Social Regionalism in Better Work Haiti

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This article affirms that emerging frameworks on social regionalism provide a normative basis through which to assess whether experimentalist transnational regulatory frameworks on trade-labour governance enhance counter-hegemonic approaches to development. First, this article briefly presents a theorization of social regionalism. Second, it turns to the specifics of the Better Factories Cambodia and Better Work preferential trading arrangements, with attention to the context and biannual reports emerging from Better Work Haiti. Its core contention is that the initiative constitutes a tentative, limited but promising example of an emergent social regionalism. It considers that a dialogic space at the international level may offer an important means through which to overcome seemingly intractable, sector-specific, transnational collective action challenges at the interface of trade and labour law.

1 INTRODUCTION

Claims about the interface between trade and labour law underscore the complexity of contemporary global governance challenges.¹ They compel an analysis that engages deeply and creatively with law and development.² In this article, I argue that social regionalism provides a normative basis through which to assess whether emerging, experimentalist transnational regulatory frameworks on trade-labour governance enhance counter-hegemonic approaches to development.

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First, this article briefly presents a theorization of social regionalism. Second, it turns to the specifics of the Better Work programme’s preferential trading arrangement, with particular attention to Haiti. Its core contention is that the initiative constitutes a tentative, limited but promising example of an emergent social regionalism. It concludes with a call for the International Labour Organization (ILO) to play a leading, constructivist role, by providing a dialogic space through which to overcome a seemingly intractable, sector-specific, transnational collective action challenge at the interface of trade and labour law.

2 THEORIZING SOCIAL REGIONALISM

The starting assumption of social regionalism is that the social is an intimate part of the economic; it follows that the economic cannot be sustainably regulated to promote development without addressing the social. The regional governance level provides a fluid, intermediate space in relation to the national and the ‘global’ through which approaches adapted to specific contexts can be adopted. The regional is heavily influenced by the challenge of embedded liberalism in the contemporary context, where liberalization à la Adam Smith abroad coupled with spending based redistribution à la John Maynard Keynes at home is no longer considered a viable bargain. It resolutely foregrounds the question of what social purposes a contemporary, multiple geometry trading system should serve.

Social regionalism therefore embraces multilevel governance. While it recognizes the prevailing importance of the national as a governance level, it is intent to consider a broad swath of transnational spaces; these include the international, in some jurisdictions the supranational, and as those interested in labour law should never forget – the law of the shop floor. Yet social regionalism posits that the regional is a particularly potent governance level for crafting solutions that mediate the relationship of the social in the economic.

Regionalism is a terrain of experimental governance, as the path dependency but also potential variety in the existing Free Trade Agreement

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7 P. Marginson & K. Sissons, European Integration and Industrial Relations: Multilevel Governance in the Making (Palgrave, 2004).
(FTA) structures analysed by the ILO in its recent report suggests. Social regionalism looks at the various formulations – promotional, pre-ratification conditionality or post-ratification continuous improvement – in a manner that seeks to be alive to asymmetries of power, yet avoids determinism about the available options and their potential. Social regionalism is a reminder that trade relationships and their contours are constructed, that is, embedded in quests for stabilized relationships between trade liberalization and labour policy that may be enhanced by diversity built into institutional difference. In this sense, social regionalism is resolutely counter-hegemonic, in that it challenges the assumption that the trade regime is purely a site of global wealth creation, with distribution to occur exclusively elsewhere; it thinks of trade and economic governance more broadly as a policy space through which collective goals and values should be pursued.

Social regionalism also seeks to move discussions beyond textual analyses of regional agreements, which may lead to a valuable but ultimately limited appreciation for the scope of regional action. Some of the studies that have moved reflection beyond a social dimensions approach contrast the North American Agreement on Labour Cooperation (NAALC) with the North American Free Trade Agreement (NAFTA)'s investment dimension, Chapter 11, or focus on the construction of trans-border solidarity within regional spaces like the NAFTA region, or track how multinational corporations (MNCs) shape employment relations to build regional patterns of norms and practice that match the trade flows. They are concerned with unanticipated consequences, like the out-migration based dislocation from Mexico to the United States (US) that resulted from deepened regional integration, or how structural adjustment, a policy which was deeply controversial in the developing world, and which was rapidly falling into disrepute in that context, [could] be
transferred to the industrialized economies of the [European Union] EU.\textsuperscript{15} In addition, they are concerned with the impact of regional patterns of institutional path dependency in law reform of labour institutions in the Southern African Development Community.\textsuperscript{16}

Labour dimensions of regional trade arrangements should be both crafted and analysed to move reflections beyond window-dressing, and even beyond standard-setting, to address the broader question of constructing sustainable multilevel governance. Two theoretical concerns are particularly pertinent to the social regionalism analysis.

2.1 \textbf{Beyond window-dressing: trade and labour linkage as an approach to distributive justice across borders}

The first concern is distributive justice across borders. The legal architecture of regional FTAs frames them as if symmetry in exchanges can be assumed. While contemporary agreements may have moved away from express invocations of special and differential treatment,\textsuperscript{17} the factual development differences between trading partners account in part for the proliferation of ‘labour provisions’ in the agreements. In the case of the NAALC (as in NAFTA Chapter 11), the party whose regulatory framework stimulated the side agreement and chapter was of course the developing country, Mexico. Yet mechanisms do not necessarily follow an expected, pre-determined life course: both NAFTA Chapter 11 and NAALC mechanisms have in fact been relied upon by corporate and civil society actors, respectively, beyond Mexico, in both the US and Canada.\textsuperscript{18} Like an analysis of the social dimensions of trade, social regionalism is concerned to consider the labour conditions under which products are produced or service provided.\textsuperscript{19} Alive to the fact that the shifting boundary between production and service


\textsuperscript{16} See, e.g., P. H. Bamu and R. Mudarikwa, \textit{Social regionalism in the Southern Africa Development Community: The international, regional and national interplay of labour alternative dispute resolution mechanisms} in Blackett & Trebilcock, supra n. 15.

\textsuperscript{17} But see Y. S. Lee, \textit{Reconciling RTAs with the WTO Multilateral Trading System: Case for a New Sunset Requirement on RTAs and Development Facilitation}, 45 J. World Trade 629 (2011).


provision is not neutral,\textsuperscript{20} it moves beyond to consider policy choices and their impacts. As Lang argues:

\[\text{[i]n a very real sense, one country's regulatory 'autonomy' is another country's external regulatory constraint. Moreover, states regulate in response to political and economic pressures which are themselves deeply shaped by the structure and operation of the global economy, and indeed of international economic law.}\textsuperscript{21}\]

Social regionalism considers the policy choices and regulatory possibilities that can be enabled within regional space. This is an old discussion of contemporary currency. Recall, for example, the early recognition that the initial integration of European states like Spain and Portugal would require intra-community, redistributive adjustment policies. Deepened integration would appear to heighten rather than decrease the need to be attentive to distribution. But the key point for this discussion is that deepened integration across development levels may provide space to embed concrete social policy support into the terms of regional exchange.\textsuperscript{22} Building on that point, this article focuses on the distributive justice that is part and parcel of the asymmetrical trade relationship between a small, open, economy in a least developed country of the global South, and a range of post-industrial market economies of the global North.

\subsection*{2.2 Beyond Standard-setting: Using Preferential Trade as a Potentially Tangible Manifestation of the Principle of International Solidarity in the Promotion of Social and Economic Development}

The second concern is to foster international solidarity, a notion that has been the basis of timely if somewhat polarizing theorization around the meaning of the international right to development within the UN context.\textsuperscript{23} The UN’s framing of a third generation right of international development has been the

\begin{itemize}
\item \textsuperscript{20} See T. Novitz, \textit{Trading in services – Commodities and beneficiaries}, in Blackett & Trebilcock, \textit{supra} n. 15 (explaining the way in which various forms of production have been recrafted as services in light of the regulatory environment).
\item \textsuperscript{21} Lang, \textit{supra} n. 5 at 344.
\item \textsuperscript{22} A. Blackett, \textit{Trade Labour Law and Development: A Contextualization} in Tzehaı̈neh Teklé, ed. \textit{Labour Law and Worker Protection in Developing Countries} 93 (Hart Publishing, 2010).
\end{itemize}
basis of important critiques, and fulsome engagement with the potential and limits of the contemporary framing and marshalling of ‘international solidarity’ is beyond the scope of this article. For the purposes of the current analysis, it suffices to note that the relationship between trade and human rights is engaged in the reflection on international solidarity, and that emphasis is placed on the critical need to understand international cooperation within a framework that emphasizes international solidarity. There would appear to be an opportunity for the ILO to influence both. The ILO’s social justice mandate and tripartite structure are classic bases upon which to rest a newer articulation of a claim for international solidarity. First, the ILO is well placed to offer grounded reflections on a deepened understanding of the social dimensions of trade liberalization, supported by theoretical contributions on the welfare-maximizing justifications for trade when social justice based distribution is not assumed only to be a domestic challenge. Second, the ILO’s tripartite structure stretches across the development divide. Despite fostering moments of real paralysis, it has on occasion been the basis for a deeper understanding of an engagement with how international solidarity is constructed and mediated. In thinking through international solidarity, I would suggest that greater attention should be paid to what has been referred to as the ILO’s dialogic function. So while I reaffirm the role of the ILO in standard setting, and its centrality to giving meaning and content to international labour standards, I argue that more is possible. I illustrate this through a discussion of the Better Work programme.

27 For example, the little commented resolution that was signed alongside the Decent Work for Domestic Workers Convention, 2011 (No. 189) and Recommendation, 2011(No. 201) contains seeds of international solidarity have been planted to deal with an intractable global challenge for which standard setting is only one crucial part. See A. Blackett, The Space Between Us: Migrant Domestic Workers as a Nexus between International Labour Standards and Trade Policy in Linking Global Trade and Human Rights: New Policy Space in Hard Economic Times 259 (Daniel Drache & Les Jacobs, eds., Cambridge U. Press, 2014).
3 FROM BETTER FACTORIES TO BETTER WORK: PREMISES ACROSS COUNTRY PROGRAMMES

3.1 AN ORIGINAL APPROACH TO TRADE-LABOUR LINKAGE

Francis Maupain has referred to the US-Cambodia Bilateral Textile Agreement as ‘a “boutique” project with an atypical, and very significant, role for the ILO’. The Better Factories programme started in Cambodia, which had just emerged from an incredibly destructive thirty-year war in 1991, and had joined the World Trade Organization (WTO) in 1994. Labour groups in the US expressed concern over the conditions under which textile products imported from Cambodia were made.

Starting in 1999, when the privileges under the General Agreement on Tariffs and Trade’s Multi Fibre Agreement were being slowly phased out under the 1995 Uruguay Round Agreement on Textiles and Clothing, the US extended preferential access for Cambodian ready-made garments to the US market, subject to the following condition: countrywide buy in to a programme designed to foster continuous improvement of working conditions in the garment sector. Substantial compliance with local Cambodian labour law and internationally recognized core standards, as monitored by specially ILO trained Better Factories Cambodia personnel – earned Cambodia significant incentives for continuous improvement, in the form of prospective increases of 14% and subsequently 18% in the quota.

3.2 PARALLEL SUPPORT TO LABOUR MINISTRIES

The ILO was apparently an initially reluctant monitor, which only accepted once the US offered financing for a parallel programme of technical assistance and training for the Cambodian Ministry of Labour. Factory-level monitoring

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30 Maupain, supra n. 28 at 197.


coupled with biannual synthesis reports have become the method through which substantial compliance is reported and monitored over time. Although there was some initial consternation over whether the countrywide reputational value that Cambodia gleaned from its participation in the programme would survive the end of the MFA phase out, the model has been expanded, with International Financial Corporation support, to cover Indonesia, Jordan, Lesotho, Nicaragua, Vietnam, and the subject of this article, Haiti.

While Better Work programmes generally have been presented as ‘win win’, there has been critique, including the suggestion from some investigative reports that the programmes are largely ‘whitewashing’ exploitative, low-wage labour conditions with the ILO at the centre. Without going quite that far, one critique raised in respect of Cambodia warrants some attention in the study of Haiti: it is the contention that the programmes run the risk of ‘eliciting forms of political participation that are “atomizing” and heavily policed rather than spontaneous and mass-based’, by emphasizing stability rather than empowering the collective representation of the poor. Hughes’ critique of Better Factories Cambodia is that the programme was not particularly effective at fostering redistributive goals.

By looking at the Better Work Haiti initiative with a social regionalism lens, this article questions whether the programme has been able to set in motion processes that can empower actors to move beyond a narrow approach to state legitimacy toward the broader process of nation-building by fostering redistributive policies, and promoting international solidarity. It does so by engaging with scholarship on the origins and legacy of Duvalierism by Michel-Rolph Trouillot. Trouillot explores the ambiguous relationship between the political state and the cultural construct of the nation, in Benedict Anderson’s words, the imagined political community. The deep divide between state and the nation (which for Trouillot, is ultimately the peasants, although he invokes the culture and history of a highly stratified civil society) characterizes governance in Haiti. An initiative like Better Work Haiti operates in and upon this ambivalent space. I argue that the ILO should seek to narrow the divide rather than exacerbate it.

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34 See Blackett, supra n. 22 at 122–124.
4 A CASE STUDY OF BETTER WORK, HAITI

4.1 HISTORICAL, ECONOMIC AND LEGISLATIVE CONTEXT

Haiti has a long and symbolically important history, as the nation that dramatically asserted its human agency by simultaneously overthrowing slavery and colonialism in 1804.\(^{37}\) Its history is also an intricate, conflicted, and painful mélange of foreign and economic policies that undermined its assertion of nationhood, including the fact that by an 1825 Ordinance of Charles X, Haiti was forced to repay FRF 150 million (the contemporary equivalent to USD 21 billion) as compensation for the loss of the economic interests of its slave holdings;\(^{38}\) Haiti occupied neighbouring Dominican Republic in the 1800s and was occupied by the US at the turn of the twentieth century;\(^{39}\) and Haitians lived through a Dominican border massacre in 1937 that helped to define its neighbour’s nationhood as not of African descent,\(^{40}\) and a thirty-year dictatorship started through a ‘noiriste’ president.\(^{41}\) For Trouillot, the Haitian state ‘combines an unusual historical depth and a fragility typical of much newer entities’.\(^{42}\)

Contemporary Haiti, still struggling with perennial political instability and severe disasters,\(^{43}\) is a small but, with 10 million persons, densely populated Least Developed Country (LDC), infamously known as the poorest country in the Western hemisphere. Unlike many previously non-aligned LDCs that embraced import substitution policies and only joined the GATT/WTO as part of structural adjustment conditionality, Haiti has been economically liberal for some time, and a member of the GATT/ WTO system since 1950. According to the most recent WTO trade policy review, Haiti has eliminated most quantitative


\(^{42}\) Trouillot, supra n. 36 at 30.

restrictions, export duties and taxes.\textsuperscript{44} Although its economy is overwhelmingly agrarian\textsuperscript{45} its main export is textiles, which account for over 10\% of the GDP.\textsuperscript{46} In 2012, Haiti’s main destination of exports was the US, at 83.6\%.\textsuperscript{47} Haiti imports heavily from the US, as well as from the Dominican Republic, despite ongoing trade disputes and the recent Dominican constitutional court ruling rendering a conservative estimate of 200,000 mainly migrant labourers of Haitian descent born in the Dominican Republic ‘stateless’.\textsuperscript{48}

Bilateral trade between the US and Haiti is supported by US legislation. In 2006, the US Congress enacted Haitian Hemispheric Opportunity through Partnership Encouragement Act (HOPE Act),\textsuperscript{49} to provide duty-free entry to the US for garments manufactured in Haiti. Garments are Haiti’s most important export product, constituting more than 80\% of all Haitian exports to the US, and valued at more than USD 550 million in 2010. The industry currently employs over 30,000 people, 66\% of whom are women mostly supporting families.\textsuperscript{50} Optimistic accounts of growth potential in this area situate future employment at 150,000.

Two years later, in 2008, the US Congress passed the HOPE II legislation,\textsuperscript{51} which expanded duty-free access and established a new programme for strengthening and monitoring working conditions in the textile and garment sector through the ILO (the Technical Assistance Improvement and Compliance Needs Assessment and Remediation programme – TAICNAR). The Haiti Economic Lift Program Act of 2010 (HELP Act)\textsuperscript{52} expanded the Caribbean Basin Economic Recovery Act and HOPE II to contribute to Haiti’s economic growth and development in the wake of the 12 January 2010 earthquake. Among its provisions, the HELP Act extended the HOPE trade preference programme including duty-free access to the US market for textile products until 2020, and expanded the tariff preference level limits for knit and woven apparel.

\textsuperscript{47} Economist Intelligence Unit, Haiti, 2012.
\textsuperscript{48} República Dominicana, Tribunal constitucional, SENTENCIA TC/0168/13, 23 Sep. 2013.
\textsuperscript{49} Title V of the Tax Relief and Health Care Act of 2006 (H.R. 6111/PL. 109-432) (amending the Caribbean Basin Economic Recovery Act (CBERA) of 1983 (PL. 98-67)).
\textsuperscript{50} Better Work Haiti, October 2014 synthesis report, supra n. 46 at 7.
\textsuperscript{51} Title XV of the Food, Conservation, and Energy Act of 2008 (H.R. 6124/PL. 110-246)–the ‘Farm Bill’.
\textsuperscript{52} H.R. 5160/PL. 111-171. The HELP Act includes rapid response, mid- and short-term capacity building and technical support for Haitian customs services.
The HOPE II legislation allows for duty-free entry into the US for a limited number of garments imported from Haiti, provided that 50% of the value of the goods and/or the costs of processing the garments originate(s) in Haiti, the US, or another country that has a FTA with the US. This percentage increases to 55% of the value of the goods and/or the costs of processing the garments originate(s) in Haiti in the fourth year and 60% in the fifth year of HOPE II implementation.

Accompanying the trade measures, the Caracol Industrial Park along the Haitian border with the Dominican Republic began operations in July 2012. The de-concentration away from Port-au-Prince is an important difference from the earlier Duvalier-era scheme, and was one of the recommendations of international organizations including the World Bank in the early 1980s, to reduce the drain on resources like electricity and generally to avoid ‘[accentuating] economic and spatial polarization without benefiting the nation’. Built as it is near the historically laden border town that was the site of the 1937 massacre in Ouanaminthe, and on land long known for agrarian struggle, the Inter-American Development Bank-financed Caracol has been the site of some consternation. It is built on particularly arable land and a fragile ecosystem, without a robust study of the environmental impact. However, the hope to attract significant foreign direct investment from farther abroad began to materialize with the arrival of Sae-A Trading Co. Ltd. – Korea’s leading garment manufacturer. The industry begins near the bottom of the value chain, assembling white or pre-dyed, pre-cut T-shirts, with imported cloth and imported thread, on imported sewing machines. The move up the value chain for a country renowned for the strikingly creative artisanal and artistic abilities of its people, may seem a far way away, and may even evoke industrial deskilling.

HOPE II added conditionality to the preferential treatment. In order to avail itself of the HOPE II/HELP trade privileges, Haiti was required – by the

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55 See Trouillot, supra note 36 at 210 (arguing that ‘the redistribution of factories to the four corners of the country would not eliminate the most fundamental problems created by the assembly industry itself.’)
57 Supra n. 54. Sontag recalls the manufacturer’s troubled labour relations in Guatemala. Ibid.
59 R. Bhala, Dictionary of International Trade Law 485 (2d ed, Lexis Nexis, 2012). Others, including economist Camille Chalmers, suggest that the socio-economic ‘conditionalities’ are broader still, and
US legislation – to establish an independent Labour Ombudsman appointed directly by the President of Haiti in consultation with the private sector and the trade unions. The Ombudsman started her mandate in 2012, and has recently seen her office both supplemented by a deputy and an assistant, and located directly in the SONAPI industrial park in Port-au-Prince. Haiti was also required to work with the International Labour Office (ILO), to develop a programme to assess and promote compliance with core labour standards and national labour law in the factories that are eligible for tariff advantages under HOPE II. This was referred to in the legislation as the TAICNAR programme. Finally, Haiti needed to develop a mechanism for ensuring that all producers benefiting from the HOPE II trade preferences participated in the TAICNAR programme.

There are two components to the TAICNAR programme. The first is what the ILO refers to as ‘technical assistance’ to strengthen the legal and administrative structures for improving compliance in the industry. The scope is extensive, and includes an ongoing labour law reform process, and support to strengthen the rather threadbare labour administration and judges of the one special labour tribunal in the entire country, which post-earthquake heard cases from a tent in Port-au-Prince…

The second element of the TAICNAR programme focuses on assessing compliance with core labour standards and national labour law, supporting remediation efforts, and publicly reporting on the progress of each factory on the Labour Ombudsman’s register. It also includes a Tripartite Presidential Commission on the implementation of the HOPE legislation (CTMO-HOPE). The sectoral programme is countrywide – participation for export-oriented textile companies in Haiti is mandatory – and factories register and accept to be monitored as soon as production begins.60 Better Work Haiti has publicly released nine English-language biannual synthesis reports, with the October 2014 report covering the period from February through August 2014.61 At that time, twenty-five factories were monitored and the subject of the report.

As with Better Factories Cambodia, the Better Work Haiti HOPE II model is one of continuous improvement, in which the programme has built-in support for non-compliant producers to bring their production practices into compliance with core labour standards and key aspects of Haitian labour law. The carrot is

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60 Better Work Haiti, April 2014 synthesis report, supra n. 46 at 9.
61 Better Work Haiti, October 2014 synthesis report, supra n. 46.
the trade. The stick remains: if support efforts fail, the US is required by law to ‘withdraw, suspend, or limit the application of preferential treatment’. 62

4.2 THE READY-MADE GARMENT SECTOR IN HAITI – PAST AND PRESENT

It is hard not to be ambivalent about the light assembly-based development model as championed by Better Work in Haiti. The development of Better Work Haiti reflects a particular model of development through industrialization, a model that is not new to Haiti and was in fact part of the Duvalier era regime’s strategy. President François ‘Papa Doc’ Duvalier touted Haiti’s political stability to US Vice-President Nelson Rockefeller during his visit to Haiti in 1969, arguing that ‘Haiti could be a great reservoir of manual labour for Americans establishing re-export industries because it is closer, more reliable and easier than Hong Kong’. 63 This strategy is associated with the second phase of Duvalierism, or Jean-Claudisme, with the accession of ‘baby doc’ Duvalier to the presidency on François Duvalier’s death in 1971; a year later, there were 150 US firms in Haiti around the Delmas industrial park, a number that would double by 1977 before starting to decline at the end of the decade. 64 Of course, during that era a strike-free, low-cost Haiti was advertised, although some have argued that in real terms the wage levels were higher at that time than they had been prior to the 2009 wage increase. 65 Trouillot offers a fairly common assessment of their economic impact:

Subcontracting assembly plants did provide employment to many people in the Port-au-Prince area, between 40,000 and 60,000 depending on the estimates. However, this was not enough to make a substantial change in the national employment picture. Factories succeeded each other, making the job market unstable even when the net number of jobs remained relatively steady. Further, given labor conditions, the absence of unions, and the excessive demands of employers (from sudden shifts in schedules to sexual harassment), few Haitians held their jobs long enough, even in the more stable firms, to benefit significantly from their employment. Finally, in spite of the very low cost of labor, many potential investors looked suspiciously at Haiti’s infrastructure and its

62 19 USCS s. 2703a(e)(4)(B)(ii).
63 Quoted in Trouillot, supra n. 36 at 200. Trouillot adds that light assembly through subcontractors first appeared in the 1950s, noticeably during the Magloire regime. Ibid. at 200–201.
64 Trouillot, supra n. 36 at 201.
political stability. Hence, far from increasing steadily, as was expected, industrial production wavered through the 1970s and 1980s.\textsuperscript{66}

Haiti under Better Work is still advertised as one of the lowest cost production regions, and Paul Collier in his oft-cited report compares Haiti’s competitiveness in textiles, perhaps tellingly prior to the Rana Plaza disaster, with Bangladesh.\textsuperscript{67} But in a letter to the \textit{Washington Post} then Haitian Prime Minister, Laurent Lamothe, noted that ‘new apparel manufacturers . . . received 50 applications for every job when they opened their factory’.\textsuperscript{68} Haitian economist Camille Chalmers and others have noted this for some time, and contend that this is precisely a causal factor in the development of the most precarious and violent neighbourhoods, like Cité Soleil.\textsuperscript{69} Indeed, the WTO has even noted a decline in the role played by agriculture, in part due to the growth in other sectors like the service sector, but in part due to a ‘rural exodus’.\textsuperscript{70} Some query the relationship between women as the backbone of agriculture and the pull of the largely female labour force in the textile industry.\textsuperscript{71} The impact of various other policies – including the 1991 international embargo – also affects the production of exportable agricultural products, over and above the ‘mountain after mountain’\textsuperscript{72} of ecological disasters and the consequences exacerbated by weak infrastructure.\textsuperscript{73} Trouillot evokes a deeper challenge, that is, peasant resistance: he suggests that exports of Haiti’s main agricultural products like essential oils, cocoa and coffee were erratic not necessarily due to international price fluctuations but also due to Haitian peasants themselves ‘becoming an economic maroon, avoiding all production that benefited the urban middlemen’.\textsuperscript{74} This hints at the stronger critique of the assembly-led development model in Haiti, which is far beyond the scope of this article but important to name: there is a deep-seated, historically rooted misfit in relation to

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\item \textsuperscript{66} Trouillot, \textit{supra} n. 36 at 209.
\item \textsuperscript{69} Chalmers, \textit{supra} n. 59.
\item \textsuperscript{70} WTO Trade Policy Review, \textit{supra} n. 44 at para. 18.
\item \textsuperscript{71} See Trouillot, \textit{supra} n. 36 at 215 (noting that ‘[n]o one has yet established any systematic correlation . . . [b]ut . . . the very idea of wages that were more than ten times the income of the average peasant certainly increased the rural exodus.’).
\item \textsuperscript{72} ‘Dye mon, gyen mon’ or ‘Beyond the mountain, more mountains’ is a Haitian proverb attesting to the persistent challenge of solving one problem only to encounter another: recalling Haiti’s topography, it evokes the perpetual nature of struggle.
\item \textsuperscript{73} WTO Trade Policy Review, \textit{supra} n. 44 at para. 18.
\item \textsuperscript{74} Trouillot, \textit{supra} n. 36 at 212.
\end{itemize}
The pays en dehors in Haiti, or the divide that dates back to the uneasy coexistence of ruling political and economic élites, with the deeply agrarian society and its troubled relationship to the urban classes in Haiti. As Trouillot contends, ‘what is required to correct the prevalent belief that Haiti is a country of idle yeomen . . . is an analysis of productive relations that shows what happens to the surplus’.

Rather than proposing a facile response to this more complex debate, this article must be read as suggesting that labour law and development in Haiti must be about more than export-led development. ILO support of decent work in Haiti should be clearly understood as multifaceted and deeply-rooted, necessarily extending beyond mediatized issues of relevance in the moment to the export-oriented economy. Part of the coherency must entail comprehensive engagement with the overwhelming, unavoidable informal economy and foster alternative modes of rural-urban development in the pays en dehors.

Perhaps surprisingly, then, and even taking into account the many critiques of the kind of growth that the factory-focused initiative represents, it may still be argued that the Better Work programme in Haiti has stimulated some counter-hegemonic experimentation, creating a regulatory irritant that provides important ways to support the process of nation-building in Haiti, including in the pays en dehors. In this last part of the article, I focus briefly on three current labour regulatory sites that have been the basis of both challenge and experimentation, in large measure due to the Better Work initiative.

5 CURRENT LABOUR REGULATORY CHALLENGES

5.1 Reforming labour law

In the 1940s, an ILO expert asked to come and propose ‘modern’ labour legislation in Haiti did so, like so many of the projects in the not quite post-colonial Africa, on the basis of developing a code for modern ‘industrial’ man. David Bleloch, chief of the conditions of work branch that was (anecdotally) based in Montreal at McGill during the interwar period, wrote a thoughtful review of the history of Haitian labour regulation beginning with the Code noir. He concluded that with the existence of large plantations where many workers were employed, and railroads, and more and more workshops where various crafts were practiced with growing technological use, the ‘historical moment to resolutely engage in the protection of Haitian workers’ had well and...

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76 Trouillot, supra n. 36 at 77.
truly arrived. He recommended the development of labour legislation for the emerging formal economy.\textsuperscript{77} The labour code currently applied in Haiti was the one ultimately adopted by Dr François Duvalier, a former Labour Minister and then President for life over a particularly brutal regime. ‘Papa Doc’ Duvalier actually adopted a ‘protective’ labour code that in many ways resembled the labour codes for the French overseas colonies, was modelled on French labour law, and was adopted in Haiti just as former French colonies were decolonizing – in 1961 . . . But this code was also seen by some to be repressive and a vehicle facilitating Duvalier’s totalitarian control. It was amended by his son, ‘baby doc’ Duvalier, in 1984.

Better Work applies the current code. In many ways, Better Work’s monitoring has highlighted a number of the problems with the Labour Code, already understood to be outdated. These include small technical matters like the reporting on the number of bathrooms required in the Code, seen by many as overly prescriptive, out of line even with most contemporary best design practices, but which resulted in Better Work synthesis reports that considered factories to be non-compliant.\textsuperscript{78} Frankly, these matters served only to trivialize or discredit Better Work monitoring.

More significant matters, which pose stronger challenges, surround the framing of trade union rights in a code that has been the basis of pointed observations by the Committee of Experts on the Application of Conventions and Recommendations. These challenges were particularly visible in the skilful management of the dismissal of trade unionists from one of the key textile factories. Better Work, alongside the ILO, was able to pinpoint the problem arising out of code that does not clearly provide workers’ right to be reinstated in their employment in the face of an act of anti-union discrimination.\textsuperscript{79} Less foregrounded but also important is the crisis of confidence around the Labour Department’s ability to address the matter in a swift and effective manner. Better Work was able to marshal the levers associated with international scrutiny and country recognition to foster a resolution that saw both worker reinstatements and social dialogue.\textsuperscript{80}

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\item \textsuperscript{78} Better Work April 2014 synthesis report, supra n. 46 at 10.
\item \textsuperscript{80} Le Nouvelliste, Social Dialogue Reinforced in the Textile Sector, 3 Apr. 2014.
\end{itemize}
It is important to emphasize the extent to which the labour code reform has consistently been cast broadly as a reform for the broad promotion of social and economic development throughout Haiti.\(^8\) There is no need to belabour the fact that the current Haitian labour code is weakly and erratically enforced within Port-au-Prince,\(^9\) and barely scratches the surface of the structure of agricultural labour in the country and the many pluralist forms of labour organization in agriculture that have developed over time – some inherently inequalitarian, others relying on collective practices to seek to redress imbalances\(^10\) – nor does it reach beyond the prototypical industrial plant to touch the work places of most Haitians – personal services in the deeply interlinked urban and rural informal economies.\(^11\) And of course Haitian migrant workers are themselves all but forgotten.\(^12\) The institutions for the administration of justice, framed on the basis of that which might have worked in the North, simply cannot be assumed to function in the same way in Haiti, even for the thin sliver of the formal economy to which they might be applied. In labour law’s peripheries, the state rarely acts as might be expected.\(^13\)

The labour law framework in Haiti suggests that a labour law reform may emanate from a narrow, centrist model of development that focuses on the so-called modern economy, and which runs the repeated risk of stifling the imagination of what ‘other nation’ beyond the textile factory might need to become possible. It may be seized upon by the parties to provide an opportunity to spotlight the potential of the vast majority of workers throughout the country. It may even become a way by which ministry officials themselves can express frustration at being comparatively poorly equipped – when compared to Better Work officials – to resolve disputes. They may express their eagerness to have the


\(^11\) See D. Bazabas, Du marché de rue en Haïti: Le système urbain de Port-au-Prince face à ses entreprises ‘d’espace-ne’ (L’Harmattan, 1997).

Interestingly, the current code contains provisions that showed at least legislative attention to the potential for extra-territorial application of labour law to protect domestic workers migrating from Haiti with their employer. See Art. 265, Décret du 24 février 1984 actualisant le Code du travail du 12 septembre 1961.

\(^12\) See Trouillot, supra n. 36 at 22.
tools and the resources necessary to conduct the comparatively sophisticated evaluations of firms that inspectors without cars or electricity would be ill-placed to perform. Concerns of this nature may lead not only to textual reforms (always understood to be insufficient) but also to broader technical support for the labour department and the labour inspectorate, notably in a programme launched in March 2014 and currently active\(^7\) that overlaps with and is essential to support any labour law reform. In other words, they might become more resolutely redistributive.

5.2 Promoting social dialogue

Better Work Haiti entails the establishment of a Tripartite Presidential Commission on the implementation of the HOPE legislation (CTMO-HOPE). Yet a tradition of social dialogue between these actors did not exist. Trouillot argues that the strength of the ‘particular dictatorship’\(^8\) of the Duvalierist state was in large measure a confirmation of the weakness of Haitian civil society\(^9\) including the trade unions that the dictatorship sought to crush.

Following Better Work’s mediation of the Sota dismissals and with ILO support initially providing training on international labour standards but progressively broadening to address governance concerns, a parallel social dialogue round-table initiative was put in place in July 2012. It has somewhat spontaneously served as a site through which a little used practice could be explored in the labour context. It was seen as helping to chip away at generations of distrust and animosity, in which wildcat strikes and lockouts were more likely to be resorted to than any dialogue that might lead to factory-level or sectoral collective bargaining, not to mention sustained discussion of key social and economic issues. A Memorandum of Understanding (MoU) was approved in late 2013. Discussions understandably ground somewhat to a halt during the December 2013 crisis on the minimum wage. However, matters are reportedly picking back up, the MoU was signed in an official ceremony in late March 2014, and there is some discussion as to how to deepen social dialogue to address more collective concerns, while extending the social dialogue fora both horizontally to other sectors of the economy, and vertically to the national level.

\(^7\) Better Work Haiti, October 2014 synthesis report, supra n. 46, at 9.
\(^8\) Trouillot, supra n. 36 at 164–165 (arguing that in a state that had been authoritarian from Dessalines to the two Duvaliers, ‘the state had broken through the culturally specific limits of authoritarianism’).
\(^9\) Ibid., at 163. Trouillot adds that ‘the history of the Duvalierist institutions reveals moments of experimentation, of retreat, and of dilemma’.

At some level, while the social dialogue round-table itself is an interesting emerging forum through which the dialogue has been concretized, it is hardly the sum of struggle for the poor; rather, it has offered one space, through the negotiation of the labour code, that a sense of shared interests and the value social dialogue has been able to develop. In this regard, rather than an atomized, unitary stability-seeking device, it is one site of many that actors call upon to shape the direction of textile industry initiatives and broader social change.

5.3 ADDRESSING THE MINIMUM WAGE

Minimum wage issues also came to the fore as the High Commission on Wages (Conseil supérieur de salaires) was revived and tripartite representatives presided by the Director of Labour appointed in summer 2013. Tensions had already been high over the interpretation to be given to an ambiguously drafted minimum wage text in 2009, as the ILO and Better Work interpretation was contested by textile factory owners and ultimately the Haitian government. While the minimum wage is generalized and affects society as a whole, the issue crystallized around the Better Work programme and comparative advantage concerns surrounding the textile industry. After no increase in minimum wage for decades, in 2009, the Préval government signed an increase that contained a HTG 200 or USD 5 general wage in industrial and commercial establishments for an eight-hour working day, and a series of provisions that at once progressively moved toward the HTG 200 minimum reference salary, but also included what can be called a ‘production wage’ that workers should be able to reach, of HTG 300, effective 1 October 2012.

The Haitian government issued a strongly worded statement challenging the interpretation, and Prime Minister Laurent Lamothe sent a detailed letter to the Financial Times, following a report produced by the Workers’ Rights Consortium (WRC) in advance of a Better Work synthesis report of 16 October 2013. The WRC claimed wage theft, a claim that revolved in some measure around an interpretation of whether the minimum wage in the textile sector was the piece rate or ‘production rate’ of HTG 300 or USD 7.50 per day, or the generally applicable minimum wage of HTG 200 or USD 5 per day.

When in addition the High Commission on Wages proposed a minimum wage increase for that sector to HTG 225, or USD 5.75 per day, protests

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91 Ibid., at 9.
92 Supra n. 68.
93 Supra n. 68.
94 That increase was adopted by presidential decree on 1 May 2014. See Better Work October 2014 synthesis report, supra n. 46 at 9.
erupted and workers literally walked off the job. Workers instead sought a wage of HTG 500, or a little less than USD 13 per day, for the export-oriented apparel sector. The cases of some workers who were reportedly dismissed are pending.\textsuperscript{95}

The ILO and Better Work, through high-level interventions with various key officials, has found an important negotiated compromise to the crisis, reflected in the covering note to the Better Work synthesis report of April 2014 such that data on the ‘production rate’ of HTG 300 are referenced but not identified as a compliance point.

The minimum wage issue is, of course, a persisting issue in a number of countries in which Better Work programmes operate. The apparel industry preferential scheme, by its nature export-oriented and trade-centred, can hardly avoid the issue.\textsuperscript{96} Global competitiveness is central to Haiti, which struggles with the cost of other factors of production like electricity and the premium for political instability. Ultimately, it is hard to overlook a few basics, including how much consumers are prepared to pay for a plain, white T-shirt, and how much women working full days in those sectors and supporting several family members should be expected to be paid to make them.

That a nation’s sectoral wage policy may constitute at once a poverty wage – even if the alternative is the virtually non-waged, predominantly subsistence economy – and a form of trade-based comparative advantage is not commonly acknowledged but hard to miss in the export-oriented textile economy worldwide. In the evolution of trade and labour debates over the past decades, important work has been done to move analyses away from slippery notions of ‘social dumping’ on the basis of pure analyses of labour cost, to focus instead on respect for core labour standards. Moreover, it is understood that the effort at the centre of the Better Work initiatives is similarly to move away from a race-to-the-bottom logic, to a system of continuous improvement of labour conditions through respect for labour standards and local labour law.

These linkage schemes, which seek to foster progressive admission of peripheral countries into broader networks of liberal investment and trade, remain premised on the assumption that living wage rates will eventually follow along, in part as workers work their way along the production value chains. It is

\textsuperscript{95} Better Work April 2014 synthesis report, \textit{supra} n. 46 at 9.

\textsuperscript{96} In Cambodia the minimum wage was USD 61 per month, and rose to USD 80 with a projected raise to USD 100 after a few factors, including one wholly unusual one: reports that masses of first generation rural women migrants to urban factories reportedly started fainting in collective spells, seen variously as manifestations of ancestral spirits, the neak ta, and bodily rejection of prevailing working conditions, shutting down production in the process. See J. Wallace, \textit{Workers of the World, Faint!} The New York Times, 17 Jan. 2014.
expected that this will transpire in the absence of a previously established normative ‘equilibrium’ line.97

The importance of an ‘equilibrium’ line can be gleaned from the history of the establishment of the free movement of persons in the original Treaty of Rome establishing the European Economic Communities. The Ohlin report was commissioned from the ILO on the related but different issue of relative wages based on gender: France had an ‘equal pay for work of equal value’ law applicable to women in industry; Italy did not and labour market segmentation on the basis of gender and inferior pay were observed. The Ohlin report made a case for establishing the principle of ‘equal pay for work of equal value’ across the regional territory; it sought harmonization in respect of labour costs, that is, the cost of wages linked to discrimination on the basis of sex. It may be said to have recognized a normative ‘equilibrium’ line, on the basis of the ILO’s Equal Remuneration Convention, 1951 (No. 100).98

On the wage issue, the ILO has focused on the principles of tripartite minimum wage fixing, at the national level.99 Arguably, a precise and important challenge is posed when a select number of LDCs all seek market access for development under preferential terms that include conditionality to promote improved labour conditions tied to international and national labour standards, and all of them wonder whether their workers – however much a productive discussion can be brought to bear for sheer human power and technology no more sophisticated than a sewing machine – can in real terms earn sufficient to support themselves and their families in dignity. At the very least it is necessary to ask whether the challenge has been sufficiently carefully considered.

Trade scholars appreciate the need to approach this crucial frontier with trepidation. Yet that does not absolve transnational labour lawyers from the need to offer something more than the assurance that the ILO is enabling social partners and states – individually, and nationally – to define their own sectoral or

minimum wage. One approach might be to seek to offer guidance on appropriate comparative factors upon which to begin to identify a normative basis for living wage setting in the specific sectoral context, across diverse national contexts. But more importantly, the ILO might offer space. In other words, in this sectoral multilevel governance exercise, transnational cooperation takes the form of trade-based redistribution, and becomes an exercise of international solidarity.

6 CONCLUSION: SOCIAL REGIONALISM AND THE ILO – RECONCILING STATE AND NATION

This article has sought to convey the idea that a social regionalism approach calls for historical, social and economic contextualization of initiatives, as well as for multilevel approaches to governance with a social or collective purpose. Despite the tendency toward path dependency, there is not an easy one-size-fits-all approach to building a deep nexus between the social and the economic in trade as development. The Better Work Haiti model of unilateral trade preferences has offered a meaningful case study of the importance of contextualization, and illustrates what is possible when market access is considered non-reciprocal and resolutely a part of a development process.

Social regionalism is not univocally focused on state action, although it actively engages the state. Labour policy is part of the broader engagement of civil society and private actors in the process of ongoing social contestations with a view to nothing less than nation-building. Social dialogue, championed by the ILO at a moment in which it could easily have been pushed aside in an era of ‘human rights as labour rights’, is at the core of an approach to labour dimensions that is potentially transformative.

Critically important inroads were made in the otherwise slightly too tidy OECD-framed debate over labour productivity as compatible with core labour

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100 See, e.g., Daniel Vaughan-Whitehead, How ‘fair’ are wage practices along the supply chain? A Global assessment, Arianna Rossi et al., Towards Better Work: Understanding Labour in Apparel Global Value Chain 68 (Palgrave McMillan, 2014) (offering an important normative sketch of a multidimensional approach to defining a ‘fair wage’ to include the notion of a living wage along the supply chain, and including different dimensions of the wage-fixing process: wage levels compliant with national law, wage adjustments and pay systems in human resource management, wage bargaining and communication on wages).

101 See, e.g., ILO, Global Dialogue Forum on Wages and Working Hours in the Textiles, Clothing, Leather and Footwear Industries, Points of consensus, Geneva, 23–25 Sep. 2014, GDFTCLI/2014/6 (emphasizing the importance of social dialogue and the role of the ILO, but perhaps ironically not quite underscoring the importance of a transnational space like the one that the global dialogue convened).

102 Lang, supra n. 5 at 348.

103 Maupain, supra n. 17 at 197.
However, the ILO’s intuition in emphasizing tripartite minimum wage fixing machinery seems both right yet insufficient: The emphasis on social dialogue of course seems right. The level might require adjusting, however, as it is increasingly a transnational issue to which ILO and other international actors will become critically important. That does not mean any national dimension is lost. However, it does mean that it is necessary to identify multilevel governance spaces within which discussions about export-oriented textile assembly industry wage levels may take place, arguably starting with the Better Work preferential trade programme for LDCs. The ILO could facilitate a deeply challenging but meaningful discussion of transnational criteria for a living wage, in the process continuing to shape the fundamentally indeterminate and increasingly contested direction of contemporary global trade in the direction of social justice.

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