



School of Law
UNIVERSITY OF GEORGIA

Digital Commons @ University of Georgia
School of Law

Scholarly Works

Faculty Scholarship

1-1-2022

Invisible Workers

Desiree LeClercq

SYMPOSIUM ON INTERNATIONAL ECONOMIC LAW AND ITS OTHERS

INVISIBLE WORKERS

Desirée LeClercq*

In the parable, *The Emperor Has No Clothes*, an emperor walks naked through a public procession, assured by his own pride and vain advisors that he was wearing a magnificent robe visible only to the smart and worthy. Like the emperor, governments imagine that they have cloaked international economic law in a new “worker-centered” trade policy. This essay explains how their efforts have merely exposed the deficits in international economic law. They have failed to account for asymmetries between capital and labor and hierarchies between sectors of workers. They also exclude the voices of the world’s most vulnerable workers—particularly those who do not benefit from union representation or job formality. The essay proposes that if policymakers intend to give workers an authentic voice and bargaining power, they must critically examine international economic law’s very corpus.

International Economic Law’s New Robe

The United States is currently leading global efforts to strengthen workers’ voices under a “worker-centered” trade policy.¹ That policy purports to give workers “a seat at the table” when governments develop new trade policies that “protect workers’ rights and increase economic security.”² So far, U.S. efforts have paid off; its policy has been echoed within the World Trade Organization and endorsed by trade parties like the European Union.

Many global and national unions have embraced the “worker-centered” policy, whose name suggests recognition of their member constituencies’ needs and interests. Those unions fail to acknowledge the residual structural inequalities and asymmetrical relationships between capital and labor. After all, international economic law has been designed to regulate the flow of goods, services, and capital across borders, not to protect labor rights. To maximize profits, corporations seek ways to lower production costs, including labor costs, and protect their prerogative to decide whether to move or close operations, hire or fire workers, or avoid union organizing. International economic law permits corporations to do so, which forces workers to compete for decent work opportunities, makes it more difficult for workers to organize, and pushes global workers into informality.³ The new trade policy does not attempt to remedy those power imbalances and associated inequalities.

* *Proskauer Employment and Labor Law Assistant Professor, Cornell University’s School of Industrial and Labor Relations.*

¹ Office of the U.S. Trade Rep., [Press Releases](#) (2021).

² See Office of the U.S. Trade Rep., [Fact Sheet: 2021 President’s Trade Agenda and 2020 Annual Report](#).

³ Manuel Castells & Alejandro Portes, *World Underneath: The Origins, Dynamics, and Effects of the Informal Economy*, in [THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES](#) 27–28 (Alejandro Portes, Manuel Castells & Lauren A. Benton eds., 1989).

International Economic Law, Globalization, and Fissured Workers

As Dani Rodrik explains, “standard economic theory predicted that workers would be the main beneficiary of the expanding global division of labor,”⁴ at least in developing countries. Nevertheless, corporations and capital have ultimately proven the winners.

Global trade and international economic law took shape in the late 1960s and early 1970s, when former colonies began to industrialize and develop economically. Multinational corporations began to outsource their labor-intensive operations to those countries in search of cheap labor and raw materials.⁵ Simultaneously, international financial institutions and other global economic actors in Africa, Asia, Latin America, and the Middle East linked financial assistance to structural adjustment programs. Those programs required recipient states to facilitate corporate flexibility—to the detriment of workers’ rights, particularly of poor women of color who lost job security and acceptable working conditions.⁶ The 1980s debt crisis in Latin America and the Caribbean further drove developing countries to export-oriented industrialization, resulting in “lower labor costs in the region and increased wage competition among traditionally low-wage regions throughout the world.”⁷

In developed economies, wages stagnated despite productivity increases.⁸ In developing countries, trade liberalization worsened labor rights.⁹ Both scenarios suggest that quality jobs may be disappearing. While there is some empirical evidence that the manufacturing and auto sectors have benefitted by offering skills development and better wages, there is also evidence that these sectors outsourced production or otherwise weakened trade union participation.¹⁰ The same paradox exists, for instance, in the *maquiladora* sectors in Mexico and Central America, where trade has provided women employment opportunities and pathways out of poverty while subjecting them to hazardous and abusive working conditions.¹¹ As quality jobs worldwide decline, workers struggle to find and keep those jobs at home, fearful of losing them to foreign workers, and are increasingly willing to settle for what jobs are available.¹²

Global supply chains have eroded national boundaries and have established sectoral units in their place, but workers’ mobility has mainly remained restricted. As companies relocate to take advantage of lax regulations and cheaper production costs, global workers have been cast along a supply chain hierarchy. At the bottom of this hierarchy are workers who harvest, collect, and assimilate raw materials and supplies to feed into the chain. At the top of the hierarchy are workers at the lead firms, where products are finished and sold. As opposed to workers at the bottom of the chain, workers at the top often enjoy formal employment and better wages and working conditions.¹³

⁴ Dani Rodrik, *A Better Deal for the World’s Workers*, PROJ. SYNDICATE (Dec. 10, 2021).

⁵ See MOHAMMED BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER*, ch. 1 (1979).

⁶ See GRACE CHANG, *DISPOSABLE DOMESTIC: IMMIGRANT WORKERS IN THE GLOBAL ECONOMY* 124 (2000).

⁷ Elizabeth Fussell, *Making Labor Flexible: The Recomposition of Tijuana’s Maquiladora Female Labor Force*, 6 FEM. ECON. 59, 62 (2000).

⁸ See Rodrik, *supra* note 4.

⁹ *Id.*

¹⁰ See generally Mathieu Dupuis & Ian Greer, *Recentralizing Industrial Relations? Local Unions and the Politics of Insourcing in Three North American Automakers*, IND. & LAB. REL. REV. (June 7, 2021).

¹¹ Edmé Domínguez, Rosalba Icaza, Cirila Quintero Silvia López & Åsa Stenman, *Women Workers in the Maquiladoras and the Debate on Global Labor Standards*, 16 FEM. ECON. 185, 189 (2010).

¹² See Richard L. Trumka, *The Crisis of Neo-liberalism and the American Labour Movement*, in *THE INTERNATIONAL HANDBOOK OF LABOUR UNIONS* 280–81 (Gregor Gall, Adrian Wilkinson & Richard Hurd eds., 2011).

¹³ See generally Kevin Kolben, *The Consumer Imaginary: Labor Rights, Human Rights, and Citizen-Consumers in the Global Supply Chain*, 52 VAND. J. TRANSNAT’L L. 839, 850–52 (2019).

Digital transformations are further straining national labor markets. Traditional jobs in operations and agriculture seem bound to be replaced by robotics and automation.¹⁴ New jobs are proving to be weak substitutions. Those jobs, such as platform jobs, tend to be precarious or self-employed, thus “providing few rights and protections to workers.”¹⁵

Workers—particularly women in developing countries—have increasingly turned to informal employment sectors.¹⁶ According to UN estimates, over 60 percent of workers across the globe are currently in the informal economy—their labor is carried out along the fringes of the law, depriving them of basic legal and social protections.¹⁷ Many are self-employed, while others work in informal enterprises or informal positions at formal enterprises (such as through subcontracting or temporary agencies).¹⁸ On the whole, these non-traditional employment arrangements have resulted in declining union memberships.¹⁹ A significant majority of the working population thus lacks independent and fair representation. Unequal access to collective bargaining has resulted in distributional asymmetries and the declining influence of organized labor on workplace conditions and international economic policies.

Voices at the International Economic Law Table

Globalization’s effects on workers have been devastating. More than 1,100 garment workers were burned alive when their building collapsed in Dhaka in 2013.²⁰ Hundreds of thousands of children are forced into hazardous and detrimental working conditions every year.²¹ Recent initiatives such as the “worker-centered” trade policy suggest a gradual recognition that international economic law goes too far in generating profits at the expense of basic human rights.

Governments such as those of the EU member states have attempted to confront rights abuses in international economic law by tolerating varying degrees of formal union and civil society engagement. However, given the underrepresentation of workers’ voices in unions and civil society, those discussions prioritize the dominant paradigm of formal union workers but fail to account for the complex plurality of the world’s most vulnerable workers.²² For instance, domestic workers, migrant workers, informal workers, and gig workers, not to mention women workers, are often not represented by unions.²³ The slogan “nothing for us without us,” popular among informal worker organizations, speaks to the frustration and disconnect felt by workers whose views have not been sought directly but whose needs are translated through well-meaning yet attenuated unions.

Those unions must reconcile the needs of their direct members and those of the informal and migratory workers they seek to represent. Cross-border competition creates tension between protecting local members from foreign

¹⁴ OECD, *Development Co-operation Report 2021: Shaping a Just Digital Transformation*, ch. 16 (2021).

¹⁵ *Id.*

¹⁶ See Bill Fletcher Jr., *Interaction Between Labour Unions and Social Movements in Responding to Neo-liberalism*, in *THE INTERNATIONAL HANDBOOK OF LABOUR UNIONS*, *supra* note 12, 280–81.

¹⁷ ILO, *WOMEN AND MEN IN THE INFORMAL ECONOMY: A STATISTICAL PICTURE*, ch. 2 (3d ed. 2018).

¹⁸ See *Castells & Portes*, *supra* note 3, at 27–32.

¹⁹ *Id.*

²⁰ See generally *LABOR, GLOBAL SUPPLY CHAINS, AND THE GARMENT INDUSTRY IN SOUTH ASIA: BANGLADESH AFTER RANA PLAZA* (Sanchita Banerjee Saxena ed., 2020).

²¹ *Id.*

²² See Diego Muro & Nuno Themudo, *Trade Unions in a Changing World: Challenges and Opportunities of Transnationalization*, in *GLOBALIZING CIVIC ENGAGEMENT: CIVIL SOCIETY AND TRANSNATIONAL ACTION* 46–48 (John Clark ed., 2003).

²³ See *Castells & Portes*, *supra* note 3, at 27–32.

competition and ensuring the availability of good jobs for foreign workers. Unions representing workers in export-oriented sectors may not be as vulnerable to that dilemma as those representing workers in import sectors, so long as the former sector does not offshore production. Unions' approaches also conflict. Some participate in the democratic mobilization of collective power to support state policies related to international economic law.²⁴ Others reject the implicit exclusion of non-citizens from political processes and outcomes.²⁵ Yet others simply distrust and reject the international economic law framework writ large.²⁶ This variance raises critical questions about which union voices are engaging on the "worker-centered" platform, whose interests are represented, and how disagreements are resolved.

Union Strategies

The combination of globalization and increasing informality has shifted the nature of work, the power balances between labor and capital, and the relationship between unions and global workers. Unions have responded through "vacillating, if not erratic . . ." strategies.²⁷ Some have attempted to assimilate informal and atypical workers. These include unions in developing countries—Zambia, Uganda, Mozambique, Brazil, Cambodia, South Africa, Georgia, Uruguay, Tunisia, and the Dominican Republic—and unions hoping to represent migrant and gig workers in the United States, the United Kingdom, and Europe.²⁸

Where formal participation is impossible or insignificant, unions, civil society, and non-governmental organizations sometimes coalesce under transnational networks to lobby the government. One notable example is the Hemispheric Social Alliance (HSA), composed of civil society organizations primarily in Brazil, Chile, Mexico, and the United States in 1997 against the backdrop of the Free Trade Area of the Americas (FTAA) negotiations. Despite efforts to streamline HSA chapters in countries, workers and advocates complained that their local views were not represented, and local chapters struggled to communicate with chapter members in other countries.²⁹

Civil society efforts within the international economic law framework also conflict and compete with other organizations. During the Central American Free Trade Agreement (CAFTA) negotiations in El Salvador, for instance, two civil society coalitions adopted competing approaches to influence rights in trade—one asked to participate in the negotiations and attempted to align its proposals with the government's trade objectives, and the other tried to stop the negotiations forcefully.³⁰ The result? The government ignored both demands, moved up its deliberations to a 3:00 a.m. session, and approved CAFTA eight hours later.³¹

²⁴ Andreas Jungherr, Matthias Mader, Harald Schoen & Alexander Wuttke, *Context-Driven Attitude Formation: The Difference Between Supporting Free Trade in the Abstract and Supporting Specific Trade Agreements*, 25 REV. INT'L POL. ECON. 215, 234–35, 287 (2018).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Fletcher, *supra* note 16, at 280.

²⁸ *INFORMAL WORKERS AND COLLECTIVE ACTION: A GLOBAL PERSPECTIVE* (Adrienne E. Eaton, Susan J. Schurman & Martha A. Chen eds., 2017).

²⁹ Marisa von Bülow, *Civil Society and Trade Negotiations: Constructing a New Field of Action in the Americas*, 2 RCCS ANN. REV. 117, 129–30 (2010).

³⁰ Rose J. Spalding, *Civil Society Engagement in Trade Negotiations: CAFTA Opposition Movements in El Salvador*, 49 LAT. AM. POL. & SOC'Y 85 (2007).

³¹ *Id.* at 101.

International Economic Law Exposed

Two critical misconceptions beset the “worker-centered” trade policy. The first involves use of the term “workers,” which remains restrictive in international economic law. The second regards how the policy’s outcome-based approach prioritizes traditional neoliberal values over critical associational rights.

First, that policy now purports to center on workers, but it remains closed to the majority of them. For instance, trade rules are inexorably tied to workers in formal sectors with a nexus to trade.³² Those sectors typically include agriculture, manufacturing, mining, services (telecommunications, commercial banking, etc.), and autos.³³ Trade rules exclude workers who work in informal sectors and outside of trade-relevant sectors.

These exclusions belie workplace realities. Consider gig workers whose informal work directly feeds into digital trade, or informal workers in manufacturing or who produce tradeable goods such as agriculture. In an era of globalization and economic interdependency, which sectors of work and workers are wholly insulated from the trade relationship? Even domestic workers play a critical role in the global economy. As demand for privatized care increases, particularly in developed countries, women in developing countries migrate for job opportunities.³⁴ Their work absolves the household wage-earners from domestic responsibilities, thus enabling economic work.

Second, that policy’s outcome-based rules synthesize minimum standards of global corporate competition. They conflict with a rights-based approach, which rejects prescribed, state-defined outcomes in favor of democratic processes.³⁵ For instance, international economic law’s sparse labor rules aim to ensure that national laws and practices protect the International Labor Organization’s fundamental labor rights, including prohibitions against forced labor. A rights-based approach centers on the process of realizing those fundamental rights and urges the participation of workers through freedom of association and collective bargaining. Without that participation, labor laws and practices do not necessarily represent worker interests.³⁶ International economic law’s rules, by contrast, require compliance with government-prescribed laws and practices.³⁷

International economic law rules that focus on outcome and not on process treat the symptom and not the disease, to the detriment of labor and (potentially) trade. To illustrate, states are increasingly using trade to enforce prohibitions against forced labor.³⁸ To that end, the European Union and the United States have banned the importation of cotton from Xingang, China over allegations of forced work in secret internment camps.³⁹ And yet, those efforts make no mention of China’s prohibitions on the formation of independent trade unions.⁴⁰ The Chinese government denies the allegations.⁴¹ States are at a stalemate: they lack data concerning working conditions in Xinjiang, so they cannot confirm whether or when conditions improve. Meanwhile, trade in global cotton has stalled.⁴² Had the new trade policy taken a rights-based approach and prioritized the workers’ associational

³² See MARY JANE BOLLE, CONG. RES. SERV., RS22823, [OVERVIEW OF LABOR ENFORCEMENT ISSUES IN FREE TRADE AGREEMENTS](#) 1–4 (2016).

³³ For a description of sectors and services deemed relevant to the trade relationship, see U.S. Int’l Trade Comm., [U.S.-Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and Specific Industry Sectors](#) (Apr. 2019).

³⁴ See ADELLE BLACKETT, [EVERYDAY TRANSGRESSIONS](#) 2 (2019).

³⁵ See Desirée LeClercq, *The Disparate Treatment of Rights in U.S. Trade*, 90 FORDHAM L. REV. 1, 27–28 (2021).

³⁶ ILO, Report of the Director General, *Freedom of Association in Practices: Lessons Learned* 5 (2008).

³⁷ See [LeClercq](#), *supra* note 35, at 27–28.

³⁸ See [The Joint Statement Issued by the G7 Countries at the G7 Trade Track on Forced Labour](#) (Oct. 22, 2021).

³⁹ See Sarah Anne Aarup, *Ban on Uyghur Imports Becomes EU’s Hot Potato*, POLITICO (Oct. 15, 2021).

⁴⁰ See Aaron N. Lehl, *China’s Trade Union System under the International Covenant on Economic, Social and Cultural Rights: Is China in Compliance with Article 8?*, 21 U. HAW. L. REV. 203, 203 (1999).

⁴¹ [Aarup](#), *supra* note 39.

⁴² *Id.*

rights, workers could have participated and provided the necessary data. Instead, labor conditions remain opaque, trust between trade actors remains negligible, and the economic and political stalemates continue.

Implications

The emperor exposed not only his body but his character deficits when he sought to cloak himself with a magical robe seen only by the worthy. Policymakers have similarly exposed international economic law's democratic and equity deficits by seeking to cloak it in a "worker-centered" policy that keeps the majority of global workers invisible.

If policymakers sincerely hope to give workers a meaningful voice in international economic law, they must radically change its structure and purpose. Trade agreements must stop serving as state-to-state contracts and must instead support the results of collective bargaining on the sectoral level. While governments would regulate procedural matters, formal and informal sector workers would participate in crafting labor strategies and priorities to be negotiated. For example, one (relatively) successful model of these sectoral negotiations is the International Labour Organization's Better Work program.⁴³ Its multi-stakeholder approach brings buyers, manufacturers, government, and formal and informal workers to negotiate sectoral agreements.⁴⁴ The program has facilitated agreements between labor and capital in Lesotho, Vietnam, Jordan, Haiti, Indonesia, Nicaragua, Bangladesh, and Ethiopia, which shows that there are ways to provide a platform for all global workers, not just those who might applaud its rhetoric.

⁴³ Kelly Pike, [*Voice in Supply Chains: Does the Better Work Program Lead to Improvements in Labor Standards Compliance?*](#), 73 IND. LAB. REL. REV. 913 (2020).

⁴⁴ *Id.*