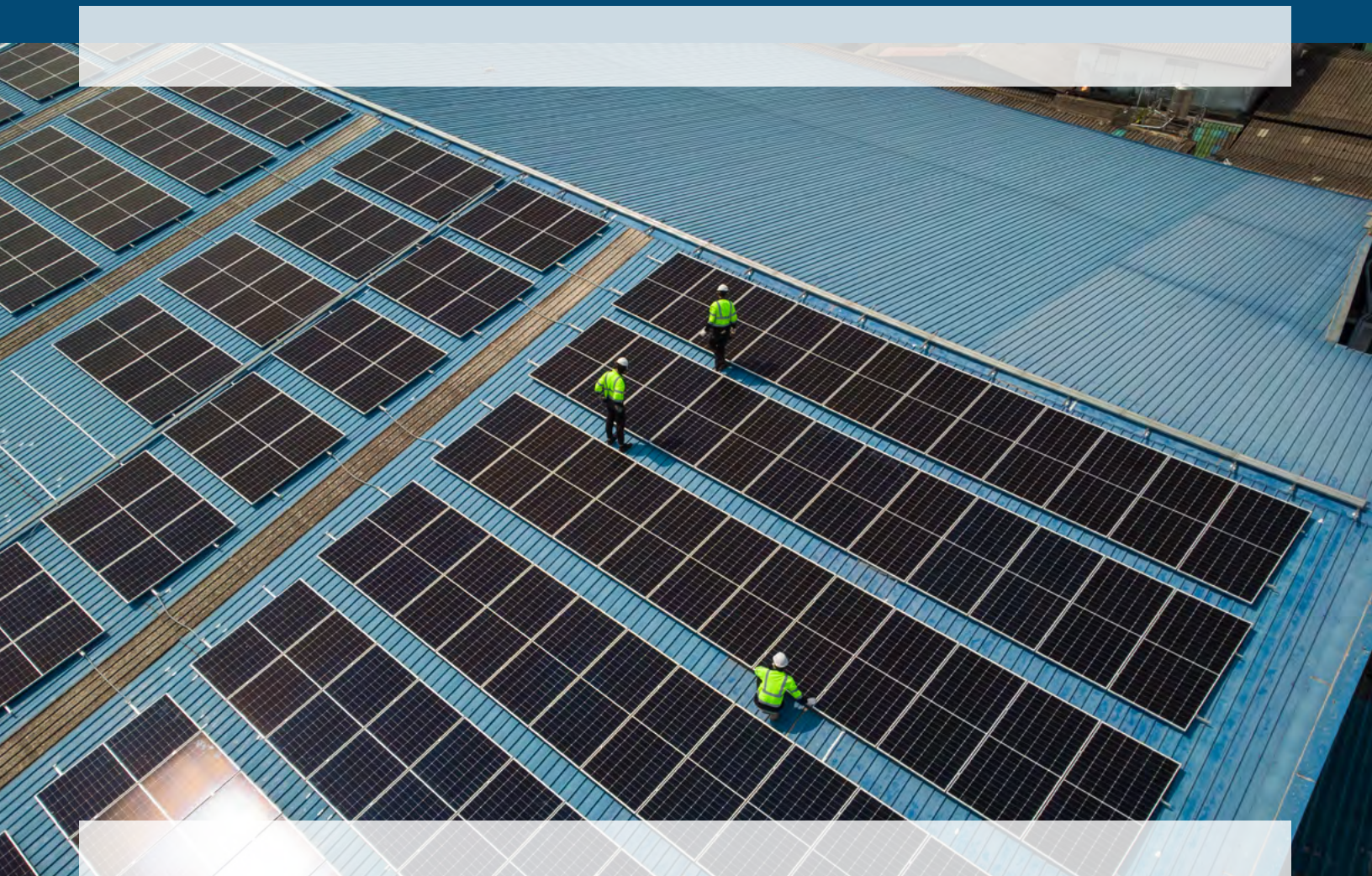

The Global Labour Rights Reporter

A Just Transition Law for Climate Justice



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EDITOR'S NOTE: A JUST TRANSITION AND THE FIGHT FOR OUR COLLECTIVE FUTURE

JEFFREY VOGT

Global warming poses a serious threat to workers and their communities around the world. Last year, the 1.5° Celsius limit set by the 2015 Paris Agreement was breached,¹ and surpassing the 2.0° Celsius limit is seen by a large majority of climate scientists as increasingly likely in the coming years.² One of the many risks associated with global warming, excessive heat, is already causing millions to suffer at work. According to a 2024 report from the International Labour Organisation (ILO), “at least 2.41 billion workers are exposed to excessive heat” each year, leading to “an estimated 22.85 million workplace injuries per year and an estimated 18,970 deaths.”³ Workplace risks associated with climate change-induced floods, droughts, storms, and diseases, among others, are also on the rise. These impacts often affect workers the hardest in countries which have contributed very little to global greenhouse gas (GHG) emissions. However, there is still time to prevent catastrophic change.

Workers and trade unions must be at the centre of efforts to develop mitigation and adaptation measures to transform our workplaces in a short period of time. The 2015 International Labour Organization (ILO) Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All (the “ILO Guidelines”)

provide a policy framework for implementing just transitions towards environmentally sustainable economies and societies.⁴ The guiding principles of the ILO Guidelines importantly include: social dialogue; the respect, promotion and realization of the fundamental principles of rights at work; a strong gender dimension to promote equitable outcomes; and policy coherence across various disciplines and institutions.⁵ Unfortunately, climate policies at all levels, from local to the international, are being developed without the meaningful input of trade unions. Collective bargaining over climate-related issues also remains relatively limited, especially in the Global South.

Despite the lack of engagement from government and industry in many countries, trade unions are not waiting around. In **Colombia**, unions in the coal sector created their own Just Transition roadmap to address the needs of affected coal workers and communities. Unions worked with multiple stakeholders to engage workers and their communities in 12 coal-dependent geographies. This process led to a worker and community-informed Just Transition roadmap. In **Cambodia**, in light of heat stress in the garment industry, unions sought to bargain the issue and succeeded. When unions negotiated with employers over heat mitigation measures, workers experienced 74% fewer working minutes at unsafe temperatures – a significant difference over non-union workplaces. In **South Africa**, the government has been more proactive, and established the Presidential Climate Commission,

¹ Gemma Conroy, *Global warming is on the cusp of crucial 1.5 °C threshold, suggest ice-core data*, NATURE (Nov 12, 2024), <https://www.nature.com/articles/d41586-024-03655-0>

² Damian Carrington, *World's top climate scientists expect global heating to blast past 1.5C target*, THE GUARDIAN (8 May 2024), <https://www.theguardian.com/environment/article/2024/may/08/world-scientists-climate-failure-survey-global-temperature>

³ INT'L LAB. ORG., Ensuring Safety and Health at Work in a Changing Climate (Apr. 22, 2024), <https://www.ilo.org/publications/ensuring-safety-and-health-work-changing-climate>

⁴ INT'L LAB. ORG., GUIDELINES FOR A JUST TRANSITION TOWARDS ENVIRONMENTALLY SUSTAINABLE ECONOMIES AND SOCIETIES FOR ALL (Feb. 2, 2016), <https://www.ilo.org/publications/guidelines-just-transition-towards-environmentally-sustainable-economies>

⁵ *Id.*



Jeffrey Vogt
Director, ILAW Network

an independent, multistakeholder statutory body established by the President. One of its first tasks was to adopt a Just Transition Framework, which sets out policy measures to minimise the social and economic impacts of the climate transition. Trade unions have formal seats in this process and have actively participated in the work of the commission.

Relatedly, it will be necessary to use the climate crisis as an opportunity to rethink the aims of and therefore the regulation of labour law. Today, the over 2 billion workers in the informal economy have minimal, if any, rights at work in most countries. Many others face obstacles to the exercise of the right to freedom of association, including agricultural workers, migrant workers, platform-based delivery workers and others who are among the most impacted by climate change. Under current labour law, these workers have few avenues to organize and take collective action, including over climate-related concerns.⁶ These exclusions have of course impacted women, racial and ethnic groups, migrants and others disproportionately, despite the greater threat faced by climate change.

This issue of the Global Labour Rights Report, through six essays, attempts to address some of these concerns.

- In our first essay, Michael Felsen, a renowned expert on occupational safety and health, explains how workers and unions have fought to establish a workplace heat standard in the United States, and the prospects for the approval of such a standard now.
- Charlene May, Chriscentia Blouws, Khensani Motileni and Senamile Madlala from the Women's Legal Centre in Cape Town, South Africa address women in precarious work and the importance of an intersectional feminist lens in ensuring a just transition for all workers.
- Professor Beryl ter Haar suggests new care and non-extractive paradigms to achieve environmentally sustainable economies and societies.

⁶ I address the specific issue of the right to strike, with Ruwan Subasinghe, in the forthcoming special issue of the International Labour Review. See, Jeff Vogt & Ruwan Subasinghe, Turning Up the Heat: The Right to Strike and the Climate Crisis, INT'L LAB. REV. (2025) now available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4987965.

- Professor Damon Silvers underscores the importance of governments in leading with green industrial policy and examines the achievements of the Biden Administration through the Inflation Reduction Act (IRA) and other measures.
- Deedee Fitzpatrick and Hannah Sachs review the work that United States unions have done to promote high quality union jobs in the clean energy sector.
- Finally, Angelo Remedio Neto and Maximiliano Nagl Garcez examine the concept of a just transition from the perspective of Brazilian workers, and the need to centre perspectives of workers in the Global South in global policy.

Additionally, the GLRR includes three interviews with lawyers and activists who are working on the front lines to support unions to promote a just transition.

- In Colombia, Ana Catalina Herrera discusses the efforts by unions in the coal mining industry to develop their own just transition plans.
- In Cambodia, Somalay So and Joe Buckley discuss the negotiation of agreements in the garment industry to significantly reduce exposure to excessive heat.
- Tania Espinosa discusses efforts to obtain a just transition for workers in the informal economy, with a focus on waste pickers and recyclers.

In his end of year speech, UN General Secretary António Guterres called on all nations to act: "[i]n 2025, countries must put the world on a safer path by dramatically slashing emissions and supporting the transition to a renewable future. It is essential, and it is possible."⁷ As this issue of the GLRR demonstrates, workers and trade unions are already showing the way forward.

⁷ *World endures 'decade of deadly heat' as 2024 caps hottest years on record*, THE GUARDIAN (Dec 30, 2024), <https://www.theguardian.com/world/2024/dec/30/world-endures-decade-of-deadly-heat-as-2024-caps-hottest-years-on-record-un-antonio-guterres>

AN ELUSIVE PROMISE: PROTECTING U.S. WORKERS FROM EXCESSIVE HEAT

MICHAEL FELSEN

United States | Originally written in English

To slow and ideally to reverse global warming, countries and economies will need to wean themselves off fossil fuels, expand existing clean technologies and develop new ones, and implement a just transition for all workers. But this will take time, and in the here and now, workers are getting sick and are dying in ever-increasing numbers from over-exposure to extreme heat. Awareness of the dangers posed when workers are exposed to extreme heat is not new. It dates back decades, if not millennia. But it's only in recent years, as global temperatures have relentlessly risen causing noticeable increases in workplace deaths, sicknesses, and injuries, that we've seen ramped-up efforts to acknowledge and effectively address the problem.

This paper will focus on how the safety and health hazards presented by worker exposure to extreme heat have been addressed, with limited success thus far, by federal, state, and local governments in the United States. We'll also examine recent legal and regulatory developments, and how they can be expected to impact efforts to protect workers in this country, in the context of worker and non-governmental organization advocacy to spur action to address this growing challenge.

Setting the Stage: A Brief Look at Global Recognition of the Problem

A July 25, 2024 report from the ILO, *Heat at Work: Implications for Safety and Health*, gives these alarming findings:

Heat is an invisible force - a silent killer. As record-breaking temperatures continue across various regions, more workers than ever before are losing the fight against excessive heat. The intensification of excessive heat not only jeopardizes the safety and health of workers, but also undermines

the resilience of economies and the potential for decent work on a global scale.¹

The report continues:

This hazard leaves both indoor and outdoor workers at increased risk of health impacts such as heat exhaustion, heatstroke, cardiovascular and respiratory conditions, and death. This is not to mention the various mental health effects and increased risk of workplace accidents and injuries. Moreover, when it comes to chronic health impacts such as kidney disease and others, we may only be seeing the tip of the iceberg.

What we know is that across the world, at least 2.41 billion workers were exposed to excessive heat in 2020 (more than 70 per cent of the workforce), leading to more than 22.85 million occupational injuries and 18,970 deaths.²

Simultaneous with the release of the ILO's report, the G20 Labor and Employment Ministers met in Fortaleza, Brazil on July 24-25, 2024. They affirmed the call for a just transition, and also explicitly recognized that "heat stress significantly impacts workers, especially those in agriculture, construction, and outdoor labour," and acknowledged the need to "implement robust and risk-based policies on occupational safety and health appropriate to adapt to the effects of climate change on workers."³ The ministers

¹ ANDREAS FLOURIS ET AL, HEAT AT WORK: IMPLICATIONS FOR SAFETY AND HEALTH 75 (2024), https://www.ilo.org/sites/default/files/2024-07/ILO_OSH_Heatstress-R16.pdf,

² *Id.*

³ G20, LABOUR AND EMPLOYMENT MINISTERS' MEETING DECLARATION §14 (2024), https://g7g20-documents.org/fileadmin/G7G20_documents/2024/G20/Brazil/Sherpa-Track/Employment%20Ministers/1%20Ministers%20Language/LEMM%20Declaration%20G20%20Fortaleza_2407.2024.pdf



Michael Felsen

Senior Advisor to Justice at Work in Boston, to the Workplace Justice Lab at Rutgers University, and to the National Council for Occupational Safety and Health; Former U.S. Department of Labor's New England Regional Solicitor from 2010-2018

commended the more detailed findings and urgent recommendations of the G20 OSH Network, that had found it “crucial to develop effective policies, regulations, and compliance systems, according to national circumstances, that ensure workplaces are free from excessive heat stress-related hazards, which pose significant risks to workers across diverse industries and occupations.”⁴ And on July 26, the ILO announced the launch of a global campaign, initiated at the G20 meeting and anchored by Brazil and the United States, to protect workers from excessive heat stress and to “build partnerships, foster social dialogue, conduct research, raise awareness and enhance international cooperation to safeguard workers from the impact of rising temperatures worldwide.”⁵

In the U.S.: Long history of awareness; long history of delay

In 1931, during the construction of the Hoover Dam in the southwest United States, fourteen workers died of “heat prostration” between June 25 and July 26.⁶ Most were employed by Six Companies, Inc., a conglomerate of companies hired by the government to construct most of the dam. Faced with the summer’s extreme heat of up to 48.8° Celsius⁷ and other unsafe conditions, the workers, under the leadership of the Industrial Workers of the World, went on strike over safety conditions. Six Companies and the federal government fought hard to break the strike, but ultimately the contractor was forced to

make concessions, including bringing ice to workers at the worksite and potable water to their dormitories and establishing first aid stations with doctors and nurses close to the site, instead of sending the sick and injured to a dispensary nine miles away.⁸ The effect of heat on these workers couldn’t be denied.

Almost forty years later, the landmark Occupational Safety and Health Act of 1970 (“the OSH Act” or “the Act”)⁹ was signed into law by President Richard Nixon, following a long history of unregulated workplace tragedies and devastating occupational illnesses. After decades of struggle and advocacy by workers, unions, and a wide array of worker protection advocates, the law was passed as “part of a wave of federal legislation to protect workers, the public, and the environment from harm.”¹⁰

Its stated mission was “[t]o assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; [and] by assisting and encouraging the States in their efforts to assure safe and healthful working conditions.”¹¹ This would be accomplished through a multi-pronged approach, including “stimulat[ing] employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions,” including joint labor-management efforts; authorizing the Secretary of Labor to develop and set mandatory occupational safety and health standards, to be enforced through an “effective enforcement program;” encouraging the States to assume responsibility for, and to improve, administration and enforcement of their occupational safety and health laws, including by providing grants; and providing for training programs “to increase the

⁴ G20, OSH NETWORK’S ANNEX TO THE 2024 G20 LABOUR AND EMPLOYMENT MINISTERIAL DECLARATION (2024), https://g7g20-documents.org/fileadmin/G7G20_documents/2024/G20/Brazil/Sherpa-Track/Employment%20Ministers/2%20Ministers%20Annex/Annex%202-G20%20OSH%20Network%20Statement_22072024.pdf.

⁵ Int’l Lab. Org., *Newly-Launched Global Campaign Tackles the Impact of Heat Stress on Workers Worldwide*, (July 26, 2024), <https://www.ilo.org/resource/news/newly-launched-global-campaign-tackles-impact-heat-stress-workers-worldwide>.

⁶ U.S. Bureau of Reclamation, *Fatalities at Hoover Dam: 1931 and Earlier*, <https://www.usbr.gov/lc/hooverdam/history/essays/fat1931.html> (last visited Dec. 15, 2024).

⁷ Randi Mann, *Temperatures Reached a Deadly 48.8 °C during the Hoover Dam Construction*, THE WEATHER NETWORK (Jul. 7, 2021), <https://www.theweathernetwork.com/en/news/weather/severe/this-day-in-weather-history-july-7-1930-building-of-hoover-dam-construction>.

⁸ J. David Rogers, *Hoover Dam: Construction Milestones in Concrete Delivery and Placement, Steel Fabrication, and Job Site Safety*, HOOVER DAM: 75TH ANNIVERSARY HISTORY SYMPOSIUM 163 (2010).

⁹ Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

¹⁰ Margaret M. Seminario, Editorial, *The Occupational Safety and Health Act at 50-A Labor Perspective*, 110 AM. J. PUB. HEALTH 642 (2020). See also, David Rosner & Gerald Markowitz, A Short History of Occupational Safety and Health in the United States, 110 AM. J. PUB. HEALTH 622 (2020).

¹¹ Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

number and competence” of personnel engaged in the field of occupational safety and health.¹²

In the OSH Act’s legislative history, heat was recognized as a preventable workplace hazard. And in 1972, just two years after it was promulgated, the National Institutes for Occupational Safety and Health (NIOSH) first recommended a potential OSHA heat standard in its *Criteria for a Recommended Standard*.¹³ An OSHA Standards Advisory Committee on Heat Stress was appointed in 1973 and presented recommendations for a standard for work in hot environments in 1974. Twelve of the fifteen members of the advisory committee agreed that occupational heat stress warranted a standard – *fifty years ago*.

Nevertheless, the government’s regulatory wheels ground slowly, and decades passed without a rule addressing excessive heat. It’s not that OSHA ignored what was an obvious problem. OSHA law enforcers over the years have dealt with cases involving dire workplace heat conditions, not infrequently resulting in death, illness, or serious injury.¹⁴ But absent a citable regulation governing employers’ obligations when their workers are exposed to excessive heat, the agency’s legal avenues for redress were limited -- constrained, as they were, to rely on the law’s “general duty clause” when asserting a violation based on exposure to excessive heat.

The Limits of Current Federal Law

Section 5(a)(1) of the Act states that employers have a general duty to furnish “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees.¹⁵ To prove a violation of the General Duty Clause, in each case OSHA must establish that: the employer failed to keep the workplace free of a hazard to which its employees were exposed; the hazard was recognized; the hazard



The Philadelphia Fire Department responds to a fire with an excessive heat warning in effect. Credit: iStock.com / BasSlabbers

was causing or likely to cause death or serious injury; and a feasible means to eliminate or materially reduce the hazard existed at the time of the alleged violation. And while over the past few decades OSHA has cited employers a number of times for violating this general duty when they exposed their workers to excessive heat, the courts, particularly recently, have been skeptical.

For example, in 2019, in a case involving an employee who died from heat stroke, the Occupational Safety and Health Review Commission (OSHRC) found “difficulty in addressing [the existence of a hazard]...in the absence of an OSHA standard,” and threw the citation out.¹⁶ Similarly, in 2020 an OSHRC Administrative Law Judge (ALJ) vacated five separate OSHA “general duty” clause citations against the U.S. Postal Service, finding that OSHA had failed to establish the conditions – including a heat index (combined effect of heat and humidity) as high as 109° Fahrenheit (42° Celsius), and workers medically diagnosed with heat illnesses -- presented a hazard. The ALJ expressed concern that “without a temperature- or heat index-specific standard, it is difficult for employers to know when heat is ‘excessive.’”¹⁷ Her view was affirmed by OSHRC in 2023.¹⁸

¹² *Id.*

¹³ BRENDA JACKLITSCH ET AL., DEP’T HEALTH & HUM. SERVICES, CRITERIA FOR A RECOMMENDED STANDARD: OCCUPATIONAL EXPOSURE TO HEAT AND HOT ENVIRONMENTS (2016), <https://www.cdc.gov/niosh/docs/2016-106/pdfs/2016-106.pdf?id=10.26616/NIOSH-PUB2016106>.

¹⁴ A recent report by Public Citizen estimates worker heat-related injuries and illnesses in the U.S. to be in the range of 170,000 per year, ranking that cause third among all others. JULY FULCHER, PUBLIC CITIZEN, BOILING POINT: OSHA MUST ACT IMMEDIATELY TO PROTECT WORKERS FROM DEADLY EXPOSURES (2022), file:///C:/Users/astamm2/Downloads/Boiling-Point-Public-Citizen-06-28-2022.pdf.

¹⁵ 29 U.S.C. §654(a)(1) (2018).

¹⁶ A.H. Sturgill Roofing, Inc., 2019 CCH OSHD ¶ 33,712, n.8 (No. 13-0224, 2019).

¹⁷ U.S. Postal Serv., 2023 CCH OSHD ¶ 33,907 (Nos. 16-1713, 16-1872, 17-0023, 17-0279, 2023).

¹⁸ *Id.* at n. 7. As Commissioner Laihow put it, “a myriad of factors, such as the geographical area where the work is being performed and the nature of the tasks involved, can impact” whether excessive heat is present, indicating that a standard is necessary to define the hazard.

As suggested by the cases cited above, under the general duty clause OSHA can't require abatement of a condition without first proving that the condition was hazardous. In stark contrast, the distinct benefit of a standard is that the existence of the hazard is established at the rulemaking stage, obviating the need for OSHA to prove it again and again in each enforcement case. Employers and employees benefit as well, of course, by gaining much greater clarity about what constitutes the hazard and what measures are needed to abate it.

Advocates Demand Action

"Given the existing legal limitations under OSH law in the U.S., as heat grows more and more extreme in both indoor and outdoor workplaces, it has become increasingly clear that an actual, enforceable standard is essential to protect workers in a wide range of industries. Hence, demands for action have proliferated."

In 2011, for example, Public Citizen, a consumer and health advocacy group then representing more than 225,000 members and supporters nationwide, along with Farmworker Justice, a nonprofit advocacy group for agricultural workers, and United Electrical, Radio and Machine Workers of America, an independent labor union, petitioned OSHA to issue an Emergency Temporary Standard (ETS)¹⁹ "for a heat stress

threshold that will protect workers from suffering unnecessary and entirely preventable health effects, including death, from excessive indoor and outdoor heat exposure."²⁰ The groups concurrently requested that OSHA immediately begin a rulemaking process for a permanent heat stress standard.

The agency denied the petition for failing to meet the ETS "grave danger" requirement. Undeterred – and increasingly alarmed, given the effectively continuous string of heat records broken in the U.S. and beyond -- Public Citizen (having grown to 500,000 members and supporters nationwide) and a large group of organizational and individual supporters petitioned OSHA again in July 2018 for a permanent standard.²¹ OSHA, at the time under the Trump administration, again failed to initiate the rule-making process that would lead to a heat standard.²²

The year 2021 brought a new Presidential administration under Joe Biden. OSHA, signaling heightened interest, announced in its regulatory agenda that it intended to examine the issue. In August, the Public Citizen consortium of activist organizations – now called the Heat Stress Network, and comprising worker rights organizations, unions, occupational health groups and experts, climate-change and faith-based organizations, collectively representing millions of workers across the country -- pressed OSHA once more. Their 2021 petition incorporated its predecessor 2018 request for a permanent standard by reference, called for issuance of an emergency temporary standard, and urged that such standard include "robust requirements

¹⁹ Section 6(c) of the Occupational Safety and Health Act imposes an affirmative obligation on OSHA to issue an emergency temporary standard if (1) "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (2) "such emergency standard is necessary to protect employees from such danger." 29 U.S.C. § 655(c)(1) (2018). The determination of what level of risk constitutes a "grave danger" is a "policy consideration that belongs, in the first instance, to the Agency." A "grave danger" under Section 6(c) of the Occupational Safety and Health Act represents a risk greater than a "significant risk," which is the threshold showing for OSHA to promulgate a permanent standard under Section 6(b) of the Act. 29 U.S.C. § 655(b) (2018). Upon publishing an emergency temporary standard, OSHA must initiate a rulemaking for a permanent standard, with the emergency standard serving as the proposed rule. The emergency temporary standard remains in effect until superseded by a permanent standard, a process contemplated by the Occupational Safety and Health Act to occur within six months. The Act is silent on OSHA's authority to extend or renew an emergency temporary standard past the six-month deadline if a grave danger remains and the permanent rule is not yet finalized.

²⁰ Letter from Public Citizen to David Michaels, Assistant Sec'y Lab. & Occupational Health 1 (Sept. 1, 2011), <https://www.citizen.org/wp-content/uploads/petition-for-a-heat-standard-090111.pdf>,

²¹ Letter from Public Citizen to Loren Sweatt, Acting Assistant Sec'y Lab. & Occupational Health (July. 17, 2018), <https://www.citizen.org/wp-content/uploads/2439.pdf>.

²² This is not to suggest that OSHA had been oblivious during the prior decade to the increasing heat hazards workers face. In addition to issuing "general duty" clause citations which, when uncontested, required employers to abate the hazardous conditions, in 2011 the agency issued inspection guidance for heat-related illnesses to its enforcement officials. That year OSHA also launched its Heat Illness Prevention Campaign to build awareness of prevention tools for employers and workers to reduce occupational heat-related illness, focusing on a three-word message: "Water. Rest. Shade." Those materials were updated in 2021, recognizing both indoor and outdoor heat hazards, and the importance of providing an acclimatization period to help protect new and returning workers from hazardous heat. Nevertheless, none of these campaigns and recommendations constitute enforceable standards.

for rest, shade, hydration, acclimatization, monitoring, training, and whistleblower protections.”

There’s an adage, “the third time’s the charm.” Regarding the Public Citizen coalition’s efforts, it seems to apply here. On October 27, 2021, OSHA at long last announced an “advance notice of proposed rulemaking” (ANPRM) “to protect indoor and outdoor workers from hazardous heat.”²³ The ANPRM signalled that the regulatory process to create a permanent standard had begun, and that OSHA was seeking “information on issues that may be considered in developing [it] including the scope of the standard and the types of controls that might be required.”²⁴

OSHA collected 965 unique comments, established an advisory committee working group to deliberate and present recommendations for the content of the regulation, and met with stakeholders and small business representatives. On July 2, 2024, the proposed rule was finally released²⁵ for public consumption, though not yet officially “published.” And on August 30, 2024, the Notice of Proposed Rulemaking (NPRM) for Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings was formally published in the Federal Register.²⁶

The Proposed Standard: Nuts and Bolts

To pass muster under the OSH Act, a safety or health standard must require conditions, practices, or processes “reasonably necessary or appropriate” to provide a safe or healthful employment and place of employment.²⁷ A standard is “reasonably necessary or appropriate”

when there is a significant risk of material harm in the workplace and compliance with the standard would substantially reduce or eliminate that risk. Jurisprudence under the OSH Act has also established that compliance with the standard must be technologically feasible,²⁸ which means that the measures the standard requires already exist or can be created using existing technology or likely developments in that technology. Finally, a standard may only require conditions or processes that are economically feasible,²⁹ such that the affected industry can adjust to the costs of compliance without causing major dislocations or threatening its existence.

OSHA believes that it’s done its homework, and that the proposed regulation satisfies the strictures set forth in the Act. In the proposed rule’s Executive Summary, the agency states that it has preliminarily determined that exposure to hazardous heat in the workplace poses a significant risk of serious injury and illness, based on the health consequences associated with exposure to heat,³⁰ and its assessment of the risk of such consequences actually occurring. In the “risk reduction” section of the proposed rule, OSHA asserts it has demonstrated “the efficacy of the controls relied on in this proposed rule to reduce the risk of heat-related injury and illness in the workplace,” and that employees in workplaces without these controls are “at higher risk of severe health outcomes from exposure to hazardous heat.”³¹

The preamble to the proposed regulation, which includes its legal and factual justification, runs almost 400 pages, as published in the Federal Register.³² The rule itself is four pages. Its goal, as previously noted, is to more clearly set enforceable employer obligations necessary to effectively protect employees from hazardous heat.

²³ ANPRM on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 86 Fed. Reg. 59309 (Oct. 27, 2021).

²⁴ Examples of the almost 100 questions as to which OSHA sought input include:
(27) Are OSHA’s existing efforts and authorities adequate or effective in protecting workers from hazardous heat in indoor and outdoor work settings?
(44) Are there industries implementing exposure monitoring for heat? Please provide examples and data.
(70) Are there different challenges and best practices for acclimatization in indoor work settings versus outdoor work settings?
(85) What are current best practices in workplace response to occupational heat-illness emergencies?

²⁵ Press Release, U.S. Dep’t Labor, Biden-Harris Administration Announces Proposed Rule to Protect Indoor, Outdoor Workers from Extreme Heat, (July 2, 2024), <https://www.dol.gov/newsroom/releases/osh/osh20240702>.

²⁶ NPRM on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. 70698 (Aug. 30, 2024).

²⁷ 29 U.S.C. § 652(8) (2018).

²⁸ *UAW v. OSHA*, 37 F.3d 665, 668 (D.C. Cir. 1994).

²⁹ *Forging Indus. Ass’n v. Sec’y of Lab.*, 773 F.2d 1436, 1453 (4th Cir. 1985).

³⁰ The consequences of occupational heat exposure, as discussed in detail in the proposed regulation’s preamble, may include: death; illnesses, including heat stroke, heat exhaustion, heat syncope, rhabdomyolysis, heat cramps, hyponatremia, heat edema, and heat rash; and heat-related injuries, including falls, collisions, and other workplace accidents. For more on the impact of excessive heat on the body, see Seth Borentein, *How Does Heat Kill?*, AP News (June 21, 2024), <https://apnews.com/article/deadly-heat-wave-body-climate-change-b70e6ff98a81e80d9b99ed088e6de3d6> and FULCHER *supra* note 14.

³¹ NPRM on Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, 89 Fed. Reg. 70698 (Aug. 30, 2024).

³² *Id.*

As summarized in an OSHA Fact Sheet, it requires employers³³ to:

- Develop and implement a work site heat injury and illness prevention plan (HIIPP) with site-specific information to evaluate and control heat hazards in their workplace.
- Identify heat hazards in both outdoor and indoor work sites.

For outdoor work sites, employers would be required to monitor heat conditions by tracking local heat index forecasts or measuring heat index or wet bulb globe temperature.

For indoor work sites, employers would be required to identify work areas with the potential for hazardous heat exposure, develop and implement a monitoring plan, and seek employee input.

- Implement control measures -- at or above the Initial Heat Trigger (i.e., a **heat index of 80°F**³⁴ or a wet bulb globe temperature³⁵ equal to the NIOSH Recommended Action Limit) -- that include providing employees:

cool drinking water; break areas with cooling measures; indoor work area controls; acclimatization protocols for new and returning unacclimatized employees; paid rest breaks **if needed** to prevent overheating; and regular and effective two-way communication.

- Implement additional control measures at or above the High Heat Trigger (i.e., **heat index of 90°F** or wet bulb globe temperature equal to the NIOSH Recommended Exposure Limit) that include providing employees:

mandatory rest breaks of 15 minutes at least every two hours (unpaid meal break may count as a rest break); observation for signs and symptoms of heat-related illness; a hazard alert to remind employees of key parts of the HIIPP; and warning

signs at indoor work areas with ambient temperatures that regularly exceed 120°F.

Take steps if an employee is experiencing signs and symptoms of a heat-related illness or a heat emergency and develop a heat emergency response plan.

Provide initial and annual refresher training for supervisors, heat safety coordinators, and employees, as well as supplemental training after changes in exposure to heat hazards, policies and procedures, or the occurrence of a heat injury or illness.

Have and maintain, for a minimum of six months, written or electronic records of indoor monitoring data.

Ensure that all requirements are at no cost to employees.³⁶

These are clear, useful, and simple life- and health-saving preventive measures. They have been applauded by worker advocacy organizations³⁷ and labour unions³⁸ alike. The question is: will they, or their functional equivalent, ever see the light of day?

³³ Excluded from the rule are short duration employee exposures to heat, emergency response activities, work at indoor sites kept below 80° Fahrenheit (27° Celsius), telework, and indoor sedentary work activities.

³⁴ A heat index considers the combined effect of temperature and humidity.

³⁵ A wet globe temperature considers the combined effect of temperature, humidity, wind speed, and radiant heat.

³⁶ Fact Sheet, OSHA, Heat Injury and Illness Prevention in Outdoor and Indoor Settings, <https://www.osha.gov/sites/default/files/publications/heat-rulemaking-factsheet.pdf> (last visited Dec. 12, 2024).

³⁷ Press Release, National Employment Law Project, On OSHA's Proposed Heat Standard for Indoor and Outdoor Workers (July 2, 2024), <https://www.nelp.org/on-oshas-proposed-heat-standard-for-indoor-and-outdoor-workers/>.

³⁸ Press Release, AFL-CIO, AFL-CIO President Applauds Biden Administration Action to Protect Workers from Extreme Heat (July 2, 2024), <https://aflcio.org/press/releases/afl-cio-president-applauds-biden-administration-action-protect-workers-extreme-heat>; Press Release, UFW Foundation, United Farm Workers & UFW Foundation Welcome Proposed Rulemaking for Federal Heat Standards for Outdoor Workers (July 2, 2024), https://www.ufwfoundation.org/united_farm_workers_ufw_foundation_welcome_proposed_rulemaking_for_federal_heat_standards_for_outdoor_workers.



Credit: iStock.com / Icepparo

The Rocky Road Ahead

*"One might think, after years of scientific study, data collection, comment solicitation, and expert deliberation, that the process would now be complete. But that's not how it works. Publication of the proposed rule is not the beginning, but it's also quite certainly – and, from the perspective of the urgency of the problem, distressingly -- not the end."*³⁹

The proposed regulation was initially open for public comment until December 30, 2024. Seeking feedback to inform a final rule, OSHA said: "Your input will help us develop a final rule that adequately protects workers, is feasible for employers, and is based on the best available evidence."⁴⁰ The public comment period was extended to January 14, 2025.⁴¹ By the close of that period, 54,371 submissions had been

³⁹ OSHA Directorate of Standards and Guidance, OSHA's Heat Injury and Illness Prevention Rulemaking Slide 6 (presentation slides) (<https://www.osha.gov/sites/default/files/Heat-Rulemaking-NPRM-Presentation.pdf>) (last visited Dec. 16, 2024).

⁴⁰ OSHA, Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings Rulemaking, <https://www.osha.gov/heat-exposure/rulemaking> (last visited Dec. 16, 2024).

⁴¹ During the current comment period, worker protection advocacy groups like the National Council on Occupational Safety and Health mobilized workers and advocates to express their views on the proposed regulation. National Council on Occupational Safety and Health, Proposed OSHA Heat Standard: Submit Your Comment, <https://nationalcosh.salsalabs.org/heat-standard-comment/index.html> (last visited Dec. 16, 2024).

received.⁴²

Regrettably, the rulemaking process, from start to finish, takes about seven years on average, and can take even ten or more.⁴³ Regulatory experts estimate that the time horizon for completion of the excessive heat rule, if it remains on track, will be at least two years.⁴⁴ The comment period now having closed, an informal public hearing on the proposed rule is slated to begin on June 16, 2025⁴⁵, lasting days or weeks, before an administrative law judge. Comments are accepted (usually for 30 days) following the hearing, and then legal briefs will be accepted for another 30 days after the comment period ends. The hearing record and comments are then analysed, and a final rule is prepared based on that analysis, followed by legal and budget impact review, and White House sign-off. Upon conclusion of those many layers of scrutiny, the final rule will be published.

Unfortunately, with Trump's election, it appears more than likely – given his and his party's antipathy for government regulation,⁴⁶ including worker protection regulation of this sort⁴⁷ – that the rule will end up in the waste basket, or, at best, on the shelf, awaiting a more pro-worker government. But even if his administration ultimately approves a final rule, two or more years from this writing, implementation of the regulation will doubtless face significant roadblocks. Final regulations are subject to challenge in federal court, for any of a host of reasons, and this one will undoubtedly suffer that fate.⁴⁸ The U.S. Chamber of

⁴² Regulations.gov., Proposed Rule: Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings, <https://www.regulations.gov/document/OSHA-2021-0009-4761>.

⁴³ OSHA, The OSHA Rulemaking Process, https://www.osha.gov/sites/default/files/OSHA_FlowChart.pdf (last visited Dec. 16, 2024).

⁴⁴ Meghan McCarty Carino, *Will Workers Be Protected from Extreme Heat on the Job?*, MARKETPLACE (Jun. 3, 2024), <https://www.marketplace.org/2024/06/03/will-workers-be-protected-from-extreme-heat-on-the-job/#>.

⁴⁵ OSHA, Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings Rulemaking, <https://www.osha.gov/heat-exposure/rulemaking>.

⁴⁶ Michael Felsen, *Trump Has Consistently Harmed Workers*, PROGRESSIVE MAGAZINE (Oct. 27, 2020), <https://progressive.org/op-eds/trump-consistently-harmed-workers-felsen-201027/>.

⁴⁷ Anna Phillips et al, *The U.S. Has a Plan to Protect Workers from Heat. Employers are Fighting It.*, WASH. POST (July 11, 2024), <https://www.washingtonpost.com/climate-environment/2024/07/08/biden-heat-labor-rules-osha-map/>.

⁴⁸ For example, in January 2022, a 6-3 majority of the U.S. Supreme Court in *Nat'l Fed'n of Indep. Business v. OSHA*, 595 U.S. 109 (2022) agreed with businesses and Republican "red" state plaintiffs who claimed that OSHA over-reached when

Commerce⁴⁹ and a string of industry groups had already voiced their firm opposition to the rule even before it was published.⁵⁰ Since publication of the NPRM, they've voiced scepticism at best,⁵¹ and upon publication (if ever) of the final rule, will no doubt find it lacking in multiple respects, warranting, in their view, one or more court challenges that could stop the rule before it's ever enforced.

In sum, following enormous efforts by worker protection advocates, and several years' work by OSHA, culminating -- thus far -- in publication of the proposed rule, the fate of a final rule is uncertain at best. And, while the regulation wends

its way through the system, workers, unprotected by an enforceable standard, are in the crosshairs of ever-increasing heat.

Can Workers Be Protected Now?

While OSHA's heat rule regulatory process grinds forward with no predictable end in sight, the hazards of extreme heat in the workplace haven't gone away, and unprotected workers remain at high risk. Hence, workers and their advocates continue to press for alternative means to address the problem.

As noted previously, the Public Citizen-led consortium has twice petitioned OSHA to issue an emergency temporary standard, without success. They haven't been alone in that effort. In February, 2023, seven state Attorneys General petitioned,⁵² unsuccessfully,⁵³ for an emergency temporary standard to take effect in May of that year. In its denial, OSHA stated that implementation of an emergency standard "would divert significant time and resources from developing a permanent standard and could very well result in no tangible results for workers."⁵⁴ Undaunted, an expanded group of eleven state Attorneys General in February, 2024, petitioned for an emergency standard specifically targeting worker exposure to excessive heat in the especially-high-hazard agricultural and construction industries.⁵⁵ At the same time, they wrote a letter⁵⁶ to Congressional Senate and House labor committee leaders in strong support of a bill introduced in 2023, the Asunción Valdivia Heat Illness, Injury, and Fatality Prevention Act. Named to honour a farmworker who died of

it issued an emergency temporary standard mandating that private employers with 100 or more employees require employees to either get vaccinated against COVID-19 or undergo regular testing and masking. The Court stayed the operation of the ETS, ruling that OSHA lacked the statutory authority to issue the vaccine-or-test rule, applying the "major questions" doctrine to say that Congress must speak clearly when empowering agencies to regulate issues of vast significance, and that it had not done so here. More generally, in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the high Court recently overruled the decades-old "Chevron doctrine," which had accorded deference to agency regulations when the enabling statute's meaning is ambiguous, and the agency's interpretation is reasonable. Going forward, it will be up to the courts, and ultimately the conservative-majority Supreme Court, to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority." This doesn't bode well for OSHA's regulatory efforts. On the other hand, the Court in July, 2024 declined to hear an industrial furnace company's challenge to OSHA's authority. *Allstates Refractory Contractors*, supported by business and conservative groups and Republican attorneys general, had claimed that Congress, when it enacted the OSH Act and enabled OSHA to issue safety regulations, had improperly delegated its legislative authority to the Executive branch (of which OSHA is a part), and thereby violated the U.S. Constitution's separation of powers. The 6th U.S. Circuit Court of Appeals had upheld OSHA's safety standard rulemaking authority, stating that the "reasonably necessary or appropriate" contingency set by the OSH Act met the Supreme Court's requirement of an "intelligible principle," and thus was sufficient to guide and limit the agency's delegated authority. The high Court declined to grant review of the Appeals Court ruling. However, Justice Clarence Thomas dissented, and apparently would have found that in the OSH Act Congress granted OSHA regulatory authority that's too broad to pass Constitutional muster. Justice Gorsuch also would have granted review. *Allstates Refractory Contractors v. Su*, 144 S. Ct. 2490 (2024). No doubt we will see this issue come before the Court again, perhaps in the form of a challenge to the heat standard, if and when it's finally promulgated.

⁴⁹ Chris Isidore, *Heat Can Kill on the Job, and These Workers Are Dying*, CNN (July 21, 2023), <https://www.cnn.com/2023/07/21/business/worker-safety-heat-protections-osh/index.html>.

⁵⁰ Phillips et al, *supra* note 45.

⁵¹ See, e.g., U.S. Chamber of Commerce's comments, urging OSHA to "withdraw this proposal..." <https://www.uschamber.com/employment-law/chamber-comments-on-oshas-proposed-heat-rule>.

⁵² Press Release, State Energy & Environmental Impact Center, NYU School of Law, Seven AGs Petition OSHA to Strengthen Worker Protections in Extreme Heat (Feb. 9, 2024), <https://stateimpactcenter.org/news-events/press-releases/seven-state-ags-petition-osh-to-strengthen-worker-protections-in-extreme-heat>.

⁵³ Letter from Douglas L. Parker, Assistant Sec'y for OSHA to Seven Attorneys General (April 17, 2023), https://stateimpactcenter.org/files/AGActions_Heat-Multistate-Petition-OSHA-Response.pdf.

⁵⁴ *Id.*

⁵⁵ Press Release, State Energy & Environmental Impact Center, NYU School of Law, Eleven AGs Press Congress, the White House, and OSHA for Action to Protect Workers from Extreme Heat (Feb. 9, 2024), <https://stateimpactcenter.org/news-events/press-releases/eleven-ags-press-congress-the-white-house-and-osh-for-action-to-protect-workers-from-extreme-heat>.

⁵⁶ Letter from Letitia James, Attorney General of New York et al to Bernie Sanders et al (Feb. 9, 2024), https://stateimpactcenter.org/files/AG-Actions_NY-Multistate-Letter-to-Congress_Heat-Legislation_2.9.24.pdf.

heat stroke after picking grapes for ten hours in 100° Fahrenheit (39° Celsius) heat, the law would direct OSHA to establish an interim occupational heat standard within one year of its enactment. It expressly provides that the interim standard would remain in place until OSHA promulgates a final standard, thus ensuring that workers have protections from extreme heat while the process for a permanent rule continues.

Lamentably, given the deeply politically divided camps in the U.S. Congress, the likelihood of the Asuncion Valdivia Act becoming law at any time in the foreseeable future is scant. In other words, regulatory or legislative action by the federal government, as we await the outcome of the rulemaking process, isn't realistic.⁵⁷ But for workers, there are other avenues for relief.

Action at the State Level

The OSH Act permits, but does not require, the establishment of "State Plans," which are OSHA-approved workplace safety and health programs operated and enforced by individual states or U.S. territories. There are currently 22 State Plans covering both private sector and state and local government workers, and seven State Plans covering only state and local government workers. State Plans are approved and monitored by OSHA and must be at least as effective as OSHA in protecting workers and in preventing work-related injuries, illnesses and deaths.

States operating State Plans have the opportunity to protect the workers within their jurisdictions with robust workplace heat standards. They don't have to wait for a federal standard against which theirs will be judged. In fact, in the absence of a federal regulation governing a specific hazard

(like workplace heat), any state, including states in which federal OSHA is the enforcer, can issue workplace health and safety regulations covering their workers, which regulations the state will enforce on its own.⁵⁸ Hence, currently, every state has the power to issue its own rule for protecting workers from excessive heat.

As of this writing, six states have done so: California, Oregon, Washington, Colorado, Minnesota, and Maryland, whose Heat Illness Prevention standard, most recently enacted, was effective September 30, 2024.⁵⁹ The standards these states have promulgated vary both in what industries they cover, and in what protections are required.⁶⁰ Their rules are also evolving with the passage of time, and with the thermometer's vertical trend.

Colorado strengthened existing rules a few years ago to require regular rest and meal breaks in extreme heat and cold and provide water and shade breaks when temperatures hit 80° Fahrenheit (26.7° Celsius).⁶¹ Washington State updated its 15-year-old heat safety standards to lower the temperature at which cool-down breaks and other protections are required.⁶² Oregon, which adopted temporary heat protection rules in 2021, made them permanent in 2022.⁶³ And California, on July 23, 2024, expanded protections to include indoor as well as outdoor environments

⁵⁸ Once OSHA promulgates a standard that addresses a specific hazard, non-State Plan states are preempted from regulating in that arena. State Plan states, as previously discussed, can issue their own regulations, so long as they are at least as effective as the federal standard's requirements. JANE FLANAGAN ET AL., HARVARD LAW SCHOOL, NATIONAL EMPLOYMENT LAW PROJECT, HOW STATES AND LOCALITIES CAN PROTECT WORKPLACE SAFETY AND HEALTH (2020), <https://www.nelp.org/app/uploads/2020/05/Harvard-NELP-How-States-Localities-Can-Protect-Workplace-Safety-Health-May-2020.pdf>.

⁵⁹ Md. OCCUPATIONAL SAFETY AND HEALTH, <https://labor.maryland.gov/labor/mosh/> (last visited Dec. 16, 2024).

⁶⁰ See Public Citizen's excellent May 22, 2024 paper, JULEY FULCHER, SCORCHED STATES: A REPORT CARD ON STATE LAWS PROTECTING WORKERS FROM HEAT (2024), with its comprehensive comparison of the different features in each state's rules.

⁶¹ 7 COLO. CODE. REGS. § 1103-15 (2024).

⁶² WASH. DEPARTMENT OF LABOR & INDUSTRIES, AMBIENT HEAT EXPOSURE RULEMAKING, <https://www.lni.wa.gov/safety-health/safety-rules/rulemaking-stakeholder-information/ambient-heat-exposure-rulemaking> (last visited Dec. 16, 2024).

⁶³ Gabe Stern, *Workers Exposed to Extreme Heat Have no Consistent Protection in the US*, AP NEWS (Aug. 28, 2023), <https://apnews.com/article/extreme-heat-worker-protections-climate-1d53c85d0f8dd2cb973f950c54fb17eb>; OR. OSHA, RULES TO ADDRESS EMPLOYEE AND LABOR HOUSING OCCUPANT EXPOSURE TO HIGH AMBIENT TEMPERATURES, <https://osha.oregon.gov/OSHArules/adopted/2022/ao3-2022-text-alh-heat.pdf> (last visited Dec. 16, 2024).

⁵⁷ It's worth mentioning, nevertheless, that in April, 2022, as it was working on the proposed regulation, OSHA rolled out a National Emphasis Program (NEP) to protect employees from heat-related hazards and resulting injuries and illnesses in outdoor and indoor workplaces. The NEP "expands on the agency's ongoing heat-related illness prevention initiative and campaign by setting forth a targeted enforcement component and reiterating its compliance assistance and outreach efforts," and "is intended to encourage early interventions by employers to prevent illnesses and deaths among workers during high heat conditions, such as working outdoors in a local area experiencing a heat wave, as announced by the National Weather Service. Early interventions include, but are not limited to, implementing water, rest, shade, training, and acclimatization procedures for new or returning employees." OSHA Instruction, National Emphasis Program – Outdoor and Indoor Heat-Related Hazards, https://www.osha.gov/sites/default/files/enforcement/directives/CPL_03-00-024.pdf (last visited Dec. 16, 2020).

(although unfortunately excluding correctional facilities).⁶⁴ More states should follow their leads.⁶⁵

Lamentably, a few state legislatures have actually moved in the opposite direction: blocking, rather than supporting, local and state-wide efforts to protect workers from the effects of extreme heat. In June, 2023, for example, Texas Governor Greg Abbott signed into law a bill⁶⁶ that prevents cities and counties – many implementing progressive policies -- from enacting local ordinances that provide more protections of various kinds than the state does. The bill has been nicknamed the “Death Star law,” in part because it invalidates longstanding ordinances passed by the cities of Dallas and Austin that require construction companies to offer 10-minute water breaks every four hours.⁶⁷ The state law has been challenged in court, but it remains in effect while appeals are pending.⁶⁸

Not to be outdone, in March, 2024, Florida’s state legislature passed a bill barring any city, county, or municipality from adopting any measure to protect outdoor workers from extreme heat.⁶⁹ Miami-Dade County in South Florida experiences, on average, about 133 days a year where outdoor temperatures top 90° Fahrenheit (32.2° Celsius). The county was moving ahead with efforts to require paid rest breaks, water, and access to shade for its 300,000 outdoor workers when the

state legislature and the governor preemptively prohibited localities from requiring any such protections against excessive heat.⁷⁰ Florida’s state government now shares with Texas the dishonor not only of failing to proactively protect their workers from the hazards of excessive heat, but even more shamefully, of preventing localities from requiring protections for workers within their jurisdictions – and hence, needlessly and undeniably putting lives at risk.

A Few Beacons of Hope – Thanks to Worker Engagement and Organizing

While the counter-protective actions of the Texas and Florida legislatures are both an embarrassment and a stain on the U.S., there are bright spots elsewhere, beyond those states cited earlier that have passed laws requiring that workers be protected from the dangers of heat. Phoenix, Arizona is the nation’s hottest city, with 31 consecutive days with temperatures over 110° Fahrenheit (43° Celcius) last summer, and 100 consecutive days above 100° Fahrenheit (38° Celcius) this summer.⁷¹ In March 2024, Phoenix enacted a landmark ordinance that’s now providing protections from extreme heat for thousands of outdoor workers.⁷² Passed by its city council with a 7-0 vote, the rule requires city contractors and their subcontractors who perform work outdoors – including construction and airport workers -- to provide access to rest, shade, water and air conditioning, as well as training on recognizing signs of heat stress. This historic result can be credited to a citywide campaign involving Service Employees International Union, UNITE HERE Local 11 and several other worker and community organizations.⁷³

In 2023, the Teamsters, one of the largest unions in the United States, broke new ground when it negotiated the “2023-2028 UPS Teamsters National Master Agreement” with the shipping company UPS. Now, workers are entitled to air conditioning, exhaust heat shields, fans and

⁶⁴ CAL. DEP’T OF INDUSTRIAL REL., CAL/OSHA HEAT ILLNESS PREVENTION GUIDANCE AND RESOURCES, <https://www.dir.ca.gov/dosh/heatillnessinfo.html> (last visited Dec. 16, 2024).

⁶⁵ States where workplace heat protection legislation has been introduced, but not enacted include: Arizona, Florida, Massachusetts, Minnesota, Rhode Island, Nevada, New Jersey, New York, Texas and Virginia.

⁶⁶ H.B. 2127, 88th Reg. Sess. (Tex. 2023).

⁶⁷ Though construction workers constitute just 6 percent of the U.S. workforce, they account for 36 percent of all heat-related deaths. In Texas, construction workers accounted for 26 percent of fatalities from heat between 2017 and 2019, according to an analysis by Workers Defense Action Fund. Ariel Wittenberg, ‘Death Star’ Law Will End Water Breaks for Texas Workers, E&E NEWS (Aug. 4, 2023), <https://www.eenews.net/articles/death-star-law-will-end-water-breaks-for-texas-workers/#:~:text=Opponents%20have%20dubbed%20it%20the,temperature%20records%20around%20the%20world>.

⁶⁸ Joshua Fechter, *Houston Sues to Attempt to Block New Law that Erodes Cities’ Power*, TEX. TRIB. (July 18, 2023), <https://www.ksat.com/news/texas/2023/07/03/houston-sues-state-in-attempt-to-block-new-law-that-erodes-cities-power/>; <https://newrepublic.com/article/183101/texas-death-star-summer-heat-effect>.

⁶⁹ Alejandra Borunda, *Florida Blocks Heat Protections for Workers Right Before Summer*, NPR (Apr. 12, 2024), <https://www.theguardian.com/us-news/2024/mar/08/florida-bill-extreme-heat-worker-protection>.

⁷⁰ *Id.*

⁷¹ Aliya Uteuova, *Phoenix, Arizona, hits its 100th Consecutive Day of 100F Weather*, THE GUARDIAN (Sep. 4, 2024), <https://www.theguardian.com/us-news/article/2024/sep/04/phoenix-arizona-100-degrees-heat>.

⁷² Aliya Uteuova, *Phoenix Passes Landmark Rule Requiring Heat Protection for Outdoor Workers*, THE GUARDIAN (Mar. 27, 2024), https://www.theguardian.com/us-news/2024/mar/27/phoenix-workers-heat-protection-law?link_id=3&can_id=ab0184786856562d7c97b3a362f2fb49&source=email-daily-brief-march-xx-2024-21&email_referrer=email_2263031&email_subject=daily-brief-april-1-2024.

⁷³ FLOURIS ET AL, *supra* note 1.

improved ventilation in UPS trucks, in what is likely the first private-sector contract to explicitly include heat protections.⁷⁴ UPS drivers have faced serious hazards from heat, which can reach nearly 50°C inside trucks, and also inside warehouses, where, under the contract, cooling zones must be established and available.⁷⁵ This landmark agreement is a big step forward, but workers and their union will need to be vigilant in enforcing it.⁷⁶

And finally, the inspiring case of the Coalition of Immokalee Workers, a non-profit organization that represents farmworkers, deserves special mention, in particular the success of their hard-fought Fair Food Program (FFP). FFP, the result of years of smart, intense, and successful organizing, is a worker-driven social responsibility program that certifies farms that follow a code of conduct, including a strict set of workplace safety rules.⁷⁷ Certified farms get priority in selling to large retailers that include Walmart, McDonald's, Whole Foods, and Trader Joe's,⁷⁸ who pay the farms a small premium for their produce to support the workers' demands. Thus far, dozens of farms in ten states have joined the program, protecting 20,000 workers. Among their benefits is what's considered the strongest set of workplace heat protections in the U.S., including 10-minute rest breaks every two hours from April 15 – November 15, shaded rest areas, clean water, and nearby bathrooms for all workers. All in all, FFP offers a leading example of a worker-driven social responsibility program that's making a life-saving difference.

Conclusion

Just months ago, the U.S. Department of Labor's Occupational Safety and Health Administration published, for the first time, a proposed regulation addressing employers' responsibilities to protect workers from the hazards of excessive heat. An imperfect, but worthy set of requirements, it regrettably arrives more than 50 years after safety and health experts in this country recognized the need for such a standard. Many lives have been lost due to excessive heat exposure in that long interim. And even now, the fate of the proposal – especially given the election of Donald Trump -- is undetermined.

Absent federal legislation mandating a national standard to protect workers while the proposed regulation is pending, it falls to states, localities, worker rights advocates, unions, and workers themselves, to fill the gap. The current record reveals a few states and municipalities rising to meet the heat-related safety needs of the workers in their jurisdiction, and others cynically giving their workers the back of their hand. It also highlights, with a few ground-breaking examples, what unions, workers, and advocates can achieve through collective action. As temperatures continue to rise, we can only hope those landmark, life-saving efforts provide inspiration for others to follow.

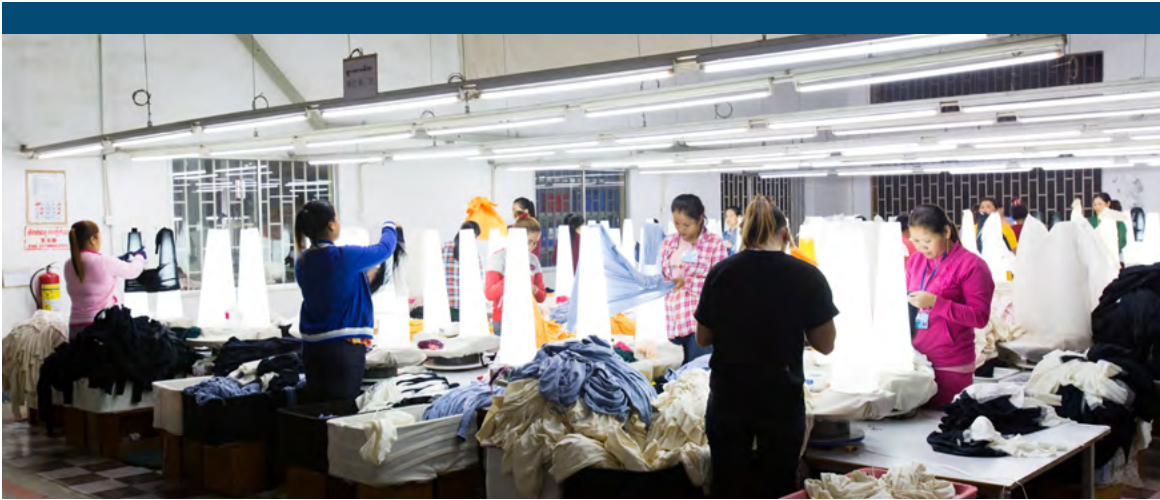
⁷⁴ Serena Lin, *UPS Drivers Won "Historic Heat Protections." They Say the Company Hasn't Lived Up to That Promise*, MOTHER JONES (Aug. 26, 2024), <https://www.motherjones.com/politics/2024/08/ups-drivers-teamsters-heat-protections/#:~:text=A%20year%20after%20a%20union,are%20still%20hot—and%20dangerous>.

⁷⁵ *Turn Up the Heat On UPS!*, TEAMSTERS FOR A DEMOCRATIC UNION (June 3, 2024), <https://www.tdu.org/turn-up-heat>.

⁷⁶ *Beat the Heat: Enforce the Contract*, Teamster.org, <https://teamster.org/beat-the-heat-enforce-the-contract/> (last visited Dec. 16, 2024).

⁷⁷ FAIR FOOD, https://fairfoodprogram.org/buyers/?itid=lk_inline_enhanced-template (last visited Dec 16, 2024).

⁷⁸ Nicolás Rivero and Eva Marie Uzcategui, *These Farmworkers Created America's Strongest Workplace Heat Rules*, WASH. POST (February 17, 2024), <https://www.washingtonpost.com/climate-solutions/interactive/2024/farmworker-heat-safety-fair-food-program/>.



Workers in a Cambodian garment factory. Credit: Ryan Shanley

HEAT AGREEMENTS IN CAMBODIA

A Conversation With Somalay So and Joe Buckley



Somalay So

Somalay So is currently a Senior Program Officer in charge of Gender Equality and Inclusion at the Solidarity Center Cambodia (SCC). She has worked for SCC for 17 years, and has been involved in various programs and activities, including gender-related policy, issues and education, organizing and collective bargaining, and campaigns for labor justice with workers and trade union partners from across sectors, including engagement in various capacity building programs for trade union partners. Furthermore, she engages in various national, regional and international conferences to discuss strategies and technical cooperation on common issues and promote solidarity among the trade union movement, organizations and networks to build workers power. In working with SC, she assisted union partners in establishing some networks such as Women Union Network (WUN), GBVH focal points at grassroots levels, ILO-C190 Advocacy Working Group (comprised of trade unions and NGOs), and Women Empowerment House, also known as "Our House," which leverages advocacy efforts to promote decent work and dignity on their job.



Joe Buckley

Joe Buckley has been in and around the labor movement for 20 years, and for the past decade has been managing trade union and labor rights projects in Southeast Asia, spanning academic, labor movement, and NGO contexts. He has also written, taught and presented widely on the region's labor movements. Joe is currently Program Development Coordinator at Solidarity Center Cambodia, managing a portfolio of programs including the office's climate and just transition work. He holds a PhD in International Development, with a thematic specialization in labor, activism, and development, from the School of Oriental and African Studies (SOAS) in London.

Cassandra Waters: Can you tell me about the situation with heat in the garment sector that led workers to want to bargain for better protections against heat?

Somalay So: The impact of climate change affects all workers, especially women workers. Garment workers wanted to negotiate a full collective bargaining agreement at the factory level. However, they were met with challenges. The employers refused to negotiate, and the Ministry of Labor did not act to make the employers negotiate in good faith. Instead, the Ministry debated whether the union had representative status. It was extremely hard for workers to negotiate, but the workers did not give up. Even though they didn't reach a full collective agreement, they did reach a small agreement to deal with the issue of heat, which was an urgent issue for the workers that needed to be dealt with.

Joe Buckley: April and May of this year had the hottest temperatures recorded in Cambodia for 170 years. Heat stress is a big issue always, but this year especially. Our union partners were saying that heat stress is a major issue in factories not just because of the immediate health impacts, but also because if you're paid piece rates, you're less productive. So it is having a direct impact on people's income.

CW: I assume that not all the garment factories have air conditioning, or if they do, it's inadequate. Is that a fair assumption?

SS: At this point, most factories don't have air conditioning. If the roof of the factory is low, it gets very hot from the machines and the materials. Even factories that have cooling systems do not use them; they just use a simple fan. So, this is a big issue, and most employers simply did not care. A few helped, but not many. Workers in the factory are 80% women, so it has a gendered impact, especially for pregnant women, as heat really affects their health.

JB: Even the factories that do have air conditioning don't like to use it because of the cost. Cambodia has some of the highest electricity prices in Southeast Asia.

CW: Can you tell me about the content of the heat stress agreements?

SS: The union negotiated that employers must monitor the temperature inside the factory, and when the temperature reaches 35° Celsius (95° Fahrenheit), the company is required to turn on a cooling system or turn it up. Sometimes, the factory has air conditioning, but they don't use it because of the cost. Other factories need to install a cooling system. Also, when it reaches 35° workers can take a break, 10 minutes or 15 minutes, depending on the situation.

JB: All the structural barriers to getting a full CBA is what has led these union partners to negotiate separate heat stress agreements. They would like a full CBA, of which heat stress would be one clause. But because they can't do that, they've developed these side heat stress agreements instead. They're simple, but they bring immediate relief to workers. When the temperature reaches 35°, the factories will turn on their cooling systems. That now means, according to our union partners, that the maximum temperature in the factory since that agreement is now usually 29° Celsius, whereas before it was 35°, 36° plus.

SS: Another thing, the factories are also required to install a thermostat so workers can see the temperature in the factory. Before the workers knew it was hot, they could feel it, but they didn't have the material to track it. Now, they can look at the factory wall and see it is 35°, so the workers can stop and take a break. Before, they didn't know.

CW: Are there any protections for pregnant workers in the agreements?

SS: Pregnant workers can take breaks early, and they can work in locations that are a little bit cooler.

CW: As you both mentioned, these aren't full CBAs and the companies are actively resisting bargaining full CBAs to address other issues. Why do you think this was something that they were willing to address?

SS: The impact of climate change was affecting all the workers, and it was a very real need that was getting worse. So, they really had to deal with the issue.

JB: I don't think we really know the answer. First, I would hazard a guess that heat stress affects productivity, so it's one issue where there's mutual interest. Second, we negotiated heat stress agreements along with a couple of other issues. Some of the factories also agreed to side agreements on addressing gender-based violence and harassment. Addressing these issues avoids a full CBA. Third, not that I ever want to let employers off the hook, but it's not always the employer actively resisting the CBA, it's also because the legal process is so convoluted. The Department of Labor will often invalidate union registrations over minor issues like spelling mistakes. Just to get to the point where the union is ready to negotiate a CBA takes ages.

SS: Both the impact of climate change and gender-based violence and harassment have costs for the business. We also tried to look at the link between heat stress and gender-based violence and harassment.

CW: Are there lessons learned from bargaining these protections?

SS: From having discussions in the unions, the workers learned about the impact of climate change. Before, they did not always link their experiences with climate. Now they see that link. Also, the agreements gave them collective tools to protect themselves from heat. Research from a Solidarity Center report on heat stress in Cambodian workplaces shows these collective measures to address heat are much more effective than individual actions.¹

JB: From that recent report, the two standout headline figures for me are that workers who are members of a union have 51% less exposure to heat stress compared to non-union workers, and workers whose union negotiates over heat stress have 74% less exposure to heat stress.² We didn't expect that when we commissioned this research, but it is a place where unions can and are having a major positive impact.

SS: Some people have been critical of the agreements, they think "oh, very simple". But workers fought and got this benefit. From the beginning, when I started to work with unions, we have always stressed the importance of decision-making power. There is still a gap, but at least it is better than before. I see similar progress when I conduct gender trainings too. In the past, I faced discrimination from leaders, but now they are aware, they know that gender equality is important and that the role of the union is very important. Heat stress and the impact of climate change also really affect women. It's a gender issue. We now have the opportunity to share these good practices, in places like the Cambodia Climate Change Summit 2024.

JB: The Summit was last month. We were there talking about the role of unions with other people in the climate change space, scientists, agronomists, financiers, and all sorts of people. We got a very interesting reaction, it seemed that a lot of people had been excluding unions not because they were anti-union, but just because they hadn't really thought that there was any role for the labour movement, that climate wasn't a labour issue.

SS: Addressing climate is linked with broader work to promote the right to form unions and engage in collective bargaining as outlined in ILO Conventions 87 and 98. The workers in our country, the trade union movement, need to be strong and have a voice. Right now, it is a very difficult situation in our country. We can support negotiations not just around raising wages, but around benefits, around support for workers to create real change in the workplace like these heat stress agreements.

CW: Are there other issues related to climate impacts on workers in the factories that weren't addressed in these agreements that unions hope to include in the future?

JB: One obvious issue that hasn't been addressed is flooding. That's not only an OSH issue, but also about income, where garment workers get their pay docked if they can't get to work because of flooding. Many garment workers would like an agreement that says no loss of pay if workers literally can't get to work because of extreme or adverse weather. One of the reasons that wasn't included in these heat stress agreements is simply because a lot of the agreements are in the city of Banteay Meanchey, and the local government upgraded infrastructure, so flooding is not as much of an issue for those workers. But it is in other parts of the country. The other thing I'd say is that 89% of Cambodia's

¹ Laurie Parsons, Pratik Mishra, Jennifer Cole, Joshua Sim Dao Wei, & Ly Vouch Long, HEAT STRESS IN THE CAMBODIAN WORKPLACE, SOLIDARITY CENTER (2024) <https://www.solidaritycenter.org/publication/heat-stress-and-workers-the-union-difference/>.

² *Id.*

workforce is in the informal economy, and they aren't covered by collective bargaining agreements. So that will need national policy or agreements with authorities rather than CBAs. We're working on that with street vendors currently, especially around improving social protection schemes.

SS: Unions are much more interested in addressing the issue after these agreements. For example, they're engaging with the Ministry of Environment and working groups on climate, so that the vision of workers and the vision of unions are prioritized.

CW: More broadly, do you have any thoughts about how unions can more effectively address the impacts of climate change with their members?

SS: The most important thing for the workers to address this issue is organising power. The legal infrastructure is very complicated in our country. We need strong organising to gain the power to negotiate with the employers and to bring them to the table. If the union wins a CBA, it is much better than the law, not just in terms of financial benefits but in terms of safety and fair practices in the working culture.

JB: Addressing the impacts of climate change is extremely important, but there are also plans globally and in Cambodia to transition the economy. So, unions also need to focus on freedom of association, collective bargaining rights, decent work, living wages, etc, in those new industries. So, we don't end up with a low-carbon, but incredibly exploitative and precarious workforce.

SS: Training and education are also very important to improving workplace democracy. So, this is a good model where workers organise, collect data, and negotiate. Another important issue is health and safety advocacy so that workers know their rights with respect to heat and other climate issues.

JB: When we talk about unions addressing climate change and climate impacts in the Global South, it's almost always on the national level. But Cambodia is not the bad guy when it comes to carbon emissions. It's Global South workers who are really feeling the impacts most acutely, but it's not their governments that are causing the problem. We really need Global South workers and their unions to have a meaningful say in climate policy. It has to be global, because what we need is for the US, Europe, Australia, Canada, and China, to reduce their emissions, not Cambodia or Bangladesh or other countries. I think that poses a major challenge for the global labour movement. Cambodian unions can do these things on a national level, but it won't stop the problem unless they can have a global influence.

INTERSECTIONAL FEMINISM AS A TOOL TO ADDRESS CLIMATE CHANGE AND A JUST TRANSITION FOR WOMEN WORKING AND LIVING IN PRECARIOUS CIRCUMSTANCES

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South Africa | Originally written in English

Introduction

There is an intersection between a just transition, a clean, healthy, and sustainable environment, and the world of work, particularly for African Black women who live and work in precarious conditions. Our rights are indivisible, and so the right to a clean, healthy, and sustainable environment is interconnected and dependent on the rights to dignity, equality, social security, and just and favourable working conditions. Achieving social justice and a healthy environment requires a multi-pronged approach that considers legal, social, political, and economic reform. Our paper explores the need for this reform to be underpinned by the lived reality of African Black women, who in our context are those most vulnerable if the status quo persists.

Globally, the climate crisis has more severe financial consequences for people who are living in poverty,² impacting them adversely in multiple intersecting ways. This includes but is not restricted to the enjoyment of their rights

to health, housing, food security, a healthy environment, and decent work. While climate change affects everyone, vulnerable groups are disproportionately impacted based on their various intersecting identities, including gender, sexual orientation, marital status, race, class, rural or urban setting, education, nationality, and profession. In South Africa, the climate crisis further intersects with multiple systemic barriers caused by the legacy of racial injustice and oppression, including food insecurity, high unemployment, crime, violence, and poverty. Consequently, climate change becomes a multiplying factor. It exacerbates inequality and results in already vulnerable groups such as women, children and people with disabilities, being most exposed to the impacts of disaster and human rights violations.³

The concept of intersectionality is essential to ensuring that any transition considers the historical context, underlying drivers, and unique experiences of marginalised groups. Intersectionality refers to the interaction of social identities such as race, class, gender, and sexuality, and their social meanings in society.⁴ This concept is helpful for an analysis of climate change and natural disasters within the socio-

¹ The Women's Legal Centre (WLC) is an intersectional African Feminist Law Centre that advances women's rights to substantive equality through strategic litigation, advocacy and education and training. The Centre provides legal assistance and advice to women and social justice organisations who face systemic discrimination, and we litigate both in our name or on behalf of clients to develop feminist jurisprudence.

² See *Breaking the Link Between Extreme Weather and Extreme Poverty*, WORLD BANK (NOV. 14, 2016), <https://www.worldbank.org/en/news/feature/2016/11/14/breaking-the-link-between-extreme-weather-and-extreme-poverty>.

³ See *Human Rights and Climate Change*, OFF. U.N. HIGH COMM'R HUM. RTS., <https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/materials/KMClimateChange.pdf> (last visited Nov. 8, 2024).

⁴ See Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).



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economic context and lived experiences of women in South Africa.

THE SOUTH AFRICAN LEGAL FRAMEWORK

The South African Constitution is the cornerstone of its democracy, incorporating an extensive bill of rights which seeks to recognise and address the injustices of our colonial and apartheid past.⁵ The Constitution recognises the importance of concepts and rights such as dignity and equality in a democracy shaped from the ashes of apartheid, which had stripped its people of both. The Constitution also promotes the value of human rights and freedoms, such as non-discrimination on the basis of race and gender.⁶

Section 22 of the Constitution provides that every citizen has the right to choose their trade, occupation or profession. The normative content to this right and its realisation has been expanded through legislation regulating the rights of people living in the country to work in decent and safe conditions free from discrimination. These laws were necessitated in a post-apartheid South Africa, a society that was largely built on the labour of African Black people, who far too often worked under appalling conditions and without any access to labour protections.

Therefore, the legal framework acknowledges that the constitutional democracy inherited a political and legal system that was inherently patriarchal and discriminatory, and to shift the lived reality of the most vulnerable, the legal system must address systemic barriers. The Labour Relations Act,⁷ the Basic Conditions of Employment Act,⁸ the Commission for Conciliation, Mediation and Arbitration⁹ and the National Economic Development and Labour Council (NEDLAC) are all designed to create a new framework towards realising

the constitutional right to choose a trade or occupation and to work in an environment that shifts away from the apartheid past.

The Constitution dedicates Section 24 to the right of everyone in the country to an environment that is not harmful to their health or well-being,¹⁰ and extends the right to recognise the importance of the environment to future generations. It also requires that reasonable legislative and other measures be taken to attain climate justice.¹¹

The National Environmental Management Act (NEMA), enacted in 1998, was the primary legislative instrument to give effect to environmental rights as outlined in Section 24 of the Constitution. It expands on the substantive elements of the constitutional right to a healthy environment, including clean air; a safe and stable climate; access to safe water and adequate sanitation; healthy and sustainably produced food; non-toxic environments in which to live, work, study and play; and healthy biodiversity and ecosystems.¹² Additionally, it provides for the essential procedural elements of the right, which are necessary for sound implementation, such as access to information, the right to participate in decision-making, and access to justice and effective remedies, ensuring the secure exercise of these rights.¹³

The Constitution, in Section 233, establishes the obligation of the state and the courts to consider and incorporate international laws where South Africa is a signatory. The South African government, being a signatory to the Paris Agreement, has committed to achieving net-zero emissions by 2050 in its Nationally Determined Contribution (NDC). Although the NDC by itself is merely an undertaking and not a binding form of international law, it serves as a yardstick to measure the state's overall commitment

⁵ Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), <https://www.justice.gov.za/constitution/SACConstitution-web-eng.pdf>.

⁶ *Id.* preamble.

⁷ Labour Relations Act 66 of 1995, <https://www.gov.za/documents/labour-relations-act>.

⁸ Basic Conditions of Employment Act 75 of 1997, <https://www.gov.za/documents/basic-conditions-employment-act>.

⁹ Labour Relations Act 66 of 1995, *supra* note 7, § 112.

¹⁰ Constitution of the Republic of South Africa, *supra* note 5, § 24(a).

¹¹ *Id.* §24(b).

¹² See *Non-toxic environments to live, work, study, and play*, OFF. U.N. HIGH COMM'R HUM. RTS. (Mar. 11, 2022), <https://www.ohchr.org/sites/default/files/2022-03/Flyer-11-March.pdf>.

¹³ National Environmental Management Act, ch. 4, <https://www.gov.za/documents/national-environmental-management-act>.

to fulfilling its constitutional obligations domestically, as well as its contribution to the broader international effort to combat climate change and promote a just transition. For those of us practicing strategic litigation, who use the law as a tool to achieve justice, it is useful to assess mitigation and adaptation efforts of government and corporations.¹⁴

In October 2023, the South African National Assembly approved the Climate Act (also known as the Climate Change Bill, hereinafter referred to as the Climate Act) which was later signed into law by President Cyril Ramaphosa in July 2024.¹⁵ The stated purpose of the Act is to enable the development of an effective national climate change response, and a long-term just transition to a low-carbon and climate-resilient economy and society for South Africa, in the context of sustainable development. It provides for a climate change response at both a municipal and provincial level, with national adaptation to impacts of climate change and a section dedicated to greenhouse gas emissions and removals.

The Climate Act is a progressive step taken by the South African government and is in line with Sustainable Development Goal 13, which calls for urgent state action to combat climate change and its impacts.¹⁶ The legislation is ambitious in that its proper implementation not only has the potential to address the past, but also the future - for example mining affected communities who are living in a social, economic and environmental crisis created by a sector that has historically prioritized profit over marginalized workers' social and economic human rights.¹⁷

The Climate Act has the potential to ensure climate action by the state through various measures, including the development of adaptation strategies and plans that are centred on the lived experiences of the people who live



A flood in South Africa. Credit: David_Steel / stock.adobe.com

and work in and around unsafe environments. It specifically references the impact of just transition on women and other vulnerable workers and states that the interpretation of the Climate Act must be guided through decision-making processes that consider the 'special needs and circumstances of localities and people that are particularly vulnerable to the adverse effects of climate change, including vulnerable workers and groups such as women, especially poor and rural women, children, especially infants and child headed families, the aged, the poor, the sick and persons with disabilities'.¹⁸

The Climate Act further recognises the need to create decent work by ensuring a just transition to a low-carbon, climate-resilient, economy and society, as well as ecologically sustainable economies and societies that contribute to the creation of decent work for all, social inclusion and the eradication of poverty. This formal recognition is important as a first step towards realising rights, however, through our work, we know that the true transformational power of policy and legislation lies in its implementation at a substantive level. The legal framework outlined here is an essential tool for the promotion of substantive equality through an intersectional lens, both in interpretation and application. Despite the approval and promulgation of the Climate Act into law, it has not been operationalised and has not shown its practical application to the abovementioned communities. As a result, it is falling short of its intended purpose, and we are unable to substantively assess its impact at this stage.

¹⁴ See *South Africa: First Nationally Determined Contribution under the Paris Agreement*, U. N. CLIMATE CHANGE (2021), <https://unfccc.int/sites/default/files/NDC/2022-06/South%20Africa%20updated%20first%20NDC%20September%202021.pdf>.

¹⁵ Climate Change Act of 2024, https://www.gov.za/sites/default/files/gcis_document/202407/50966climatechangeact222024.pdf.

¹⁶ See *Goal 13: Take urgent action to combat climate change and its impacts*, U.N. DEP'T OF ECON. & SOC. AFFAIRS, <https://sdgs.un.org/goals/goal13>.

¹⁷ See Makua M. Pretty & Kola O. Odeku, *Harmful Mining Activities, Environmental Impacts and Effects in the Mining Communities in South Africa: A Critical Perspective*, 8 ENV'T ECON. 14-24 (2017), [https://doi.org/10.21511/ee.08\(4\).2017.02](https://doi.org/10.21511/ee.08(4).2017.02).

¹⁸ Climate Change Act of 2024, *supra* note 16, § 3

At the Intersection of the Environment, the World of Work and Housing

In South Africa, most people who are regarded as poor or poverty stricken reside in areas prone to climate related disasters (floods, droughts, storms, etc.) because they live in informal settlements.¹⁹ Increasingly, climate disasters destroy homes, infrastructure, and livelihoods, causing immediate and long-term economic losses, migration and displacement from homes and workplaces. While South Africa is lauded for its extensive human rights framework, especially its socio-economic provisions, the lived reality for Black women in South Africa is far removed from the ideal envisioned in the Constitution, and much work needs to be done to substantively transform their lives.

Women and girls are historically more disproportionately affected by displacement,²⁰ they face increased risks of violence, exploitation, and loss of social networks and support systems.²¹ Women often bear the brunt associated with food insecurity.²² Climate change causes shifts in precipitation patterns, increased temperatures, and extreme weather events, which can lead to decreased agricultural yields, threatening food security for women and their families.²³ Women are usually largely responsible for food production and are more likely to be involved in subsistence farming.²⁴ In developing countries, women are more economically vulnerable due to their work in agriculture, subsistence farming and informal

trading.²⁵

Given the country's patriarchal and colonial history of racial and gender discrimination, women in particular face numerous historical and systemic barriers when seeking to access land in South Africa. Apartheid policies and its discriminatory legal framework of segregation and denial of basic human rights to all citizens meant, that for African Black women to find employment and work in cities and suburbs designated as white only, they were required to obtain state approval in the form of an official "pass identity document."²⁶ Women were unable to move freely or live anywhere in the country. The legacy of apartheid and its relegation of Black people's bodies to informal tenure has left a deep and lasting impact on our land and housing rights.

Land has been the main barter in establishing power and control globally, with class, race, and socio-economic background largely determining who has access to land, housing or decent work opportunities.²⁷ This apartheid legacy is still starkly visible with Black women in South Africa living in poor and working-class communities such as informal settlements, townships, and rural areas, forced to travel long distances or leave their families behind to access working opportunities. These inequalities and intersecting forms of discrimination force women to live and work in unsafe environments to support their families.

The 2022 floods in the KwaZulu-Natal province, highlighted the precarious position of residents in informal settlements and rural areas to climate change and its devastating impacts.²⁸ The province experienced heavy downpours that led to severe flooding and landslides that destroyed thousands of homes, businesses, and infrastructure, and killed an estimated 450 people.²⁹ The devastating

¹⁹ See Khanyi Mlaba & Gugulethu Mhlungu, *How Is Apartheid's Legacy Making Climate Change Impacts Worse in South Africa?*, GLOBAL CITIZEN (Apr. 26, 2022), <https://www.globalcitizen.org/en/content/apartheid-climate-change-impact-south-africa/> (last visited Nov. 7, 2024).

²⁰ See *South Africa's National Policy Framework for Women's Empowerment and Gender Equality*, THE OFF. ON THE STATUS OF WOMEN, https://www.dffe.gov.za/sites/default/files/docs/national_policy_framework.pdf.

²¹ See Maite Nkoana-Mashabane, *Women Adapt to Climate Change* (2012), <https://oneworldgroup.co.za/wp-content/uploads/2014/12/OneWorld-2012-Thuto-ya-Batho-Women-Adapt-to-Climate-Change-OneWorld-Sustainable-Investme.pdf>.

²² See *The State of Food and Agriculture: Climate Change, Agriculture and Food Security*, U.N. FOOD & AGRIC. ORG (2016), <http://www.fao.org/3/a-i6030e.pdf>.

²³ See Emmanuel Niyonzima, *Examining Impacts of Climate Change on Women Health and Food Security*, 8 INT'L J. ACAD. PEDAGOGICAL RES (2024).

²⁴ See *Women's Contributions to Agricultural Production and Food Security: Current Status and Perspectives*, U.N. FOOD & AGRIC. ORG., <https://www.fao.org/4/x0198e/x0198e02.htm>.

²⁵ See *Women in the Informal Economy*, UN WOMEN, <https://www.unwomen.org/en/news/in-focus/csw61/women-in-informal-economy>.

²⁶ See "Dom Pas": History of Worker Control, FOSATU WORKER NEWS (1983), https://disa.ukzn.ac.za/sites/default/files/pdf_files/FwMar83.1562.7624.000.019.Mar1983.5.pdf.

²⁷ See *Race and Ethnicity in South Africa*, South African Hist. Online (2018), <https://www.sahistory.org.za/article/race-and-ethnicity-south-africa>.

²⁸ See *Children's Lives and Rights at Risk Due to KwaZulu-Natal Floods*, UNICEF (2022), <https://www.unicef.org/southafrica/press-releases/childrens-lives-and-rights-risk-due-kwazulu-natal-floods>.

²⁹ See *Death Toll from Flooding in South Africa's KZN Rises to 459*, BLOOMBERG (May 29, 2022), <https://www.bloomberg.com/>

consequences of these floods highlighted the country's deep inequalities, with South Africa's poorest suffering the most. It appears there is no comprehensive strategy in place, and that the government is relying on early weather warning systems to simply provide information about impending weather conditions, without addressing the impact on the lived reality of the most affected communities or taking meaningful action to improve the conditions of marginalised groups.

"South Africa is particularly vulnerable to climate change, with temperatures in the central regions of Southern Africa rising at nearly twice the global average rate.³⁰ Where people live directly influences their proximity to inequality and human rights violations. Therefore, climate change is not only about the environment, but also about the historical legacy and context that placed people where they are today."

In both townships and rural areas, women bear the burden of these environmental shifts, particularly women who undertake unpaid care work in their home and community.³¹ In situations with limited social protection, women often assume the role of primary caregivers for children, the sick, or the elderly, leaving the formal economy. Following extreme weather events such as heat waves, droughts, floods, and hurricanes, women are more likely to become caregivers for sick and injured family members.³²

When access to basic services like fuel and

[news/articles/2022-05-29/death-toll-from-flooding-in-south-africa-s-kzn-rises-to-459](https://www.cer.org.za/news/articles/2022-05-29/death-toll-from-flooding-in-south-africa-s-kzn-rises-to-459).

³⁰ See Robert Scholes & Francois Engelbrecht, *If We Don't Take Climate Action Now, This is What Life in South Africa Will Look Like*, CTR. FOR ENVTL. RIGHTS (Sep. 28, 2021), <https://cer.org.za/news/if-we-dont-act-now-on-climate-change-this-is-what-life-in-south-africa-will-look-like>.

³¹ See Jacques Charmes, *The Unpaid Care Work and the Labour Market: An Analysis of Time Use Data Based on the Latest World Compilation of Time-Use Surveys*, INT'L LABOUR ORG. (2019), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@dgreports/@gender/documents/publication/wcms_732791.pdf.

³² See Sherilyn MacGregor et al., *Caring in a Changing Climate: Centering Care Work in Climate Action*, OXFAM (Feb. 23, 2022), <https://oxfamlibrary.openrepository.com/bitstream/handle/10546/621353/rr-caring-in-a-changing-climate-230222-en.pdf;jsessionid=BD6114147FA09B977C7D617072CD-F706?sequence=1>



The Kusile Coal Power Plant in South Africa. Credit: Stef / stock.adobe.com

water is unavailable, women are generally required to collect water and firewood from areas surrounding the homestead. Women are also more likely to participate in subsistence farming and livestock rearing to ensure food security for their children and families. These shifts change the dynamic of both the household and community.³³

Women who live and work on farms experience increased health risks due to farm owners' continued reliance on industrial agriculture and the use of toxicants including chemicals, pesticides and fertilizers. This is concerning for the health and well-being of women working on farms, especially in the context of global climate change and its effects on the environment and broader health systems. Rising temperatures are expected to intensify the toxicity of contaminants, including air pollutants in urban areas, and increase organisms' sensitivity to chemical stressors.³⁴

We are beginning to recognise the need for the intersectional and substantive enforcement of policy and legal frameworks, as the various forms of discrimination women experience are interconnected.

The Evolving Jurisprudence on Intersecting Rights

The South African Courts have developed the normative content regarding the applicability

³³ *Id.*

³⁴ See *Health Impacts of Air Quality and Energy*, WORLD HEALTH ORG., <https://www.who.int/teams/environment-climate-change-and-health/air-quality-energy-and-health/health-impacts>.

and interpretation of the right to a healthy environment. The Supreme Court of Appeals held that the Constitution's inclusion of environmental rights as fundamental and justiciable human rights requires that environmental considerations be accorded appropriate recognition and respect in the country's administrative processes. In the case of *Director Mineral Development Gauteng Region and Another v. Save the Vaal Environment and Others*, the Court held that "together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns."³⁵

In the case of *BP Southern Africa (Pty) Ltd*,³⁶ the Court discussed the wide interpretation of the right to a healthy environment, which included specialist and older categories of pollution, conservation, and health in line with international law as contained in various international conventions and treaties. The Court held that the right was a composite right, which included social, economic, and cultural considerations to ultimately ensure a balanced environment. The case beautifully illustrates how the Courts are developing jurisprudence based on substantive equality principles, considering not only the law and the facts before it, but also the lived reality and experiences of the people most impacted by the Court's decision.

We submit that an intersectional lens when applied to the law not only considers the diverse categories of identity for women but also examines the intersection of discrimination they face and how such discrimination impacts various rights. One example of a sector that is largely gendered in nature is domestic labour, which includes both paid domestic work outside the individual's home and unpaid care work within the home. "Domestic work remains a highly feminized sector where 80 per cent of all domestic workers are women who lack access to any kind of social security coverage."³⁷ The recent Constitutional Court case of *Mahlangu*³⁸ has

highlighted the impact of patriarchy on domestic workers' ability to access social protection in the form of occupational health and safety measures that are available to other workers. The case is a critical example of how a specific class or group of people were discriminated against by being excluded from compensation and the right to social security based on the work they perform. As we noted at the outset of this paper, rights are indivisible, so where an individual or group of people experience one form of rights violation, they will also face others, to varying degrees. In our experience working with women in South Africa, there are strong connections between their right to a healthy environment and other human rights such as dignity, equality, housing, land and decent work. Our Courts, for instance, have recognised the direct link between the right to a healthy environment and the right to dignity, equality, and decent work. In the case of *Bato Star*, the Constitutional Court sought to extend access to the fishing industry to previously disadvantaged communities, recognising the constitutional commitment to equality in line with the goals of the Marine Living Resources Act (MLRA).³⁹

"In cases concerning food security and the balance between state obligations and the rights of private stakeholders to develop land, the Courts have recognised the need to ensure food security, and the potential impacts of the changing climate should fertile land be given up to development."

In the case of *Philippi Horticultural Area Food & Farming Campaign v. MEC for Local Government, Environmental Affairs and Development Planning* the High Court halted an administrative decision allowing urban development, instructing that the impacts of climate change be more thoroughly considered.⁴⁰ This decision resonates with earlier submissions in this paper, emphasizing that the

³⁵ *Director: Mineral Development, Gauteng Region and Another v. Save the Vaal Environment and Others*, (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (Mar. 12, 1999).

³⁶ *BP Southern Africa (Pty) Ltd v. MEC for Agriculture, Conservation, Environment and Land Affairs*, 2004 (5) SA 124 (W).

³⁷ See *Who are domestic workers*, Int'l Labour Org., <https://www.ilo.org/global/topics/domestic-workers/who/lang-en/index.htm>.

³⁸ *Mahlangu and Another v. Minister of Labour and Others*, (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2

BLLR 123 (CC); (2021) 42 ILJ 269 (CC) (Nov. 19, 2020).

³⁹ *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism*, 2004 (4) SA 490 (CC) para. 53.

⁴⁰ *Philippi Horticultural Area Food & Farming Campaign v. MEC for Local Government, Environmental Affairs and Development Planning*, 2020 ZAWHC 8, <https://climatecasechart.com/non-us-case/philippi-horticultural-area-food-farming-campaign-et-al-v-mec-for-local-government-environmental-affairs-and-development-planning-western-cape-et-al/>.

constitutional right to a healthy environment not only reflects present concerns, but also the needs of future generations.

Access to clean drinking water is a challenge in South Africa, due to a combination of limited water resources, inadequate maintenance of water infrastructure, and an increase in demand.⁴¹ As a result, litigation in this area has developed the law to recognise intersecting needs related to access to water. In 2023, the company Thungela Operations appealed a decision denying a water use license for a proposed coal mine.⁴² The Tribunal found that the region was already burdened by extensive water pollution from other mining activities and concluded granting the license would further jeopardise an important water resource. Significantly, the Tribunal found that Thungela Operations had failed to adequately consider climate change in its mitigation measures.⁴³

In a different case, the High Court ruled that the decision to permit exploration of oil and gas along South Africa's Wild Coast was unlawful; halting the development.⁴⁴ The Court found that the permitting process not only excluded affected communities and ignored their cultural practices, but also failed to conduct a climate change assessment.⁴⁵ This case illustrates the important role of the Court in adjudicating matters that have potential inter-generational impacts on communities. We emphasise that women's right to land for agricultural or subsistence use and access to marine resources must be viewed through an intersectional lens that considers race, ethnicity, religion, tradition and customs, economic status, disability, sexual orientation, gender identity and expression and sex characteristics. The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP) explicitly addresses gender-based



A woman in South Africa goes to work. Credit: poco_bw / stock.adobe.com

stereotypes faced by rural and peasant women. As jurisprudence evolves, and normative content is developed for these rights, it is crucial that such factors must be considered.

The expansion of industrial agriculture and extractive projects and products has led to pervasive violations of rights in respect of land and its many other intersecting rights such as custom and culture. Questions around use and control are more frequently coming before our courts, as illustrated by the cases that we have referenced in this paper. Corporate impunity and risks of corporate capture have numerous gendered impacts that should be made visible. While States are the primary duty bearers under international law, with a well-established obligation to respect, protect, and fulfil human rights, companies—particularly those operating transnationally—have largely enjoyed impunity. International and national mechanisms of accountability do not yet systematically consider companies as duty bearers with human rights obligations. For the most part, initiatives to ensure that corporations respect human rights have primarily been voluntary. However, there are precedents establishing that corporate entities have direct obligations under international law, including international human rights law.⁴⁶

⁴¹ See Leleti Maluleke, *Poor Governance Exacerbates South Africa's Water Crisis*, GOOD GOVERNANCE AFRICA (Mar. 25, 2024), <https://gga.org/poor-governance-exacerbates-south-africas-water-crisis/>.

⁴² *Thungela Operations (Pty) Ltd v. Chief Director, Water Use License Management: Department of Water and Sanitation and Others*, (WT04/22/GP) [2023] ZAWT 1 (Apr. 26, 2023).

⁴³ *Id.* para. 10.

⁴⁴ See *SA's Laws Aren't Geared to Protecting Against Climate Change: Judges Are Trying to Fill the Gap*, UNIV. OF THE WITWATERSRAND JOHANNESBURG (Apr. 2024), <https://www.wits.ac.za/news/latest-news/opinion/2024/2024-04/sas-laws-arent-geared-to-protecting-against-climate-change-judges-are-trying-to-fill-the-gap.html>.

⁴⁵ *Id.*

⁴⁶ See generally, Menno T. Kamminga, *Corporate Obligations under International Law*, OFF. U.N. HIGH COMM'R HUM. RTS. (Aug. 17, 2004), <https://www2.ohchr.org/english/issues/globalization/business/docs/kamminga.doc>; Ekaterina Aristova & Carlos Lopez, *Corporate Accountability for Human Rights Abuses*, INT'L FED'N FOR HUMAN RIGHTS (June 2021), https://www.fidh.org/IMG/pdf/corporate_accountability_guide_version_web.pdf; *UK Okpabi et al v. Shell: UK Supreme Court Reaffirms Parent Companies May Owe a Duty of Care Towards Communities Impacted by their Subsidiaries in Third Countries*, OPINIO JURIS (Feb. 16, 2021), <http://opiniojuris.org/2021/02/16/uk-okpabi-et-al-v-shell-uk-supreme-court-reaffirms-parent-companies-may-owe-a-duty-of-care-towards-communities-impacted-by-their-subsidiaries-in-third-countries/>; *Millieudéfensie et al. v. Royal Dutch Shell plc.*, May 26, 2021, <http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case->

The South African government's failure to redirect resources to sustainable materials, such as renewable energy, while continuing to invest in oil and gas, is frustrating and contradicts the climate justice commitments that have been made. This has recently compelled environmental activists to approach the High Court in an effort to protect the public interest and the environment from TotalEnergies' drilling decisions.⁴⁷ Despite community opposition, the Minister of Forestry, Fisheries and the Environment gave TotalEnergies the go-ahead to drill exploratory wells, which is not only affecting the ocean but coastal communities whose livelihoods depend on the well-being of the ocean. The decision to allow drilling was made with little or no consideration of the environment, or the livelihoods and cultural heritage of marginalized coastal communities.⁴⁸ In this case, little consideration was given to women or the 95% of the families who were dependent on small-scale fishing for survival, even after the community objected to the drilling.

As an organisation, we are concerned by government decisions that do not align with South Africa's climate change commitments. During the most recent State of the Nation address, in February 2024, the President acknowledged that South Africa has abundant solar and wind resources, with the capacity to create thousands of renewable energy jobs. However, the Upstream Petroleum Resources Development Bill (UPRD Bill) directly contradicts efforts to transition away from fossil fuel extraction.⁴⁹ Studies show that this exploitation will inevitably contribute to greenhouse gas emissions, which South Africa's climate commitments are intended to reduce. Moreover, a study conducted on an oil refinery in Durban revealed heightened health risks for communities located near these facilities.⁵⁰

documents/2021/20210526_8918_judgment-2.pdf.

⁴⁷ *South Africa: Legal Challenge Launched Against TotalEnergies Drilling Decision*, NATURAL JUSTICE, <https://naturaljustice.org/south-africa-legal-challenge-launched-against-totalenergies-drilling-decision/>.

⁴⁸ *See To Protect Oceans and Livelihoods: Western Cape High Court Set to Hear Another Case Against TotalEnergies Drilling Plans in South African Waters*, THE GREEN CONNECTION (Nov. 6, 2024), <https://thegreenconnection.org.za/2024/11/06/to-protect-oceans-and-livelihoods-western-cape-high-court-set-to-hear-another-case-against-totalenergies-drilling-plans-in-south-african-waters/>.

⁴⁹ *See Committee Meeting: Upstream Petroleum Resources Development Bill: Public Hearings*, PARLIAMENTARY MONITORING GRP. (Nov. 18, 2022), <https://pmg.org.za/committee-meeting/36055/>.

⁵⁰ *See Oil Refinery Blast is One More Reason South Africa Should Take Industrial Risks Seriously*, THE CONVERSATION (2020), [https://](https://theconversation.com/oil-refinery-blast-is-one-more-reason-south-africa-should-take-industrial-risks-seriously-151779)

The Constitutional Court in *Rahube v. Rahube* declared that during both the apartheid and post-apartheid eras, Black women faced triple discrimination based on their class, race, and gender.⁵¹ This resulted in Black women, even after apartheid, not fully enjoying their rights under the South African Constitution. Naturally, due to the difference in use and enjoyment of land in rural areas, along with the unequal access faced by Black women, the impacts of the climate crisis are experienced differently. For example, cities like Johannesburg have experienced rapid urbanisation, with housing demands continuing to rise. Currently, the predominant mode of affordable housing delivery in South Africa confines lower-income households to the urban periphery, far from economic opportunities, work and essential services.⁵² As a result, most poor Black women live in informal settlements and townships, which are often built with little to no official planning, minimal consideration for drainage and sewage systems and certainly no adequate environmental impact assessments.

We are reminded by the Constitutional Court in *Mahlangu* that the power of an intersectional approach lies in its capacity to shed light on the experiences and vulnerabilities of groups that have been erased or rendered invisible. Women who live and work in precarious conditions, such as farming, mining, fishing or in rural areas were placed there by our apartheid and colonial history, and remain trapped there by intergenerational cycles of poverty. Their inequalities have only been exacerbated over the years, with the state failing to adequately and substantively redress and address the needs of Black women, who continue to face discrimination in our society. The cases and judgements we have discussed are indicators of what can be accomplished when human rights and constitutional values, standards and principles are upheld. However, without an intersectional lens, we remain far from achieving the ideals of the Constitution.

theconversation.com/oil-refinery-blast-is-one-more-reason-south-africa-should-take-industrial-risks-seriously-151779.

⁵¹ *Rahube v. Rahube and Others* (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (Oct. 30, 2018).

⁵² *See New Research Reveals How to Build a City Where People and the Environment Can Thrive*, SOUTH AFRICAN AFFORDABLE HOUSING (Oct. 2021), <https://saaffordablehousing.co.za/new-research-reveals-how-to-build-a-city-where-people-and-the-environment-can-thrive/>.

Conclusion

The many debates surrounding how to best address climate change often feel like an issue for a privileged minority. We argue that an intersectional feminist lens is crucial to integrating a gendered perspective into strategies that highlight the social, economic, and political factors that contribute to the vulnerability of women and marginalised groups to climate change. An intersectional lens requires that strategies be shaped by the voices and experiences of marginalised women who live and work in precarious environments. Active participation is essential to ensure effective and proactive decision making that leads to a more just society and climate.

Addressing climate change requires strengthening both adaptation and mitigation measures. State parties and the private sector must have an active role in promoting and pursuing mitigation strategies, including reducing carbon emissions and investing in renewable energy. Adaptation measures involve improving resilience to immediate events by creating processes, practices, and structures to minimize potential damage associated with climate change. This should be done through a gendered lens, focusing on the substantive change of outcomes for poor and marginalised groups in our society, particularly Black women.

Whilst the Climate Act expressly mentions the consideration of marginalised groups, including women; our laws - and the people who enforce them - must do much more to create change in South Africa. In the communities where the WLC works, women have little to no knowledge of the legislation or its intent to realise their constitutional rights. The fact that the Climate Act has not been operationalised despite being promulgated into law, means that it has yet to demonstrate its practical application to these communities, falling short of its intended purpose.

Although the Climate Act has the potential to be a transformational tool, as illustrated above, more rights-based education and awareness is needed about its objectives. The state must do more to ensure that ordinary South African's are aware of their rights and have tangible access to those rights under the legislation it adopts. As an accountability mechanism, the Climate Act can only be effective if it is operationalised, actively used, and its impact substantively measured.

Without this, we risk once again creating a structure of formal equality, where women and marginalised communities have rights on paper without the substantive enjoyment thereof.

To ensure sustainable development and a just society, as envisioned by our Constitution, laws, policies, and strategies need to focus on the interrelated and connected nature of the rights to a healthy environment, just and favourable working conditions, equality, and dignity. In our opinion, a holistic and multi-pronged approach that is intersectional, feminist, and seeks to address the immediate and substantive needs of those most vulnerable and affected is the only way to achieve a clean, healthy and sustainable environment for all.

THE FREEDOM TO RUN A BUSINESS GUIDED BY THE PRINCIPLES OF CARE AND NON-EXTRACTIVENESS FOR A JUST TRANSITION

BERYL TER HAAR¹

Global | Originally written in English

Introduction

Many actors are involved in the transition from an unsustainable climate- and people- exploiting economy to an economy that is sustainable because it respects planetary boundaries and people's wellbeing, including governments and enterprises.² To realise a just transition in terms of leaving no one in the world of work behind and ensuring access to decent work,³ the International Labour Organization (ILO) laid out a path in its 2015 Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies for All, which were endorsed by the ILO's 2023 Resolution Concerning a Just Transition Towards Environmentally Sustainable Economies and Societies for All.⁴ The ILO 2015 Guidelines form the foundation of the UN's policy architecture for a just transition.⁵ Furthermore, decent work is referenced in the preamble of the

2016 Paris Agreement,⁶ and in the 2024 OECD Development Co-Operation Report Tackling Poverty and Inequalities through the Green Transition.⁷ The COP28 included an explicit focus on decent work in its *Just Transition Work Programme*.⁸

According to the ILO, within this approach, enterprises are expected to "ensure that decent and productive work considerations are embedded in their climate and environmental actions and due diligence measures."⁹ This article argues that the set path of decent work will not be enough to ensure this expectation, primarily because enterprises' freedom to run a business under law lacks guidance by general principles that determine the scope of the freedom.¹⁰ To

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² INT'L LABOUR ORG. [ILO], GUIDELINES FOR A JUST TRANSITION TOWARDS ENVIRONMENTALLY SUSTAINABLE ECONOMIES AND SOCIETIES FOR ALL § 9 (2015), <https://www.ilo.org/media/435091/download> [hereinafter ILO 2015 Guidelines]; *ILO Helpdesk: Business and a Just Transition*, ILO (Aug. 20, 2024), <https://www.ilo.org/resource/other/ilo-helpdesk-business-and-just-transition>.

³ Specification taken from the subtitle of: TONIA NOVITZ, TRADE, LABOUR AND SUSTAINABLE DEVELOPMENT: LEAVING NO ONE IN THE WORLD OF WORK BEHIND (2024).

⁴ ILO, ILC.111/Resolution V, *Resolution Concerning a Just Transition Towards Environmentally Sustainable Economies and Societies for All* (June 16, 2023) [hereinafter ILO 2023 Resolution], <https://www.ilo.org/media/252966/download>.

⁵ *UN Agencies Team Up to Promote Decent Work in Climate Change Context*, UN CLIMATE CHANGE (Mar. 14, 2017), <https://unfccc.int/news/un-agencies-team-up-to-promote-decent-work-in-climate-change-context>.

⁶ *The Paris Agreement*, UN CLIMATE CHANGE <https://unfccc.int/process-and-meetings/the-paris-agreement> (last visited Oct. 20, 2024).

⁷ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), DEVELOPMENT CO-OPERATION REPORT 2024: TACKLING POVERTY AND INEQUALITIES THROUGH THE GREEN TRANSITION (2024), https://www.oecd.org/en/publications/development-co-operation-report-2024_357b63f7-en/full-report.html.

⁸ *COP28: Overall Outcome & EU Reactions*, EUROPEAN COMMISSION (Jan. 24, 2024), <https://ec.europa.eu/social/main.jsp?langId=en&catId=89&furtherNews=yes&newsId=10741>.

⁹ *ILO Helpdesk*, *supra* note 2.

¹⁰ This thought is inspired by these works: ALAIN SUPIOT, THE SPIRIT OF PHILADELPHIA: SOCIAL JUSTICE VS. THE TOTAL MARKET (2012); WOLFGANG STREECK, HOW WILL CAPITALISM END (2017); PAUL COLLIER, THE FUTURE OF CAPITALISM: FACING THE NEW ANXIETIES (2018); KATE RAWORTH, DOUGHNUT ECONOMICS: SEVEN WAYS TO THINK LIKE A 21ST CENTURY ECONOMIST (2017); Dominique Méda, *The Future of Work: The Meaning and Value of Work in Europe* (ILO Rsch. Paper No. 18, 2016), <https://www.ilo.org/publications/future-work-meaning-and-value-work-europe>; as well as the European Research Council funded research project N-EXTLAW, which focuses on non-extractive economic practices and is hosted by the Amsterdam Centre for Transformative Private Law. See *What is the N-EXTLAW Project?*, N-EXTLAW, <https://www.nonextractivefuture.eu/the->

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overcome this problem, two new legal principles, of care and non-extractiveness, will be introduced as proposed reciprocal obligations to the freedom to run a business. The arguments supporting this claim and proposal will be framed within an updated reading of Carroll's pyramid of corporate social responsibility (hereinafter CSR) that treats four responsibilities - economic, legal, ethical, and philanthropic - as a unified and integrated whole, rather than sequentially or hierarchically related responsibilities.¹¹ The activities that are expected from enterprises are those that are also part of CSR, particularly implementing the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy¹² and the Guiding Principles on Business and Human Rights¹³ by the Human Rights Council of the United Nations (hereinafter UN).¹⁴ Moreover, CSR seems to have morphed into corporate sustainability, which lies at the heart of the just transition.¹⁵ Section 2 of this article elaborates on the updated reading of Carroll's CSR pyramid. Section 3 introduces the freedom to run a business and indicates what this means in the context of Carroll's CSR pyramid. In Section 3, the path of decent work is unpacked in order to understand what this

means for enterprises and elaborates on why this path will not be enough to ensure a just transition due to enterprises' freedom to run a business. Section 4 concludes with a proposal for the introduction of two new ethical principles of care and non-extractiveness, as reciprocal obligations of the freedom to run a business, in order to overcome the limitations of the path of decent work.

Carroll's pyramid of CSR: an updated reading

Carroll presented his definition of CSR as four responsibilities in 1979¹⁶ and presented them in the form of a pyramid in 1991.¹⁷ Among the purposes of the pyramid was "to illustrate the building block nature of the four part framework."¹⁸

The ground layer of the pyramid is formed by the economic responsibilities of an enterprise. Carroll argues that the enterprise is a unit in society that produces and sells goods and services society needs and desires. To stay in business, an enterprise needs to be profitable to satisfy owners/shareholders and to attract investments to grow and develop. Without profitability, a business's other responsibilities would be mere "moot considerations."¹⁹ As part of a "social contract" between society and enterprises, enterprises are expected to pursue their economic responsibilities within the framework of the law. As such, legal responsibilities can be considered as codified ethics, since they "embody basic notions of fair operations" as regulated by the lawmakers.²⁰ Although the legal responsibilities are depicted as the second layer on the pyramid, they are to be perceived as coexisting with the economic responsibilities as "fundamental precepts of the free enterprise system."²¹

[project/](#) (last visited Oct. 31, 2024).

¹¹ Archie B. Carroll, *Carroll's Pyramid of CSR: Taking Another Look*, 1 INT'L J. CORP. SOC. RESP., no. 3 (2016), <https://jcsr.springeropen.com/articles/10.1186/s40991-016-0004-6>.

¹² ILO, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISES AND SOCIAL POLICY (2023) [hereinafter ILO MNE Declaration], <https://www.ilo.org/publications/tripartite-declaration-principles-concerning-multinational-enterprises-and-3>.

¹³ John Ruggie (Special Representative of the Secretary-General), Hum. Rts. Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, (Mar. 21, 2011) [hereinafter UN GPs], <https://documents.un.org/doc/undoc/gen/g11/121/90/pdf/g1112190.pdf>.

¹⁴ Cf., ILO Helpdesk, *supra* note 2.

¹⁵ Carroll, *supra* note 12, at 6. This shift is visible in the regulatory initiatives of the European Union that are related to the green/just transition. See, e.g., Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting, 2022 O.J. (L 322/15); Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937, 2024 O.J. (L 1760).

¹⁶ Archie B. Carroll, *A Three-Dimensional Conceptual Model of Corporate Social Performance*, 4 ACAD. MGMT. REV. 497 (1979).

¹⁷ Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Reward the Moral Management of Organizational Stakeholders*, 34 BUS. HORIZONS 39 (1991).

¹⁸ Carroll, *Carroll's Pyramid of CSR*, *supra* note 12, at 4.

¹⁹ Carroll, *The Pyramid of Corporate Social Responsibility*, *supra* note 18, at 41; Carroll, *Carroll's Pyramid of CSR*, *supra* note 12, at 3.

²⁰ *Id.*

²¹ *Id.*

Ethical responsibilities, the third layer of the pyramid, embody norms and standards that are not codified. Carroll argues that enterprises are expected to conduct their business to conform to the concerns of stakeholders.²² These norms and standards can be the driving force behind the creation of laws and regulations.²³ CSR reporting and human rights due diligence expectations are examples of ethical standards formulated first as legally non-binding rules.²⁴ Some have since been codified in laws by several states, like France, Germany and Switzerland, and by the European Union in two directives.²⁵ Ethical responsibilities, thus, not only underpin legal responsibilities, but also they carry those responsibilities further to what stakeholders consider as their rights.²⁶ In addition, this connection implies that ethical, or universal, principles of moral philosophy, such as rights, justice, and utilitarianism, should inform and guide the business conduct of enterprises.²⁷ Philanthropy concerns the activities of enterprises that meet society's expectations that enterprises are good corporate citizens.²⁸ It is about enterprises wanting to do what is right for society, about "giving back."²⁹ However, often philanthropic activities are conducted not for altruistic reasons of giving back, but for reputational reasons. The distinction between this fourth layer and the third, ethical layer of the pyramid is that philanthropy is not necessarily expected in a moral or ethical sense: when an enterprise does not engage in philanthropic activities, society will not regard the enterprise as unethical.³⁰

With the pyramid presentation, it is tempting to regard the responsibilities in a hierarchical manner, with the layers building on each other. However, Carroll stressed that the pyramid should be viewed as an integrated, unified whole,



The International Labour Organisation headquarters in Geneva, Switzerland. Credit: diegograndi / stock.adobe.com

meaning that an enterprise "should strive to make a profit, obey the law, engage in ethical practices and be a good corporate citizen."³¹ Moreover, the ethical responsibility should be seen as a factor that "cuts through and saturates the entire pyramid."³² Regarding the economic responsibility, Carroll elaborates that the pyramid implicitly assumes a capitalist society in which it is "ethically appropriate that owners or shareholders merit a return on their investments."³³ Inevitably, this "ethical recognition" of profit-making for shareholders as a required responsibility for enterprises, leads to tensions and trade-offs between the economic responsibility on the one hand and the legal, ethical and philanthropic responsibilities on the other hand.³⁴

Although many business cases exist that show that approaching the pyramid as an integrated, unified whole benefits the enterprise's profits,³⁵ tensions between the responsibilities continue to exist.³⁶ This article argues that the liberal concept of the freedom to run a business,³⁷ which legally and ethically further drives an

22 Carroll, *A Three-Dimensional Conceptual Model*, *supra* note 17, at 500; Carroll's *Pyramid of CSR*, *supra* note 12, at 3.

23 Carroll, *The Pyramid of Corporate Social Responsibility*, *supra* note 18, at 41.

24 See, e.g., the ILO MNE Declaration; the UN GP; and the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct.

25 See note 16 for references to the EU directives.

26 Carroll, *Carroll's Pyramid of CSR*, *supra* note 12, at 3.

27 Carroll, *A Three-Dimensional Conceptual Model*, *supra* note 18, at 41; Carroll, *Carroll's Pyramid of CSR*, *supra* note 12, at 4.

28 Carroll, *A Three-Dimensional Conceptual Model*, *supra* note 18, at 42; Carroll, *Carroll's Pyramid of CSR*, *supra* note 12, at 4.

29 Carroll, *Carroll's Pyramid of CSR*, *supra* note 12, at 4.

30 Carroll, *A Three-Dimensional Conceptual Model*, *supra* note 18, at 42; Carroll, *Carroll's Pyramid of CSR*, *supra* note 12, at 4.

31 Carroll, *Carroll's Pyramid of CSR*, *supra* note 12, at 6 (referencing BUSINESS AND SOCIETY: ETHICS, SUSTAINABILITY AND STAKEHOLDER MANAGEMENT (Archie B. Carroll & Ann K. Buchholtz eds., 9th ed. 2015)).

32 Carroll, *Carroll's Pyramid of CSR*, *supra* note 12, at 5.

33 *Id.*

34 Carroll, *Carroll's Pyramid of CSR*, *supra* note 12, at 5-6.

35 Archie B. Carroll & Kareem M. Shabana, *The Business Cases for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT'L J. MGMT. REVS. 8 (2010); Elizabeth Kurucz, Barry Colbert & David Wheeler, *The Business Case for Corporate Social Responsibility*, in THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 83 (Andrew Crane *et al.* eds. 2008).

36 Carroll, *Carroll's Pyramid of CSR*, *supra* note 12, at 6.

37 Cf. Nicolas Bueno, *The Value of Work in Labour Law*, in LABOUR LAW UTOPIAS: POST-GROWTH AND POST-PRODUCTIVE WORK APPROACHES 116 (Nicolas Bueno, Beryl ter Haar & Nuna Zekic eds., 2024).

enterprise's preoccupation with profit-making for shareholders, is one of the reasons for the continuation of these tensions. More concretely, with these tensions present, the path of decent work will not be enough to realise a just transition that leaves no one in the world of work behind.

Freedom to run a business

The idea of the fundamental freedom to conduct a business dates back to the late eighteenth and mid-nineteenth century. The first two industrial revolutions ended the guild-system of protected labour and introduced wage labour, with the idea that everyone would be free to choose an occupation and change it when desired.³⁸ An example of this practice can be seen in France, which abolished its guild system with the Allarde Decree and the Le Chapelier Law (*loi Le Chapelier*), which enacted the freedom to pursue or exercise one's trade, profession, or business of craft.³⁹ Similar provisions can be found in many constitutions and statutory laws of the member states of the European Union (EU). These constitutions and laws have in common that the freedom to run a business is closely linked to the right to freely choose employment. In fact, in some legal systems, like the Netherlands, the freedom to run a business only exists through a constitutional provision that expresses the right to freely choose employment.⁴⁰

A similar formulation of the freedom to run a business can be found in human rights instruments. The International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR) includes the right to work,⁴¹ which has been interpreted by the expert committee monitoring the implementation of the ICESCR to include "all forms of work, whether independent work or dependant wage-paid work."⁴² To foster

the right to work, states are urged to "respect and protect self-employment, recommending such measures as increased incentives and subsidies for private businesses, support for setting up microbusinesses and vocational training, as well as assistance to marginalised groups for opening their own businesses."⁴³

The freedom to run a business is not absolute. The ICESCR, for example, requires states to undertake steps for the full realisation of the right to work, including full and productive employment, "under conditions safeguarding fundamental political and economic freedoms to the individual."⁴⁴ Those to be safeguarded as fundamental freedoms include "just and favourable conditions of work," such as fair wages, safe and healthy working conditions, equal opportunities and reasonable limitations of working hours and paid annual leave.⁴⁵ The Charter of Fundamental Rights of the European Union (hereinafter CFR), recognises the freedom to run a business "in accordance with Community law and national laws and practices."⁴⁶ Limitations of rights in general under the CFR must be provided for by law, and respect the essence of the rights and freedoms involved.⁴⁷ Limitations must be proportionate, necessary and genuinely meet objectives of general interest or the need to protect the rights and freedoms of others.⁴⁸

Such limitations to the freedom to run a business are also present in national legal systems, particularly those of EU member states. The Dutch Constitution, for example, requires the

Soc., and Cultural Rights, *General Comment No. 18 : Article 6 of the Covenant*, ¶ 6, U.N. Doc. E/C.12/GC/186 (Feb. 6, 2006).

⁴³ FRA, *supra* note 40, at 10 (citing U.N. Comm'n on Econ., Soc., and Cultural Rights, *Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant: Ukraine*, ¶ 6, U.N. Doc. E/C.12/UKR/CO/5 (Jan. 4, 2008); U.N. Comm'n on Econ., Soc., and Cultural Rights, *Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant: Cameroon*, ¶ 14, U.N. Doc. E/C.12/CMR/CO/2-3 (Jan. 23, 2012); U.N. Comm'n on Econ., Soc., and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Document submitted by the United Nations Interim Administration Mission in Kosovo (UNMIK)*, ¶ 37, U.N. Doc. E/C.12/UNK/CO/1 (Dec. 1, 2008).

⁴⁴ ICESCR, ¶ 2, art. 6.

⁴⁵ ICESCR, art. 7.

⁴⁶ Charter of Fundamental Rights of the European Union, art. 16, Oct. 26, 2012, O.J. (C326) [hereinafter CFR].

⁴⁷ CFR, art. 52(1). Those other rights and freedoms include the right to freedom from discrimination (CFR, art. 21), the right to information and consultation (CFR, art. 27), the right to collective bargaining and collective action (CFR, art. 28), and the right to fair and just working conditions, including paid annual leave (CFR, art. 31).

⁴⁸ FRA, *supra* note 40, at 21.

³⁸ ADAM SMITH, *THE WEALTH OF NATIONS* 201 (Penguin Classics 1999)(1776).

³⁹ EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA), *FREEDOM TO CONDUCT A BUSINESS: EXPLORING THE DIMENSIONS OF A FUNDAMENTAL RIGHT 25* (2015) [hereinafter FRA], <https://fra.europa.eu/en/publication/2015/freedom-conduct-business-exploring-dimensions-fundamental-right>.

⁴⁰ Gw. [Constitution] art. 19, sub. 3. See also Mijke Houwerzijl & Nuna Zekic, *Commentaar op artikel 19 van de Grondwet*, in *ARTIKELSGEWIJZ COMMENTAAR OP DE GRONDWET* (Ernst Hirsch Ballin & Gert-Jan Leenknecht eds., 2021), <https://www.nederlandsrechtstaat.nl/grondwet/inleiding-bij-hoofdstuk-1-grondrechten/artikel-19-werkgelegenheid-en-arbeidskeuze/>.

⁴¹ International Covenant on Economic, Social and Cultural Rights, art. 6(1), adopted Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

⁴² FRA, *supra* note 40, at 10 (quoting U.N. Comm'n on Econ.,

state to regulate in statutory laws the legal status and protection of working persons and rules concerning co-determination.⁴⁹ Moreover, in general many labour laws are accepted as necessary limitations of the freedom to run a business. In fact, this is true for most of the labour standards that have been set by the ILO, especially standards on maximum weekly working hours and safety-related regulations.⁵⁰

Viewed against Carroll's CSR pyramid, the freedom to run a business can be seen as a legal and ethical legitimization for an enterprise to conduct its business as it wishes. This freedom includes the economic responsibility to make profits, how to make those profits and what to do with those profits. However, this freedom also includes the legal responsibility to comply with the laws that limit the freedom to run a business,⁵¹ such as those regulating labour rights. As already mentioned above in section 2, there is a continuous tension between the economic responsibility on the one hand and the other three responsibilities, including the legal, on the other hand. A tension that leads often to grave and extensive non-compliance with labour standards; a situation that many labour law academics describe as a crisis.⁵² It is this tension, emphasised by the legal and ethical legitimization embedded in the liberal concept of the freedom to run a business, that leads to the argument that the path of decent work to ensure a just transition will not be enough.

The path of decent work to ensure a just transition by enterprises

To substantiate the argument that the path of decent work to ensure a just transition by enterprises will not be enough, it is necessary to get a better understanding of what this path entails for enterprises. The ILO 2015 Guidelines and 2023 Resolution are policy documents. That means that the statements and guidelines in

those instruments are strong in expressing what should be done, especially by governments, but weak in formulating concrete expectations for enterprises. The ILO 2015 Guidelines, for example, lists about sixteen activities, such as providing an enabling environment for sustainable enterprises, various forms of financial incentives, including fiscal and tax reforms, and providing information, advice and technical support.⁵³ With such activities, the ILO 2015 Guidelines give, at best, a somewhat abstract impression of what is expected of enterprises when dealing with the just transition.

The most concrete aspect of the ILO 2015 Guidelines are the international labour standards that are listed in the Annex and which "may be relevant to a just transition framework." Besides the conventions on the fundamental principles and rights at work,⁵⁴ the list includes the governance conventions, several technical conventions, a few recommendations and two resolutions. One of the resolutions is the Resolution Concerning the Promotion of Sustainable Enterprises, adopted in June 2007. Among its listed practices and principles, this resolution includes CSR and states that, "[s]ustainable enterprises can use CSR to complement their pursuit of sustainable strategies and outcomes."⁵⁵

To support enterprises, the ILO has established a Helpdesk on Business and a Just Transition.⁵⁶ The website of the Helpdesk states that enterprises can contribute to the just transition through "their business operations, corporate social responsibility and responsible business conduct programmes." Notably, they can ensure "that decent and productive work considerations are embedded in their climate and environmental actions and due diligence measures."⁵⁷ As for further guidance, the Helpdesk follows the

⁴⁹ GW. CONSTITUTION art. 19, sub. 2.

⁵⁰ FRA, *supra* note 40, at 34.

⁵¹ For an overview of this freedom within the context of the EU, see Nils Wahl, *The Freedom to Conduct a Business*, in *THE INTERNAL MARKET AND THE FUTURE OF EUROPEAN INTEGRATION: ESSAYS IN HONOUR OF LAURENCE W. GORMLEY* 273 (Fabian Amtenbrink et. al eds., 2019).

⁵² For an overview of this literature, see GUY DAVIDOV, A PURPOSEFUL APPROACH TO LABOUR LAW 2-3 (2016). For a more general treatment of the tension between economic and legal responsibilities from a labour law perspective, see ADRIAN TODOLI-SIGNES, LABOUR LAW AND ECONOMIC POLICY. HOW EMPLOYMENT RIGHTS IMPROVE THE ECONOMY (2024).

⁵³ ILO 2015 Guidelines, §§ 21-23.

⁵⁴ These conventions and fundamental principles include forced labour, child labour, equal treatment, social dialogue and collective bargaining, and since 2022, occupational safety and health. *Conventions, Protocols and Recommendations*, ILO <https://www.ilo.org/international-labour-standards/conventions-protocols-and-recommendations> (last visited Oct. 30, 2024).

⁵⁵ ILO, *Resolution Concerning the Promotion of Sustainable Enterprises*, § 13(5), Int'l Lab. Conf., 96th session (2007), [https://webapps.ilo.org/public/libdoc/ilo/P/09734/09734\(2007-96\).pdf](https://webapps.ilo.org/public/libdoc/ilo/P/09734/09734(2007-96).pdf).

⁵⁶ *Just Transition Towards Environmentally Sustainable Economies and Societies*, ILO, <https://www.ilo.org/topics/just-transition-towards-environmentally-sustainable-economies-and-societies> (last visited Oct. 30, 2024).

⁵⁷ ILO Helpdesk, *supra* note 2.

call in the ILO 2023 Resolution for an effective implementation of the MNE Declaration and the UN GPs.⁵⁸

The most concrete expectation these instruments formulate for enterprises is based on the Ruggie Framework of “Protect, Respect, and Remedy” that underpins the UNGPs. In this framework, enterprises are expected to respect human rights, which include the ILO fundamental rights. Respecting human rights means that enterprises are firstly expected to act in compliance with national laws. Secondly, enterprises are expected to comply with norms and morals that are defined by social expectations. As such, the expectation to respect moves beyond what is required legally (the second layer CSR pyramid), but also includes what is expected ethically (the third layer CSR pyramid).⁵⁹ More particularly, the expectation to respect human rights is formulated in the terms of “actual and potential adverse human rights impacts arising from a business enterprise’s own activities and from the relationships with third parties associated with those activities.”⁶⁰ This has become the core of human rights due diligence (HRDD),⁶¹ as well as the EU’s corporate sustainability due diligence.⁶² In brief, these forms of due diligence entail “identifying and addressing potential and actual adverse human rights and environmental impacts in the company’s own operations, their subsidiaries and, where related to their value chain(s), those of their business partners.”⁶³

Thus, the path of decent work to ensure a just transition means for enterprises two things:

⁵⁸ ILO 2023 Resolution § III.21.(i).

⁵⁹ JOHN G. RUGGIE, JUST BUSINESS: MULTINATION CORPORATIONS AND HUMAN RIGHTS 90 (2013).

⁶⁰ *Id.* at 97.

⁶¹ *Cf. Human Rights Due Diligence & Impact Assessment*, BUSINESS & HUMAN RIGHTS CENTRE, <https://www.business-humanrights.org/en/big-issues/governing-business-human-rights/human-rights-due-diligence-impact-assessment/> (last visited Oct. 30, 2024).

⁶² *Cf. Corporate Sustainability Due Diligence*, EUROPEAN COMMISSION, https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en (last visited Oct. 30, 2024).

⁶³ *Id.*

⁶⁴ LABOUR RIGHTS INDEX, <https://labourrightsindex.org/> (last visited Oct. 30, 2024).

⁶⁵ *Labour Rights Index in Context*, LABOUR RIGHTS INDEX <https://labourrightsindex.org/2024/labour-rights-index-in-context> (last visited Oct. 30, 2024).

⁶⁶ *Cf. Directive 2024/1760*, *supra* note 16, arts. 5 & 7.

comply with national laws and respect human rights through a due diligence process. With respect to the freedom to run a business, both these things are problematic. To respect national laws is only possible when such laws exist. However, the Labour Rights Index (LRI) shows that in many countries national labour laws barely meet the requirements of the ILO labour standards.⁶⁴ In other words, many national labour law systems are far from ensuring decent work and this is even worse when the LRI scores are put in context with other relevant legal aspects, such as the regulation of enforcement from the Rule of Law Index of the World Justice Project.⁶⁵ Effectively, this means that when enterprises respect only the national legislation of the countries in which their business activities take place, decent work as expressed in the ILO’s labour standards are not ensured at all.

"Second, the due diligence process is a form of risk management.⁶⁶ Effectively, this means that enterprises are not required to change the way they run their business at a substantive level."

Instead, enterprises can run their business as normal and only need to adjust those activities that have an adverse impact.⁶⁷ In other words, instead of a positive obligation (or expectation) on enterprises to fundamentally adjust their business conduct to run a “good” business, due diligence formulates a negative obligation (or expectation) on enterprises to correct the “bad” parts of the business operations, when such is identified through the due diligence process. Furthermore, as far as the purpose of due diligence⁶⁸ is to fundamentally change the way in which an enterprise conducts its business, to what extent such a change will include the substantive aspects that will be needed to ensure a just transition is questionable, since the regulation of due diligence is limited to its procedural aspects. Even the EU’s directive on corporate sustainability due diligence follows Ruggie’s approach not to impose substantive legal requirements on enterprises, other than the widely accepted social expectations that

⁶⁷ *Cf. id.* arts 8 & 9.

⁶⁸ Labour law and business logics lead to different interpretations of the purpose of due diligence. *Cf.* INGRID LANDAU, HUMAN RIGHTS DUE DILIGENCE AND LABOUR GOVERNANCE 66 (2023).

internationally recognised human rights should not be infringed.⁶⁹ Whether enterprises should also comply with other standards depends on the circumstances. Since compliance with more than internationally recognised human rights standards will be needed to ensure a just transition, like the right for workers to up- or re-skill or just conditions for remote working, it leaves these substantive aspects up to what societal morals and norms (ethically) expect from enterprises.

The discussion above illustrates that the path of decent work is rather limited, (i.e., existence of decent work in national jurisdictions enterprises have to comply with) and vague (i.e., what international standards to comply with beyond internationally recognised human rights) in what it expects from enterprises. Placed in the context of Carroll's CSR pyramid, the path of decent work falls even more short because the limited legal requirements and vague ethical expectations need to be balanced with the enterprise's economic requirements. As pointed out in section 3, the already relatively strong(er) economic requirements are enhanced by the overall ethical expectation to respect the freedom to run a business, which is also a legal CSR requirement to be complied with. Therefore, I argue that reciprocal obligations to the freedom to run a business are needed in addition to the path of decent work to ensure a just transition leaving no one in the world of work behind.

The principles of care and non-extractiveness as reciprocal obligations to the freedom to run a business

The idea to introduce reciprocal obligations to the freedom to run a business is inspired by a number of academic ideas.⁷⁰ More concretely, it is based on the simple idea that freedoms come with responsibilities. Responsibilities that can also be formulated as obligations. In her ILO Future of Work Research paper, Méda introduced such an obligation for enterprises, namely to *care for* and *care about* our natural heritage, social cohesiveness and human labour.⁷¹ Méda seems to have based this idea on an extensive interpretation of care as developed by the Care Collective: "*caring for*

which includes the physical aspects of hands-on care, *caring about*, which describes our emotional investment in and attachment to others, and *caring with*, which describes how we mobilise politically in order to transform our world."⁷² Most interestingly, the Care Collective proposed to use this broad understanding of care as the organisational principle of any society, putting it in front and at the centre of every aspect of life.⁷³ As an organisational principle, this extensive interpretation of care could also be applied to any business activity. Hence, it could function as a reciprocal obligation to the freedom to run a business, meaning that enterprises are free to conduct their business as they want, as long as this conduct is in compliance with the principle of care. In the context of work, aspects of the principle of care could be the organisation of work activities in the spirit of and in compliance with labour rights and ILO's decent work labour standards.⁷⁴

The principle of care could be considered as a positive obligation that enterprises should enable and foster when conducting their business. The principle of non-extractiveness could be considered as its negative counterpart, indicating what enterprises should refrain from when conducting their business. The principle of non-extractiveness is derived from the idea of a non-extractive economy, which rejects extracting ever more unpaid energy, resources, money, personal data, labour, health and well-being from people and from places.⁷⁵ Translated to the context of work, this principle means that the manner in which the enterprise conducts its business should not be exploitative of its workers. Business conduct is non-exploitative (or non-extractive), when it is conducted in compliance with human rights and the ILO's decent work

⁶⁹ RUGGIE, JUST BUSINESS, *supra* note 60, at 96. Regarding EU Directive 2024/1760, *supra* note 16, see its Annex, which refers in part I to 1) rights and prohibitions included in international human rights instruments and 2) human rights and fundamental freedom instruments.

⁷⁰ See Carroll, *Carroll's Pyramid of CSR*, *supra* note 12.

⁷¹ Méda, *The Future of Work*, *supra* note 11, at 24.

⁷² CARE COLLECTIVE (ANDREAS CHATZIDAKIS ET AL.), THE CARE MANIFESTO: THE POLITICS OF INTERDEPENDENCE 21 (2020) (emphasis added) (citing JOAN TRONTO, CARING DEMOCRACY: MARKETS, EQUALITY, JUSTICE (2013); Tronto introduced the term *caring with*).

⁷³ CARE COLLECTIVE (ANDREAS CHATZIDAKIS ET AL.), THE CARE MANIFESTO: THE POLITICS OF INTERDEPENDENCE (2020).

⁷⁴ For elaboration of the principle of care in relation to work and the freedom to run a business, see Beryl ter Haar, *Industry 4.0 + Industry 5.0 = Happy Marriage Between Humans and Technology*, 17 ITALIAN LABOUR LAW E-JOURNAL, no.15 (SPECIAL ISSUE), 2024; Beryl ter Haar, *The Freedom to Conduct a Business, a Care Paradigm, and Industry 5.0 as Pathways for Compliance with Labour Rights in Global Value Chains*, Working Paper Presented at the 10th ILERA Regional Conference, Livingstone, Zambia (Apr. 4, 2024).

⁷⁵ Kinanya Pijl, *From an Extractive to a Non-Extractive Economy: Disentangling the Building Blocks of Non-Extractive Economic Practices*, 15 INT'L & COMP. CORP. L.J. 13 (2022).

labour standards.⁷⁶

Of course, these principles need to be further worked out to be operational. However, for the argument in this article, it suffices because it illustrates how these principles, as reciprocal obligations to the freedom to run a business, will force enterprises to fundamentally change how they conduct their business activities. The principles will force enterprises to design their business conduct in compliance with, among other things, human rights and the ILO's decent work labour standards, rather than adjusting the business conduct to only identify adverse impacts of the enterprise's activities.

The effect of these principles as reciprocal obligations to the freedom to run a business will also change the balancing exercise between the responsibilities of the CSR pyramid. Instead of enforcing the economic responsibilities of an enterprise, the principles will enhance the legal and ethical responsibilities of the enterprise in conducting its business. This is the result because the scope of the freedom to run a business is then determined by those legal and ethical responsibilities, like respecting human rights and the ILO's decent work labour standards, instead of the current pure economic drivers, like profit-making for a small group of shareholders above anything else.

The principles of care and non-extractiveness as reciprocal obligations to the freedom to run a business will fundamentally alter how enterprises deal with human rights and the ILO's decent work labour standards when conducting their business. Consequently, thanks to these principles, it will also be more likely that the path of decent work will ensure that no one in the world of work is left behind in the just transition.

⁷⁶ See generally Carroll, *Carroll's Pyramid of CSR*, *supra* note 12.



Credit: Roxane Florin

THE RIGHTS OF WASTEPICKERS IN A CIRCULAR ECONOMY

A Conversation With Tania Espinosa Sánchez



Tania Espinosa Sánchez

Tania Espinosa Sánchez holds a Master's degree in International Legal Studies from the Fletcher School of Law and Diplomacy, Tufts University, and a Bachelor's degree in Law from the Universidad Iberoamericana in Mexico. Since 2015, she has worked at Women in Informal Employment Globalizing and Organizing (WIEGO), where she is currently the Latin America Coordinator for Law Programme. She has been a member of the Honorary Board of the National Human Rights Commission of Mexico. Since 2016, she has been a member of the Honorary Board of the Human Rights Commission of Mexico City.

Cassandra Waters: Can you explain the concept of the circular economy?

Tania Espinosa Sánchez: The products that companies generate are put on the market, consumed by people and then waste is generated from that consumption. The idea of the circular economy is that instead of that waste being discarded and ending up in a rubbish dump, that waste is selected and recycled or reintegrated into the value or production chain of the company that generated it. For example, if Coca-Cola puts a bottle in a supermarket and then it is consumed, instead of that bottle ending up in a landfill, it should go back to Coca-Cola and be reused. This reduces the amount of waste that companies generate, and reduces the impact on the environment, taking into account that the packaging, bottles, etc., that large companies use for their products generate an environmental impact, and the companies do not always take responsibility for that impact.

CW: What is the role of waste pickers and their contribution to caring for the environment?

TE: What waste pickers do, in the face of inefficient waste management systems on the part of governments, is replace this absence of government roles with their work. They get involved in segregation at different stages of waste management. One can be waste collection, and that can be at home, in the streets, or in companies, it can be in different places because the government does not have the capacity to do that collection or collects without segregating the waste. At the same time, companies, in general, do not have circular models. This is also why many grassroots recyclers work at the final destination of the waste, in landfills, because that is where many recyclable materials are found that were not segregated at the source or in collection.

As a livelihood activity, waste pickers sort recyclable materials from the rubbish and sell them to the recycling industry. As a result, the materials are reinserted into the appropriate value chains, the plastic value chain, the cardboard value chain, and so on. And these materials can be reused. This means that, on the one hand, waste pickers play the role of environmental managers within the waste management systems, a role that governments should have. On the other hand, they cover the environmental responsibility of companies to recover the waste they put on the market and reinsert it into the value chain. Through their work, they play an important role in mitigating climate change by reducing carbon and methane emissions. By returning this waste to value chains, fewer natural resources are used to re-generate those boxes or bottles. Also, by segregating waste, the amount that is buried at a final destination is reduced. Additionally, it reduces the government's costs for transporting waste and saves energy for waste processing. This is why waste pickers are environmental heroes and heroines.

CW: What are the responsibilities of the state under international law in terms of the rights of waste pickers?

TE: Governments must recognise waste pickers as workers. Without recognition, waste pickers do essential work to keep communities healthy at a very high cost, working in extremely precarious conditions and without any rights. They are taking on responsibility for waste management, which the state should have, and they are generating environmental and health contributions that are indispensable for societies to continue to function. Meanwhile, waste pickers generally live in poverty and do their work without adequate tools, equipment, and protection for their health and well-being. If they were recognised as workers, all the benefits that come from work would follow, such as decent working conditions and social protection benefits.

CW: And there are international standards that support this, right?

TE: Yes, international human rights law is very clear through, for example, the International Covenant on Economic, Social and Cultural Rights;¹ the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights;² and ILO Recommendation 204 on the transition from the informal to formal economy.³ When one reviews the right to work and the right to social security, these instruments do not make a distinction between formality and informality. In other words, if waste pickers work in informal employment, international law says this is not an excuse for them not to have the right to work guaranteed, as well as all labour rights, both individual and collective. The right to social security is not even linked to the right to work, they are independent of each other. Therefore, waste pickers should have access to social security.

In fact, the United Nations Committee on Economic, Social and Cultural Rights concluded that States must respect the right to work by refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, such as those working in informal employment in subsistence activities.⁴ The Special Rapporteur on Economic, Social, Cultural, and Environmental Rights (REDESCA) of the Inter-American Commission on Human Rights has urged states to guarantee the right to work and social protection to waste pickers.⁵ States should guarantee their recognition as workers and access to labour rights, decent working conditions and social security, so that their conditions can improve. Similarly, the Inter-American Court of Human Rights, in *Buzos Miskitos v. Honduras*,⁶ found that the absence of social security in the context of informal employment is discriminatory.

¹ Int'l. Covenant on Econ., Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (1966)

² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Nov. 17, 1988)

³ INT'L LAB. ORG (ILO) Recommendation 204 on Transition from the Informal to the Formal Economy (2015) https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204

⁴ UNITED NATIONS COMM. ON ECON., SOCIAL AND CULTURAL RIGHTS, General Comment No. 18: The Right to Work, E/C.12/GC/18 ¶ 23 (Feb. 6, 2006)

⁵ INTER-AMERICAN COMM. OF HUMAN RIGHTS, Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights, Press Release, *REDESCA de la CIDH llama a avanzar en el reconocimiento y protección de los derechos de las personas recicladoras en empleo informal en la región* (May 1, 2023) <https://www.oas.org/es/CIDH/jsForm/?File=/es/cidh/prensa/comunicados/2023/082.asp>

⁶ Inter-American Court of Human Rights, Case of the Miskito Divers, *Lemoth Morris et al v. Honduras* (August 31, 2021) https://www.corteidh.or.cr/docs/casos/articulos/seriec_432_ing.pdf ("Case of the Miskito Divers"); See also UNITED NATIONS COMM. ON ECON., SOCIAL AND CULTURAL RIGHTS, General Comment No. 19: the Right to Social Security, E/C.12/GC/19 ¶ 31 (Feb. 4, 2008) <https://www.refworld.org/es/leg/coment/cescr/2008/es/41968>

CW: What are the responsibilities of companies?

TE: The State has a duty to protect against human rights violations committed by companies in its territory, reflected at the international level in the Ruggie Principles⁷ and at the Inter-American level in the jurisprudence of the Inter-American Court.⁸ Companies must have due diligence processes in place to identify and prevent human rights violations, guarantee decent work, and establish reparation processes, especially when it comes to people living in poverty.

States often privatise waste management and contract companies to carry out this management. These companies displace the waste pickers, who are the ones who have been doing waste management for decades, and who know how to do it. But because they are not recognised as workers, and governments prefer to privatise these services, waste pickers are displaced and left without a livelihood. This generates a completely unequal conflict over waste because waste pickers do not have the capital that private companies have to provide the same services.

Companies must ensure that their activities do not result in human rights violations. Therefore, it is important that they carry out social impact assessments to know the specific impact their projects will have on the lives of waste pickers. This would also generate labour alternatives and design just transition models. While moving towards circular and extended producer responsibility models that are more environmentally friendly, it is essential to include the most vulnerable workers rather than just displacing and disappearing them.

Private waste management systems, circular economy and extended producer responsibility schemes must include waste pickers rather than displace them and guarantee decent working conditions and social security. Companies do not act alone; companies act with the permission of governments. So, if a company commits human rights violations, there should be international responsibility for the State where the company is located.

CW: Have you seen legal and policy advances in incorporating waste pickers and creating circular economies?

TE: Yes, there has been progress. For example, in Buenos Aires, Argentina, after a very strong social movement on the part of the waste pickers, the *cartoneros*, the Zero Waste Law was passed. This law officially integrates and prioritizes urban waste pickers into the differentiated public waste collection circuit.⁹ It also establishes credit lines and subsidies for their cooperatives. This is related to a very strong social struggle and organisation of workers, where they refused to receive less than what they are entitled to in terms of their rights and the dignity of their work.

In Brazil, the National Solid Waste Policy recognises the role of waste pickers in the waste management system and establishes reverse logistics, which is a model of extended producer responsibility.¹⁰ Companies must integrate cooperatives into recycling plans as service providers,

⁷ United Nations Guiding Principles on Business and Human Rights ("Ruggie Principles"), HR/PUB/11/04 (2011) https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

⁸ Inter-American Court of Human Rights, *Pueblos Kallina y Lokono vs. Surinam* ¶ 224 (Nov. 25, 2015) https://www.corteidh.or.cr/docs/casos/articulos/seriec_309_esp.pdf; Case of the Miskito Divers *supra* note 6 ¶ 46

⁹ Ley 1854 [Law 1854] Legislatura de la Ciudad Autónoma de Buenos Aires [Legislature of the City of Buenos Aires, Arg.] (2005) <https://boletinoficial.buenosaires.gob.ar/normativaba/norma/81508>; See also CITY OF BUENOS AIRES, Basura Cero [Zero Garbage] (last visited Dec. 21, 2024) https://buenosaires.gob.ar/areas/med_ambiente/basura_cero/?menu_id=30973

¹⁰ Lei. No. 12.305 [Law No. 12.305] (Braz.) (Aug. 2, 2010) https://www.planalto.gov.br/ccivil_03/_ato2007-2010/2010/lei/l12305.htm; See also Sonia Dias, International Alliance of Waste Pickers, *Extended*

and they developed sectoral agreements with the industry, which made it easier for cooperatives to have the infrastructure to work and sell recyclables to the industry. It is not a perfect model, but it establishes an agreement between the parties and waste pickers have a place at the table to negotiate with the government and with companies about their own working conditions. I would add that the *Movimento Nacional dos Catadores de Materiais Recicláveis* (National Association of Waste Pickers of Recyclable Materials) is one of the most articulate social movements of waste pickers in Latin America.

Colombia is another example where progress has been made regarding the rights of waste pickers through Constitutional Court rulings, arising from the waste pickers' demand for the recognition of their rights. In a 2009 ruling, waste pickers were determined to be marginalized workers entitled to special protection, recognized as public service providers and given priority access to waste.¹¹ A follow-up court order established their right to remuneration for the provision of their services.¹² Recently, the national government passed Decree 1381, which formally recognizes and protects waste picking activities and waste picker organisations.¹³ This is the result of decades of waste picker organisation and social struggle.

CW: What are the challenges to achieving a fair and sustainable system?

TE: It seems to me that the challenges are mainly in this lack of recognition. There are cities like Mexico City, where the public waste management service appears to work well. However, when one studies the details of how the system functions, there are several places where waste pickers exist without any rights, even when they work within the public service. There are other examples where they are not in the public service, but they provide services and are persecuted. We have cases where they are expelled from the dumps without any alternatives, beaten by the police, and imprisoned.

In short, the patterns of precariousness are variable, which is why I believe that the greatest challenge lies in their recognition. If States were to recognise waste pickers for the work they have been doing historically and for the positive contributions they have made to society, the environment, and the economy, policies on issues such as waste management, circular economy, and extended producer responsibility would have a different vision, one related to improving working conditions in this occupation. Waste pickers would be included in waste policies, and their recycling skills and capacity would be strengthened instead of being replaced by private companies or machines. With this inclusion, there would also be a vision of affirmative action to level the playing field so that waste pickers can grow in the recycling value chain. They could move to occupy more privileged positions rather than being destined to be subsistence workers forever.

Another challenge is to guarantee access to recyclables in the public and private sphere. The government should give waste pickers their rightful place in waste management systems and ensure they are explicitly and clearly included in the law. Companies should include them within the circular economy and extended producer responsibility models, with funding from companies and governments so that they have the working equipment and infrastructure to carry out the work

Producers Responsibility and Inclusion: Brazil's Extended Producer Responsibility and its Interface with Waste Pickers (April 2021) <https://globalrec.org/2021/04/09/extended-producers-responsibility-inclusion-waste-pickers-in-brazil/>

¹¹ Corte Constitucional [Constitutional Court] Sentencia T-291/09 (Colom.) (April 23, 2009) <https://www.corteconstitucional.gov.co/relatoria/2009/t-291-09.htm>; See also Federico Parra, Women in Informal Employment Organising and Globalising (WIEGO), *Reciclaje: ¡Sí, pero con recicladores! Gestión pública del aprovechamiento con inclusión de recicladores: Un nuevo paradigma en el manejo de los residuos en Bogotá*, Colombia (February 2015) <https://www.wiego.org/wp-content/uploads/2019/09/Parra-reciclaje-recicladores-WIEGO-WP9-espanol.pdf>

¹² Corte Constitucional [Constitutional Court] A275-11 (Colom.) (2011) <https://www.corteconstitucional.gov.co/relatoria/autos/2011/a275-11.htm>

¹³ Decreto 1381 de 2024 Ministerio de Vivienda, Ciudad y Territorio [Ministry of Ministry of Housing, City and Territory] (Colom.) (Nov. 14, 2024) <https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=256236>

they already know how to do. This should be accompanied by decent working conditions and social security.

The UN plastics treaty is key to achieving all of the above and reflects the will of governments, companies, and waste pickers, who participate through the International Alliance of Waste Pickers and Recyclers, in the negotiations.

It is a challenge because there is a disparity in power and resources between governments, big business, and waste pickers. At the same time, there are organisations and allies, especially from the environmental and human rights movement, who support the inclusion of waste pickers in the treaty as the first and most vulnerable link in the recycling process. Given that plastic generates a great deal of global pollution, the role of waste pickers is fundamental. Waste picking generates less pollution than industrial recycling, in addition to its social component.

CW: Can you tell me a bit more about these treaty negotiations? Is the inclusion of the waste picker rights controversial?

TE: I am not directly involved in the negotiations, but from what I know, it has been difficult to get specific recognition of waste pickers. Governments tend to speak simply of “recyclers,” and that is very dangerous. Within the scope of that term are people who are extremely poor doing subsistence work and companies with a lot of resources. We are talking about different entities in radically different situations, and with very different motivations. The public policies that should be designed for these different types of people or companies should also be completely different. It must be clear in the treaty that waste pickers are the first link in the recycling chain and also the most vulnerable, the poorest. Waste pickers are more likely to be excluded from doing their subsistence work and have specific social conditions that need to be considered. Public policies need to guarantee their inclusion, capacity building, and decent working conditions; as well as the possibility to grow within the recycling industry where they have always worked.

Failure to specifically include waste pickers and their work would obscure the poverty and the injustice in which they have historically worked and the obligation that states and companies have towards them. It is therefore essential that they are explicitly recognized and protected in the treaty.

CW: Are there other issues that you think should be taken into account?

TE: The text of the treaty is not yet finalised, but the last time I read a draft, it included the concept that countries would establish circular economic systems at the national level. It is key that waste pickers and their organisations have a place at the table, to ensure their inclusion in the circular economy and to create the right conditions for that inclusion and their work. This will be a new opportunity for the State and businesses to comply with international human rights law. It would be a paradigm shift in the way States have treated waste pickers in practice, disregarding the obligations under international law to protect their right to work, decent working conditions, and social security.

CW: What should the trade union movement and especially trade union lawyers do to support the rights of waste pickers?

TE: I believe that, in the context of the Plastics Treaty, a milestone is the creation of the International Alliance of Waste Pickers and Recyclers,¹⁴ which is the first global union of waste pickers. They held their elective congress in Buenos Aires in May this year. A Brazilian comrade, Severino Lima Jr., is the president of the Alliance, a historic catador from the national movement. The creation of a global union shows the magnitude of the importance of the work of waste pickers globally and makes it clear that worldwide they are not being treated fairly by governments or recognised as workers. So, it is a strategy from this sector to try to address this power imbalance at the negotiating table, with the government and with the industry. For me, it is an example of how the trade union movement fulfils its role in defending the rights of the most vulnerable workers.

I believe that the role of the trade union movement should be to support the International Alliance of Waste Pickers and stand in solidarity with their cause, globally and locally. It is the essence of the trade union movement that what touches one, touches all. If governments are allowed to disregard the rights of waste pickers, they are allowed to do the same to any other worker in any other sector at any time. That is why it is essential that this solidarity be generated with the new waste pickers union.

There is an urgent need for the trade union movement to include migrants, workers in informal employment, and people in work arrangements other than traditional, formal employment, such as self-employed people, traders in public spaces, and shoe cleaners, among other occupations. These workers find it difficult to be included in traditional trade unions that are focused on the formal economy. Worldwide, at least half of people working fall outside formal employment, so solidarity is very necessary.

¹⁴ Int. Alliance of Waste Pickers and Recyclers, <https://globalrec.org/es/>

LABOUR LAW AND CLIMATE POLICY IN THE UNITED STATES: THE IMPACT OF THE BIDEN ADMINISTRATION'S INVESTMENT AGENDA

DAMON SILVERS¹

United States | Originally written in English

More than 35 years after the world's scientific community reached a consensus that human-caused climate change was a reality, the science and the lived experience of climate change should drive an extraordinary urgency. The world remains on track to reach or exceed 3 degrees Celsius of global warming. This means we are rapidly approaching a point of no return on a journey to a radically different and fundamentally more hostile world to human beings. That is the message of the most recent United Nations (UN) Intergovernmental Panel on Climate Change (IPCC) reports summarizing what we know about human caused climate change. Just three projections from the IPCC should tell us why 3 degrees of warming is intolerable: (1) 3 degrees means 1 billion climate refugees—from rising seas, drought, and simple heat. (2) 3 degrees means sea level rise of 1-2 metres by the end of the century—inundating major cities and fertile river deltas. (3) 3 degrees means a 50% cut in tropical food production—threatening large scale famine and conflict over food.²

The levels of human suffering implied in these projections is hard to imagine, but the real danger is not from the environment directly, but from the consequences of these kinds of stressors on the global political and economic system—the potential for both large-scale conflict and political and economic collapse.

¹ The views expressed herein are solely Professor Silvers' personal opinions and do not represent the views of any organization. He wishes to thank Felix Barbieri for his research assistance with this article.

² Intergovernmental Panel on Climate Change, Climate Change 2023: Synthesis Report, Summary for Policymakers (Core Writing Team et al eds., 2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf.

But there is reason for hope. Success in the fight against climate change is possible, and it will not require perfection. The whole point of the UN's heroic efforts to understand human-caused climate change is that we can achieve climate stability without wholly eliminating carbon emissions immediately—which is an impossible task. We need large-scale reductions immediately, and we need to focus our efforts on the large-scale systems that drive carbon emissions globally.

As Mariana Mazzucatto and I argue in a recent piece in *Foreign Affairs*, the events of the last two years show that to fight climate change a fundamental rethink of the relationship between workers, firms and governments is urgently needed—one that in many respects draws on the kind of collaboration and conscious market shaping that has in the past been associated with wartime or with state projects like the Apollo space program or the events portrayed in the movie *Oppenheimer*.³

Working people—and specifically people who work in the construction, manufacturing, and engineering sectors that are at the core of what must be done to fight climate change—must be at the centre of our efforts as a global community. The reason the relationship between labour and the state is at the heart of whether it will be possible to execute effective climate policies is rooted in the nature of climate change as a problem. Much like war, climate change is completely unsuited to market solutions—this

³ Mariana Mazzucatto & Damon Silvers, *How to Make the Green Economy a Just Economy*, FOREIGN AFFS. (Jan. 24, 2024), <https://www.foreignaffairs.com/united-states/how-make-green-economy-just-economy>.

can be shown conceptually, by looking at the implications of climate change's nature as a long term externality, and it can be shown historically, through the record of decades of failed efforts to look to markets and nudges, even strong nudges like tax policy, to solve the problem.

To have an actually effective effort to bring climate change under control requires a far more robust role for the state, a rethinking of corporate finance and corporate governance to be more long term and more focused on the firm as a nexus of investment, and a true integration of working people and their unions into the decision-making processes of the political economy. Only these steps can support the level of scale and speed of investment and technological change that are needed. And this approach requires the political engagement and support of working people to have any chance of success.

This brings us to the question of the approach to workers' rights in the context of climate change in the United States— one of the world's most powerful nation-states where political conflict around climate change is most intense.

U.S. Labour Law Background

To understand how U.S. climate policy and U.S. labour law interact, one must begin with the background state of U.S. labour law. U.S. labour law is among the weakest in the developed world. While the National Labor Relations Act formally protects private sector workers' right to organize and collectively bargain, in reality since 1980 it has largely been possible for employers to (1) retaliate against workers for organizing by firing them or closing their workplaces, (2) refuse to engage in meaningful collective bargaining with workers if they are organized, and (3) treat employees as if they were independent contractors and thus had no workplace rights at all—with few if any legal consequences.⁴

⁴ CAMBRIDGE HANDBOOK OF LABOR LAW FOR THE TWENTY-FIRST CENTURY (Richard Bales & Charlotte Gardens eds., 2020); Percy David Metcalfe, *Labor Law in America: Facing Up to a Rule of Law Deficit*, GEO. J. POVERTY LAW & PUB. POL'Y: BLOG (Apr. 17, 2023), <https://www.law.georgetown.edu/poverty-journal/blog/labor-law-in-america-facing-up-to-a-rule-of-law-deficit/>; Dorothy Singletary, *U.S. Labor Unions Are Having A Moment*, AM. CONST. SOC'Y: EXPERT F. (May 22, 2024), <https://www.acslaw.org/>

The reality of private sector labour law in the United States makes it very difficult for new organizing to occur and thus for labour standards to be maintained through periods of economic or technological change. This background situation, and the resulting lived experience of working people in recent periods of economic and technological change, is a major obstacle to working people supporting any process of technological change in the U.S.

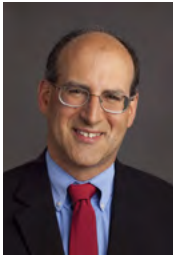
In the public sector, U.S. workers face a bifurcated legal order. In the federal government and in the states of the Northeast, Midwest, and Pacific Coast, public sector workers largely enjoy a real right to organize and collectively bargain and meaningful workplace protections. In the states of the South, Southwest, and Great Plains, public sector workers generally have few workplace rights and in a number of states are legally barred from collectively bargaining with their employers. Public sector labour law in these areas is not in compliance with ILO Core Conventions not just in terms of the reality, as is also true in the U.S. private sector, but formally as well.⁵ This structure means that absent specific legislative or regulatory provisions in U.S. climate legislation, workers involved in decarbonizing the U.S. economy will be in one of these three labour law regimes and most likely will be subject to the general downward pressure on wages and benefits that have characterized U.S. labour markets since 1970.⁶ As a general matter, U.S. workers in new firms and in new industries are less likely to be organized than in older firms and industries, less likely to have benefits such as quality health care and real pensions, and less likely to even be treated as statutory employees by their employers.⁷

expertforum/u-s-labor-unions-are-having-a-moment/.

⁵ David Weissbrodt & Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842 (2013); LANCE COMPA, UNFAIR ADVANTAGE (2000).

⁶ Lawrence Mishel, *Policy Decisions' Role in Wage Suppression and Inequality*, THE GREAT POLARIZATION 191 (2022).

⁷ Compare unionization in the US auto industry. The Big Three U.S. firms, all founded before 1940, remain completely unionized, and, until the 2008 restructurings, all provided defined benefit pension plans. The foreign transplants, organized beginning in the 1980's, are majority non-union, as is Tesla, the only major US auto manufacturer established since 1980. The non-union firms provide 401(k)



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These characteristics of the US labour law regime are formidable obstacles to working people and their unions supporting aggressive action on climate change and the economic and technological transformations required for effective action on climate change.

The Biden Administration's public investment legislation did not create a new labour law system for the transition to a low carbon economy—but in a variety of complicated ways it did four important things.

First, it funded climate related construction projects on a huge scale and did so under the jurisdiction of the wage and benefit regulations that had applied to previous large scale U.S. infrastructure projects, including the interstate highway system, known as the Davis-Bacon Act.⁸ This system also acts as an incentive to collective bargaining in the construction sector because of the superior training programs run by U.S. construction unions and their impact on the productivity of the unionized construction workforce.⁹

Second, the Biden investment program applied "Buy America" rules to this economy within the economy—shielding supply chains to climate change related projects from global wage competition to some degree.¹⁰

Third, in various ways it created modest pressures and incentives in the growing clean energy economy for employers to pay prevailing wages, to invest in worker training, and to engage with workers and their unions in crafting 21st century U.S. industrial policy.¹¹

savings plans rather than pensions and have a track record of being significantly staffed by long-term temporary workers. Compare UNITED AUTO WORKERS, THE 2024 UAW UNION-BUILT VEHICLE GUIDE (2024), <https://uaw.org/wp-content/uploads/2024/02/Vehicle-Guide-Spread-2024.pdf> (showing 2024 union-made vehicles), with Press Release, Nat'l Right to Work Comm., 'Made in U.S. Cars & Trucks Made Union-Free' (Apr. 16, 2018) (discussing union-free auto manufacturing). See also Morning Edition, *UAW Criticizes Nissan for Use of Perma-Temps*, NPR, at 05:07 (Feb. 10, 2015), <https://www.npr.org/2015/02/10/385138846/uaw-criticizes-nissan-for-use-of-perma-temps>.

⁸ 40 U.S.C § 3141 (2018).

⁹ Robert W. Glover & Cihan Bilginsoy, *Registered Apprenticeship Training in the US Construction Industry*, 47 EDUCATION + TRAINING 337 (2005).

¹⁰ Inflation Reduction Act of 2022, Pub. L. 117-169, 136 Stat. 1818; , Build America, Buy America Act, Pub. L. 117-58, 135 Stat. 429 (2021); . CHIPS Act, Pub. L. 117-167, 136 Stat. 1366 (2022).

¹¹ Inflation Reduction Act of 2022, Pub. L. 117-169, 136



A maintenance engineer at a wind turbine farm.
Credit: VIEWFOTO STUDIO / stock.adobe.com

Finally, while Biden's public investment bills did not create an explicit transition plan like that of the German Coal Deal, which provided 80 billion Euros in job-creating investments to Germany's coal regions, the bills did create economic development funds for energy-dependent regions at a scale that offered some hope of being able to preserve regional economies in areas dependent on coal, oil and natural gas.¹²

It is worth noting that by contrast, in the Second World War, the U.S. government mandated that all defence contractors— accounting for roughly 50% of GDP at the height of the war—collectively bargain with their workers and their workers' unions.¹³ No such provision applies in the U.S. to workers involved in the fight against climate change, and efforts to include the concept of collective bargaining as a requirement of federal support was blocked in the course of 2021 and 2022 by Congressional Republicans in coalition with right wing Democratic Senators Manchin and Sinema.¹⁴

Stat. 1818; Research and Development, Competition, and Innovation Act., Pub. L. 117-167, 136 Stat. 1366 (2022).

¹² Guri Bang et al., *Balancing Cost and Justice Concerns in the Energy Transition: Comparing Coal Phase-Out Policies in Germany and the UK*, 22 CLIMATE POLICY 1000 (2022); AGORA ENERGIEWENDE & AURORA ENERGY RESEARCH, THE GERMAN COAL COMMISSION: A ROADMAP FOR A JUST TRANSITION FROM COAL TO RENEWABLES (2019), https://www.agora-energiawende.de/fileadmin/Projekte/2019/Kohlekommission_Ergebnisse/168_Kohlekommission_EN.pdf; Inflation Reduction Act of 2022, Pub. L. 117-169, 136 Stat. 1818, § 13101 (provision relating to "Energy Communities").

¹³ Exec. Order No. 9017, 7 Fed. Reg. 237 (Jan. 12, 1942).

¹⁴ Richard Luscombe, *Joe Manchin and Kyrsten Sinema: The Centrists Blocking Biden's Agenda*, GUARDIAN (Oct. 3, 2021), <https://www.theguardian.com/us-news/2021/oct/03/joe-manchin-kyrsten-sinema-democrats-biden>.

However, the Biden Administration has adopted a policy of supporting workers' right to organize and collectively bargain throughout the economy, and particularly in sectors of the economy like auto manufacturing that are critical to the transition to a low carbon economy.¹⁵ This policy, which goes beyond the formal legal framework of the Biden Administration's four major public investment bills, has been expressed through both executive orders and by informal gestures—such as President Biden joining an auto worker picket line during last fall's strike by the United Auto Workers Union against the three largest domestic auto makers, GM, Ford and Stellantis.¹⁶

U.S. Climate Policy and Labour Law Pre-Biden Administration

The history of U.S. climate policy has been shaped by the close relationship of the Republican Party, one of the two major U.S. political parties, with the coal, oil and gas industries, and the hostility of both the Republican Party and the business-oriented elements of the Democratic Party to the idea of a high-wage climate investment agenda. This has led to a profound instability in US climate policy. When Republicans control the Presidency and at least one house of Congress there has been effectively no U.S. climate policy. Any progress on climate policy has happened only when Democrats have controlled not only the Presidency but also at least one House of Congress.

The initial phase of policy action on climate in the U.S. was during the late 1990s during the Clinton-Gore Administration, when with Al Gore's involvement, the US participated in the Kyoto Global Climate negotiations. The Kyoto Treaty that resulted from these negotiations defined targets for emissions reductions, but did not include provisions for public investment, or labour standards for those industries that would have come into being had the Kyoto targets been met.¹⁷ When the Kyoto Treaty came up for a vote in the U.S. Senate, key labour movement institutions either opposed it or declined to take a position. The Kyoto Agreement failed to attract

the support of a single Senator.¹⁸

The Kyoto period was followed by the Bush Administration, a period during which effectively climate policy remained frozen. Starting with the Democrats' successful return to control of Congress in 2007, Democrats began a significant effort to enact comprehensive climate legislation.¹⁹

Initially the Obama Administration's climate agenda involved public investment in carbon emissions reduction through the American Recovery and Reinvestment Act of 2009 (ARRA), an economic stimulus program passed in February 2009 at the height of the economic crisis that followed the financial crisis of 2008.²⁰ The ARRA contained significant funding for renewable energy projects and mechanisms to increase energy efficiency, such as tax credits for the purchase of electric and hybrid cars, and for home energy efficiency retrofits. ARRA included requirements that construction workers be paid wages and benefits at the rates prevailing in the construction sector in the area of the projects, as required under the Davis-Bacon Act of 1950.²¹ According to the US Government Accountability Office, approximately \$102 billion of the \$309 billion appropriated in the ARRA for projects was wages and benefits covered by the Davis-Bacon Act—and this included approximately \$18 billion in climate related spending.²²

However, Davis-Bacon Act coverage by itself was not the end of the story. Because the ARRA funded new federal programs in areas like home energy retrofits, it was not clear whether the craft's wage standards should apply in these areas, or whether new low wage standards should be set. Attempts by labour unions to work with the Obama Administration to create stronger labour standards through administrative processes were resisted by the Administration's business allies in the tech sector. The resulting delays contributed to the ARRA not meeting its own goals in residential retrofits, in part due to a lack of skilled labour resulting from a failure to integrate

¹⁵ Exec. Order No. 14126, 89 Fed. Reg. 73559 (Sept. 6, 2024).

¹⁶ Peter Nicholas, *Biden Makes History by Joining Striking Autoworkers on the Picket Line*, NBC News (Sept. 26, 2023) <https://www.nbcnews.com/politics/white-house/biden-makes-history-striking-auto-workers-picket-line-rcna117348>.

¹⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 U.N.T.S. 162.

¹⁸ S. Res. 98, 105th Cong. (1997).

¹⁹ John M. Broder, *Democrats Oust Longtime Leader of House Panel*, N.Y. TIMES (Nov. 20, 2008).

²⁰ American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115.

²¹ Id. § 16606.

²² U.S. GOV'T ACCOUNTABILITY OFF., GAO 10-421, RECOVERY ACT: OFFICIAL'S VIEWS VARY ON IMPACTS OF DAVIS-BACON ACT PREVAILING WAGE DIVISION (2010).

the ARRA's programs with the labour movement's construction labour training capacity.

However, what the ARRA did do was provide low-cost debt financing to Elon Musk's auto startup Tesla.²³ Tesla received significant publicly subsidized financing without having to meet any labour standards other than those that generally applied in the private sector. Musk used public financing to set up an auto company that sold electric cars to wealthy Americans, produced by workers paid less than workers at established auto companies—a model which climate deniers were able to point to as evidence that the fight against climate change only benefited the wealthy at the public's expense. As of this writing Musk is the richest person on Earth and Tesla appears unable to sell cars profitably at price points that are competitive with Chinese EV manufacturers. Following the ARRA, the Obama Administration supported the development of the Waxman-Markey comprehensive climate legislation.²⁴ This legislation included support for the development of renewable energy, nuclear energy, and mass transit—but its core strategy relied on putting a price on carbon and hoping that energy markets and capital markets, properly incentivized, would drive a rapid reduction in emissions. The US labour movement was significantly involved in the drafting process for the Waxman-Markey Act, and most US unions ultimately supported the Act.²⁵

Like the ARRA, construction work that would have been funded by the Waxman-Markey Act was covered by the Davis-Bacon Act's prevailing wage provisions.²⁶ But also like the ARRA, Waxman-Markey did not create additional rights for production workers employed by enterprises that would have benefited from government support. In the summer of 2010, the Waxman-Markey Act passed the US House of Representatives, but in the aftermath of the death of US Senator Ted Kennedy, the Democrats lacked a large enough majority to overcome the Senate's filibuster rule, leading to the death of the Waxman-Markey



A hydrogen fuel hub in Oakland, California.
Credit: sheilaf2002 / stock.adobe.com

Act as a viable piece of legislation.²⁷ This was then followed by Republican victories in the House and Senate elections of 2010, effectively closing off the possibility of passing climate change legislation for the remainder of President Obama's administration.

In the aftermath of the push for the Waxman-Markey Act, the Obama Administration, under pressure from the environmental movement which had begun protest campaigns against the construction of petrochemical infrastructure like oil and gas pipelines, shifted its focus from trying to pass climate legislation to regulatory initiatives designed to limit greenhouse gas emissions.²⁸ This type of regulatory response, which was divorced from public investment, did not support the creation of new jobs in low carbon sectors, compensate carbon energy dependent communities, or enact labour standards to apply to new clean energy industries.

As a result, the second half of the Obama Administration was a period of conflict between the labour movement and the environmental movement over both the specifics of the Obama Administration's climate regulations and over the fate of specific oil and gas projects that were being built under collective bargaining agreements with the construction labour movement.²⁹ These conflicts were the backdrop

²³ Chuck Squatriglia, *Feds Lend Tesla \$465 Million to Build Model S*, WIRED (June 23, 2009), <https://www.wired.com/2009/06/tesla-loan/>.

²⁴ American Clean Energy and Security Act of 2009, H.R.2454, 111th Cong. (2009).

²⁵ Joseph Romm, *AFL-CIO's John Sweeney Endorses Approach of Waxman-Markey Climate and Clean Energy Bill*, GRIST (May 22, 2009), <https://grist.org/article/afl-cios-john-sweeney-endorses-approach-of-waxman-markey-climate-and-clean/>.

²⁶ American Clean Energy and Security Act of 2009, H.R.2454, § 246, 111th Cong. (2009).

²⁷ Daniel Weiss, *Anatomy of a Senate Climate Bill Death*, Ctr. Am. Progress (Oct. 12, 2010), <https://www.americanprogress.org/article/anatomy-of-a-senate-climate-bill-death/>; JANE A. LEGGETT, CONG. RSCH. SERV., R43120, PRESIDENT OBAMA'S CLIMATE ACTION PLAN (2014).

²⁸ Morning Edition, *For Protestors, Keystone Pipeline is Line in Tar Sand*, NPR, at 18:23 (Sept. 1, 2011), <https://www.npr.org/2011/09/01/140117187/for-protesters-keystone-pipeline-is-line-in-tar-sand>; JANE A. LEGGETT, CONG. RSCH. SERV., R43120, PRESIDENT OBAMA'S CLIMATE ACTION PLAN (2014).

²⁹ *Manufacturers and Laborers Agree: Keystone Veto is Missed Opportunity for American Workers*, LIUNA (Fed. 24, 2015),

to the Trump campaign's appeals to unionized workers in the construction, transportation, and industrial sectors. Trump promised he would support job-creating coal, oil, and gas projects as well as infrastructure generally, while his opponent Hillary Clinton talked about closing the coal industry entirely.³⁰

With Trump's victory in the 2016 elections and the Republicans maintaining control of both Houses of Congress, U.S. climate policy once again went into a kind of hibernation. Despite Trump's rhetoric in the 2016 campaign, as President he proved ineffective at passing infrastructure legislation and was unwilling to challenge the strength of anti-worker forces within the Republican Party, ultimately appointing a prominent anti-union lawyer, Eugene Scalia, as his Secretary of Labor. Scalia embarked on an effort to further weaken U.S. labour law in the construction industry, an effort that only ended with Trump's defeat in the 2020 election.³¹

Labour Rights and the Biden Climate Investment Agenda

The Biden Administration came into office in 2020 with the support of the US labour movement, including early endorsements from key construction unions deeply unhappy with the Trump Administration's combination of attacks on construction labour rights and failure to actually pass infrastructure investment legislation.³² Biden made clear from the beginning of his campaign his intention to support the labour movement and workers' rights, and his belief that green jobs needed to be good jobs.³³

<https://www.liuna.org/news/story/manufacturers-and-laborers-agree-keystone-veto-is-missed-opportunity-for-american-workers>.

³⁰ Tessa Berenson Rogers, *The Return of 'Drill, Baby, Drill'*, TIME (Nov. 26, 2016), <https://time.com/4574513/donald-trump-energy-policy/>; Daniel Strauss, *Clinton Haunted by Coal Country Comment*, POLITICO (May 10, 2016), <https://www.politico.com/story/2016/05/sanders-looking-to-rack-up-west-virginia-win-over-clinton-222952>.

³¹ Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations, 29 C.F.R. pt. 29 (2020); Press Release, N. Am. Building Trades Union, NABTU Commends Executive Actions to Rescind IRAPs and Reinstate the Advisory Committee on Internship (Feb. 18, 2021), https://nabtu.org/press_releases/nabtu-statement-commending-biden-irap-executive-actions/.

³² *The IBEW Endorses Vice President Joe Biden for President*, IBEW (Feb. 5, 2020), https://www.ibew.org/media-center/Articles/20Daily/2002/200205_TheIBEWEndorses.

³³ Jacob Pramuk, *Joe Biden Unveils \$2 Trillion Green Infrastructure and Jobs Plan*, CNBC (July 14, 2020), <https://www.cnbc.com/2020/07/14/joe-biden-unveils-green-jobs->

The American Recovery Act

Biden's first piece of major legislation was the American Rescue Plan Act (ARP), \$1.9 trillion comprehensive legislation designed to respond to the COVID-19 crisis, passed by Congress in February 2021.³⁴ While not primarily climate legislation, the ARP involved several measures that resourced climate-related government programs at the state and local level and stabilized the pension plans of many of the unions that were going to be key to what would become the Biden Administration's climate investment agenda.³⁵ The ARP provided \$480 billion in funding to state and local governments, which in much of the U.S. meant an increase in employment covered by strong labour laws, including laws that included meaningful guarantees of the right to organize and collectively bargain.³⁶

The ARP also, by stabilizing collectively bargained pension funds covering construction and transportation workers, created an atmosphere of trust between the Biden Administration and those parts of the U.S. labour movement that had traditionally been most resistant to aggressive action on climate change.³⁷

Finally, the American Rescue Plan contributed to the U.S. labour market's rapid recovery from COVID-19 and the return of full employment in the US. by late 2021—developments that were crucial to creating a labour market environment that would enable a transition from fossil fuel to renewable dependent jobs with minimal impact on blue collar workers.³⁸

[and-infrastructure-plan-during-2020-election.html](https://www.whitehouse.gov/briefing-room/legislation/2021/01/20/president-biden-announces-american-rescue-plan/).

³⁴ American Rescue Plan Act of 2021, Pub. L. 117-2, 135 Stat. 4.

³⁵ Press Release, The White House, President Biden Announces American Rescue Plan (Jan 20, 2021), <https://www.whitehouse.gov/briefing-room/legislation/2021/01/20/president-biden-announces-american-rescue-plan/>.

³⁶ David Weissbrodt & Matthew Mason, *Compliance of the United States with International Labor Law*, 98 MINN. L. REV. 1842 (2013).

³⁷ Press Release, N. Am. Building Trades Union, NABTU Applauds Biden Administration's Pension Relief Efforts (July 6, 2022), https://nabtu.org/press_releases/biden-pension-relief/.

³⁸ Press Release, Bureau of Labor Statistics, The Employment Situation — January 2022 (Feb. 4, 2022), https://www.bls.gov/news.release/archives/empst_02042022.pdf.

The Infrastructure Investment and Jobs Act

The Biden Administration's second major statutory achievement, the 2021 Infrastructure Investment and Jobs Act (IIJA), was a piece of broad public investment legislation, providing \$1.2 trillion over five years for a wide range of new construction and repair across the built environment in the U.S.³⁹ The IIJA included funding for roads and bridges, ports and inland waterways, schools, airports, railroads, telecommunications, water and sewage, and electric power. The IIJA sought to address an infrastructure deficit built up over decades of underinvestment since the early 1990s, related to the politics of low taxation at the state and local level and a misguided belief that private investment would fund public goods.⁴⁰

Depending on how one assesses the categories of funding in the IIJA, between \$50 billion and \$100 billion of the projects it funded were aimed at fighting climate change—roughly five times the climate funding in the ARRA in 2009. Climate related projects included methane reduction, building energy efficiency, industrial energy efficiency, carbon capture and storage, hydrogen, nuclear, hydropower, and funding for improvements in clean energy supply chains.⁴¹

"The IIJA did not create a new labour relations regime for the construction it funded. But it did make clear that the 'vast majority' of the projects it funded were subject to the Davis-Bacon Act, a Depression-era statute that required that construction projects funded by federal dollars pay wages and benefits at least as good as those prevailing in the construction labour market in the area where the projects were located.⁴¹ Under the Davis-Bacon Act, prevailing wage levels for US federal government funded construction sector are set by the U.S. Department of Labor, based on surveys of local construction labour markets. The surveys include wages, benefits, and training expenditures."



A mixed coal and nuclear power plant in Johnstown, Pennsylvania.
Credit: Klodian / stock.adobe.com

The IIJA included large increases in funding for federal infrastructure programs already covered by Davis-Bacon,⁴⁴ surface transportation, mass transit,⁴⁵ and water and sewer infrastructure,⁴⁶ and explicitly extended Davis-Bacon Act coverage to energy projects.⁴⁷ Regarding broadband and other telecommunications related projects, which traditionally were the purview of the private sector and not covered by Davis-Bacon, the IIJA included the payment of prevailing wages within the Davis-Bacon framework as a criteria agencies could use in awarding contracts among competing bidders.⁴⁸

The inclusion of Davis-Bacon wage rules for the Energy Division of the IIJA reinforced on a much larger scale the principle embedded in Obama's ARRA that construction jobs building the low carbon economy would be at least as good as the jobs they were replacing. This occurred against the backdrop of a pattern of solar and wind project developers hiring non-union construction firms and paying dramatically lower wages than those paid by carbon fuel sector construction projects in the same communities. Ironically, however, in light of the ARRA experience, the Bi-Partisan Infrastructure Act included an exemption from Davis-Bacon for residential energy retrofit projects involving less than 5 units at a time.⁴⁹

³⁹ Infrastructure Investment and Jobs Act, Pub. L. 117-58, 135 Stat. 429 (2021).

⁴⁰ American Society of Civil Engineers, *Infrastructure Investment Gap 2020-2029*, Report Card for America's Infrastructure <https://infrastructurereportcard.org/economics-old/investment-gap-2020-2029/>.

⁴¹ Press Release, The White House, Fact Sheet: The Bipartisan Infrastructure Deal (Nov. 6, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/>.

⁴² *Fact Sheet #66A, Bipartisan Infrastructure Law*, U.S. DEP'T LAB. WAGE AND HOUR DIV., (<https://www.dol.gov/agencies/whd/fact-sheets/66a#>

⁴³ *Fact Sheet #66, The Davis-Bacon and Related Acts*, U.S. DEP'T LAB. WAGE AND HOUR DIV. (OCT. 2023), <https://www.dol.gov/agencies/whd/fact-sheets/66-dbra> (Department of Labor 2023).

⁴⁴ Infrastructure Investment and Jobs Act, Pub. L. 117-58, 135 Stat. 429 (2021)(Divisions A and B).

⁴⁵ *Id.* (Division C).

⁴⁶ *Id.* (Division E).

⁴⁷ *Id.* (Division D).

⁴⁸ *Id.* (Division F).

⁴⁹ *Id.*

The IIJA also included Buy American provisions covering materials used in the construction projects funded by the Act. While these provisions were not labour provisions, they were designed to support significantly unionized industries such as steelmaking and the fabrication of building materials.⁵⁰

Applying prevailing wage and Buy America rules to IIJA projects was a major step away from the model for “public” investment financed by “public-private partnerships” that had been promoted to both U.S. political parties by a combination of financial and tech interests.⁵¹ In this financialized model, public investment generally, and climate change related public investment specifically, was supposed to have been driven by properly incentivized private capital markets and managed by private firms that were to be left free to set their workers’ wages and working conditions as they saw fit. In reality this approach had led to capture of public subsidies by private firms and decades of underinvestment. The IIJA marked a return to the post-New Deal approach of predominantly public funding and wage regulation designed to prevent low-bid public spending from driving a downward spiral in the construction labour market, with a parallel risk of shoddy and dangerous construction quality on public projects.⁵²

CHIPS and Science Act and the Issue of Job Training

The Chips and Science Act was passed by Congress on a bi-partisan basis like the Infrastructure Act and was signed by President Biden on August 9, 2022. It provides for \$280 billion in funding to support the strengthening of the U.S. computer chip industry and associated workforce development and scientific research. \$67 billion of Chips and Science Act funding goes to support scientific research associated with the fight against climate change.⁵³

The Chips and Science Act’s only meaningful labour provisions relate to workforce training. Recipients of \$39 billion in federal support for the private sector chip manufacturing industry are required to have company specific workforce development plans. However, responsibility for administering these grants and the training requirements that come with them rests with the Commerce Department, which has control of the overall grant, rather than with the Labor Department which is the historic hub for worker training programs within the federal government.⁵⁴

In its initial guidance for companies seeking to apply for this funding, the Commerce Department released a set of “Workforce Development Strategy Principles:”

- Ensures it is employer-led to better connect skilled workers to quality jobs.
- Includes partners like educational institutions, labour unions, and community-based and economic development organizations.
- Offers wrap-around services to support vulnerable populations.
- Increases educational and workplace diversity, equity, and inclusion.
- Prioritizes proven earn-and-learn models like Registered Apprenticeships.
- Leads to stackable, industry-recognized credentials.
- Measures outcomes such as workers’ employment and earnings.
- Builds sustainable systems and partnerships.⁵⁵

These principles connect the Commerce Department’s approach to the Labor Department’s program of Registered Apprenticeships, and appear to, in tentative ways, point toward a true tripartite system of workforce training and development.

The Inflation Reduction Act

The most significant of the Biden public investment bills from both a climate and a labour perspective was the 2022 Inflation Reduction Act (IRA).⁵⁶ The IRA provided \$783 billion aimed at

⁵⁰ Build America, Buy America Act, Pub. L. 117-58, 135 Stat. 429 (2021).

⁵¹ Frank Beckers & Uwe Stegeman, *A Smarter Way to Think about Public-Private Partnerships*, MCKINSEY (Sept, 10, 2021) <https://www.mckinsey.com/capabilities/risk-and-resilience/our-insights/a-smarter-way-to-think-about-public-private-partnerships>.

⁵² Edward M. Gramlich, *Infrastructure Investment: A Review Essay*, 32 J. ECON. LITERATURE 1176 (1994),

⁵³ CHIPS and Science Act, Pub. L. 117-167, 136 Stat. 1366 (2022).

⁵⁴ *Id.* § 106201.

⁵⁵ *Our Workforce Development Strategy*, U.S. DEP’T COM., (<https://www.commerce.gov/issues/workforce-development>) (last visited Dec. 12, 2024).

⁵⁶ Inflation Reduction Act of 2022, Pub. L. 117-169, 136 Stat. 1818.

fighting climate change, of that total \$663 billion was in the form of tax credits over ten years designed to support investments to transform the U.S. into a low carbon economy.⁵⁷ The IRA is by far the largest single step the United States has taken in the direction of fighting climate change, and the Biden White House estimated that, when combined with President Biden's other climate related initiatives, it would bring the U.S. to 80% of its Paris Accord emission targets for the period up until 2030.⁵⁸

The key labour provision of the IRA increases tax credits available to companies that comply with the IRA's prevailing wage conditions for construction workers. The IRA's prevailing wage rules are administered by the Internal Revenue Service as part of its role overseeing the IRA's tax credits.⁵⁹ However, the substantive rules governing what constitutes prevailing wage for any particular craft in any particular place are governed by the Department of Labor's already existing wage surveys.⁶⁰

More recently, in June 2024, the Treasury Department published additional guidance clarifying that in assessing whether companies claiming additional tax breaks were really entitled to those benefits, the Internal Revenue Service would take into consideration whether the company claiming the tax breaks had entered into a comprehensive collective bargaining agreement with its project's construction work force, called a Project Labor Agreement. While the Internal Revenue Service was not *requiring* project sponsors to enter into Project Labor Agreements as a requirement for funding support, it was signalling that this was the favoured path.⁶¹

⁵⁷ Press Release, The White House, Fact Sheet: Two Years In, the Inflation Reduction Act is Lowering Costs for Millions of Americans, Tackling the Climate Crisis, and Creating Jobs (Aug. 16, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/08/16/fact-sheet-two-years-in-the-inflation-reduction-act-is-lowering-costs-for-millions-of-americans-tackling-the-climate-crisis-and-creating-jobs/>.

⁵⁸ Press Release, The White House, Fact Sheet: Biden-Harris Administration Leverages Historic US Climate Leadership at Home and Abroad to Urge Countries to Accelerate Global Climate Action at U.N. Climate Conference (COP28) (Nov. 12, 2024).

⁵⁹ Inflation Reduction Act of 2022, Pub. L. 117-169, 136 Stat. 1818 § 13101.

⁶⁰ After a period of uncertainty, this was made clear in the Treasury Department's Initial Guidance published in November 2021. Internal Revenue Service, Prevailing Wage and Apprenticeship Initial Guidance Under Section 45(b)(6) (B)(ii) and Other Substantially Similar Provisions, 87 Fed. Reg. 73,580 (Nov. 30, 2022).

⁶¹ Internal Revenue Service, Increased Amounts of Credit

In addition, the IRA has "Buy American" provisions governing the materials used in energy facilities. Domestic iron and steel are requirements for receiving the IRA's tax credits, and those credits are enhanced by up to 10% depending on the degree to which domestic "manufactured materials" are used in the construction of eligible energy facilities.⁶² The IRA also has a "Made in America" requirement associated with the \$7500 tax credit that is available for purchasers of electric and hybrid passenger vehicles.⁶³

However, the IRA, like the Chips and Science Act, and unlike the IJJA, is actually focused on providing financial support to operating businesses, rather than on construction *per se*. Nonetheless, the IRA includes almost no provisions affecting the labour practices of these operating businesses that will be the recipients of the largest share of the IRA's funds. Specifically, there are no requirements beyond general federal labour law that IRA-funded firms respect the labour rights of their production workers to organize and collectively bargain or provide training to production workers in the manner required by the Chips and Science Act.

As discussed above, in an earlier version of the IRA there was a requirement that electric vehicles be built in unionized facilities, which was removed after it met opposition from two Democratic Senators, Manchin of West Virginia and Sinema from Arizona. There is a large non-union Toyota manufacturing facility in West Virginia.⁶⁴

Summary of Labour Provisions in the Biden Climate Initiatives

Together, the four Biden public investment bills—the American Rescue Plan, the IJJA, the Chips and Science Act and the IRA—are a powerful force acting to promote economic growth and full employment in the U.S. economy—and in particular in the construction industry and the manufacturing sectors that contribute to the supply chains for energy and transportation

or Deduction for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements (Internal Revenue Service ed., 2024).

⁶² Inflation Reduction Act of 2022, Pub. L. 117-169, 136 Stat. 1818 § 13102.

⁶³ *Id.* § 13401.

⁶⁴ David Shepardson, *U.S. Senate Democrat Manchin Opposes \$4,500 EV Union Tax Credit*, REUTERS (Nov. 11, 2021) <https://www.reuters.com/business/autos-transportation/toyota-investing-240-million-west-virginia-build-hybrid-parts-2021-11-11/>.

infrastructure.⁶⁵ Full employment, more than many legal measures, gives workers bargaining power they can use to win better wages, better working conditions and lasting structures for worker voice and influence.

The Biden bills also specifically targeted investments through a number of programs at regions of the country where either there has already been job loss related to decarbonization, or where job loss is likely in the future. Some of these investments—like hydrogen hubs, nuclear plants, and carbon capture and storage facilities—have been targeted to provide jobs requiring similar skill sets with similar wages and benefits to jobs that have been lost.⁶⁶ Again, while not explicit labour law changes, these programs are clearly designed to advance the goals of the labour movement's call for a just transition to a low carbon economy.

In terms of actual climate policy specific labour law, there are requirements or incentives for construction workers on federally supported climate projects being paid the prevailing wage for their craft in the relevant geographic region, including support for industry training funds, and a preference for federally funded climate related construction projects being subject to project labour agreements. These provisions are a mix of statutory language and administrative guidance. Finally, Biden Administration policy required companies that receive federal support to obey federal labour laws, remain neutral in union organizing campaigns, and bargain in good faith with their workers' unions.⁶⁷ This policy is in line

with the statutory goals of US labour law, but was far more explicit in terms of its support of workers' right to organize and of collective bargaining than US administrations of either political party have been since the early 1970's.

The U.S. Has Made Strides Toward Connecting Climate Policy and Workers' Rights, but Much Remains to be Done—and Labour Movements Around the World Can Learn from Both

The results of the Biden Administration's initiatives from a climate and a jobs perspective so far have been impressive. Total clean energy investment in the U.S. was up 38% in 2023 at \$239 billion.⁶⁸ Investment in new manufacturing plants in the U.S. tripled from Feb 2021 to Feb 2024. And, the US has maintained high rates of unemployment in the face of rising interest rates, both domestically and globally.

In this sense, the Biden initiatives provide a road map to other countries as to how to effectively fight climate change and "crowd-in" private investment. The "crowding in" effect has been particularly dramatic in the construction of new private manufacturing facilities.

A critical lesson in terms of climate policy is that the use of large-scale public investment, rather than hoping that policies like carbon taxes will lead to appropriate levels of private investment, appears to be clearly superior in terms of the speed and scale necessary to comply with Paris Treaty emissions targets.

The construction labour standards also represent viable models for other national labour movements to look at in the construction sector, particularly where the default construction labour relations scheme is either weak or non-existent.

However, from the perspective of the production workers in the facilities created by the Biden Administration investments, the lack of strengthened labour rights or enhanced labour standards is a major problem. And this could easily give rise to a larger political problem, as these low-quality jobs in manufacturing and energy systems operations will outlast the high-quality construction jobs. Of course, the importance of this issue will vary depending on the strength of other countries' underlying private sector

⁶⁵ Together they are delivering \$350 billion (1.3% of GDP) in stimulus to the U.S. economy for the first five years (through 2026), and in total \$1 trillion (3.7% of GDP) in climate-related public investment. As of this writing, the U.S. remains close to full employment after more than a year of rising interest rates. Press Release, The White House, Fact Sheet: Two Years In, the Inflation Reduction Act is Lowering Costs for Millions of Americans, Tackling the Climate Crisis, and Creating Jobs (Aug. 16, 2024), Press Release, The White House, Fact Sheet: The Bipartisan Infrastructure Deal (Nov. 6, 2021), Press Release, The White House, Fact Sheet: Two Years after the CHIPS and Science Act, Biden- Harris Administration Celebrates Historic Achievements in Bringing Semiconductor Supply Chains Home, Creating Jobs, Supporting Innovation, and Protecting National Security (Aug. 9, 2024), Press Release, Bureau of Labor Statistics, The Employment Situation — August 2024 (Dec. 6, 2024), <https://www.bls.gov/news.release/pdf/empst.pdf>.

⁶⁶ Press Release, The White House, Fact Sheet: Two Years In, the Inflation Reduction Act is Lowering Costs for Millions of Americans, Tackling the Climate Crisis, and Creating Jobs (Aug. 16, 2024).

⁶⁷ Exec. Order No. 14,126, 89 Fed. Reg. 73,559 (Sep. 11, 2024).

⁶⁸ *Total Construction Spending: Manufacturing in the United States*, FRED (Dec. 2, 2024), <https://fred.stlouisfed.org/series/TLMFGCONS>; CLEAN INVESTMENT MONITOR, <https://www.cleaninvestmentmonitor.org/> (last visited Dec. 24, 2024).

labour laws. Nonetheless, it is worth noting that in Sweden, Tesla has proven a challenge to even one of the world's strongest systems of collective bargaining.⁶⁹

It is also important to note that the Biden investments were funded, in part, by additional borrowing, and the IRA was largely funded by increased tax collections. Countries that lack the U.S.'s dominant position in international finance, or whose politics make increased revenue realization more difficult, may find it challenging to finance such large-scale programs without support from the world's dominant economies.

Moreover, the approach of using tax credits as the mechanism of public support for climate related investment in the Inflation Reduction Act has led to three problems.

The first is a lack of effective conditionality—both around labour rights for production as opposed to construction workers, and around getting the public a share of the profits the subsidies are contributing to. As of today, companies like Tesla and Mercedes are facing multiple accusations of violating U.S. labour laws while receiving significant financial support from the IRA.⁷⁰ Even if these companies are found to have violated U.S. labour law, they will still be able to receive IRA subsidies. If the IRA funds another company like Tesla – creating another \$1 trillion market capitalization company – the public's share in that company will be the same as the public's share in Tesla: nothing.

The second involves the difficulty of targeting public money to the most important problems. The criteria for eligible projects for IRA tax credits is intentionally very broad. In reality, the fight against climate change requires a focus on the

electric power grid, the energy usage of buildings, the carbon emissions associated with heavy industry, and with surface transportation. Some investments are significantly more important than others in relation to these tasks, and the design of the IRA is not ideal in terms of channelling capital accordingly.

Finally, the IRA is a bill designed to subsidize private investment, not to make wholly public investments. Private investment is vulnerable to interest rate fluctuations, which has proven to be a serious problem for key strategic projects such as offshore wind. As interest rates have risen, the IRA's subsidies have proven inadequate to make key projects attractive to the necessary equity investors.⁷¹

An actually effective effort to bring climate change under control requires robust labour rights enforcement, a rethinking of corporate finance and corporate governance to be more long term and more focused on the firm as a nexus of investment, and a true integration of working people and their unions into the decision-making processes of the political economy.

More broadly, the U.S. experience and the experiences of multiple countries over the last ten years suggests the state that is seeking to build broad public support for the necessary action with speed and scale needs to do three things—money, dialogue, and leadership.

Money in the sense of funding for the investments that must be made now, compensation for workers and communities facing job loss and economic dislocation, and money necessary to ensure that the jobs that are created are comparable to the old ones that are destroyed.

Dialogue in the sense that there must be collaboration among the major stakeholders—workers, business, communities, environmentalists, scientists and others—to shape state action, or there will never be the level of social support needed for the scale and speed that are necessary.

And finally, leadership from the state itself. Civil society will not organically generate the level of urgency needed at this point to avoid catastrophe. It requires political leadership. The goal must be

⁶⁹ Elisabeth Braw, *Argument, Swedes Are United against Tesla's Union Busting*, FOREIGN POLICY (Jan. 29, 2024), <https://foreignpolicy.com/2024/01/29/sweden-tesla-unions-elonmusk/>.

⁷⁰ Ian Kullgren, *Mercedes Hit With Unfair Labor Practice Charges by Auto Union*, BLOOMBERG L. DAILY LAB. REP. (Mar. 26, 2024), <https://news.bloomberglaw.com/daily-labor-report/mercedes-hit-with-unfair-labor-practice-charges-by-auto-union>; Mercedes Applies for Tax Relief for Projects at Two U.S. Plants, REUTERS (Sep. 25, 2023), <https://www.reuters.com/business/autos-transportation/mercedes-applies-tax-relief-projects-two-us-plants-2023-09-25/>; Hyunjoon Jin, *Tesla Taps Biden Tax Credits to Offset EV Price Cuts*, REUTERS (July 21, 2023), <https://www.reuters.com/business/autos-transportation/tesla-taps-biden-tax-credits-offset-ev-price-cuts-2023-07-21/>; Brandon Vigliarolo, *Tesla Ran over Worker Rights, Again, US Labor Judge Finds*, REGISTER (Apr. 28, 2023), https://www.theregister.com/2023/04/28/us_labor_board_tesla/.

⁷¹ The Associated Press, *Climate, In a Setback for the Wind Industry, 2 Large Offshore Projects are Cancelled in N.J.*, NPR, at 15:49 (Nov. 1, 2023), <https://www.npr.org/2023/11/01/1209986572/offshore-wind-energy-new-jersey-orsted>.

avoiding catastrophic warming. That goal tells us what the emissions targets must be. Political leadership must convene civil society, set that as the goal, and THEN ask the question, how do we hit the targets we MUST hit.

Richard Trumka, the former President of the American Federation of Labor - Congress of Industrial Organizations (AFL-CIO), said not long before his death in 2021 that we would “either have a just transition to a low carbon economy or no transition at all.”⁷² Trumka was a forceful man and many who heard him thought that was a threat. But it wasn’t. It was a prophecy. What he meant was that in the absence of policies addressing these three fears effectively, one way or another working people would block action on climate change—regardless of what positions their unions or their traditional parties took on the question.

In this way we see the twin curses of neo-liberalism in relation to climate change. On the one hand neo-liberal policies for directly addressing climate change through “market-based solutions” have failed and were certain to fail given the nature of climate change as a problem. Secondly, and more insidiously, neo-liberal labour market and tax policies have weakened trade unions and other institutions of social solidarity and promoted skyrocketing economic inequality—the combination has seriously damaged the capacity of neo-liberal societies to respond to climate change by weakening both the levels of trust and the institutions of civic participation necessary to organize the kind of policy response that human caused climate change demands.⁷³

And for that engagement to occur, policymakers need to move away from neo-liberal frameworks. Policymakers need to bring to the process of shaping state action the leadership, the money and most of all the commitment to engage with working people. Only through processes of engagement can governments ensure that working people benefit economically from the

transition to a low carbon economy and, most importantly, that working people are part of shaping the transition to a low carbon economy. The goal must be that workers and their institutions are partners with government and business in shaping that transition. That in this greatest of innovation challenges workers are co-creators, not objects.

Despite the shortcomings and challenges discussed above, the Biden-Harris Administration’s climate investments and their approach to labour issues marks a clear break with previous neo-liberal policy approaches to climate change in the United States—with their clear recognition that public investment was necessary to drive climate policy, that labour standards had to be at the core of the structure of those investments, and that the supply chains supporting those investments needed to be resilient and bring tangible economic benefits to the communities whose taxes were supporting those investments.

The robustness of the results compared to the lack of progress in the past suggests that, in the language of the UN’s IPCC, there are no pathways to climate stability that assume a continued neo-liberal approach—to finance, to working people, and to international economics.

⁷² Richard Trumka, Pres. AFL-CIO, We’ll Either Have a Just Transition or No Transition at All, Speech at the 2020 Ceres Global Investor Summit (May 20, 2020), <https://aflcio.org/speeches/trumka-well-either-have-just-transition-or-no-transition-all>.

⁷³ For a detailed discussion of these themes, see Damon Silvers, The Labour Movement, the State, and the Fight against Climate Change, Labour and Climate Change Lecture Series (Apr. 25, 2024), <https://www.ucl.ac.uk/bartlett/public-purpose/events/2024/apr/labour-movement-state-and-climate-change-what-must-be-done-prevent-catastrophe>.

LABOUR LEADING ON CLIMATE: ADVANCING HIGH-QUALITY UNIONS JOBS IN THE EMERGING U.S. CLEAN ENERGY SECTOR

DEEDEE FITZPATRICK AND HANNAH SACHS

United States | Originally written in English

Introduction

Ahead of COP28, the United Nations issued a warning that the world is hurtling towards three degrees of warming—even if countries implement existing commitments under the Paris Agreement to cut carbon emissions.¹ To meet the Paris Agreement’s aspirational target of limiting global temperatures to 1.5° Celsius above pre-industrial temperatures, each country—and especially each of the world’s largest emitters—must dramatically increase its ambition to achieve national decarbonization to avert a world-wide climate catastrophe.² The U.S. is the biggest cumulative emitter of carbon dioxide in the world, yet U.S. leadership on climate policy has been inconsistent and ineffectual, at best.³ For decades, the U.S. has skirted or subverted major global climate initiatives and lagged on adopting

robust domestic emission controls, including, in 2021, President Trump’s withdrawal from the Paris Agreement.⁴

States and localities have emerged as key leaders in advancing meaningful climate action. While many Renewable Portfolio Standards⁵ were established over a decade ago, states have substantially increased their ambitions through significant revisions to these policies, the adoption of Clean Energy Standards,⁶ and additional measures to incentivize or directly procure clean energy generation. These policies have been pivotal drivers of the growth in renewable energy generation across the U.S.

The Biden Administration’s passage of the Inflation Reduction Act (IRA), the Infrastructure Investment and Jobs Act (IIJA), and the CHIPS and Science Act (CHIPS) marked a significant turning point in U.S. climate leadership, providing unprecedented levels of federal investment that bolstered state and local efforts to combat climate change. The investments in key clean energy

¹ Damian Carrington, *World Facing ‘Hellish’ 3C of Climate Heating, UN Warns before Cop28*, GUARDIAN (Nov. 20, 2023), <https://www.theguardian.com/environment/2023/nov/20/world-facing-hellish-3c-of-climate-heating-un-warns-before-cop28>; UNITED NATIONS ENV’T PROGRAMME, BROKEN RECORD: TEMPERATURES HIT NEW HIGHS, YET WORLD FAILS TO CUT EMISSIONS (AGAIN) (2023), <https://wedocs.unep.org/bitstream/handle/20.500.11822/43922/EGR2023.pdf>.

² Additionally, COP28 made plain the failure of the world’s richest economies, including the United States, to honour long-standing commitments to mobilize at least \$100 billion annually for climate finance in developing and middle-income countries. Increased climate and development finance for these countries is paramount to achieving the Paris Agreement. See, e.g., Sunny Kaplan, *Laser-Focused on Bridging the Climate Finance Gap at COP28*, WORLD BANK BLOGS (Nov. 28, 2023), <https://blogs.worldbank.org/en/ppps/laser-focused-bridging-climate-finance-gap-cop28>.

³ Shannon Osaka, *Is the US Uniquely Bad at Tackling Climate Change? After Decades of Failed Climate Bills, America Seems to Have a Problem.*, THE GRIST (Jan. 6, 2022), <https://grist.org/politics/is-american-democracy-uniquely-bad-at-tackling-climate-change>.

⁴ The failure to ratify and subsequent repudiation of the Kyoto Protocol under the Clinton and Bush administrations, respectively, marked one of the U.S.’s first major failures to commit to an international framework to reduce greenhouse gas emissions. See, e.g., Tony Barboza, *A Brief Timeline of U.S. Climate Pledges Made, and Discarded*, L.A. TIMES (Apr. 22, 2021), <https://www.latimes.com/environment/story/2021-04-22/three-decades-of-us-climate-pledges-and-inaction>.

⁵ Renewable Portfolio Standards are a “binding requirement on retail electric suppliers [utilities] to procure a minimum percentage of generation from eligible sources of renewable electricity.” GALEN BARBOSE, BERKELEY LAB, U.S. STATE RENEWABLES PORTFOLIO & CLEAN ELECTRICITY STANDARDS: 2024 STATUS UPDATE 7 (2024), https://live-lbl-eta-publications.pantheonsite.io/sites/default/files/lbnl_rps_ces_status_report_2024_edition.pdf.

⁶ A Clean Energy Standard is similar to an RPS, but often targets a broader set of eligible technologies. *Id.*



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technologies and infrastructure promised to reduce U.S. emissions by over 40% below 2005 levels by 2030.⁷ The IIJA upgrades and modernizes America's infrastructure, including making transportation, the power grid, homes, schools, and businesses more resilient to climate change. The IRA marked the largest climate and clean energy investment in history, accelerating clean energy manufacturing and deployment, as well as efficient buildings, sustainable transportation, clean industry, and climate-aligned agricultural conservation and forestry.⁸ CHIPS primarily invests in American semiconductor manufacturing, seeking to strengthen American manufacturing, supply chains, and national security.

Even though the 2024 U.S. elections ushered in a Republican President and Congress, there is reason to be hopeful about the IRA's future since nearly every state has benefitted from federal IRA investments, and most of those funds to date have flowed to Republican congressional districts.⁹ Coupled with strong private sector momentum, state and local governments can continue to drive the clean energy transition.

The laws created pathways for high-quality, union jobs through both statutory requirements and the Biden Administration's broader regulatory framework. Notably, the IRA's clean energy tax credits are structured to offer enhanced incentives if prevailing wage¹⁰ and registered apprenticeship requirements¹¹ are met, domestically

sourced materials are used,¹² and projects are sited in historic energy communities. Additionally, the regulatory framework for the tax credits encourages developers to adopt project labour agreements (PLAs)¹³ to ensure projects are completed on time and within budget, while many of the IIJA and IRA's competitive funding programs incentivize recipients to commit to high-quality jobs, labour standards, and equity in their applications.

Among several factors, the decline in union density and the erosion of collective bargaining rights have been key drivers of today's historic levels of economic and racial inequality.¹⁴ In comparison to European

instruction and paid work experience. Apprenticeship continues to grow, with a 64% increase in new apprentices between 2010-2021. *FY 2021 Data and Statistics, Registered Apprenticeship National Results Fiscal Year 2021*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/eta/apprenticeship/about/statistics/2021>, (last visited Dec 25, 2024).

¹² Domestic content requirements stipulate that certain percentages of materials, components, or production processes of a product originate within the country. See, e.g., *Domestic Content Bonus Credit*, I.R.S., <https://www.irs.gov/credits-deductions/domestic-content-bonus-credit> (last visited Dec. 6, 2024).

¹³ A project labour agreement (PLA) is a pre-hire collective bargaining agreement, used only in the construction industry, that operates between a union and a contractor and sets the terms and conditions of employment on a construction project (e.g., wages and fringe benefits, use of registered apprentices.) See *Project Labor Agreement Resource Guide*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/good-jobs/project-labor-agreement-resource-guide> (last visited Dec. 25, 2024).

¹⁴ Ample scholarship has demonstrated the role of unions in narrowing income distribution during the mid-20th century, especially for less educated and non-white workers, and how declining density since then has coincided with widening income inequality. See, e.g., Henry S. Farber et al., *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data*, 136 Q. J. ECON. 1325 (2021). Unions raise wages for union and non-union workers, provide strong benefits and job protection, and reduce gender and racial wage gaps. *Unions Help Reduce Disparities and Strengthen Our Democracy*, ECON. POL'Y INST. (Apr. 23, 2021), <https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy>; see also JOSH BIVENS ET AL., ECON. POL'Y INST., UNIONS PROMOTE RACIAL EQUALITY (2023), <https://files.epi.org/uploads/270662.pdf>. Unions also enable safer and healthier workplaces. See, e.g., FRANK MANZO ET AL., ILL. ECON. POL'Y INST., THE IMPACT OF UNIONS ON CONSTRUCTION WORKSITE HEALTH AND SAFETY: EVIDENCE FROM OSHA INSPECTIONS (2021) (finding that in the construction sector, one of the country's most dangerous industries, union worksites are nearly 20% less likely to have Occupational Safety and Health Administration (OSHA) violations and have one-third fewer violations per

⁷ Lachlan Carey & Jun Ukita Shepard, *Congress' Climate Triple Whammy: Innovation, Investment, and Industrial Policy*, ROCKY MOUNTAIN INST. (Aug. 22, 2022), <https://rmi.org/climate-innovation-investment-and-industrial-policy>.

⁸ Press Release, White House, Fact Sheet: Two Years In, the Inflation Reduction Act is Lowering Costs for Millions of Americans, Tackling the Climate Crisis, and Creating Jobs (Aug. 16, 2024).

⁹ Niko Kommenda et al., *See How the Inflation Reduction Act is Affecting Your Community*, WASH. POST (Oct. 28, 2024), <https://www.washingtonpost.com/climate-environment/interactive/2024/climate-bill-biden-clean-energy>.

¹⁰ The prevailing wage refers to the average wage and benefits paid to similarly employed workers in a specific occupation in a given geographic area. *Prevailing Wage and the Inflation Reduction Act*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/IRA> (last visited Dec. 25, 2024).

¹¹ Registered apprenticeship is an "earn-while-you-learn" workforce training model that provides a nationally recognized credential through classroom

and other countries, the U.S. social safety net is weak and healthcare and retirement benefits are enterprise-based, with the scope of benefits dependent on the widely varying policies of individual employers.¹⁵ Additionally, American labour relations are defined by a “system of voluntaristic, decentralized unionism,” in which collective bargaining is a private, adversarial negotiation at a worksite, without sectoral bargaining and government engagement.¹⁶ Notwithstanding the recent resurgence in union organizing, union density, especially in the private sector, has declined dramatically from its peak in the 1950s.¹⁷ Although this decline is reflected in the clean energy sector’s historically low union density, unionization rates in the sector surpassed the fossil-fuel sector for the first time in 2023.¹⁸

Yet, organized labour is seizing the opportunity to organize in developing clean energy industries, capitalizing on state and local leadership to drive worker-centred climate policies. State-level unions and labour organizations around the country are coming together to form state-based Climate Jobs coalitions that have relevant industry expertise, worker power, and the political power necessary to drive change at the state level. The Climate Jobs National Resource Center (CJNRC) and its academic partner, Cornell University’s Climate Jobs Institute, provides this network of state coalitions with resources for their strategic campaigns to win good union jobs in the clean energy sector. The state coalitions are leveraging federal and state investments to champion legislative, regulatory, and organizing campaigns at the state- and local-level to establish industry-wide, high-road labour standards. This article



Credit: Climate Jobs National Resource Center

features several of these campaigns, highlighting labour-led efforts to accelerate emissions reductions and build a high-road, union, and inclusive workforce in these new and burgeoning industries.

Labour and Climate Jobs Coalitions Build Worker-Led and Worker-Centred Green Climate Policy

New York: Utilizing State Procurement Power to Establish Union Jobs in the Utility-Scale Solar, Onshore Wind, and Offshore Wind Industries

Climate Jobs New York (CJNY)—the first Climate Jobs coalition, formed in the aftermath of Hurricane Sandy—adopted an advocacy approach that has become a model for promoting a fast transition to renewable resources while simultaneously winning strong labour and equity standards for workers in that industry.¹⁹ CJNY and statewide climate and labour groups have worked deliberately to create an independent, long-term coalition that builds mutual understanding of shared interests at the

inspection).

¹⁵ David McHugh, *Pandemic Shows Contrasts Between US, European Safety Nets*, AP NEWS (May 10, 2020), <https://apnews.com/article/health-financial-markets-ap-top-news-financial-crisis-virus-outbreak-016b768f9c856c1baa1f7a6032de1243>.

¹⁶ Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 6 (2016).

¹⁷ Press Release, Bureau of Lab. Stat., Union Members – 2023 (Jan. 23, 2024), <https://www.bls.gov/news.release/pdf/union2.pdf>; Laura Feiveson, *Labor Unions and the U.S. Economy*, U.S. DEP’T OF TREASURY (Aug. 28, 2023), <https://home.treasury.gov/news/featured-stories/labor-unions-and-the-us-economy>; Michael Sainato, *US Labor Movement Faces Big Obstacles Despite Surge in Strikes and Union Wins*, GUARDIAN (Oct. 31, 2023), <https://www.theguardian.com/us-news/2023/oct/31/union-labor-win-strike-obstacles> (noting that the U.S. labour movement is “having a moment” with historic union election and contract campaign wins and a surge of strikes across a wide-range of industries).

¹⁸ U.S. DEP’T OF ENERGY, UNITED STATES ENERGY & EMPLOYMENT REPORT viii (2024), https://www.energy.gov/sites/default/files/2024-10/USEER%202024_COMPLETE_1002.pdf.

¹⁹ CJNY’s member unions include American Federation of State County and Municipal Employees (AFSCME) District Council 37, The Building & Construction Trades Council of Greater New York, The Building and Construction Trades Council of Nassau and Suffolk Counties, Communications Workers of America (CWA) (District 1), International Brotherhood of Electrical Workers (IBEW) Local 3, IBEW Third District, International Union of Operating Engineers (IUOE) Local 30, International Union of Painters and Allied Trades (IUPAT) District Council 9, Construction and General Building Laborers’ Local 79, Long Island Federation of Labor, New York City Central Labor Council (AFL-CIO), New York City District Council of Carpenters and Joiners of America, New York State AFL-CIO, New York State Nurses Association, 32BJ Service Employees International Union (SEIU), Transport Workers Union of America (TWU), TWU Local 100, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (UA), Utility Workers Union Local 1-2. *Our Coalition*, CLIMATE JOBS N.Y., <https://www.climatejobsny.org> (last visited May 19, 2024).

labour and climate nexus.²⁰

Beginning in 2017, CJNY convened building trades and energy sector unions to support the state's effort to create offshore wind facilities and to demand that developers incorporate high-road labour standards²¹ in the implementation of those projects. The state government recognized New York's "substantial potential" for offshore wind production and its importance to achieving the state's climate goals.²² The efforts of CJNY and its allies provoked the state to increase the state's offshore wind goal to 9 gigawatts by 2035 and mandate that high road labour standards be adhered to in the development of facilities.²³

In the United States, state and local regulation of labour relations is limited by broad doctrines of federal labour law pre-emption²⁴ that preclude any regulatory activity that is (or "arguably" is) protected or prohibited by the foundational U.S. labour law, the National Labor Relations Act.²⁵

²⁰ The building trades refers to highly trained, highly skilled union workers in the construction industry that have developed expertise in particular trades, such as electrical construction.

²¹ The "high road" is often described as a labour market approach where businesses compete by investing in worker well-being and success, which is key to attracting and retaining skilled workers and ensuring high-quality work. See, e.g., CAROL ZABIN ET AL., UNIV. OF CAL. BERKELEY LAB. CTR., PUTTING CALIFORNIA ON THE HIGH ROAD: A JOBS AND CLIMATE ACTION PLAN FOR 2030 6-8 (2020), <https://laborcenter.berkeley.edu/wp-content/uploads/2020/09/Putting-California-on-the-High-Road.pdf>. High-road labor standards refer to the broad framework of policies and practices that create such high-quality jobs and enable a "high-road" approach. There is general consensus that a good job pays a living wage with comprehensive benefits (e.g., health care, retirement, paid sick and family leave); provides job security and a safe, healthy, and accessible workplace; offers skills and career advancement; complies with all workplace laws; and facilitates worker empowerment and representation, such as through unions and collectively bargaining. See, e.g., *The Good Jobs Initiative*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/good-jobs/principles> (last visited Dec. 25, 2024).

²² New York adopted a Clean Energy Standard in 2016—50% renewable generation by 2030—and expanded it in 2020 to adhere to the goals established by the 2019 Climate Leadership and Community Protection Act: 70% renewable generation by 2030 and a zero-emission electric grid by 2040. See *Clean Energy Standard*, N.Y. ENERGY RSCH. DEV. AUTH., <https://www.nyserda.ny.gov/All-Programs/Clean-Energy-Standard> (last visited Dec. 25, 2024).

²³ *Id.*

²⁴ Under the Supremacy Clause of the U.S. Constitution, the federal constitution and federal law take precedence over state laws. U.S. CONST. art. VI, cl. 2. This Clause is the foundation of federal pre-emption, which is a "ubiquitous feature of the modern regulatory state." BRYAN L. ADKINS ET AL., CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER (2023).

²⁵ *San Diego Unions v. Garmon*, 359 U.S. 236 (1959). Labor pre-emption has been extended in other cases, including to activity that congressional intent indicated was meant to be

Generally speaking, these pre-emption doctrines bar state and local governments from imposing standards that support union organizing or intrude on collective bargaining. However, the U.S. Supreme Court has established an exception to this pre-emption doctrine in circumstances where the state or local government acts as a "market participant," akin to a private party in the marketplace.²⁶ If the government uses its spending power to advance its proprietary interest in the efficient, on-time, high-quality completion of work for which the government contracts, the government *can* require that the developer adopt certain labour agreements, such as project labour agreements and labour peace agreements (PLAs and LPAs).²⁷ In this case, ensuring high road standards fosters the uninterrupted, expeditious completion of the public contract.²⁸

In New York, the New York State Energy Research Development Authority (NYSERDA) procures renewable energy credits (RECs) from generation facilities via annual solicitations.²⁹ NYSERDA acts as a "market participant" when it purchases RECs, and thus has a proprietary interest in the expeditious and high-quality construction and operation of the generation facilities.

left to the "free play of economic forces." *Machinists v. Wis. Emp. Rels. Comm'n*, 427 U.S. 132, 140 (1976) (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

²⁶ *Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I.*, 507 U.S. 218, 227 (1993).

²⁷ A labour peace agreement (LPA) is an agreement between a union and employer that generally includes employer commitments on neutrality regarding union organizing, an agreement on the terms of worksite access for union organizers, and a process for employer-recognition of a union, together with union commitments not to disrupt work at the site. Roger C. Hartley, *Preemption's Market Participant Immunity - A Constitutional Interpretation: Implications for Living*, 5 U. PA. J. LAB. AND EMP. L. 229 (2002).

²⁸ PLAs and LPAs protect a state or local government's proprietary interest by prohibiting union members and employers from engaging in strikes, lockouts, or any other economic interference with the construction or operation of the project. Project Labor Agreements (PLAs), for example, result in overall cost savings, improved quality, and uninterrupted work. See, e.g., RONDA SAUGET & MARV FINKELSTEIN, PROJECT LABOR AGREEMENTS (PLAs) AND TRIPARTITE APPROACH MODEL FOR CONSTRUCTION PROJECT MANAGEMENT (2015), <https://leadershipcouncilswil.com/wp-content/uploads/2015/12/Full-PLA-for-website.pdf> (analysing PLAs and cooperative labour-management agreements and practices in the construction industry in Southwestern Illinois).

²⁹ A certificate of the energy production representing the attributes of one megawatt-hour of electricity generated from a qualifying renewable energy source. In New York, as in many states, utilities must obtain RECs to substantiate compliance with the state's Clean Energy Standard. *NYGATS Frequently Asked Questions*, N.Y. ENERGY RSCH. DEV. AUTH., <https://www.nyserda.ny.gov/All-Programs/NYGATS/Renewable-Energy-Credits-Policy-Change/FAQ> (last visited Dec. 25, 2024).

Capitalizing on NYSEERDA's role as a "market participant," CJNY and its affiliate unions campaigned to persuade state officials to require PLAs in state-procured utility-scale offshore wind.³⁰ In the Public Service Commission's (PSC) administrative rulemaking establishing the offshore wind standard and procurement framework, the PSC adopted a PLA requirement, finding that PLAs may be "particularly valuable" in a context in which "time is of the essence," concurring with CJNY's assertions that PLAs create project efficiencies.³¹ Unions still maintain significant labour power in the state (New York boasts the second highest union membership rate in the country), enabling CJNY labour leaders to make policy demands of state administrative and legislative officials directing the state's large-scale procurements.³²

Following this initial success in the offshore wind industry, CJNY has led campaigns to both strengthen and broaden the labour standards to apply to the entire renewable energy sector. CJNY's legislative wins have expanded LPAs, prevailing wage, and domestic content requirements in all other large-scale renewable procurements.³³ The long-term effect of this effort is the creation of thousands of well-paying union construction jobs on utility-scale offshore wind, solar, and other renewable energy projects across the state. CJNY's affiliates are now focusing on winning favourable organizing terms through LPAs at clean energy manufacturing and supply

chain facilities, which is bolstered by incentives to build both a local and domestic manufacturing sector—where the largest number of permanent jobs will be.³⁴

Although this initial offshore wind campaign occurred in 2018, prior to the passage of the IRA and IIJA, New York has subsequently passed legislation and administrative rulings that seek to leverage federal funding. In NYSEERDA's large-scale renewable procurement solicitations, including post-IRA offshore wind procurements, developers must describe potential use of federal tax credits in the project's financing.³⁵ Thanks in no small part to labour's advocacy, New York is taking advantage of the IRA's historic opportunity in a manner that elevates labour and workforce standards even above the federal floor, benefitting workers and communities across the state.

Illinois: Creating Good Jobs and Job Access Through Equitable Workforce Training

Climate Jobs Illinois (CJI),³⁶ a statewide coalition of unions united around a pro-worker and pro-climate agenda, championed the landmark 2021 Climate and Equitable Jobs Act (CEJA) alongside environmental and racial justice allies. CEJA is a sweeping clean energy and climate justice bill that sets ambitious timelines for the state's clean energy transition, includes landmark labour standards for the buildout of new renewable infrastructure, and cultivates apprenticeship and training opportunities for historically underrepresented and marginalized communities.³⁷ CEJA's equity-oriented framework

30 Utility-scale is typically defined as projects 10 megawatts or larger. See *Renewable Energy: Utility-Scale Policies and Programs*, U.S. DEP'T OF ENERGY, <https://www.energy.gov/scep/slsc/renewable-energy-utility-scale-policies-and-programs> (last visited Dec. 25, 2024).

31 Order Establishing Offshore Wind Standard and Framework for Phase 1 Procurement, N.Y. PUB. SERV. COMM'N Case 18-E-0071, 50 (2018).

32 Press Release, Bureau of Lab. Stat., *supra* note 17. The Maine Labor Climate Council (MLCC), the Maine Climate Jobs coalition, has led a successful campaign to advance the buildout of offshore wind, a critical new clean energy industry required to meet the state's climate goals and with the potential to create high-quality jobs in historically deindustrialized communities. In a 2023 landmark bill, the MLCC engaged fisheries and community stakeholders around a responsible plan to site 3 gigawatts of offshore wind by 2040 in a manner that addresses the concerns of historic lobster and fishing grounds, prioritizes local workers, and pays collectively bargained wages. See ME. REV. STAT. ANN. tit. 35 § 3407 (2015).

33 N.Y. PUB. SERV. LAW § 66-r (McKinney 2019); N.Y. LAB. LAW § 224-d (McKinney 2024). CJNY also supported the passage of a bill that requires the state power authority to construct and operate renewable energy projects to achieve the state's climate goals and requires PLAs. N.Y. EDUC. LAW § 3602-e (McKinney 2023).

34 CJNY successfully won recent legislation that expands labour peace and other labour standards to the offshore wind supply chain. N.Y. PUB. SERV. LAW § 66-r (McKinney 2019).

35 See, e.g., N.Y. RSCH. & DEV. AUTH., NYSEERDA SEEKS TO ACQUIRE NEW YORK TIER 1 ELIGIBLE RENEWABLE ENERGY CERTIFICATES 55 (Nov. 30, 2023), <https://portal.nyserda.ny.gov/servlet/servlet.FileDownload?file=00P8z000003b5XREAY>.

36 CJI's member unions include Illinois AFL-CIO, Chicago Federation of Labor, Chicago & Cook County Building & Construction Trades Council, Mid-America Carpenters Regional Council, International Association of Heat & Frost Insulators, Illinois Education Association, Illinois Federation of Teachers, International Association of Bridge Structural Ornamental and Reinforcing Iron Workers Union, IBEW State Council, IBEW Local 134, IUOE Local 150, Laborers International Union of North America Great Lakes Region, Laborers International Union of North America Midwest Region, SEIU State Council, Illinois Pipe Trades Association. *About Us*, CLIMATE JOBS ILL., <https://climatejobsillinois.org> (last visited May 13, 2024).

37 S.B. 2408, 102nd Gen. Assem., Reg. Sess. (Ill. 2021). The law's PLA requirement for utility-scale wind, solar, and

will also support communities disproportionately impacted by climate change and fossil fuel communities facing economic dislocation from decommissioned coal plants and mines, including through grants to communities that have experienced plant or mine closures, incentives to install energy storage facilities at the sites of former coal plants, and assistance to children of displaced energy workers.³⁸

The common industry refrain is that the climate agenda is hindered by labour shortages in key occupations.³⁹ CJNRC and Climate Jobs coalitions understand that there is not a labour shortage, but rather a shortage of good union jobs with a living wage, health insurance, retirement benefits, and job protection. In the U.S., the public education system does not necessarily provide pathways to vocational and technical trades. Although there are multiple sources, organized labour plays a key role in offering registered apprenticeship and pre-apprenticeship programs for the skilled trades that are subject to federal regulation.⁴⁰ For example, the North American Building Trades Union (NABTU) operates the nation's largest registered apprenticeship program: 75% of U.S. construction apprentices are trained in NABTU's joint labour-management training programs, registering an average of 75,000 new apprentices annually.⁴¹

brownfield solar projects from which the state procures RECs, as well as the broader prevailing wage requirement, ensure a long-term pipeline of union jobs that creates the demand for pre-apprenticeship and apprenticeship recruitment from target communities.

³⁸ Other CEJA Programs, ILL. DEP'T OF COM. & ECON. OPPORTUNITY, <https://dceo.illinois.gov/ceja/other-ceja-programs.html> (last visited Dec. 4, 2024).

³⁹ Nichola Groom & Valerie Volcovici, *Insight: Biden's Climate Agenda Has a Problem: Not Enough Workers*, REUTERS (Jan. 11, 2023), <https://www.reuters.com/business/energy/bidens-climate-agenda-has-problem-not-enough-workers-2023-01-11/>.

⁴⁰ Registered apprenticeship is an "earn-while-you-learn" workforce training model that provides a nationally recognized credential through classroom instruction and paid work experience. Apprenticeship continues to grow, with a 64% increase in new apprentices between 2010-2021. *FY 2021 Data and Statistics, Registered Apprenticeship National Results Fiscal Year 2021*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/eta/apprenticeship/about/statistics/2021>, (last visited Dec. 29, 2024). Pre-apprenticeship programs are designed to prepare individuals to enter registered apprenticeships.

⁴¹ NORTH AM. BLDG. TRADES UNION, ENHANCE YOUR SKILLS ADVANCE YOUR LIFE, (2021), https://nabtu.org/wp-content/uploads/2021/09/NABTU_ApprenticeshipPrograms2021-Web.pdf. NABTU estimates that an apprentice earns \$300,000 more over the course of a career compared to non-apprenticeship participants. *Id.*

⁴² ILL. DEP'T OF COMM., CEJA ILLINOIS: CLIMATE AND EQUITABLE JOBS ACT WORKFORCE PROGRAMS (2023).

To equitably grow the state clean energy workforce, CEJA established several programs. The Climate Works Pre-apprenticeship Program will fund three centres to prepare workers to enter building trades apprenticeship programs through training, apprenticeship placement, and transition support.⁴² The Energy Transition Navigator Program will conduct outreach, education, and recruitment for the Pre-apprenticeship Program, and the Returning Resident Clean Jobs Training provides clean jobs training, education, and supportive services to formerly incarcerated individuals within thirty-six months of their release.

"Collectively, these programs have the potential to dismantle employment barriers for women, people of colour, and other historically marginalized and disadvantaged groups that are particularly underrepresented in clean energy job occupations."

Illinois' programs were further bolstered by the IRA's and IJA's equitable workforce development standards and programs. The drafters of the IRA intended for the apprenticeship tax credit bonus to foster the growth of a skilled, high-wage workforce. IJA grant funding provides states and other entities over \$800 million to be used in workforce development.⁴³ By passing CEJA, Illinois is expanding and strengthening the clean energy workforce development pipeline that will both meet increased demand and improve the lives of historically underrepresented and disadvantaged workers.

⁴³ THE WHITE HOUSE, ADVANCING EQUITABLE WORKFORCE DEVELOPMENT FOR INFRASTRUCTURE JOBS: A GUIDE TO SELECTED FEDERAL RESOURCES (2022), . That figure does not include the additional discretionary funding streams that may be used for this purpose.

Texas: Mobilizing Local-Level Policymakers to Achieve Climate Jobs Wins

Even where state-level politics do not permit sweeping statewide legislative reform to create union jobs and/or raise labour standards on renewable energy projects, there are Climate Jobs coalitions, such as the Texas Climate Jobs Project (TCJP), that are making innovative inroads at the local level.⁴⁴ At the state level, the dominant political forces in Texas are largely hostile to advancing workers' rights and labour standards. Texan workers, on average, have low wages that fail to cover cost of living, few worker protections, and limited organizing rights.⁴⁵ Somewhat counterintuitively, despite Texas' history as the nation's top oil- and natural gas-producer, the state has also recently become the nation's biggest producer of wind and solar energy.⁴⁶ Yet this has not stopped state leaders from advancing legislation aimed to thwart the state's flourishing industry and entangle climate policy in the "culture wars" currently raging in American political discourse.⁴⁷

⁴⁴ The Texas Climate Jobs Project member unions include American Federation of Government Employees (AFGE) Local 1003, Dallas Building & Construction Trades Council, International Association of Machinists (IAM) Local 776, IBEW Local 20, IBEW Local 72, IBEW Local 479, IBEW Local 520, IBEW Local 716, IUPAT District Council 10, Maritime Employee Benefits Association Union, Plumbers Local Union 68, Southwest Laborers District Council (SWLDC), Texas AFL-CIO, Texas American Federation of Teachers (AFT), Texas Building and Construction Trades Council, Texas CWA, Texas Gulf Coast Area Labor Federation, Texas SEIU, San Antonio Building & Construction Trades Council, Southwest Gulf Coast Regional Council of International Association of Sheet Metal, Air, Rail, and Transportation Workers (SMART), Southwest Pipe Trades Association, United Auto Workers (UAW) Region 8, UAW Local 119, United Steelworkers (USW) District 13. *Texas Climate Jobs Project*, CLIMATE JOBS NAT'L RES. CTR., <https://www.cjnr.org/texas> (last visited Dec. 29, 2024); TEX. CLIMATE JOBS PROJECT, <https://www.txclimatejobs.org> (last visited Dec. 29, 2024).

⁴⁵ *Best and Worst States to Work in America 2023*, OXFAM INT'L, <https://www.oxfamamerica.org/explore/countries/united-states/poverty-in-the-us/best-states-to-work-2023> (last visited Dec. 29, 2024); Texas' so-called "Death Star" law went into effect in September 2023 and pre-empts several areas of local regulation, including labour relations. Matt Sledge, *After Fierce Debate, Texas 'Death Star' Law Has Yet to be Used in Houston, Other Big Cities*, HOUS. LANDING (Nov. 13, 2023), <https://houstonlanding.org/after-fierce-debate-texas-death-star-law-has-yet-to-be-used-in-houston-other-big-cities/>.

⁴⁶ *Texas State Energy Profile*, U.S. ENERGY INFO. ADMIN., (June 15, 2023), <https://www.eia.gov/state/print.php?sid=TX>; Dan Gearino, *One State Generates Much, Much More Renewable Energy Than Any Other—and It's Not California*, INSIDE CLIMATE NEWS (Mar. 9, 2023), <https://insideclimatenews.org/news/09032023/inside-clean-energy-texas-renewables>.

⁴⁷ Kristoffer Tigue, *Clean Energy Is Thriving in Texas. So Why Are State Republicans Trying to Stifle It?* INSIDE CLIMATE NEWS (Apr. 14, 2023), <https://insideclimatenews.org/>

Against this backdrop, TCJP has skilfully navigated the landscape to advance labour standards at the county and municipal levels. The TCJP Action Fund lobbied the Austin Independent School District Board of Trustees to approve a resolution imposing labour standards for District construction projects funded by a 2022 \$2.44 billion bond package. The District used the bond to make energy efficiency retrofits for public school buildings and committed to pay living wages, hire locally through apprenticeship and training programs, and provide safety training, access to health care, workers compensation, and sick leave.⁴⁸

TCJP won strong labour standards in a federal award to deploy solar in low-income and historically under-resourced communities by successfully encouraging the applicants to make stronger commitments in a competitive grant program. The Environmental Protection Agency (EPA) is administering the Greenhouse Gas Reduction Fund (GGRF), a \$27 billion investment channelled through three programs to finance clean technology deployment nationwide, especially in low-income and disadvantaged communities. Each of these programs required applicants to detail how their proposed projects will generate high-quality jobs with a diverse, skilled workforce that pay family-sustaining wages and respect workers' right to freely and fairly join a union and collectively bargain.⁴⁹ Although these programs do not mandate labour standards beyond requiring compliance with Davis-Bacon prevailing wages,⁵⁰ the EPA's

[news/14042023/clean-energy-is-thriving-in-texas-so-why-are-state-republicans-trying-to-stifle-it/](https://www.austintribune.org/2023/11/17/texas-climate-textbooks-education-SBOE); Erin Douglas & Kevin Vu, *Texas Board Rejects Many Science Textbooks over Climate Change Messaging*, TEX. TRIB. (Nov. 17, 2023), <https://www.austintribune.org/2023/11/17/texas-climate-textbooks-education-SBOE>.

⁴⁸ AUSTIN INDEP. SCH. DIST. BD. OF TRS., RESOLUTION BY THE BOARD OF TRUSTEES OF THE AUSTIN INDEPENDENT SCHOOL DISTRICT (2022), [https://go.boarddocs.com/tx/austinisd/Board.nsf/files/CJMNQM5EDD61/\\$file/Attachment%201%20Worker%20Protection%20Resolution.pdf](https://go.boarddocs.com/tx/austinisd/Board.nsf/files/CJMNQM5EDD61/$file/Attachment%201%20Worker%20Protection%20Resolution.pdf); see also Becky Fogel, *Austin ISD School Board Approves Protection for Construction Workers Ahead of Bond Election*, KUT NEWS (Sept. 30, 2022), <https://www.kut.org/education/2022-09-30/austin-isd-school-board-approves-protections-for-construction-workers-ahead-of-bond-election>.

⁴⁹ See, e.g., U.S. ENV'T PROT. AGENCY, OFF. OF THE GREENHOUSE GAS REDUCTION FUND, NATIONAL CLEAN INVESTMENT FUND (NCIF) REQUEST FOR APPLICATIONS, EPA-R-HQ-NCIF-23 33 (2023).

⁵⁰ The Davis-Bacon and Related Acts requires contractors and subcontractors on federally funded or assisted contracts above \$2,000 to pay their labourers and mechanics no less than the locally prevailing wages and fringe benefits for the construction, alteration, or repair of public buildings or public works. See *Davis-Bacon and Related Acts*, U.S. DEP'T

applications require applicants to provide labour and equity workforce plans. The EPA credits applicants with robust plans in the application's overall score, thereby incentivizing robust labour and equity commitments. TCJP urged applicants in Texas to incorporate commitments to labour standards like PLAs and LPAs in their applications to enhance their chances of having their applications approved.

TCJP celebrated EPA's \$249 million Solar for All Program (SFA) award, one of the GGRF's three programs, to a Harris County-led coalition of a dozen Texas cities and counties.⁵¹ The goal is to transform access to distributed solar in Texas, particularly for low-income and disadvantaged communities, and to create community wealth and savings through energy cost reductions and equitable access to well-paying jobs. Together with labour and community groups, TCJP worked with Harris County Commissioners for months, building a shared understanding of the public benefit of including strong labour standards in the County's application. When it was submitted, the application included promises to include a Community Workforce Agreement (CWA) requirement—a kind of PLA that includes broader equity- and community-oriented economic and other commitments—with the Texas Building & Construction Trades Council for all SFA-funded work. The coalition also committed to require domestic content for the manufactured products (e.g., solar panels and battery energy storage) used in these projects, as well as a requirement for the manufacturer to provide written evidence that none of the funds received will be used to oppose union organizing.

In another successful SFA application, the Clean Energy Fund of Texas (Texas' "green bank") and the Texas AFL-CIO signed a private, binding agreement that sets out fair and neutral organizing and representation terms for construction and manufacturing workers. This includes binding CWAs with the Texas Building & Construction Trades Council. This funding will target deployment of solar and battery technologies at Historically Black Colleges and Universities (HBCUs) and other Minority

Serving Institutions (MSIs) across the country. Additionally, TCJP successfully negotiated with the Clean Energy Fund to establish a Labor Advisory Committee and create a union set on the bank's governing board. The inclusion of a union voice in the management of green banks is a goal that other Climate Jobs coalitions are likely to adopt in the immediate future.

Rhode Island: Labor Voice to Establish a Pro-Worker Municipal Climate Framework

In a national first, the Providence City Council voted to declare Providence "America's First Climate Jobs City."⁵² The resolution was the product of extensive collaboration between Climate Jobs Rhode Island (CJRI),⁵³ the Mayor's Office, the Providence City Council, and other labour, environmental, and community partners.⁵⁴ The resolution built upon a suite of recent state laws that CJRI championed to accelerate the state's timeline to reach 100% renewable energy by 2033 and establish a host of robust labour standards, including LPAs and registered apprenticeship utilization.⁵⁵

CJRI labour leaders drove the consensus-building process among labour, environmental, community advocates, and local elected leaders to build a holistic urban climate action vision. The

52 Res. 42502, 2023 Leg. (Providence, R.I. 2023), https://providenceri.igm2.com/Citizens/Detail_LegiFile.aspx?Frame=None&MeetingID=14043&MediaPosition=&ID=42502&CssClass=.

53 The CJRI member unions and other affiliates include the Rhode Island AFL-CIO, RI Building and Construction Trades Council, Audubon Society of Rhode Island, The Nature Conservancy in RI, IUPAT DC 11, Green Energy Consumers Alliance, The Acadia Center, SEIU District 1199NE, IBEW Local 99, Clean Water Action RI, RI Federation of Teachers & Health Professionals, LiUNA NE Region, National Education Association RI, Groundwork RI, Laborers Local 271, Building Futures RI, RI Environmental Education Association, RI Committee for Occupational Safety & Health, Fuerza Laboral, Teamsters Local 251, Amalgamated Transit Union Local 618, Childhood Lead Action Project, Carpenters Local 330, SMART, Northeast Regional Council Local 17, Build RI, Conservation Law Foundation, The Latino Policy Institute at RWU, United Way of RI, Utility Workers Union Local 310, Plumbers and Pipefitters (UA) Local 51. *Coalition Members*, CLIMATE JOBS R.I., <https://climatejobsri.org/the-coalition> (last visited Dec. 29, 2024).

54 Sarah Wray, *Providence Pledges to be America's First 'Climate Jobs City'*, CITIES TODAY (Oct. 12, 2023), <https://cities-today.com/providence-pledges-to-be-americas-first-climate-jobs-city>.

55 39 R.I. Gen. Laws § 26-4 (2022); 39 R.I. Gen. Laws § 26-8 (2022). The labour peace agreement is predicated on an analysis similar to the "market participant" exception described above, which is that Rhode Island may condition state financial assistance on entry into a labour agreement because the state's financial assistance is not a form of labour regulation. *N. Ill. Chapter of Assoc. Builders & Contractors v. Lavin*, 431 F.3d 1004 (7th Cir. 2005).

OF LAB., <https://www.dol.gov/agencies/whd/government-contracts/construction> (last visited Dec. 29, 2024).

51 Press Release, Texas Climate Jobs Project, Texas Climate Jobs Project Applauds Biden Administration for Awarding Harris County "Game-Changing" Clean Energy and Jobs Grant (Apr. 22, 2024), <https://www.txclimatejobs.org/press/texas-climate-jobs-project-applauds-biden-administration-for-awarding-harris-county-game-changing-clean-energy-and-jobs-grant>.

resolution commits Providence to harnessing federal clean energy incentives to accelerate a just transition, workforce development, building decarbonization, and clean energy. The vision for Providence reflects an interdisciplinary approach, committing the city to decarbonization objectives that will create equitable access to family-sustaining jobs and investment in the communities most in need.

To accomplish the resolution's commitment to decarbonize and retrofit all existing buildings by 2050, the City Council passed an ordinance to require that municipal buildings be carbon neutral by 2040.⁵⁶ CJRI, including the state's Building and Construction Trades Council, was again instrumental in crafting this groundbreaking ordinance, which requires an analysis to determine PLA-use on energy efficiency upgrades and electrification projects, such as electric heating and cooling systems and the use of thermal energy networks.

The resolution explicitly empowers CJRI to partner with the city in identifying IJA, IRA, and other federal funding streams that can amplify local investments and advance decarbonization. Indeed, CJRI is developing strategies to mobilize IRA funding and financing for single and multi-family residential decarbonization that could advance the building decarbonization efforts. Most recently, the Rhode Island Office of Energy Resources received a \$49.3 million Solar for All award that will be used to defray the financial barriers to solar adoption for low-income renters and homeowners.⁵⁷ CJRI will continue to chart the path for how state and city governments can take full advantage of federal funds to support state and local policymaking that prioritizes an equitable, worker-centred transition.

Conclusion

The American labour movement is championing a worker-centred and worker-led transition to a net-zero carbon emissions economy. In New York, the coalition leveraged the power of state procurement to secure labour agreements across the rapidly growing clean energy sector. The Illinois coalition collaborated with a broad array of environmental and racial justice allies to establish workforce training programs to build a pipeline of skilled workers essential for

the energy transition. In Texas, despite a hostile political landscape, the coalition advanced labour standards for local clean energy deployment. In Rhode Island, the coalition embedded labour as a formal partner in the development of a municipal climate framework.

In each case, Climate Jobs coalitions and labour unions at the state and local levels deftly wielded organized labour's power to embed high-road standards in programs and projects prior to their implementation – for the benefit of workers and communities as well as industry. Unions are uniquely suited to lead these efforts, drawing on their deep industry expertise, capacity to mobilize their membership, and sophisticated understanding of the political landscape. While the efforts were bolstered by the IRA, IJA, and CHIPS, organized labour's climate leadership predates the Biden Administration's industrial policy and will continue to be paramount in winning good climate jobs at the state and local levels.

Now more than ever, the success of the climate movement and the growth of the labour movement are inextricably linked. Workers are already grappling with the profound impacts of climate change on their lives and livelihoods, and they know the essential role of unions in establishing a high-road, union jobs framework, just as the clean energy sector takes hold. Increasingly, policymakers and climate advocates acknowledge that unions are vital to building the highly skilled and trained workforce necessary to scale clean energy solutions with unprecedented speed. Climate jobs coalitions and labour affiliates are demonstrating the profound political potential of labour leading on climate to ensure the clean energy transition advances an inclusive, equitable, and sustainable society.

⁵⁶ Ord. 2024-3, 2023 Leg. (Providence, R.I. 2023).

⁵⁷ *Solar for All*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/greenhouse-gas-reduction-fund/solar-all> (last visited Dec. 29, 2024).



El Cerrejón Coal Mine in Guajira, Colombia. Credit: camaralucida1 / stock.adobe.com

COLOMBIAN COAL WORKERS AND A JUST TRANSITION

A Conversation With Ana Catalina Herrera Parra



Ana Catalina Herrera Parra

Ana Catalina Herrera Parra is a lawyer specializing in labour law and industrial relations from the Externado University of Colombia, with an emphasis on international human rights law from the American University Washington College of Law. She is a Candidate for a Master's Degree in Gender and Public Policy at FLACSO Argentina, with work experience in promoting decent work, just energy transition, and labour and human rights. She is an expert in risk analysis, developing strategic action plans for the application of labour and human rights, mediation, protection, and access to remedy in international judicial and non-judicial reparation bodies, including the ILO, the Inter-American System, OECD National Contact Point, and the EU Single Entry Point.

Cassandra Waters: You have been working with unions in the coal mining sector on just transition for four years. Can you tell me about the key issues that you and the unions have identified in relation to the right to a just transition?

Ana Catalina Herrera Parra: I started working with five unions in the mining sector in northern Colombia that are present at the big companies and multinationals: Sintracarbón, Sintramienergía, Sintradem, Sintradrummond and Sintracerrejon. Together, we created a space called Colectivo de Trabajadores por una Transición Justa (Workers' Collective for a Just Transition). The Collective is a coordinated, programmatic space for workers to confront mine closures. The demand for coal is falling. Already, companies are renouncing their mining contracts and firing workers.

The Collective is not a formal structure, the unions each have their own structures, but they are at the same table to develop a shared narrative about just transition. I have been a part of this process as an advisor and facilitator, but it is the union leaders who discuss and define the big issues related to a just transition, not just an energy transition.

The Collective identified four issues: social dialogue, social protection, economic diversification and retraining of workers. First is social dialogue. Through strong unions and unity of action, we want to achieve sectoral bargaining to define how to achieve just mine closures. Together with the trade unions, I supported the creation of a list of demands on how to carry out just mine closures, ensuring no one is left behind, to be presented to the multinationals and companies in the mining corridor, to start negotiations on this issue. Here I want to draw attention to the ILO Committee on Freedom of Association, which has stated that when companies make decisions regarding termination or restructuring, they must consult with workers to minimise the impact.¹

The second issue is the right to social protection. Most workers in the mining sector suffer from occupational diseases. This is a big problem when a mine closes, the workers have no other job options because they are discriminated against because they have health problems. They do not qualify for unemployment benefits because they earn more than the minimum wage. So, it is essential that both the companies and the government create a social protection fund for mine workers.

The third issue is economic diversification. In most of the mining territories, people are dependent on the industry. We must change that through economic diversification in those areas. In our work, we support trade unions to create associations and cooperatives and identify other sources of income, particularly the creation of green jobs that help preserve and restore the environment and promote sustainable development.

The fourth issue is retraining. As a result of the work of the Collective, I planned a retraining strategy with allies such as universities in the territories to promote cooperative projects; now four cooperatives of mineworkers and former mineworkers have been created, which promote diversification and retraining of workers in different skills.

In sum, for the energy transition to be just from a labour perspective, it must include social dialogue, social protection, economic diversification, and worker retraining.

¹ INT'L LAB. ORG. (ILO) COMPILATION OF DECISIONS (2018), 1553 - 1562 https://normlex.ilo.org/dyn/nrmlx_en/f?p=NORMLEXPUB:70002:0::NO:70002:P70002_HIER_ELEMENT_ID,P70002_HIER_LEVEL:3948810,1

CW: Can you tell me more about the proposals developed by the trade unions to achieve the right to a just transition? What were the demands and how did the government and industry respond?

AH: We are promoting the creation of a space for institutional dialogue between workers, companies in the mining sector, and the government. This space would be part of the Ministry of Labour and the Ministry of Energy. It has not yet been created, but the government intends to do so. The current government has worked hard to promote a just energy transition policy.

The organizations of the Collective and I have been promoting a reform to the Labour Code that includes the concept of decarbonization and guarantees for workers in the event of mine closures. The reform would identify the number of workers directly or indirectly affected by mine closures and create a special fund for economic diversification and social protection. In 2020, various titles and mining contracts were terminated, and there was no legislation. The absence of legislation to protect workers was an advantage for the companies because, of course, they made decisions without even considering, let alone addressing, the impact on workers.

So, the fact that there is a regulatory proposal on this issue today is a big step forward. The energy transition will lead to mine closures, and absent regulations companies will continue renouncing mining contracts to avoid complying with the environmental obligations associated with mine closures, leaving the economic and social costs to the State. The labour reform proposal has passed in the House of Representatives but must be discussed in the Senate. We hope it can move forward; it would be an important advance to protect workers and there aren't sufficient legal protections on this issue.

CW: What is the difference between renouncing a contract and closing a mine?

AH: Renouncing the contract means that one of the parties unilaterally terminates the contract. In the case of companies like Prodeco/Glencore, they renounced their mining titles and the contract and returned that land to the State. This meant they did not have to close the mine or comply with environmental restoration obligations. They left it to the State to decide whether to issue a contract to another company, or shoulder the costs of closing the mine.

Renouncing the contract has only minor legal obligations, but the closure of a mine has legal obligations of a different nature, especially in terms of environmental restoration. We have proposed sectoral collective bargaining to address three situations: title renunciation, mine closure, and cessation of operations; to ensure all three include obligations to workers regarding social dialogue, social protection, economic diversification and retraining. If it isn't dealt with, companies will continue to renounce their titles before the contract ends.

Mine closures should be done with the community, with the workers, and with the unions. An agreement has to be reached on how the mine will be closed and on measures for social protection for sick workers and elderly workers, among others. We must define how the workers will continue to be guaranteed access to pensions and health care. Otherwise, we will see an increase in the number of workers in the informal economy.

Today, taking advantage of the much higher price per ton of coal on the international market, we could raise money to create a fund in which multinationals, companies that buy coal, and the State itself could participate. We could create a fund or a budget for social protection for sick workers, workers about to retire, and workers in debt, for example. Many companies lend money to workers, and when workers are dismissed and should receive their severance pay, they leave without it because the company keeps the money the workers borrowed.

CW: What are the loans for?

AH: For housing or education. When the worker's contract ends and they should get severance pay, the company keeps the money because the worker is in debt to the company. There should be proportionality so both the worker and the company get money. Companies usually already know when they will close and when they will make decisions. The workers don't know, which is why consultations with the workers are so important.

They should be consulted on issues of social protection, such as access to pensions and health care, and on proposals to fund economic diversification so that the workers can develop, for example, cooperatives to promote the economy of their territories.

Often the energy transition is looked at only as a matter of economic diversification. Economic diversification is important, but social protection is fundamental because cooperative projects don't become productive overnight; it takes time for them to become economically viable, and in the meantime, you have a gap in social protection. Social protection and economic diversification must go hand in hand.

Workers could play a significant role in reforestation around the mines if they are trained to help repair the environmental damage that the mine created. This could be taken into account in mine closure plans. The land issue is vital. The mines have so much land, and this land should be returned to the communities so that they can promote productive projects. For example, installing solar panels or hydroponic crops for the benefit of the communities. They could export products, for example, through associations and cooperatives, hopefully coming from the trade union movement itself. It would be fantastic.

CW: This is a very interesting reflection on former miners' role in cleaning up pollution. Are there currently any requirements on how to deal with environmental pollution, particularly around continuity of the workforce or any other aspect related to workers' rights?

AH: There are well-developed environmental obligations when a mine closes. But there aren't clear obligations in terms of labour issues, so one option here would be to link environmental obligations with labour obligations, using a human rights-based approach.

The unions have exciting proposals; they have created cooperatives that develop green and blue jobs. For example, one cooperative trains workers to install solar panels. There is another cooperative that is focused on agribusiness. Some are considering growing mangoes to diversify the area's economy. Others are more focused on a plant called sisal that can produce biodiesel. There are very cool ideas that can help retrain workers who have built their lives around mining. The companies also have a responsibility because when they came to the territory, they trained people in

mining. So now that they are leaving, they have an obligation to repair the damage that has been done. One way to repair the damage is to return things to how they were before so that the workers have other income opportunities besides mining.

CW: How has the industry reacted to these proposals?

AH: Here in Colombia, in the last few years, the companies have been silent about what is happening and about the future of coal. For example, in the latest negotiations with Drummond, the company refused to discuss the transition. In the last negotiations with Glencore and Carbones del Cerrejón, the companies decided to create a bipartite table to address the transition issue, thanks to Sintracarbón who fought for transparency in this process. This will possibly take place in 2034, which is when their mining contract ends, that is if they do not give up the contract before then!

The countries that buy coal in Colombia are mostly European, and they have signed the Paris Agreement, so it is possible that soon there will be mine closures or renounced titles, and we need to talk about this in a transparent way. The companies have clearly defined their strategy and their economic diversification plans, of course because coal prices are falling.

Companies in the mining corridor agreed to follow a voluntary code of conduct called "Bettercoal," which has some obligations regarding mine closure procedures.² The code of conduct specifically discusses the importance of planning closures with communities and unions. However, the companies aren't actually complying with this code of conduct.

Given that the companies know their exit strategy, the union movement should also know its plan of action so that bad experiences don't happen again, and the renunciation of titles and mine closures don't take us by surprise. I think it is essential that the mine workers know that at some point the mines are going to close, it could be in ten years, fifteen years, twenty years, or thirty years. Regardless of when it happens, we must have a strategy at the union level, but also at the negotiation level, of what we want the procedure for mine closures to be.

People think that mining is here to stay, but it isn't. Many countries have signed the Paris Agreement and must reduce their nationally determined emissions. This will end up affecting the countries of the Global South, which are the countries where coal is generally mined. We must have a differentiated strategy for the energy transition in the countries of the Global North and the Global South, because we depend on this sector of the economy. This dependency has been imposed on us; we have been made to depend on extractivism. Therefore, we also must think about reparations and access to remedies. The right to have the damage repaired so that it doesn't happen again, and the need for measures, including normative measures to guarantee non-repetition, so that we don't fall back into neo-extractivism.

Within the trade union movement, we have to think about differentiated and grounded strategies. We must keep in mind that the closures can happen at any time, and have a strategy for how we want the process to ensure workers' rights, health, and future.

² See Bettercoal Standard 2.0 (January 2021) <https://www.bettercoal.org/bettercoal-code>

CW: Your point on reparations is so essential. Can you talk about what needs to happen to recognize and repair the damage?

AH: On the issue of the right to reparations, I adopt the concept of the United Nations, which is based on five elements.³ One is the guarantee of non-repetition, that is, the guarantee that what happened in terms of the premature renunciation of mining titles without consequences will not happen again. To guarantee this will not happen again, there has to be legislation that creates procedures for mine closures that guarantee the participation of workers. There must be compensation measures, an economic component, to maintain economic diversification and social protection funds that reach the mine workers. There must be measures of satisfaction, that is, measures that have been built with the workers. There must also be symbolic measures. The Inter-American Court of Human Rights, when it speaks of symbolic measures, has sought the reconstruction of memory and the construction of history.⁴ For example, this could mean the creation of a museum that clearly shows the reality of the violations and the consequences of those violations. I am not only referring to the violations of workers' rights because, in the case of Colombia, many workers were harassed, and they were even murdered because they raised their voices in defence of their rights. This should be seen as something that cannot happen again, so it is a measure to repair and write history so that it does not recur. Environmental issues should also be made visible. For example, it could be a museum that demonstrates the process of extractivism and how we do not want neo-extractivism, which is also a concern. Finally, as much as possible, there should be restitution, meaning the situation should be restored to what it was before the violation.

There is an obligation to repair in both directions: on the one hand, the State itself, which has not protected the rights, and on the other, the multinational corporations, which have not respected the rights. Both must remedy and repair the damage.

CW: You have used international mechanisms to try to hold companies accountable regarding the right to a just transition. As you mentioned, there is a long history of egregious labour rights violations, including the murder of trade unionists and violence against workers. You have used the OECD complaints mechanism and the EU-Colombia trade agreement dispute settlement mechanism to address corporate impunity. Can you tell me about these cases and their outcomes?

AH: I can specifically mention two cases that I have argued on the topic of energy transition and mine closures.

In the first case, we used the ILO Declaration on Multinational Enterprises, which has a mediation mechanism. Well, we tried to activate the mechanism, but we weren't able to. Why not? This is a lesson learned: if you want to use the mechanism, there has to be a prior agreement between the company and the union to mediate. We contacted the ILO and asked them to bring the parties together and mediate an agreement on the process for dismissals during mining title renunciation, in the case of Prodeco/Glencore. In my arguments, I referenced the ILO Committee on Freedom of Association, which has determined that workers must be consulted regarding restructuring or dis-

³ UNITED NATIONS, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147 ¶¶ 19-23 (21 March 2006)

⁴ See, e.g. Inter-American Court of Human Rights, *Miembros del Sindicato Unico de Trabajadores de Ecasa (SUTECASA) v. Peru* (June 6, 2024) https://corteidh.or.cr/docs/casos/articulos/seriec_526_esp.pdf; See also INTER-AMERICAN COMM. ON HUMAN RIGHTS, *Compendium on Truth, Memory, Justice and Reparation in Transitional Contexts* (Apr. 12, 2021) <https://www.oas.org/en/iachr/reports/pdfs/CompendiumTransitionalJustice.pdf>

missals.⁵ It would have been a very interesting case regarding transition and verifying compliance with the mechanism provided in the Declaration on Multinational Enterprises, but the case was not opened. However, I believe it could still be possible because the union continues to exist. After all, the company could not legally argue the process of removing union protection.

We presented another case using the trade agreement between the European Union and Colombia. In this trade agreement, the "Single Entry Point" seeks to ensure compliance with the ninth chapter on sustainable development. The case was presented in 2022.⁶ Part of the argument focused on the disproportionate increase in outsourcing. This outsourcing is a strategic tactic by multinationals to have the lowest "labour debt" at the time of mine closure or renunciation since the level of unionization of outsourced workers is relatively low. Having more outsourced workers rather than workers who are directly hired and unionized allows companies to close mines or renounce their titles quickly, and nothing happens.

As part of the legal argument for this case, I used ILO Convention 111, which refers to equal treatment in employment and occupation. I argued that even though the outsourced workers had the same functions, level of productivity, and place of work, they were earning 50% less because they were outsourced. The argument is that outsourcing is increasing because of mine closures and that outsourcing is illegal because it doesn't meet the criteria of equal pay for work of equal value. The decision on this case is still pending; we filed it two years ago, and it is still with the European Union. We are waiting for an answer.

What I asked for in this case for the workers was the inclusion of the concept of integral reparation, which includes the components that I mentioned: compensation, satisfaction, the guarantee of non-repetition, rehabilitation, and restitution. I think it is essential that we, as workers' advocates, always include this concept in the petitions because, ultimately, the violation of workers' rights is a violation of human rights. The United Nations has said that when there is a violation of human rights, reparation must be holistic.

CW: We hope for a good outcome in this case, which could set an important precedent. Thinking about just transition broadly, are there other fundamental challenges for labour law to address? What else could be done creatively to ensure the right to a just transition?

AH: Undoubtedly, it is sectoral collective bargaining, which is fundamental and what we are striving for through the programmatic unity in the unions. The unions have presented a list of demands on how the mine closures should be carried out to all the companies in the mining corridor, not exactly to speed up the closures, but to make sure that when they happen, they happen in a just way.

Legislation is important, of course, but unions can make legislation through collective bargaining. This is not just for those who are members; it is for those who become members in the future; it is a responsibility to those who are coming into the union movement. There doesn't have to be formal unity if there is programmatic unity. It does not have to be just one union with one president. If there is programmatic unity, we are already on a path that gives a lot of strength to any issue, including the just energy transition.

⁵ ILO DIGEST, supra note 1.

⁶ Complaint to the European Union Single Entry Point regarding the Non-compliance of the Government of Colombia and Peru of the Chapter IX on Sustainable Development of the Trade Agreement with the Trade Agreement with the European Union, presented by CNV International in support of the Trade Unions of Sintracarbón, Sintracerejón and Sindicato de Trabajadores Mineros Metalúrgicos de Andaychagua Volaychagua Metallurgical Workers Union of Andaychagua Volcan Compañía Minera and the Specialized Specialized Companies, Contractors and Intermediary Companies that provide services to Volcan Mining Company - Andaychagua (May 17, 2023) https://www.cnvinternationaal.nl/_Resources/Persistent/b/5/f/7/b5f73076b0ee2d57582409c00ebbb6b0fad3af55/COMPLAINT%20ENGLISH.pdf

I ask for support for the process that is going on in Colombia, from the trade union network, from lawyers, for international cooperation and support of the demands put to the companies for a procedure to close the mines. We ask that they make this demand in their countries so that the right to sectoral collective bargaining of these unions is guaranteed, so that the energy transition leaves no one behind.

UNIONS, WORKERS AND A JUST ENERGY TRANSITION: PERSPECTIVES FROM THE GLOBAL SOUTH

**ANGELO REMEDIO NETO¹ & MAXIMILIANO NAGL
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Brazil | Originally written in English

Introduction

Legal concepts are regularly subject to political, cultural, ideological and economic contestation. One concept which is being contested at present is the *just energy transition*. First is the question as to what we mean by “transition” and the second is what do we mean for the transition to be “just” for the environment and for all workers. The concept is even more complicated given that it is meant to be globally applicable and take into account the stark differences in responsibility, needs and resources, which are the lasting legacy of colonial extractivism.³

Unfortunately, there is very little time to waste on further debates. The time to act is now. As explained by leading scientists in October 2024:

We are on the brink of an irreversible climate disaster. This is a global emergency beyond any doubt. Much of the very fabric of life on Earth is imperiled. We

are stepping into a critical and unpredictable new phase of the climate crisis. ... As scientists and academics, we feel it is our moral duty and that of our institutions to alert humanity to the growing threats that we face as clearly as possible and to show leadership in addressing them.⁴

From the outset, it should be noted that the impacts of energy production and the rates of consumption and emissions are diametrically opposed, in an extremely unequal world. The energy transition is happening within the framework of capitalism and the international division of labour. In the economic and financial neocolonialism that we live in today, capital will always reorganise itself towards the greatest possible expropriation and will result in the greatest profit. Such expropriation causes environmental, labour, social and human rights damage. Even though the discourse around a just energy transition was rooted in trade union action starting in the 1980s, the concept is now being co-opted by business to prevent it from being antagonistic to extractive capitalism. Indeed, some proposals are now sponsored by large energy companies – which now endorse a “just energy transition” on their terms.

This article argues that a just energy transition must be based on a transformation of humanity's relationship with both work and the environment. The countries that have suffered the most from the impacts of climate change and that have

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³ Francisco Adilson da Silva & Moema Hofstaetter, *Vozes dos territórios por uma transição energética justa e popular*, LE MONDE DIPLOMATIQUE BRASIL (Feb. 2, 2024), <https://diplomatie.org.br/transicao-energetica-justa-e-popular/>.

⁴ William J. Ripple et al., *The 2024 State of the Climate Report: Perilous Rimes on Planet Earth*, 74 BIOSCIENCE 812 (2024), <https://academic.oup.com/bioscience/article/74/12/812/7808595>.



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contributed the least to its occurrence will likely suffer the most in a transition, unless regional and global inequalities are directly addressed. Failure to do so would only perpetuate climate injustice and cause further harm to workers in the Global South. This article seeks to offer a perspective from the Global South on this question. Only with an active trade union movement capable of transforming its demands into public policies can we achieve an energy transition that respects human and environmental rights, protects jobs and improves working conditions. This article is divided into two sections. In the first section, we discuss regional inequalities and the need for a just energy transition. For the Global South, the need for a just energy transition goes hand in hand with the need for a transition away from the capitalist economic model or at least for significant structural changes in capitalism at a global level. In the second section, we discuss the risks of an energy transition to the Global South.

Regional Inequalities and Energy Transition

The Global North and its contribution to the current climate framework

The work required for a just energy transition begins with measuring responsibility. The Global North is responsible for most carbon dioxide emissions, in addition to greater use of mineral materials that are extracted mainly from the Global South.⁵ When we talk about the Global North, we are referring to countries mostly in North America, Western Europe, Oceania and parts of Asia that have higher levels of economic development and more capacity to intervene and influence in the global public debate. The Global South – an analytical category that replaces the concept of the Third World⁶ – includes countries that, to a greater or lesser extent, have a subaltern geopolitical identity.⁷ In the last two decades, we have witnessed the

growth of the South as a region of belonging and a reconstruction of global identities with cooperation and development. However, this does not mean that dramatic development differences due to colonialism should be forgotten.

If the energy transition is intended to be global, the contradictions of the international system are inherent to it. If we think about the global energy scenario, we can easily see the discrepancies between North and South. By not taking these differences into account, any energy transition drastically reduces its chances of being fair to the environment and to the working class. This is due both to the discrepancy in energy consumption in the North and environmental extractivism and precarious labour relations in the South, as well as the underrepresentation of the Global South in multilateral decision-making bodies. The Global North has been most responsible for emissions, given its early industrialization and large consumption of energy from fossil fuels.⁸ Even taking into account countries, such as China, India and Brazil, that have contributed more to emissions in recent years, as a whole the Global South has contributed much less to global emissions than the Global North. If we talk about responsibility for mitigation and changes, we can easily infer a greater responsibility to the Global North for the current climate crisis we find ourselves in today.

The Global South: Effects of Global Energy Policy

Compared to other developing countries, LDCs (Least Developed Countries) emit relatively small amounts of greenhouse gasses, which are the main cause of global warming and climate change. However, LDCs are extremely vulnerable to the effects of climate change, as they lack the resources necessary to adapt.⁹ Despite the fast growth of many Global South countries, the Global North is still responsible for the highest

5 Emilia Reyes, *Resolver a crise climática requer o fim da dependência do crescimento econômico*, OPEN DEMOCRACY (Dec. 6, 2023), <https://www.opendemocracy.net/pt/oureconomy/cop28-norte-global-sul-crescimento-economico-descolonizar/>.

6 Luciana Ballestrin, *O Sul Global como projeto político*, HORIZONTES AO SUL (July 15, 2020), <https://www.horizontesaosul.com/single-post/2020/06/30/O-SUL-GLOBAL-COMO-PROJETO-POLITICO>.

7 *Id.*

8 Reyes, *supra* note 5.

9 Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States (UN-OHRLS), *THE IMPACT OF CLIMATE CHANGE ON THE DEVELOPMENT PROSPECTS OF THE LEAST DEVELOPED COUNTRIES AND SMALL ISLAND DEVELOPING STATES* (2009), https://www.un.org/ohrls/sites/www.un.org.ohrls/files/the_impact_of_cc_on_ldcs_and_sids_for_web.pdf.

per capita emission rates and has historically contributed significantly to cumulative emissions over time.¹⁰ There is a consensus in the scientific community that people in the Global South are the ones who suffer the most from climate change today and will be the ones who will suffer the most from an energy transition that does not take these inequalities into account.¹¹ “Developing countries are affected more because of the economic importance of climate sensitive sectors such as agriculture in combination with their low adaptive capacity.”¹² Added to this situation is the lack of financial capacity for investment and adaptation to meet challenges due to climate change.

"An energy transition that is effective and fair must move away from the perspective of simply replicating models of switching energy sources, which assumes adaptability to every country in the world and ignores local realities." ¹³

From this perspective, researcher Stefania Relva states that these discussions are “far from the reality of low- and middle-income countries. While developed countries talk about consumer autonomy, other countries still struggle to give access to any type of electricity to part of the population.”¹⁴ Looking at the energy transition without local perspectives will only increase global inequality, which is anchored in neocolonialism and the international division of labour.

Risks of the current model of transition to the Global South

The Perspective of Regional and Global Labour Governance

The International Labour Organization (ILO), the largest and oldest international organisation focused on work, is responsible for formulating and supervising the application of standards at a global level. The ILO has been increasingly engaged in the question of climate change and its impacts on workers, including the impacts of an energy transition. The ILO's tripartite structure allows for the participation of trade unions in the formulation of law and policy, which makes it unique among international organisations. In 2015, the ILO's constituents endorsed the *Guidelines for a Just Transition Towards Environmentally Sustainable Economies and Societies For All*,¹⁵ whose guiding principles include social dialogue and the respect, promotion and realisation of the fundamental principles and rights at work.¹⁶ As such, the Guidelines recognise that the trade union movement is essential for effective action on climate change.¹⁷ In June 2023, the 111th International Labour Conference reaffirmed the Guidelines and the importance of governments, employers and unions for a just transition.¹⁸

In a 2023 blog post, Subasinghe and Vogt argue that ILO Convention 122 on Employment Policy (C122)¹⁹ forms an important basis for ILO action. Although adopted in 1964, long before the global acknowledgement of a climate crisis, C122 “calls for a coordinated approach to economic and

¹⁰ *Os países que mais emitiram gases de efeito estufa*, WRI BRASIL (June 17, 2024), <https://www.wribrasil.org.br/noticias/os-paises-que-mais-emitiram-gases-de-efeito-estufa>.

¹¹ African Development Bank et al., *POVERTY AND CLIMATE CHANGE REDUCING THE VULNERABILITY OF THE POOR THROUGH ADAPTATION* (2003), <https://documents1.worldbank.org/curated/en/534871468155709473/pdf/521760WP0pover1e0Box35554B01PUBLIC1.pdf>.

¹² Fulco Ludwig et al., *Policy Department, Economic and Scientific Policy, EU Parliament, CLIMATE CHANGE IMPACTS ON DEVELOPING COUNTRIES 7* (2007), [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2007/393511/IPOL-ENVI_ET\(2007\)393511_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2007/393511/IPOL-ENVI_ET(2007)393511_EN.pdf)

¹³ *Transição energética nos países em desenvolvimento depende de nova abordagem [Energy Transition in Developing Countries Depends on a New Approach]*, CENTRO DE ESTUDOS ESTRATÉGICOS (CEE) FIOCRUZ (SEPT 8, 2021), <https://cee.fiocruz.br/?q=transicao-energetica-nos-paises-em-desenvolvimento-depende-de-nova-abordagem>.

¹⁴ *Id.*

¹⁵ *ILO Adopts Guidelines on Sustainable Development, Decent Work and Green Jobs*, ILO (Nov. 5, 2015), <https://www.ilo.org/resource/news/ilo-adopts-guidelines-sustainable-development-decent-work-and-green-jobs>.

¹⁶ ILO, *GUIDELINES FOR A JUST TRANSITION TOWARDS ENVIRONMENTALLY SUSTAINABLE ECONOMIES AND SOCIETIES FOR ALL* (2015), <https://www.ilo.org/publications/guidelines-just-transition-towards-environmentally-sustainable-economies>.

¹⁷ LENE OLSEN & CLAIRE LA HOVARY, ILO, *USER'S MANUAL TO THE ILO'S GUIDELINES FOR A JUST TRANSITION TOWARDS ENVIRONMENTALLY SUSTAINABLE ECONOMIES AND SOCIETIES FOR ALL 11-12* (2021), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_826060.pdf.

¹⁸ International Labour Conference, *Outcome of the General Discussion Committee on a Just Transition*, ILC.111/Record No.7A (June 15, 2023), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_885375.pdf.

¹⁹ Convention (No. 122) Concerning Employment Policy, adopted July 9, 1964, 569 U.N.T.S. 65, <https://treaties.un.org/doc/Publication/UNTS/Volume%20569/volume-569-I-8279-English.pdf>.

social policies to promote full, productive, and freely chosen employment.”²⁰ Subasinghe and Vogt apply this language to the concept of a just transition, arguing C122 would require “states to adopt a coordinated set of policies to ensure access to employment opportunities and active labour market policies to support transition away from those industries contributing to the crisis.”²¹ Subasinghe and Vogt also contend that ILO Convention 168 on Employment Promotion and Protection against Unemployment²² offers additional support to workers in a just transition by calling upon states to provide adequate social protection against unemployment, specifically noting that “ensuring that workers, especially the most vulnerable, are supported through the transition will be necessary to ensure support for these measures.”²³ Of course, the proper functioning of the ILO supervisory system and the very effectiveness of these measures will only happen if the workers affected are able to organise themselves and influence the public debate on this issue.

The International Trade Union Confederation (ITUC) and the International Transport Workers’ Federation (ITF) provided comments on the obligation of States with respect to climate change submitted by the UN General Assembly (Resolution A/RES/77/276) to the International Court of Justice. Both ITUC and ITF confirm that a transition to a “carbon-resilient economy, including by reaching the temperature goals of the Paris Agreement, requires fundamental shifts in all sectors of society.”²⁴ It is in this context that dialogue becomes fundamental. The energy transition affects the lives of workers around the world in different ways, and the elevation of this fundamental issue in the international political debate on climate change is critical. However, dialogue has not been easy. The ILO has called for



Two dogs stranded in a flood in Rio Grande do Sul state, Brazil.
Credit: cabusca / stock.adobe.com

“social dialogue to be involved with environment-related subjects” and observed that a barrier to the “realization of the right to bargain collectively in the context of climate change response is insufficient recognition, in law and practice, of environmental protection matters (including climate change mitigation and adaptation measures) as legitimate subjects of trade union collective bargaining and collective action.”²⁵

An example of the difficulty of this dialogue is the unsatisfactory results of COP29,²⁶ which, according to the ITF, leaves the Global South with a fraction of the financing that the text itself recognises as essential to fight climate change.²⁷ The meeting was also emblematic of the difficulty in coming to a consensus and showcased the problematic approach of the Global North. The COP29 meeting was extended by two days due to a negotiation crisis, and delegations from small island countries and developing countries ultimately left the negotiating table due to feeling disregarded.²⁸ The final agreement, which can only be approved through consensus among the more than 200 countries participating in the conference, was seen as insufficient by

²⁰ Ruwan Subasinghe & Jeff Vogt, *A Just Transition Guaranteed by International Law is Within Reach – Here’s How*, EQUAL TIMES (May 25, 2023), <https://www.equaltimes.org/a-just-transition-guaranteed-by?lang=en>.

²¹ *Id.*

²² Convention (No. 168) Concerning Employment Promotion and Protection Against Unemployment, *adopted* June 21, 1988, 1654 U.N.T.S. 67, <https://treaties.un.org/doc/Publication/UNTS/Volume%201654/v1654.pdf>.

²³ Subasinghe & Vogt, *supra* note 21.

²⁴ Written comments submitted to the International Court of Justice by the International Trade Union Confederation (ITUC) and the International Transport Workers Federation (ITF), at 6, *Obligations of States in Respect of Climate Change*, Request for Advisory Opinion (Mar. 22, 2024), <https://t.co/61JR9Zwr6r>.

²⁵ *Id.*

²⁶ “COP 29 stands for the 29th meeting of the Conference of the Parties (COP) to the UN Framework Convention on Climate Change (UNFCCC), a landmark international treaty agreed in 1992, and parent treaty to the 2015 Paris Agreement.” *About COP 29*, UNITED NATIONS CLIMATE CHANGE, <https://unfccc.int/cop29/about-cop29> (last visited Jan. 14, 2025).

²⁷ *COP29: Just Transition in the Spotlight on Transport and Tourism Day*, INTERNATIONAL TRANSPORT WORKERS FEDERATION (ITF) (Nov. 20, 2024), <https://www.itfglobal.org/en/news/cop29-just-transition-in-spotlight-transport-and-tourism-day>.

²⁸ Georgina Rannard & Esme Stallard, *Huge COP29 Climate Deal Too Little Too Late, Poorer Nations Say*, BBC (Nov. 24, 2024), <https://www.bbc.com/news/articles/cd0gx4przejo>.

countries in the Global South, who had argued for greater investment and responsibility on the part of rich countries responsible for the climate crisis.²⁹ For example, Marina Silva, Minister of the Environment of Brazil, made the following comment:

We need there to be an equivalent alignment in means of implementation and financing, an alignment between substance and finance, Mr. President. This is the COP of means of implementation and financing. We have a process to measure whether our goals to 1.5 degrees are being met. We also need a process that can measure whether financing is up to this challenge.³⁰

Achieving the global temperature targets set in the Paris Agreement requires fast and fundamental changes in all areas of society. If implemented within the current frameworks of international capitalism, the climate change agenda could intensify inequalities. There are two initial risks to consider in this regard: 1) the effects of any transition will be felt more in the Global South; and 2) the new technologies needed to deal with a just transition that have been developed in the Global North will require large amounts of extraction and mineral production from the Global South. To this end, it is important to corroborate the perspective that the energy transition “should not be considered merely as an abstract public policy concept but rather as a human right.”³¹

It is important to highlight the progress already made under international law to effectively promote a just transition. The Inter-American Commission on Human Rights approved Resolution No. 3/2021 titled *Emergencia Climática: alcance y obligaciones interamericanas de derechos humanos*, which states that governments must guarantee that new jobs in sectors linked to renewable energies respect labour and union rights.³² This resolution will be effective in the

region if there are opportunities for the trade union movement to think about the right to organise in a world in climate crisis,³³ that is, from the creation of public policies to promoting an energy transition aimed at defending human rights and guaranteeing decent working conditions.

It will be essential for global and regional protection mechanisms – such as the Inter-American Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights (REDESCA)³⁴ – to consider the historical differences between the Global North and South to promote transnational transition policies during the climate crisis. To be effective, a just transition will therefore require two fundamental actions: an international institutional framework that recognises the need for effective policies to reduce inequalities on the one hand, and strong unions to formulate public policies at the local level, on the other.

Inequalities and Perspectives

The debate on the energy transition has often sold equality and equitable coexistence between humans and nature, but the practice is more complex. According to Milanez and Wanderley,³⁵ an electric car, for example, uses six times more metals than internal combustion cars. Aluminum production is expected to grow up to thirty percent by 2050, generating demand from new mines and aluminum plants around the world. This observation brings us to a central question: Is only changing technology and energy sources capable of solving the problem of the climate crisis? There is no doubt about the need for a transition, given the climate urgency suffered most in the Global South. But here the critical question is: Will a transition sponsored by large energy companies be able to solve the problem?

Countries in the Global South need to adapt

obligaciones interamericanas de derechos humanos, Res. 3/2021, at ¶ 50 (Dec. 31, 2021), https://www.oas.org/es/cidh/decisiones/pdf/2021/resolucion_3-21_spa.pdf.

³³ Subasinghe & Vogt, *supra* note 21.

³⁴ The REDESCA (Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights) is a mechanism created within the Inter-American Commission on Human Rights. Its goal is to monitor, promote and protect economic, social, cultural and environmental rights in the member countries of the Organization of American States (OAS).

³⁵ Bruno Milanez e Luiz Jardim Wanderley, *Mineração como indutora das mudanças climáticas e da escassez hídrica no Brasil*, LE MONDE DIPLOMATIQUE BRASIL (Aug. 17, 2021), <https://diplomatie.org.br/mineracao-como-indutora-das-mudancas-climaticas-e-da-escassez-hidrica-no-brasil/>.

²⁹ *Estados insulares e países em desenvolvimento abandonam reunião da COP29*, UOL (Nov. 23, 2024), <https://www.uol.com.br/ecoa/noticias/afp/2024/11/23/estados-insulares-e-paises-em-desenvolvimento-abandonam-reuniao-da-cop29.htm>.

³⁰ *COP29: Marina reforça necessidade de avanço sobre financiamento*, UOL (Nov. 21, 2024), <https://www.uol.com.br/ecoa/ultimas-noticias/2024/11/21/cop29-marina-reforca-necessidade-de-avanco-sobre-financiamento.htm>.

³¹ Subasinghe & Vogt, *supra* note 21.

³² Inter-am. comm'n H.R., *Emergencia Climática: alcance y*



A coal power plant in Rotterdam, the Netherlands.
Credit: iStock.com / oliver de la haye

to the current process of climate change, with unions playing a leading role in this debate, through demands for better training, conditions and guarantees of employment and income. In 2023, the city of São Paulo hosted the 3rd International Trade Union Forum for a Just, Social and Ecological Transition. The Central Única dos Trabalhadores (CUT), Brazil's most important central trade union, pointed out that there is a consensus among international union leaders that the concept of a just transition must include the defence of life, rights and employment. In this way, a transition thought up by governments in rich countries is far from being a truly fair model for the global working class, according to the union leaders who attended the Forum.³⁶ The trade union movement has been warning about this problem for a while. It is necessary to transform carbon jobs into green jobs, avoiding a scenario of layoffs, unemployment and ageism in the job market. It is through the leadership of workers that investments in a just transition can be expanded in the Global South. It is also necessary for jobs to be secure, with mitigation plans, including evacuation, alerts and safety in the event of climate disasters. Antônio Lisboa, the CUT's international relations secretary, pointed out at the Forum that the great challenge for a just energy transition is not to allow the South to be a producer of *commodities*, while the North deepens its position as a holder of transition technologies.³⁷

³⁶ André Accarini, *Sindicalistas internacionais debatem papel dos sindicatos na transição energética*, CUT CENTRAL ÚNICA DOS TRABALHADORES (Oct. 18, 2023), <https://www.cut.org.br/noticias/sindicalistas-internacionais-debatem-papel-dos-sindicatos-na-transicao-energetica-a639>.

³⁷ *Id.*

An emblematic case that occurred in Brazil illustrates this concern. The municipality of Candiota, located in the State of Rio Grande do Sul, has approximately forty percent of the country's mineral coal reserves. The signing of the Paris Agreement by Brazil, and the commitment to reduce carbon dioxide emissions, meant that the plant was removed from the Federal Government's plans for the supply of energy nationwide. Due to the lack of foresight in this policy, however, the small town's only source of employment and income was paralysed by the closure of the plant. The impacts were condemned by union leader Adriano Revelante Fagundes who argued that "[t]he city of Candiota was created around the return of electricians and miners" and that because of the closure, "[m]any colleagues have no other professional training and it will be very difficult for them to find another occupation."³⁸ The dramatic impacts in this city show that simply reducing carbon dioxide emissions by cutting production is not enough for a fair energy transition. Changes and new policies must also contemplate training workers for new jobs, public policies to mitigate the economic impacts of reducing or stopping polluting activities and investments in new forms of energy generation. Otherwise, a reduction in carbon dioxide rates could camouflage newly created poverty and precarious work relationships.

The Inter-American Commission on Human Rights Resolution No. 3/2021 confirms "that climate impacts pose a significant threat to the enjoyment of a wide range of essential rights for a dignified life."³⁹ States must act to implement public policies that prevent and mitigate the damage caused by climate change, while ensuring the maintenance of established environmental protection levels, according to the principles of progress, non-regression and precaution. The Brazilian government has taken heed of this threat. In August 2024, President Lula launched the National Energy Transition Plan (PNTE). The Plan focuses mainly on wind, solar, hydro, biomass, biodiesel, ethane, carbon capture

³⁸ Tatiana Gappmayer & Jefferson Klein, *Capital nacional do carvão corre contra o tempo para fazer transição energética*, A PÚBLICA (Aug. 18, 2023), <https://apublica.org/2023/08/capital-nacional-do-carvao-corre-contra-o-tempo-para-fazer-transicao-energetica/>.

³⁹ Press Release, Inter-Am. Comm'n H.R., Brazil: CIDH and REDESCA Stand in Solidarity with the Environmental Tragedy in Rio Grande do Sul and Reaffirm the Importance of Promoting Broader Actions in Response to the Climate Emergency (May 30, 2024), https://www.oas.org/en/iachr/jsForm/?File=en/iachr/media_center/preleases/2024/120.asp.

and storage and green hydrogen. According to Alexandre Silveira, Minister of Mines and Energy,

the policy establishes the guidelines that will guide the Brazilian strategy for the energy transition, reinforcing the Federal Government's commitment to contributing not only to the reduction of emissions from greenhouse effect phases, but also the generation of employment opportunities, taking care of supply security and combating social and regional inequalities.⁴⁰

It is clear that the energy transition cannot be fairly measured only by CO2 emission rates. Dignified work and new employment opportunities are fundamental for the energy transition to be fair. It is essential to analyse multiple factors that effectively allow for a better global distribution of wealth, which would improve the quality of life of populations that are currently disproportionately suffering from the impacts of climate change. On our part, there is a required degree of skepticism about the possibility of an energy transition led by large energy companies, mostly located in the Global North, that often sell the idea of a green capitalism without questioning the entire social, economic, political and cultural structure of the world that has brought us face to face with the terrible threats created by the climate crisis.

Conclusions

A greater engagement of the Global South in energy transition models is urgently needed to ensure a fair transition. Rather than importing models, the Global South needs the autonomy and financial capacity to develop its own transition strategies. If we consider that the origin of the problem lies in the economic system itself – a system that prioritises economic growth, profit and wealth accumulation over the well-being of people and the planet – we are faced with a scenario of continued extraction and the further deepening of inequalities.⁴¹ As Reyes states, "governments of industrialised economies have presented the 'new green agreements' as the



A worker on a tea plantation in Bangladesh cools off in the heat.
Credit: Solidarity Center / Gayatree Arun

solution. But their goals and measures reinforce the economic structures that depend on colonial extraction in the Global South."⁴²

Not long ago, the state of Rio Grande do Sul faced the worst floods in its history, which caused extensive damage and affected hundreds of thousands of people – including their access to work. The Inter-American Commission on Human Rights and the Special Rapporteur on Economic, Social, Cultural and Environmental Rights expressed their solidarity with Brazil and affirmed the importance of effective measures to achieve a just climate transition.⁴³ In the Global South, as everywhere, unions must play a leading role in debates on the energy transition, including guarantees of quality jobs rooted in the principle of decent work. Legislative reforms to address a wide range of other issues are also necessary, from housing to migration policy, and including internally displaced peoples and climate refugees. Structural reform of the global financial system itself is also required. It is the workers themselves who can contemplate and propose a just transition in the context of the climate and social crisis.

⁴⁰ *Ministério de Minas e Energia. Presidente Lula e Alexandre Silveira lançam Política Nacional de Transição Energética, com potencial de R\$ 2 trilhões em investimentos*, GOV.BR (Aug. 26, 2024), <https://www.gov.br/mme/pt-br/assuntos/noticias/presidente-lula-e-alexandre-silveira-lancam-politica-nacional-de-transicao-energetica-com-potencial-de-r-2-trilhoes-em-investimentos>.

⁴¹ Reyes, *supra* note 5.

⁴² *Id.*

⁴³ Inter-am. comm'n H.R., *supra* note 40.

The International Lawyers Assisting Workers (ILAW) Network is a membership organization composed of trade union and workers' rights lawyers worldwide. The core mission of the ILAW Network is to unite legal practitioners and scholars in an exchange of information, ideas and strategies in order to best promote and defend the rights and interests of workers and their organizations wherever they may be.