique an IFZ.⁴⁴ The differences between these two types of zones are inconsequential. EPZs are defined as “industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being (re-)exported again.”⁴⁵ An IFZ on the other hand, “is a designated area, frequently near a port or an airport, which has a basic infrastructure of common facilities and services for the establishment of manufacturing plants primarily oriented towards foreign markets.”⁴⁶

⁴¹ Above, 165.

⁴² Heeples (n 14 above) 186.

⁴³ Section 2, Export Processing Zones Act 9 of 1995.

⁴⁴ Preamble, Industrial Free Zone Regulation Decree No. 62/99 of 21 September.

⁴⁵ Nam (n 5 above) 161.

⁴⁶ Schulze (n 34 above) 8.

II. FREE TRADE ZONES: VEHICLES OF SOCIAL RIGHTS OR SOCIAL APARTHEID?

2.1. Lifting the veil of free trade zones

Thus far the paper has haphazardly linked trade liberalisation and FTZs. FTZs are pedigrees of trade liberalisation. "Where comprehensive liberalisation is not possible, a "second-best" solution is the establishment of a free trade zone as a means of attracting FDI."⁴⁷ The establishment of FTZs is the first step in the path of liberalisation. The overall objective is that the entire country should operate as a FTZ.⁴⁸ Just as Aristotle had argued that all men are mortal and Socrates is a man, at this juncture this paper holds that trade liberalisation violates labour rights and FTZs are nothing more than trade liberalisation.

2.2. Labour standards in the midst of trade liberalisation

2.2.1. Understanding trade liberalisation

As impressive as macro economic figures and facts might be the best way to depict the predicament of the employed in Africa is to juxtapose a national minimum wage and a grocery list. The reality is often harsh, as monthly earnings can barely grease lips to deceive. Scholarship on Africa's failed economic development abounds, but nothings expresses the dire state of Africa's proletariat better than Jauch's portrayal; "a large number of "working poor" in full-time employment, unable to meet even their basic needs."⁴⁹ Hence the desperation for economic development.

In a globalized economy the options available to African economies to meet their developmental needs are dished out by the World Bank and the IMF. The New Partnership for Africa's Development (NePAD) also noted this and affirmed that greater global integration "has limited the space for developing countries to control their own development."⁵⁰ Like the fable of the Armenian King and the perfect liar, those who wield power are those who control the options. As aptly defined by Pieterse; globalisation "means that developing states are faced with the choice of either adhering to the dominant economic culture or facing isolation through limited access to the global market."⁵¹ The latter is not an option particularly with respect to development because it reduces the continent's chances of accessing much needed foreign capital for investment. "FDI brings with it employment, managerial skills and technology,

⁴⁷ Schulze (n 34 above) 198.

⁴⁸ Jauch H "Export processing zones and the quest for sustainable development: A Southern African perspective" (2002) 14(1) *Environment and Urbanisation* 101.

⁴⁹ Jauch (n 1 above) 11.

⁵⁰ Udombana N "How should we then live? Globalisation and the New Partnership for Africa's Development" (2002) 20 *Boston University International Law Journal* 298.

⁵¹ Pieterse M "Equality in the global village" (2003) XXXVI *CILSA* 176.

and thus accelerates growth and development.”⁵² By a process of elimination, the only option left for African states is adherence to the dominant economic culture, which translates into trade liberalisation.

Trade liberalisation or free trade is merely the oil that greases the wheels of globalisation.

Globalisation is the substantive process of economic and technological expansion looking towards the opening up and integration of the entire world into and under one economic system. Liberalisation provides the policy lubricants and produces the appropriate regulatory/legal frameworks to ensure the smooth implementation of the process.⁵³

Free trade means deregulation.⁵⁴ Hugon explains it by reference to the economic policy objectives of the Washington Consensus. Key words in his analysis are “economic flexibility,” “opening up to the world markets based on the principle of comparative advantage,” “free circulation of the factors of production” and the removal or relaxation of *inter alia* foreign exchange controls and tariffs.⁵⁵ “Internal liberalisation has to do with trade agencies, a reduction in the role of the state, the “slimming down” of public and parastatal enterprises, the dismantling of subsidies and stabilisation bodies, and the rationalisation and privatisation of the public sector.”⁵⁶ The rationale for this strategy is that the development of developing economies is hampered by excessive regulation and red-tape. The “high-level of protection makes it difficult to export and attract foreign direct investment in export activities,”⁵⁷ therefore in order for states to attract FDI, rules governing the business environment must be relaxed. State-centred regulation must be replaced by the rules of the market.⁵⁸

2.2.2. Can labour rights survive trade liberalisation?

Free trade rejects rules and state intervention. It “[rejects] encumbering markets with social clauses that...impose regulations and standards intended to preserve workers’ social dignity.”⁵⁹ In this respect, trade liberalisation is swimming against the labour rights current. This is because modern labour law requires an interventionist state. It is based on four approaches; namely, deregulation, human rights, rights-based regulation and regulation for competitiveness.⁶⁰ Deregulation requires the regulation of the employment relationship using the private law obligations, for instance laws of contract.⁶¹ The rights-based regulation approach, on the other hand, holds that there are discrepancies in the labour market as markets are, amongst others, culturally defined⁶² and for purposes of economic efficiency, distributive

⁵² Asiedu E “On the determinants of foreign direct investment to developing countries: Is Africa different?” (2002) 30(1) *World Development* 2.

⁵³ Keet D “Globalisation, the World Trade Organisation and the implications for developing countries” *Law, Democracy and Development* 33.

⁵⁴ Goldman (n 16 above).

⁵⁵ Hugon P *The economy of Africa* (2004) 90.

⁵⁶ Above.

⁵⁷ Schulze (n 34 above) 198.

⁵⁸ Ben-Israel (n 15 above) 3.

⁵⁹ Goldman (n 16 above). See Garbers C “Labour law and economic development: Lessons from the Pacific Rim” in Kalula & Woolfrey (n 8 above) 101.

⁶⁰ Heepel (n 14 above) 184 – 8.

⁶¹ Above 184.

⁶² Goldman (n 16 above) 13.

justice and improved economic performance the state has to increase its role in the economic market to correct the discrepancies.⁶³ The argument in favour for the regulation for competitiveness approach is that when liberalisation of trade and investment throws the labour and welfare systems of the states into competition with each other the result is “a process of market selection [whereby] states adopt the most efficient form of regulation.”⁶⁴ Finally, the global human rights movement is a rule-based movement. Ben-Israël confirms that social human rights are suckling infants of state-centred regulation when she writes that “workers’ entitlement to social dignity could not have been implemented [and cannot be maintained if] the state [does not play] an active role in intervening in labour relations.”⁶⁵ To this extent trade liberalisation and labour rights are incompatible as they are moving in opposite directions.

Another debate that connects liberalisation and labour rights concerns the comparative advantage principle. An infamous consequence of globalization on labour rights was coined by Justice Louis Brandeis of the United States Supreme Court in the phrase a “race to the bottom”.⁶⁶ Globalisation, more specifically, trade liberalisation throws states into competition with each other.⁶⁷ It is stated that with labour as their greatest commodity, in order to improve their chances developing states have to engage in what the IMF refers to as “labour market flexibility”.⁶⁸ Theoretically this translates into making labour markets adaptable; however, critics argue that this is “a code name for lower wages and less job protection.”⁶⁹ Labour market flexibility in developing countries is tantamount to weak or absent regulation according to some scholars. This negative competition is desperate competition premised on the myths that:

- (a) Lower labour standards lead to lower labour costs, and (b) foreign investors prefer to locate where labour costs are lower.⁷⁰

This negative competition also affects policy making at a regional level. Behind the veil of diplomacy during regional policy negotiations is self-interest. Competition results in states negotiating open and vague terms that allow them room to draft national trade and labour policies that fall short of meeting the core social dignity values.

Trade liberalisation is also seen to be antithetical to labour rights because it redefines the right to work in purely economic terms. The concerns of trade liberalisation are not employment, but rather

⁶³ Heepel (n 14 above) 185.

⁶⁴ Above, 186.

⁶⁵ Ben-Israël (n 15 above) 2.

⁶⁶ US Supreme Court Justice Louis Brandeis in the 1933 case, *Liggett Co. v. Lee* (288 U.S. 517, 558-559) coined the concept a “race to the bottom”. It is a metaphor to illustrate that countries are vulnerable to interstate competition. “The “race to the bottom” implies that the...states compete with each other as each tries to underbid the others in lowering taxes, spending, regulation...so as to make itself more attractive to outside financial interests or unattractive to unwanted outsiders.” http://en.wikipedia.org/wiki/Race_to_the_bottom (accessed 18 October 2007).

⁶⁷ Mansoor FZ “Trade versus peace: A contextual analysis of core labour standards in the global trading community” (2005) 5 *Asper Review* 134.

⁶⁸ Heepel B *Labour laws and global trade* (2005) 11.

⁶⁹ Above.

⁷⁰ Nam (n 5 above) 166.

unemployment. In free trade “the right to work is replaced by employability.”⁷¹ As a consequence, the state is stripped of all regulatory powers with respect to workers’, except the responsibility to improve the opportunities of citizens to access employment.⁷² As with illegal prostitution, the prostitution of workers’ to transnational corporations through globalisation requires them to be “reflexive and flexible in adapting themselves to the bitter realities of the changing industrial society even if it means undermining their right to social dignity.”⁷³ The statement of the Namibian Minister of Trade and Industry, in the face of flying allegations of serious violations of labour rights at an EPZ factory, corroborates this argument. The Minister “called on workers to “embrace the [inhuman and degrading] work ethics [of EPZ enterprises].”⁷⁴

Finally, trade liberalisation is also characterised by the domination of transnational corporations as it promotes privatisation.⁷⁵ There is a paradigm shift, namely the transfer of power from the state to multinational companies and it cannot be overemphasised that transnational corporations make uncomfortable sleeping partners. Globalisation drives a wedge between the public-private divide and widens it, not only in terms of ownership but also in terms of regulation.

As far as workers’ social human rights are concerned, [liberalisation] rejects any outside interference in labour relations and is demanding its re-privatisation, claiming that human rights’ concerns are limited to the public sphere only, and therefore workers’ entitlement to social dignity is beyond the scope of basic constitutional rights.⁷⁶

2.2.3. *Labour rights can survive trade liberalisation*

Pieterse is of the opinion that the antithetical approaches of trade liberalisation and labour rights do not necessarily imply that they cannot co-exist. Firstly, this is because both are products of the same phenomenon, globalisation.⁷⁷ Further, they are not an end in themselves. “The respective interests served by the global economy and the global human rights movement fall to be balanced domestically under local conceptions of constitutionalism.”⁷⁸ The above and the equivocal evidence leads liberalisation protagonists to conclude that whether or not trade liberalisation is bad or good for a developing economy depends to a large extent on the internalisation of the trade policies.

Schulze quantifies the position taken by Pieterse when he alludes to the fact that FTZs are not molecules, but atoms in a molecule. “The free trade zone cannot itself induce an inflow of foreign investment if foreigners are not interested in investing in the economy because of their unfavourable

⁷¹ Ben-Israel (n 15 above) 3.

⁷² Above.

⁷³ Above.

⁷⁴ Labour Resource and Research Institute (LaRRI) “RamateX: On the other side of the fence” (October 2003) <http://www.alrn.org/images/upload/RamateX.doc> (accessed 28 October 2007) 8. See Price LR “International framework agreements: A collaborative paradigm for labour relations” in Likosky MB *Law, infrastructure, and human rights* (2006) 241.

⁷⁵ Price (above).

⁷⁶ Ben-Israel (n 15 above) 3.

⁷⁷ Pieterse (n 51 above) 173.

⁷⁸ Above.

assessment of the local business environment, including political and social stability and physical trade infrastructure.”⁷⁹ According to the scholar favourable business ambiances are wanting in a large number of developing countries, particularly in Africa.⁸⁰ This observation is shared by the drafters of NePAD who acknowledged Africa’s deficiency and called on states “to *develop the capacity* to sustain growth at levels required to achieve poverty reduction and sustainable development.”⁸¹ (My emphasis) Heeple even narrows the problem down to bad governance.⁸² The simplistic argument he provides is justified by the following conundrums: Are labour rights the only human rights violated in FTZs? More importantly, which labour rights are violated in FTZs? Is it only those that relate to increased economic performance or is there an indiscriminate violation of all rights? “[A]n International Confederation of Free Trade Unions study concedes that [FTZs] are by no means the only places where labour rights are violated.”⁸³

Juliana Nam attributes violations of labour laws in FTZs to the use of FTZs as trade policies.⁸⁴ The scholar argues that developing countries often prioritize economic development over human rights.⁸⁵ However, this phenomenon which leads to a “race to the bottom”, she states is not economic but political.⁸⁶ An example of such prioritization from the Namibian front is a statement made by President Sam Nujoma wherein he justifies the non-applicability of Namibian labour laws in the EPZs as a “delicate compromise necessary to achieve a larger goal of job creation.”⁸⁷ Taking into consideration Mebratu Belay’s barometer of economic success; which holds that the “unemployment rate is one of the best measures of the economic condition of the nation,”⁸⁸ it is clear that FTZ policies have an economic and not social allegiance in some states. The solution proposed is not to throw out the baby with the bath water. “From a policy perspective,...governments should be encouraged to move away from incentive-based means of competing to attract FDI in favour of greater concentration on rule-based means of competing that do not weaken...labour standards.”⁸⁹ In essence, what is required is a rational use of rights.⁹⁰

Finally, the term trade liberalisation spews out the fact that it is tied to liberal policies. Liberalists argue that it is the states job to improve the quality of people’s lives by opening up options and allowing people to make choices.⁹¹ Therefore, if there is an economic worth in the creation of FTZs, regardless of whether or not violations of labour rights occur, FTZs should be maintained. This argument is built from an understanding that “an element of voluntarism is always present in every employment relationship.”⁹²

⁷⁹ Schulze (n 34 above) 199.

⁸⁰ Above.

⁸¹ NePAD <http://www.nepad.org/2005/files/documents/inbrief.pdf> (accessed 28 October 2007), para 64.

⁸² Heeple (n 68 above) 3.

⁸³ Nam (n 5 above) 163.

⁸⁴ Above, 164.

⁸⁵ Above.

⁸⁶ Above, 167.

⁸⁷ LaRRI (n 74 above) 4.

⁸⁸ Belay M *Principles of economics* 180.

⁸⁹ Nam (n 5 above) 168.

⁹⁰ Heeple B “The Labour Relations Act and global competitiveness” *Law, democracy and development* 143.

⁹¹ Metz T “Justice and the law: liberals, redistribution, capitalists and their critics” in Roederer C & Moellendorf D *Jurisprudence* (2004) 389.

⁹² Du Toit (n 10 above) 165.

In liberal thinking “competent adults should have the liberty to engage in actions that might be self-destructive, obscene or degrading, so long as these actions directly affect no one besides those who choose to perform them.”⁹³

According to liberalists allowing market principles to regulate the market may result in the realisation of social human rights for workers. Market regulation to a large extent implies regulation by transnational corporations. As the “internal labour markets of transnational corporations usually provide better wages, conditions of work and social security benefits, better than those prevailing in domestic firms...there may be a spillover of the best practices of these transnational corporations to domestic firms.”⁹⁴

A thread that runs most of the arguments made in favour of liberalisation can be coined in the civil law expression; “confession and avoidance.” None of the arguments boldly assert that the establishment of FTZs do not violate labour rights, they merely shift the blame. Nevertheless, they affirm that liberalisation and respect to labour rights are not mutually exclusive.

2.2.4. Mauritius: A practical example

In 1970, the Port Louis administration promulgated the Export Processing Zones Act 3 of November 1970 (EPZ Act of 1970). The government’s main preoccupation at the time was the growing unemployment rate which at the time stood at nineteen percent and the fact that young people were entering the workforce faster than they could be absorbed.⁹⁵ The government designated twenty-three areas as part of the zones.⁹⁶ Enterprises that set up shop in these tracts were initially not exempt from the operations of the national labour legislation, as well as, the national labour relations legislation;⁹⁷ confirming Nam’s observation that there is usually no formal waiver of the enforcement of labour laws in FTZs.⁹⁸ By 1993 unemployment was downsized by a considerable amount. However, in 1993 the first link was drawn between the efficiency of FTZs and labour rights. The Industrial Expansion Act 11 of 1993 (IE Act of 1993) amended the EPZ Act of 1970. This amendment afforded enterprises operating in the EPZs greater flexibility with respect to labour rights, in particular, rights relating to working hours. According to Schulze:

Labour Unions [over time accepted this adjustment because] their leaders...realised that in order to be able to *compete* with overseas companies, the EPZ enterprises [had to make certain concessions, otherwise] they can no longer compete in the international export market and will have to close down their operation which in turn will result in higher unemployment figures.⁹⁹

⁹³ Metz T (n 91 above) 384.

⁹⁴ Heeple (n 68 above) 20.

⁹⁵ Schulze (n 6 above) 179.

⁹⁶ Above.

⁹⁷ Article 14 of the EPZ Act of 1970.

⁹⁸ Nam (n 5 above) 163.

⁹⁹ Schulze (n 6 above) fn 117.

From the above quotation it is clear that the amendment Act exhibits a trade-off, between rising employment figures and dignified employment.

2.2.4.1. *Balancing conflicting Interests*

In the language of rights, EPZs prioritise rights of access to employment as opposed to rights that relate to the quality of employment. This trade-off, however, is wanting if juxtaposed against the human rights guarantee of the right to work. The wording of the ACHPR clearly indicates that emphasis is not only on *access to* employment but also on the *conditions* of work. “Every individual shall have *the right to work under* equitable and satisfactory conditions and shall receive equal pay for equal work.” (My emphasis) However, without access to employment there can be no discussion of the conditions of employment. This dilemma is a consequence of the nature of the right to work.

Firstly, working, unlike other human rights, is a factor in production. “Enterprises have to constantly improve their performance, which heightens their dependence on the human factor. Most enterprises are responding by intensifying work, and this clearly puts more pressure on workers.”¹⁰⁰ By its very nature, guaranteeing the right to work implies a trade-off or an equilibration of the interests of those at work and the interests of the unemployed. The interests of the latter are tied into the societal interests of economic growth. Amartya Sen postulates a balance of conflicting interests. His suggestion is a reasonable approach to the right to work by making the fulfilment of each right a matter of relative adherence, in other words, allowing room for acceptable trade-offs.¹⁰¹ Two judgments of the South African jurisdiction endorse this position. In *Hoffman v South African Airways*¹⁰² the South African Constitutional Court acknowledged the validity of the “economic rationality” defence. In other words, human rights can be limited by legitimate commercial requirements.¹⁰³ The judge based his decision on the dictates of the “greater interest of society.”¹⁰⁴ In *Woolworths v Whitehead*¹⁰⁵ the court reiterated that libertarian interests must be balanced against economic interests. The judge adopted a neo-liberal position when he weighed economic rationality heavily against freedom from discrimination. Willis JA held as follows:

Without a rapidly expanding economy, it will be impossible to deliver to our society so many of the changes and improvements it so desperately needs. [Depending on the economic state of a country, the realisation of employment rights will be allowed only if its realisation would not be] economically irrational as to be fundamentally harmful to [a] society.¹⁰⁶

¹⁰⁰ Jauch (n 48 above) 102. See Thornhill C “Labour policy governance” Lecture, General Good Governance Programme, Centre for Human Rights, Pretoria (5 July 2007).

¹⁰¹ Heepie (n 68 above) 22.

¹⁰² 2000 2 SA 628 (W).

¹⁰³ Above, para 6, 33 & 34.

¹⁰⁴ Above.

¹⁰⁵ 2000 6 BLLR 640 (LAC).

¹⁰⁶ Above, para 136.

Moreover, article 27(2) of the ACHPR holds that “the rights and freedoms of each individual shall be exercised with due regard to, *inter alia*, the rights of others and common interest. However, in *Civil Liberties Organization (in respect of Bar Association) v. Nigeria*,¹⁰⁷ the Commission held that claw-back clauses are not a ticket for states to use domestic laws to justify deprivation of a person’s freedom.¹⁰⁸ “[T]he regulation of the exercise of the [rights and freedoms in the ACHPR] should be consistent with States’ obligations under the African Charter.”¹⁰⁹ Although the South African judgments have been criticised, they indicate that in the face of the dominant neo-liberal culture of the twenty-first century the IE Act of 1993 is justifiable. The question that remains to be answered is what trade-off is acceptable in FTZs.

In addition, the fact that liberalisation is also a human right that requires protection cannot be ignored. “Freedom of exchange and transaction is itself part and parcel of the basic liberties that people have reason to value.”¹¹⁰ The overtone thereof is that the right to trade freely must also be weighed up against social dignity.

2.2.4.2. *Progressive realisation of the right to work*

A human rights solution is presented to us by the African Commission. In *Purohit and Another v The Gambia and Another*,¹¹¹ the benchmark set by the African Commission was parcelled in the phrase “concrete and targeted steps, while taking full advantage of available resources.”¹¹² The meaning of concrete and targeted steps is situation-bound and will depend on the economic matrix of a country.¹¹³ Craven explains that this is not a blanket exemption from the immediate realisation of the right to work.¹¹⁴ Although article 2(1) of the ICESCR states that the full realisation of the right to work should be achieved progressively, by their nature some socio-economic rights are not inherently different from civil and political rights and therefore require immediate realisation, for example; freedom from discrimination in the workplace.¹¹⁵ From a policy-perspective, the EPZ legislation of Mauritius has resulted in violations of labour rights, however, these violations can be justified, provided they did not tamper with the aorta of labour rights, the core labour standards.

¹⁰⁷ (2000) AHRLR 186 (ACHPR 1995).

¹⁰⁸ Above, para 15.

¹⁰⁹ Above, para 3.

¹¹⁰ Petersmann EU “Human rights and international trade law: Defining and connecting the two fields” in Cottier T, Pauwelyn J & Bürgi E (eds) *Human rights and international trade* (2005) 51.

¹¹¹ (2003) AHRLR 96 (ACHPR 2003).

¹¹² Above, para 84.

¹¹³ Above.

¹¹⁴ Craven M “The domestic application of the International Covenant on Economic, Social and Cultural Rights” (1993) 40 *Netherlands International Law Review* 369.

¹¹⁵ Above.

2.2.4.3. Conclusion

From a practice perspective the EPZ of Mauritius with its shortcomings is living up to its goals of social development. The biggest success story is with respect to unemployment; from nineteen percent in 1970 to less than ten percent in 2007.¹¹⁶ In 1994, the EPZs employed approximately 90 000 people.¹¹⁷ In addition, “employees in the EPZ sector are paid higher wages and salaries than their counterparts in the rest of the economy.”¹¹⁸ These enterprises also provide employees with meal subsidies and transport.¹¹⁹ The extent of the rights protected has even increased because decreasing unemployment levels have resulted in a shortage of workforce, which in turn has resulted in competition of enterprises through the provision of amenities.¹²⁰ The positive impacts of this competition are so vast that Mauritian EPZ employees have their dignity guaranteed through the sound of music in shop floors.¹²¹

The case of Mauritius leads us to conclude that the protection of human rights, in particular labour rights, in FTZs is not impossible. However, this case has peculiarities that distinguish it from other African countries. Its economic, social, cultural, political and historic circumstances differ from most other African states. For instance, the EPZ policies were adopted at least thirty years ago, there are high-levels of education and there is an established business community.¹²² Further, the Mauritian formula is a combination of human rights justifiable policies and political will manifested through the implementation of policies. Schulze captures the government’s management spirit in EPZ’s as follows:

An issue that was strongly criticised in the past was the working conditions in the EPZ enterprises. In response the government [tightened] the conditions and requirements that [had to] be fulfilled by a company [applying] for an export enterprise certificate. In order to ensure that minimum working conditions [were] provided by an EPZ enterprise to the employees, inspectors from four different government departments...thoroughly inspect the employer’s factory premises...Only if the legally required minimum standards and working conditions are complied with, will an EPZ operating licence be issued...Thereafter, the premises [are] visited regularly and inspected...to ensure that the minimum standards and working conditions are maintained at all times.¹²³

Social rights or social apartheid? For Mauritius, FTZs have proved to be a success story, a vehicle of social rights.

¹¹⁶ “Mauritius snapshot” (July 2007) http://www.deloittetaxguides.com/index.asp?layout=countrysnapshotDtt&country_id=360000036&rf=o (accessed 28 October 2007).

¹¹⁷ United States Department of State “Mauritius human rights practices 1994” (February 1995) http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_africa/Mauritius.html (accessed 28 October 2007).

¹¹⁸ Schulze (n 6 above) 190.

¹¹⁹ Above 191.

¹²⁰ Above.

¹²¹ Above.

¹²² Jauch (n 48 above) 110.

¹²³ Schulze (n 6 above) 191.

III. POLICIES AND PRACTICES OF THE FREE TRADE ZONES OF MOZAMBIQUE AND NAMIBIA

3.1 Completing the syllogistic sequence

Therefore, Socrates is mortal. Therefore, FTZs violate labour rights. Chapter three is the paratrooper of this paper, because it shall determine, using the legal and factual matrices of Mozambique and Namibia whether FTZs violate labour laws.

3.2. National matrix

3.2.1. Mozambique

3.2.1.1. Free trade zone regulation

In Mozambique IFZs are regulated by the Industrial Free Zone Regulation Decree No. 62/99 of 21 September (IFZ Decree 62/99). From the offset the Decree alludes to the fact that the establishment of the zones is a product of regional and global economic pressures.¹²⁴ Article 1(7) of the Decree and article 1(1)(x) of the Investment Law 3/93 of the 24th June (IL 3/93) define an IFZ as a legal entity that is export-oriented and designed to enhance industrialisation. Article 1(15) of the Decree elaborates a further characteristic of IFZs, is geographic separation from the hinterland and the fact that the zones are, for purposes of customs, considered to be foreign jurisdiction.

Article 5 of the Decree enunciates that the creation of employment is an economic rationale for the establishment of IFZs. Mozambique has two different types of zones. It has industrial parks which house small projects and mega projects which are located outside the industrial parks.¹²⁵ Classifications are according to the amount invested by an enterprise. In terms of article 5(1), it is a requirement that each industrial zone or industrial park must create at least 500 permanent employment positions for Mozambican nationals. The labour laws of Mozambique do not define the term “permanent employment”; however, it can be assumed that the drafters of IFZ Decree 62/99 did not mean the creation of casual employment. “Each of the enterprises operating in the industrial free zone [industrial parks] must employ a minimum of 20 employees.”¹²⁶ For existing enterprises to convert into IFZs they have to employ at least 250 Mozambican nationals in permanent employment in each unit or enterprise. This article 5(2) requirement applies to companies referred to as “mega projects”. Article 5 is reinforced by article 18(1)(c) which requires an applicant for an IFZ licence to specify the number of employment positions to be created for Mozambican nationals.

¹²⁴ Preamble, IFZ Decree 62/99.

¹²⁵ Interview with the Department of IFZs at the Investment Promotion Centre, Maputo, Mozambique (24 October 2007).

¹²⁶ Above.

The Decree does not only protect the right of access to employment. Article 13(3) of the Decree also requires applicants to prove that they have established “green zones and leisure areas in order to provide an appropriate employment environment.” The Decree also places as a conditionality for the creation of IFZs proof of “provision of appropriate facilities for emergency medical care.” According to article 13(4) authorization from the IFZ Council is also dependent on proof of the “social, economic and environmental impact of the proposal in question.”

In addition to the norms, the Decree creates enforcement mechanisms and outlines the penalties that will befall an enterprise that fails to meet the requirements set out in its text. The infractions according to article 39 must amount to either material or systematic violations of the Decree or other norms applicable to IFZs. In other words, the infractions must be substantial and part of the policy of the enterprise. The expression “other norms applicable” places the labour regime’s regulation within the jurisdiction of the Council of Ministers. The remedy available in such an instance is cancellation of the authorization to trade in an IFZ. Sub-article 3 specifies that the cancellation has no bearing on the civil responsibility of any such enterprise. In addition to the article 39 procedures the Decree also lays out the following:

1. Industrial Free Zone Developers and Enterprises shall use their best efforts to resolve by amicable or mediated negotiation any ambiguities, claims and disputes that may arise in the process of implementation and operation of the respective projects.
2. If a negotiated or amicable solution of any ambiguities, claims and disputes that have arisen is not possible, then the provisions of article 26 of the Investment Law Regulations (approved by Decree no. 14/93 of 21 July) and article 25 of Law 3/93, of 24 June (the Investment Law) shall apply.

Article 26 referred to above is a general complaints procedures relating to investments. With this procedure complaints must be submitted to the Investment Promotion Centre (IPC), which transfers the complaint to the appropriate authority for a decision or to the Minister of Planning and Finance. According to article 26(5) the parties to a dispute have a right of recourse. From the wording of the statute, there is no limitation with respect to the subject-matter of the dispute. In other words, these procedures can also be used for disputes pertaining to labour rights.

The umbrella legislation that covers IFZ Decree 66/99 is the IL 3/93, which is an offshoot of article 135 of the Constitution. Article 3(1) of IL 3/93 makes the Act applicable to IFZs. Like Decree 66/99 it sets out the overall objective of foreign investment as contribution to progress and the improvement of well-being in the country. This is reference to both the social and economic function of law. In addition, the preamble of IL 3/93 also points to the fact that the legislative piece is part of the wave of trade liberalisation when it states as follows:

The profound changes underway throughout the world in general, and in Mozambique in particular,... together with the need to adopt a more *open and objective economic policy* which favours greater participation, complementarity and

equality of treatment of national and foreign investments, have brought about the need to revise the existing legislation regarding investment matters.

Article 1(1)(x) of IL 3/93 states that, the labour regimes that will operate in the IFZ will be “appropriate” and “especially instituted and designed to the efficient functioning of their undertakings operating [in the zones].” The article further links efficiency to commercial and financial obligations abroad.¹²⁷ This locates IFZ regulation as a matter of trade or economic policy. The recognition of labour rights happens as an after-the-fact, when the article goes on to outline the expected benefits for Mozambique as; “general stimulation of regional development and the generation of general economic benefits and, in particular, the expansion of productive and commercial capacity, a wider tax base, the creation of jobs and the generation of foreign exchange.”¹²⁸ Although article 1(1)(x) reads as though it qualifies the application of labour laws in the IFZs, article 4(1) allays fears. Article 4(1) is the most important as it makes the national labour rights regime applicable in IFZs.¹²⁹ The above is confirmation that FTZs policies usually make labour laws applicable in the zones.¹³⁰ This equality of treatment provision reads:

In carrying out their activities, foreign investors, employers and workers will enjoy the *same rights and be subject to the same duties and obligations applicable to nationals* in accordance with the legislation in force in the Republic of Mozambique. (My emphasis)

The rights and duties applicable to nationals in Mozambique are the national labour legislation, the constitutional provisions and international treaties ratified by Mozambique. Article 5 endorses the idea that international treaties duly ratified by Mozambique contribute to the laundry list of rights and duties which are applicable. It states that the “provisions of [the Investment] Law shall not restrict any guarantees, advantages or obligations specially contemplated in international agreements or treaties to which the Republic of Mozambique has become a signatory.”

2. Exception to the provision of paragraph 1 of this Article shall be those cases of projects or activities by nationals which by their nature or scale of investments and undertakings may merit special treatment and support from the Government.¹³¹

This proviso is very limiting, the scale of investment provision in particular, as it affords the government the discretion of curtailing the enjoyment of some rights on account of the fact that it is likely to generate suitcases of capital for the national economy. In *sotto voce* the article 4(2) exception resonates the thinking of the judges in the *Hoffman* and *Woolworths* cases

¹²⁷ Article 1(1)(x), IL 3/93.

¹²⁸ Above.

¹²⁹ The question though is whether the courts when adopting a holistic interpretation consider article 4(1) in light of article 1(1)(x) or whether they consider article 1(1)(x) in light of article 4(1).

¹³⁰ “[O]n the face of the legislative instruments creating EPZs, one would find that labour laws in EPZs are the same as those that are applied elsewhere in the State.” See Nam (n 6 above) 163.

¹³¹ Article 5(2), IL 3/93.

The content of the Mozambican labour package is, as stated above, outlined in the constitution, legislation and international law. The Constitution guarantees labour rights in several articles. Both the hard text and the spirit of this document voice the commitment of the Mozambican nation to the social human rights of workers. Articles 84 to 87 are dedicated to human rights specific to workers. These articles mirror, to a large extent, article 23 of the UDHR, through the protection of rights to, *inter alia*, leisure, freedom of choice and the right to strike. The opening line of the express constitutional protection of labour rights reads “[o] trabalho constitui direito e dever de cada cidadão.”¹³² Which translates into; work is the right and duty of every citizen. The Constitution makes it a point to highlight the fact, like the ACHPR,¹³³ that there is a duty to work. What remains to be seen is whether work in IFZs in Mozambique is more of a duty than a right.

Currently, Mozambique is in the process of adopting new labour legislation. Labour Law No. 8/98 of 20th July is being replaced by Labour Law No. 23/2007 of the 1st August. The preamble of the 2007 legislative piece justifies the transition. It states that the “dynamics of the social, economic and political situation call for a re-structuring of the legal framework governing labour, employment and social security.” The 2007 legislation is not a step backwards with respect to the protection of the social human rights of workers because it safeguards basic rights that guarantee social dignity. Moreover, article 13(1) cites international treaties and conventions as sources of labour law.

The international labour rights regime applicable to Mozambique is extensive. With the exception of the ICESCR, Mozambique is a party to all the major international conventions which are paternalistic about labour rights. It is a member of the ILO and a party to the eight ILO core conventions.¹³⁴ It is a party to the ACHPR¹³⁵ and the UDHR is applicable to it by virtue of its status as customary international law.¹³⁶ Finally, Mozambique is bound to the provisions of the Southern Africa Development Community (SADC) Charter of Fundamental Social Rights in SADC.¹³⁷ The SADC Charter also protects the social human rights of workers. An overall reading of the sources of Mozambican labour law proves that the national regulatory framework protects the social human rights of workers.

Article 6 of IL 3/93 reinforces this position by emphasising that investments in Mozambique should have a human face in order to be legal. They should contribute to the “sustainable economic and *social*

¹³² Article 84(1), Constitution of Mozambique.

¹³³ The ACHPR also expresses the rights as duties. Article 27(1) reads; “every individual shall have duties towards his family and society, the state and other legally recognised communities and the international community.” See also article 29: “The individual shall also have the duty:

2. To serve his national community by placing his physical and intellectual abilities at its service; and,
3. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society.

¹³⁴ International Labour Organisation *The ILO: What it is. What it does.* (2007) 10.

¹³⁵ It ratified the Charter on 22 of February 1989. See Heyns C & Killander M (eds) *Compendium of key human rights documents of the African Union* (2006) 308.

¹³⁶ See Udombana (n 20 above) 184.

¹³⁷ Mozambique signed the Charter on 26 August 2003. The Charter does not require ratification because it entered into force the date of signature. http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/socialchar.pdf (accessed 28 October 2007).

development of the country.”¹³⁸ (My emphasis) In addition, it is a requirement that they should meet the principles and objectives of the national economic policy and other applicable legislation, for instance, the labour laws, of the country.¹³⁹ Article 7 of IL 3/93 outlines the objectives of investment in Mozambique and includes in sub-article (d), the creation of jobs and enhancing the professional skills of the Mozambican workforce.

The above discussion clearly illustrates that the Mozambican IFZ policy is not wanting with respect to the protection of labour rights. This is because liberalisation in Mozambique is tariff-based. Clearly, from a policy perspective there is no segregation with respect to the application of labour laws. Both internationally sound norms and appropriate enforcement mechanisms are in place.¹⁴⁰

3.2.1.2. *Practice in perspective*

According to the IPC, there are at least 17 companies operating in the industrial parks as IFZs and 14 companies operating outside the zones.¹⁴¹ Thus far most companies operating as IFZs have complied with the requirements pertaining to the number of employment positions that have to be created.¹⁴² The Beluluane industrial park employs at least 991 nationals, whilst 14 projects outside the zone employ 7790 nationals.¹⁴³ As a matter of fact, most companies employ more people than the core obligation. In terms of employability, EPZ are in practice meeting their objectives. This according to the IPC, is due to the way in which the Act is framed.¹⁴⁴ Moreover, government has been vigilant in ensuring that companies comply with the requirements of the IFZ Decree 62/99. The only concession government has given is to allow for progressive compliance with the Decree. The IPC explains that some companies, particularly the industrial park operating enterprises, cannot meet the threshold and therefore conclude agreements with the government to meet the requirement over time.¹⁴⁵ The most common concession is the employment of 20 people over a three year period.¹⁴⁶ These concessions are, however, very few.¹⁴⁷

Thus far, there has been no rejection of a proposal on account of the fact that there is a foreseeable violation of labour rights.¹⁴⁸ This is because all proposal submitted thus far are consistent with the requirements of IFZ Decree 62/99. In addition, the IPC confirms the fact that the jobs created are new

¹³⁸ Article 6, IL 3/93.

¹³⁹ Above.

¹⁴⁰ The importance of appropriate enforcement mechanisms was emphasised by Udombana, who holds that failure to provide appropriate remedies is tantamount to the violation of rights by the state. See Udombana (n 20 above) 183. See also; articles 1 and 7 of the ACHPR.

¹⁴¹ n 125 above.

¹⁴² Above.

¹⁴³ Above.

¹⁴⁴ As mentioned above; the creation of employment is a condition that must be fulfilled for an IFZ licence to be granted.

¹⁴⁵ n 125 above.

¹⁴⁶ Above.

¹⁴⁷ Above.

¹⁴⁸ Above.

jobs and not old jobs in new skin as suggested by some FTZ critics.¹⁴⁹ These jobs, the centre explains absorbs most young people who enter the job market.¹⁵⁰ The quality of jobs in IFZs varies because there are different firms. The Industrial Free Zones Regulation Decree No. 75/99 ensures that not only low quality jobs are created for Mozambicans. It does so by imposing rigorous requirements for the employment of foreign employees in Mozambique.¹⁵¹ Moreover, there is an obligation on all enterprises to train employees; therefore IFZs also result in the transfer of skills to the local population.¹⁵²

Thus far, the enforcement mechanisms of labour rights in IFZs have not been tested. The IPC has record of only one conflict between an enterprise and employees; a case involving the company MOZAL. There was a strike and the dispute was resolved amicably between the parties. Workers were striking because they wanted an increase in wages; they felt that there was segregation in terms of wages between Mozambican workers and South African employees in South Africa.¹⁵³ This is proof of the fact that IFZ employees are better off than other employees in the rest of the country, because they are guaranteed rights in accordance with international (foreign) scales.¹⁵⁴ According to the IPC the wages in IFZs are generally higher than those of other employees in the rest of the country.¹⁵⁵ In addition, although some FTZ enterprises operate 24 hours, they respect the clauses relating to working hours through the creation of shifts for employees.¹⁵⁶

When asked whether IFZ licences can be revoked as penalty for an infraction, the IPC stated that there is no precedent of an infraction that has occasioned such a penalty.¹⁵⁷ However, there is no doubt that it can happen. This is mainly due to the fact that the government applies the same standards in IFZs as in the rest of the country.¹⁵⁸ As revocation of business licences have occurred in non-IFZ companies, it is likely that the same can happen in IFZs. According to the IPC, thus far, the Mozambican government has demonstrated the necessary political will to protect workers' by adhering to the letter of the law.¹⁵⁹

In a country where labour rights are not respected throughout the country, IFZs have stood out as a beacon of hope for the proletariat. Webster, Wood & Mtyingizana paint the following picture of the labour force in Mozambique: it is characterized by child labour,¹⁶⁰ reduced job security, low wages and long working hours.¹⁶¹ It is a system that fails to recognise the basic regalia of the employment

¹⁴⁹ Jauch (n 48 above) 102.

¹⁵⁰ n 125 above.

¹⁵¹ Jauch (n 48 above) 108.

¹⁵² Above.

¹⁵³ Above.

¹⁵⁴ Nam confirms that this is a general trend with most FTZs as they are run according to the work culture of the foreign firms. (n 5 above) 164.

¹⁵⁵ Above.

¹⁵⁶ n 125 above.

¹⁵⁷ Above.

¹⁵⁸ Above.

¹⁵⁹ Above.

¹⁶⁰ Webster E, Wood G & Mtyingizana B "Pesquisa sobre as practicas das relações industriais em Moçambique" in Coughlin P (ed) *Relações laborais em Moçambique: Lei, pratica e implicações economicas incluído comparações internacionais* (2005), 69.

¹⁶¹ Above, 206.

contract.¹⁶² The authors state further, that there is no system of industrial relation. What pretends to be a “system”, they hold, is a gathering of weak actors in the industrial relations sphere who are barely connected.¹⁶³

Mozambique’s economic growth has been significant over the past years, and the IFZs have contributed to this phenomenon. “The country’s GDP growth has been among the highest in the world since 1996; the economy has grown at over 10% a year.”¹⁶⁴ Even though, the country still ranks as a least developed country it has made great strides with respect to development. Moreover, the development policies undertaken are pivoted on the people. People-centred development results in the realisation of human rights.¹⁶⁵

An explanation for the guarantee of labour rights in Mozambique is the fact that the country has established IFZs. IFZs are social policies. According to Schulze:

IFZs are also useful in reducing domestic unemployment. Some countries specify that one purpose of an IFZ should be to safeguard employees’ interests against possible exploitation in that it establishes adequate labour policies.¹⁶⁶

3.2.2. Namibia

3.2.2.1. Free trade zone regulation

The Namibian government promulgated the Export Processing Zones Act 9 of 1995 (EPZ Act of 1995) as a legal framework for the creation and operation of EPZs. Unlike Mozambique, the EPZ Act of 1995 does not fall under the general arrangement of foreign investments in the country. Section 9 of the EPZ Act of 1995 exempts EPZs from the operation of the Foreign Investment Act 27 of 1990.

The objectives and purposes of the EPZ Act of 1995 are outlined in section 3. The Act aspires:

- (a) to attract, promote or increase the manufacture of export goods;
- (b) to create or increase industrial employment;
- (c) to create or expand export earnings;
- (d) to create or expand industrial investment, including foreign investment; and
- (e) to encourage technology transfer and the development of management and labour skills,
in Namibia.

¹⁶² Above.

¹⁶³ Above, 205.

¹⁶⁴ World Trade Organisation “Mozambique” (January 2001) http://www.wto/English/tratop_e/trp_e/tp154_e.htm (accessed 28 October 2007).

¹⁶⁵ Van Ginneken W “Conclusions” in International Labour Organisation *Social protection and inclusion: Experiences and policy issues* (2006) 217.

¹⁶⁶ Schulze (n 6 above) 8.

Unlike its Mozambican counterpart, the Namibian legislative piece does not express itself on the social objectives of the EPZs. The Namibian Act merely expresses the goal of creating and increasing industrial employment.¹⁶⁷ In this respect, the EPZ Act of 1995 is more of a trade policy than a social policy.

A cardinal difference between the Namibian legislative piece and the Mozambican statute is the fact that the Namibian Act, prior to its amendment, did not make the labour Act applicable. Article 8(1) of the EPZ Act of 1995 held that the provisions of the Labour Act 6 of 1992 were not applicable in EPZs. The political justification offered by the Namibian president clearly points to the fact that Namibia's reflection on the mirror was the face of corporations. It was not about what society needed; instead, it was about what corporations wanted. He "described the exclusion of the Labour Act as necessary to allay investors' fear of possible industrial unrest."¹⁶⁸ The compromise was regulations promulgated by the Minister of Trade and Industry in consultation with the Minister of Labour and Human Resources Development and the Offshore Development Company. The regulations pertained to the basic conditions of employment, the termination of the contract of employment, disciplinary actions, as well as, the health, safety and welfare of employees in EPZs.¹⁶⁹ The regulations are contained in government gazette GN 87/1996 (GG 1298). The Act did not make it peremptory to pass regulations of this nature as it merely states in directory language that the "Minister may" make regulations. Why regulations and not the Act itself? Comprehensiveness and the flexibility regulations offer are the immediate answer. In other words, there is a limitation on the rights guaranteed and, the provision of labour rights through regulations has the playing-clay effect, it can be moulded at any time to suit the needs of the Minister and corporations. The penalties for contravening ministerial regulations according to section 24(3) are either a fine "not exceeding N\$4 000 or imprisonment for a period not exceeding twelve months or both such fine and such imprisonment."

The road to the recognition of labour rights in the EPZs in Namibia is paved with a million potholes. Due to the efforts of trade unions, the EPZ Act of 1995 was amended in 1996 with respect to the labour rights provisions.¹⁷⁰ The Export Processing Zones Amendment Act 6 of 1996 (Amendment Act of 1996) made the national labour legislation applicable subject to certain modifications and exceptions. The amendment made strikes and lock-outs illegal in EPZs for a period of five years.¹⁷¹ This amounted to a violation of ILO recognised core labour standards. Although the right to strike has not been expressly recognised in any of the core conventions, the case law of the Committee on Freedom of Association reveal that two conventions, namely the Freedom of Association and Protection of the Right to Organise Convention and the Right to Organise and Collective Bargaining Convention, have been interpreted as guaranteeing the right to strike.¹⁷² For five years the voice of EPZ employees in Namibia were silenced.

¹⁶⁷ By October 1998 unemployment in Namibia stood at thirty percent. See Schulze (n 6 above) 171.

¹⁶⁸ LaRRI (n 74 above) 4.

¹⁶⁹ Section 8(2), EPZ Act of 1995.

¹⁷⁰ Schulze (n 6 above) 188.

¹⁷¹ Section 8(2), Amendment Act of 1996.

¹⁷² Birk R "Derogations and restrictions on the right to strike under international law" in Baplain & Weiss (n 14 above) 96.

After the lapse of the five-year period the prohibition on strikes and lock-outs was not re-enacted.¹⁷³ Therefore, to date all labour laws in Namibia are applicable in EPZs.

Although, the Labour Act of 1992 was not applicable, by virtue of the supremacy of the constitution, workers in EPZs had basic rights. These include, amongst others, the right to dignity, equality and freedom from discrimination and right to effective remedies. As well as, labour specific infra constitutional rights, amongst others; freedom from slavery and forced labour in article 9, prohibition of child labour in article 15(2), freedom of association in article 21(1)(e), freedom to withhold labour in article 21(1)(f) and freedom to practice any profession, or carry on any occupation in article 21(1)(j). The last three freedoms are not entrenched like the rest, they may be limited. By virtue of article 22(a), a limitation may not negate the content of the right. The complete prohibition of these freedoms by the EPZ Act of 1995 amounts to a violation of this provision, rendering the Act unconstitutional.¹⁷⁴ However, the constitutionality of the Act was never tested in courts because trade union efforts were always frustrated by negotiations with government which resulted in compromises that were still costly with respect to the full realisation of the social human rights of workers.¹⁷⁵

Other labour rights are protected as soft law constitutional principles, principles of state policy. Article 95 titled; promotion of the welfare of the people, states as follows:

The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:

- (b) enactment of legislation to ensure that the health and strength of the workers, men and women, and the tender age of children are not abused *and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength;*(My emphasis)¹⁷⁶
- (c) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices; [and],
- (d) membership of the International Labour Organisation (ILO) and, where possible, adherence to and action in accordance with the international Conventions and Recommendations of the ILO.

Directives of state policy are merely guides that determine the broad focus of government policies. The specific entitlements outlined in this section are peripheral and do not have the binding force of other constitutional rights, in other words, they are not justiciable as individual rights. However, the principles of state policy are still constitutional rights which create obligations for the state. State policies must meet these objectives.¹⁷⁷ With directives of state policies have rights to specific policies. Failure to echo these provisions in state policies amounts to a violation of article 95. Legislation that prohibits the application of the Labour Act fails to ensure the protection of labour rights, does not encourage

¹⁷³ Jauch (n 48 above) 107.

¹⁷⁴ Article 63(1) of the Namibian Constitution makes all laws subject to the constitution.

¹⁷⁵ LaRRI (n 74 above).

¹⁷⁶ This article shows that the liberal argument espoused in chapter II cannot hold sway in Namibia. The Constitution makes it clear that economic situations that compel people to undertake unfavourable employment practices are unconstitutional.

¹⁷⁷ See article 95 of the Constitution of Namibia.

collective bargaining or sound labour relations and fails to promote adherence to ILO standards and other international instruments. Given the above, the EPZ Act of 1995 also fails the constitutional muster in this respect.

Article 144 International Law

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.¹⁷⁸

The international legal regime of Namibia is similar to that of Mozambique. The only differences are, firstly, the fact that Namibia is a party to the ICESCR.¹⁷⁹ Further, Namibia is not party to the ILO Discrimination (Employment and Occupation) Convention of 1958. Nevertheless it is bound to the Convention. The International Labour Conference declared in the Declaration on Fundamental Principles and Rights at Work “that all members, even if they have not ratified the conventions in question, have an obligation arising from the very fact of membership in the organisation to respect, to promote and to realise, in good faith and in accordance to the constitution, the principles concerning the fundamental which are the subject of these conventions.”¹⁸⁰ It is also a member state of SADC and is bound to the provisions of the Charter of Fundamental Social Rights in SADC.¹⁸¹ Like Mozambique, the national labour laws protect the social human rights of workers.

The Labour Act of 1992 is being replaced by new legislation, the Labour Act 15 of 2004. This legislative piece has not yet come into force and already an amendment to the Act has been tabled in Parliament, the Labour Amendment Bill of 2007. Could the transition in both countries indicate the fact that in the face of economic transformation labour rights are being stirred up? A reading of the table of contents of the Labour Act of 1992 indicates that social human rights, as envisaged in chapter 1, are protected in Namibia. In addition, the Act provides various enforcement mechanisms, from committees for specific aspects such as wages to labour courts for general issues. Given the fact that the EPZs have their own dispute resolution procedures it can not be said with certainty which forum will deal with labour related claims. It would, however, be sensible to assume that labour courts would have jurisdiction because section 115(1)(c) of the 2004 Act states that labour courts have the competence to review “any decision of any body or official provided for in terms of any other Act, if the decision concerns a matter within the scope of the Labour Act.”¹⁸² Moreover, the remedies provided in the EPZ Act of 1995 did not envisage the application of the Labour Act and are therefore inadequate.¹⁸³ For instance, there is no trade union representation in the EPZ management boards.¹⁸⁴

¹⁷⁸ Article 144, Namibian Constitution.

¹⁷⁹ Namibia ratified it on 28 November 1994. <http://www.ohchr.org/english/bodies/ratification/3.htm#ratifications> (accessed 28 October 2007).

¹⁸⁰ Namibia is a member of the ILO. ILO (n 134 above) 10.

¹⁸¹ It became a member on the 26 August 2003. (n 137 above).

¹⁸² Section 18 and 19, Labour Act of 1992.

¹⁸³ These procedures are outlined in section 10(1), EPZ Act of 1995. They are primarily administrative bodies.

¹⁸⁴ Jauch (n 48 above) 108.

Unlike Mozambique, from a policy perspective the establishment of FTZs in Namibia has resulted in violations of labour rights, both constitutional, as well as, labour rights contained in international instruments. The earliest policy proves that the protection of labour rights was never envisaged in EPZs.

3.2.2.2. *Practice in perspective*

In practice as in policy EPZs in Namibia have shown themselves to be “compassion with a hard edge”.¹⁸⁵ Firstly, EPZs have not met their overall objective of economic development defined in terms of employability.¹⁸⁶ In all three phases; before the labour Act, after the first amendment and after the lapse of the five-year suspension the situation of employees in EPZs has remained steady. The constant in all phases is an occult policy of social segregation by EPZ enterprises condoned by the government and at times by trade unions. Before placing a specimen of the treatment of workers in EPZs under the microscope it is important to study the attitude of government and trade unions.

The attitude of the Namibian government *ab initio* showed ominous signs. The posture of the government was not upright with respect to the fundamental rights of labourers. The disposition of the Namibian government and the major economic institutions called to mind Nam’s observation that “the use of EPZs as [] trade [policies]...has in fact led [] states to disregard human rights norms in favour of economic development.”¹⁸⁷ President Nujoma described EPZs as the only solution to high unemployment in Namibia.¹⁸⁸ The Namibian government canvassed violations of labour rights as clashes of culture.¹⁸⁹ The Minister of Trade and Industry even called upon workers to embrace the foreign firms’ work ethic which was clearly out of sync with national labour standards.¹⁹⁰ In Namibia, EPZ are both a trade and political policy. Critics of EPZ projects were tagged “enemies of the government”.¹⁹¹ Another disconcerting fact is that success of the EPZ programme according to government representatives was always measured in terms of the capital contribution of the investment. Garbers rightly asserts that “efficiency (economic performance) is no guarantee that society will benefit in practice.”¹⁹² Investments were slowly becoming an end in themselves and the goal of social development never took off. The trade unions which were supposed to be the saving grace of the Namibian proletariat were not always useful. Although they had played a pivotal role in pioneering the recognition of labour rights in EPZs, they were not a comparable match to the forces of government. According to an employee at an EPZ factory:

¹⁸⁵ Ben-Israel (n 15 above) 4.

¹⁸⁶ There is a discrepancy with respect to the figures of employment created by EPZs. However, there is consensus that the objective has not been met by a long margin. See Jauch (n 48 above) 105.

¹⁸⁷ Nam (n 5 above) 164.

¹⁸⁸ LaRRI (n 74 above). See also Schulze (n 6 above) 171.

¹⁸⁹ LaRRI (n 74 above) 10.

¹⁹⁰ Above.

¹⁹¹ Above, 9.

¹⁹² Garbers (n 59 above) 100.

[Trade Unions do] not necessarily get us out of hearings, it's always suspensions. They are weak. There is also pressure from the president you know' whenever these unions are trying to say something the president is blocking them.¹⁹³

Their political allegiances were always put to the test when they voiced the interest of the workers, and often at times, they succumbed to political pressure. An even greater controversial position taken by the unions is their interest as shareholders in some of the EPZ enterprises.¹⁹⁴ Unions proved that the adage; you cannot serve two masters, does not only have a religious truth but also has business veracity. This resulted in weak representation of the interests of workers.¹⁹⁵

Any discussion on EPZs in Namibia would be incomplete without reference to the case of Ramatex. The treatment of workers at Ramatex shall be used to paint a picture of what the consequences of EPZ factories can be.

Ramatex proved the reality of a "race to the bottom". In 2001, Ramatex contracted with the Namibian government which was bidding against South Africa and Madagascar for the same project. Namibia's success "was achieved by offering even greater concessions seemingly above those granted to other EPZ companies."¹⁹⁶ With respect to labour a fitting example is the fact that employees in Namibia were paid less than employees in Ramatex factories in South Africa.¹⁹⁷ Ramatex also proved that transnational corporations were on the driver's seat in EPZs. "Ramatex threatened that unless their request (to access more land which the Municipality pointed out was unavailable, some of which the factory had already been using illegally) was granted, they might move to other countries."¹⁹⁸ Although, this was with respect to land, this attitude prevailed in all negotiations with the Namibian government. To add insult to injury, Ramatex practices could not be criticised. The government, the Namibian Chamber of Commerce and other prominent persons in society would come to their rescue with political rhetoric.¹⁹⁹

The treatment of workers at Ramatex factories constituted a flagrant violation of both national and international labour standards. Workers were clearly operating well below the regalia of an ordinary employment contract. Wages were very low, employees were compelled to work long working hours, employees were exposed to toxic substances and deprived of medical care during working hours, there was discrimination between Namibia and Asian employees, employees were subjected to inhumane, degrading and humiliating searches, insults and abuses and female trainees were compelled to take

¹⁹³ LaRRI (n 74 above) 10.

¹⁹⁴ Jauch (n 48 above) 107.

¹⁹⁵ Above.

¹⁹⁶ LaRRI (n 74 above) 5.

¹⁹⁷ Jauch (n 48 above) 110.

¹⁹⁸ LaRRI (n 74 above) 9 - 10.

¹⁹⁹ Above 9.

pregnancy tests.²⁰⁰ The above is merely a superficial congested description of the treatment of Ramatex employees. The following extracts from interviews with employees' appropriately describe the situation.

The contract was read to more than 3000 people at one time, how will one hear anything, and then you were just made to sign. We were not even allowed to read the contracts ourselves. That [trade union] man read the contract to us. We just signed, we were afraid we will get fired, so we just signed.²⁰¹

Sometimes I spend three months without seeing my children. The problem is that I have to work from 7 in the morning until 7:30 in the evening so that I can earn little bit more.²⁰²

We work six days a week and we get a day of, sometimes we work seven days, but we don't get paid working on Sundays. The day that we are supposed to be on leave we don't choose them ourselves they only draw up a list of names indicating who will be off duty. They only choose names randomly; if you choose an off day for yourself they will make you sign a warning letter. Mostly Sundays are regarded as off days, but we are required to report for duty sometimes and that's why we do not get paid for working on Sundays, even if we work.²⁰³

We (Namibians) are only allowed to drink water. If you are found drinking anything coloured, then your chances of being called for a warning at the office is quiet high. You know why I have a problem with this rule is that the Chinese people are allowed to eat whatever they want even when we are working. They come there with their packets of chips and cool drink and display them on their desks and eat. When it comes to us (Namibians), our glasses or containers of water are not even supposed to be on the table. This also raises a health concern, because the fabric is always dusty and when a glass of water is on the floor it can gather dust from the fabric and the water is contaminated. In addition our Chinese colleagues are always spitting and one fears that they might spit in your water if it is not closed.²⁰⁴

Look I am cut; this is because of Ramatex [pointing at a scar on her finger]. This was stitched at the hospital. They took me to the hospital. I have lost the use of my finger. My finger does not bend backward and forward anymore. I was not compensated for this.²⁰⁵

We stand the whole day and we never get a chance to sit. Since I started working here I stand seven days a week. We are already sick now, we feel pain because of the long hours standing, and if they see you leaning on something for support you will be given a warning. They call us blacks all the time. They want the Namibians to do all the dirty, messy work while the Chinese, Malaysians and Philipinos are doing the easy work.²⁰⁶

They are real colonisers. They do not understand that a person is human. If the Chinese have spoken and he says something to a Filipino you only have to sign the warning. It does not matter whether you want to explain why you were absent. If the Chinese have spoken it is done. If they dismiss you, you will never get paid.²⁰⁷

I hated the way they searched people there. I know of an incident where a colleague was having her monthly cycle. The security guard forced her to explain what was between her legs. She said it was a pad. They insisted that she must have stolen a T-shirt. She insisted that it was not. The security guard pulled her to the bathroom, only to find

²⁰⁰ Above 8.

²⁰¹ Above 26.

²⁰² Above 15.

²⁰³ Above 16.

²⁰⁴ Above 16.

²⁰⁵ Above 21.

²⁰⁶ Above 23.

²⁰⁷ Above 23.

that my colleague was telling the truth. I know of another worker who was undressed in the office in front of a group of Filipino and Chinese people. She was also accused of stealing. She was found with nothing.²⁰⁸

Sometimes the way they treat us you look at them and you feel they are more Namibian than we are. For us that's colonisation.²⁰⁹

Social Rights or social apartheid? Social apartheid. Namibian EPZs have fostered a culture of disregard for labour rights. The impression created is that EPZs are foreign territory with regard to labour laws. In comparison with the rest of the country it is evident that a certain portion of the working class in the country has been selected to carry the brunt of the negative cost of social development. With the exception of EPZs, Namibia has made great strides with respect to the protection of labour rights. The 2000 judgment of justice Levy in *Nanditume v Minister of Defence*²¹⁰ is proof thereof. The Labour Court held that “no person may be excluded from enlistment into the Namibian Defence Force solely on the basis of such person's HIV status where such person is otherwise fit and healthy unless such person's CD4 count is below 200 and his viral load is above 100 000.”²¹¹

²⁰⁸ Above 29.

²⁰⁹ Above 25.

²¹⁰ 2002 AHRLR 119 (NaLC 2000).

²¹¹ Above, para 40(2).

IV. CONCLUSION

Mozambique and Namibia have both opened up their economies to development. Comprehensive deregulation in the entire country was impossible to achieve in both territories, therefore, relative liberalisation through the allotment of certain portions of the country to FTZ programmes was the next best option. This paper dedicated itself to a study of whether the establishment of FTZs in these two countries resulted in violations of labour rights and came to the conclusion after three chapters worth of insight, that FTZs are not a *mala in se*.

4.1. Emerging issues

To reach this conclusion, this paper employed a definition of labour rights that is all encompassing. Labour rights are, thus, synonymous with social human rights of workers.²¹² What defines the enjoyment of the right to work is not merely access to employment, but whether the quality of the job affords workers the right to lead lives worthy of human dignity if measured against the societal grid.²¹³ The ACHPR and its interpretation by the Commission was a template for the discussion.

Two chapters, namely chapters two and three, have traced the chains of cause and effect. The conclusion drawn from these studies is that FTZs, which are manifestations of trade liberalisation, are a double-edged sword. The deleterious blade is antithetical to the labour rights movement because it, *inter alia*, rejects state regulation of labour rights and it causes a “race to the bottom” in labour standards.²¹⁴

Globalisation protagonists have corrected the misunderstanding that deregulation means literal deregulation, as understood by Namibia and other countries. Hanami points out that reduced state intervention does not imply the absence of labour policies, but rather, reform of labour policies to accommodate market flexibility.²¹⁵ It implies that macro-economic and macro-labour policies must balance job security and market flexibility, hence Pieterse’s assertion that the full effects of the attendant consequences of trade liberalisation fall to be harnessed and mitigated through national policies.²¹⁶ Therefore, whether or not FTZs violate labour rights depends on the policies adopted by an administration. Mozambique’s IFZs are tariff-based. These IFZs are social policies and are premised on the notion that purely economic factors should be manipulated to improve the living conditions of people. The Mozambican model breathes life to the call of the World Commission on the Social Dimension of Globalization, which states: “that the dominant perspective on globalisation must shift more from a narrow preoccupation with markets to a broader preoccupation with people.”²¹⁷ The

²¹² Ben-Israel (n 15 above) 2.

²¹³ Above.

²¹⁴ Price (n 74 above) 242.

²¹⁵ Hanami T “Deregulation and international regulation: An Asian perspective” in Baplain & Weiss (n 14 above) 175 – 6.

²¹⁶ See Petersmann (n 110 above) 30.

²¹⁷ Van Ginneken (n 168 above) 217.

Mozambican and Mauritian formula, also emphasise a very important factor in ensuring that FTZ programmes meet their goals. Both models prove that FTZs cannot reach the goal of social development in the absence of political will.²¹⁸ Political will is the Achilles heel of the success of FTZs. It ensures that policies will not only be designed to protect the rights of workers, but also ensures that policies will be enforced. In the absence of implementation, the words of policy papers are void. In sum, FTZs can be successful in advancing the social human rights of workers if appropriate policies and effective enforcement mechanisms are in place.

The Namibian EPZ project quantifies the above position. It serves as a model for the fact that EPZ policies that are trade-centred and not people-oriented result in violations of labour rights. With respect to policy Mozambique has a handle on the horse's reins. Namibia, on the other hand, lost control over labour rights when it drafted and promulgated its 1995 EPZ policy. The mistake the Namibian administration made was to forget who the sovereign was. Its primary aim was to attract foreign investment to develop, and not to develop through the attraction of foreign investment.²¹⁹ According to the Offshore Development Corporation, "Namibia needs to build an industrial culture first and [] salaries must be determined by the market and not by minimum wage legislation."²²⁰ The danger in allowing investors to lead in the foxtrot of international trade was felt, especially by employees of Ramatex who were stripped off their dignity. Namibia never fully recovered from its first big mistake, namely, prohibiting the application of the labour laws in FTZs.²²¹ Firstly, because perceptions were built around the opinion that the EPZs could succeed only if they gave Namibia a competitive edge which surpassed that of other countries. With labour as its greatest resource this translated into sacrificing labour rights. The provision of labour rights, at a later stage, became a mere formality on the part of government. The enforcement of labour rights was never really carried out.²²² Secondly, the incorporation of labour rights was not genuine. The ban was merely lifted without adjusting the EPZ structures to secure the enforcement of labour rights.²²³ The eradication of social segregation cannot be achieved simply by changing policies; there is a need to poke the bee's hive in order to achieve substantive equality. The same principle applies in this case; the policies must seek to ensure substantive equal treatment of EPZ employees.

In conclusion, the blend of FTZs and labour rights in developing countries is not inherently bad. However, in the absence of a national regulatory framework and the political will to safeguard the social human rights of workers, FTZs and labour rights mix into a crippling cocktail, a Molotov cocktail. This paper suggests that IFZs which peremptorily require the protection of labour standards should be preferred over EPZs which are primarily concerned with the attraction of investors. States are

²¹⁸ "The government of Mauritius has played a very supportive role in ensuring the success of the EPZ scheme." Schulze (n 6 above) 185.

²¹⁹ Section 3, EPZ Act of 1995.

²²⁰ Endresen S & Jauch H "Export processing zones in Namibia: A success story?" (February 2000) <http://www.larri.com.na/papers/EPZ-ILRIG.PDF> (accessed 28 October 2007) 7.

²²¹ Section 8(1), EPZ Act of 1995.

²²² See Nam (n 5 above) 164.

²²³ The five-year period lapsed and Parliament did not re-enact section 8(2), Amendment Act of 1996.

marionettes of investors in EPZs because, the success of EPZs depends “on efficient administration of these zones, [which means providing] policies designed to remove obstacles that are seen to be reducing the ability or willingness of investors to take advantage of the underlying comparative advantage of the country.”²²⁴ IFZ-policies on the other hand are social policies. In social policies; social aspects are given the same importance as economic aspects as social policies link democracy, social justice and economic success.²²⁵

4.2. How can things be improved?

It is not within the scope or competence of this paper to lead a detailed discussion on how to remedy the defects of FTZs. However, without reference to possible remedies to the shortcomings of FTZs, this paper will be nothing more than a three-legged dog. The starting point is acknowledging that states, at times base their decisions on misconceived ideas, hence a “race to the bottom”. Therefore, it would be worthwhile to explore the alternative metaphors to a “race to the bottom” as recommendations.

4.2.1. Laboratories of labour-standards

The first recommendation is a conversion of FTZs, from playgrounds of negative competition to laboratories of labour standards. The term “laboratories of federalism”, like a “race to the bottom”, was coined by Justice Brandeis in *New State Ice Company v Liebmann*.²²⁶ It was developed as an antithesis to a “race to the bottom”. This metaphor “implies a more sanguine [trade] in which [states] use their authority and discretion to develop innovative and creative solutions to common problems which can be then adopted by other states.”²²⁷ In practical terms, a country like Namibia can develop ways and methods to counter pressures from transnational corporations to relax labour standards and then transfer this method to other countries. In essence, each country serves as a breeding ground for smart solutions.

4.2.2. Harmonisation of labour standards

In competition between states; “in order to maintain the equilibrium, each of the other nations would have to lower their [labour standards] to match the “defector” (the nation that first lowered its labour standards). The end result is that each nation adopts [] lower [labor standards].”²²⁸ This solution manipulates the fact that the action of states is in tune. Therefore, to counter this force, states have to agree and cooperate to avoid competitive advantage through the harmonization of labour standards. They should adopt common labour policies and common FTZ policies with respect to labour standards.

²²⁴ Schulze (n 6 above) 10.

²²⁵ Alan C. “Neal Do we need a social policy for Europe?” In Blanpain & Weiss (n 14 above) 288 – 9.

²²⁶ 285 U.S. 262, 311 (1932).

²²⁷ n 66 Above.

²²⁸ Above.

4.2.3. Core labour standards

This approach can be combined with the former to make the harmonization of labour standards more realistic. It would be impractical to require all states to maintain the same standards with respect to labour and FTZ policies, “because universal human rights have important contextual dimensions.”²²⁹ The best option would be to require states to adhere to minimum obligations, which are inviolable. This should be coupled with a rolling rule regime that ensures that states progressively realise rights.²³⁰ There are internationally recognised minimum labour standards, the fundamental principles outlined by the ILO Declaration on Fundamental Principles and Rights at Work.²³¹ According to Nam:

[Stable] , predictable and transparent rules should help governments collectively to overcome the prisoner’s dilemma’ nature of policy competition, and the “free rider” problem associated with it, and should favour policies that work, enhance productivity and growth in developing and emerging economies in ways that promote sustainable development and improved working conditions in those countries.²³²

The only other predicament with respect to universal floor obligations concerns their enforcement. “Should the initiative be taken by the World Trade Organisation or by the ILO?”²³³ This discussion is beyond the scope of this paper, but remains food for thought.

4.2.4. Moral purchasing

Moral purchasing has also been presented as a solution to preventing a “race to the bottom”. This solution appeals to the moral grounding of individuals. It means ensuring that buyers are aware of the labour quality invested in the production of their goods.²³⁴ This could result in boycotts of products from certain FTZs and thereby pressurise states to improve labour conditions in FTZs. “[It] can [also] involve forbidding or applying heavy tax, tariff and trade sanctions to nations that permit the export of [goods produced in sweatshops], re-directing revenues raised from such tax or tariff to combating abuses.”²³⁵

4.2.5. International framework agreements

A global response to a “race to the bottom” in labour standards is the creation of international framework agreements (IFAs). IFAs are agreements “negotiated between transnational corporation[s] and a global union federation concerning the international activities of that company in all of its workplaces.”²³⁶ This method, although it is the most novel and the most difficult, it offers great prospects of success. Price

²²⁹ Nam (n 5 above) 170.

²³⁰ Goldman (n 16 above) 19.

²³¹ The problem with this document is that it is not binding. The Declaration is a promotional instrument. M “New developments within the ILO supervisory system” in Baplain & Weiss (n 14 above) 91 – 2.

²³² Nam (n 5 above) 168.

²³³ Above, 170.

²³⁴ n 66 above.

²³⁵ Above.

²³⁶ Price (n 74 above) 243.

describes the partnerships created as a way of “developing corporate social awareness, and eventually, increasing accountability for labour rights in the long term.”²³⁷

4.2.6. Economic processing zones

Another option is upgrading the current FTZs into the new version of EPZs, namely, economic processing zones. Economic processing zones differ from EPZs, in that they are “dynamic, investment-intensive, management-driven and empowering.”²³⁸ Because these new models are not labour-intensive and incentive-driven, they attract high-quality investments which in turn results in an increase in “value added per worker and capital invested per worker.”²³⁹ The focus on management implies that the business environment will be assessed in terms of the quality of and the administration of regulations. These zones offer greater protection to workers’ because of the fact that they emphasize the application of policy.

[Word count: 13 961]

²³⁷ Above.

²³⁸ Schulze (n 34 above) 215.

²³⁹ Above.

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