doi:10.1017/aju.2022.12

SYMPOSIUM ON INTERNATIONAL ECONOMIC LAW AND ITS OTHERS

INTERNATIONAL ECONOMIC LAW AND RACIALIZED "OTHERS"

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This essay seeks to show how racialized histories of global political economy have shaped core issues in international economic law.[1] The essay begins by noting challenges to framing the topic of racialized "others," and then turns to the case study of cotton, showing how U.S. domestic production subsidies—long a focal point of international trade law in both formal dispute settlement and agreement negotiations—have affected persons of African heritage in the United States and internationally. The essay concludes by considering the U.S. and international contexts more generally, both to demonstrate where integral structural biases are at play, and to locate areas of contingency and change.

Disclaimers: Representation and Voice

While the symposium's objective of exploring how international economic law affects "others" is commendable, there may be a certain irony in the production of necessarily delimited interventions around a premise that points to vast and systemic exclusion. Precisely because such exclusion has existed, one must think expansively, in addressing this topic, about how "marginalized" and "other" voices might better be heard in spaces where international economic law and policy are made.[2]

The question of race raises additional considerations: which "racial others," and how defined, fit into this rubric? How would the analysis change if one considers Afro-descended, Latinx, Asian, Pacific Islander, or Indigenous peoples? Is it possible or viable to group those who are racial minorities within a particular society to countries whose majorities belong to the same ethnicity? More fundamentally, is it desirable to adopt a single lens for all of these populations? To insist on a single analytical category, "race," would be to reenact the anti-scientific, ahistorical ideology of racialization—to see diverse peoples, not to mention individuals, as belonging to some innately uniform set of traits. And yet the indeterminacy of racialized identity can be taken not as a refutation, but rather as a key characteristic of, racialization in the way that it has contributed to entrenching global economic inequality. The "master discourse" of racialized identity has held together and obscured immeasurable differentiation and

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[1] For helpful collections exploring questions of race in international law, see *Symposium: Transnational Legal Discourse on Race and Empire*, 67 UCLA L. Rev. 1386 (2021); *Symposium: Critical Race Theory and International Law*, 45 Vill. L. Rev. 827 (2000). *See also* E. Tendayi Achiume, *Transnational Racial (In)Justice in Liberal Democratic Empire*, 134 Harv. L. Rev. F. 378 (2021); James Thuo Gathii, *Studying Race in International Law Scholarship Using a Social Science Approach*, 22 Chi. J. Int'l L. 71 (2021); Henry J. Richardson III, *The Limits of Human Rights Limits*, 115 AJIL 154 (2021).

[2] *See* Nicolás Perrone & Gregory Shaffer, *Introduction to the Symposium on International Economic Law and its Others*, 116 AJIL Unbound 90 (2022).

contradiction.[3] Rather than evidencing a pre-modern cultural frame, this discourse provided crucial ideological cover for the formative practices that created the contemporary global economic terrain, by permitting the conquest and exploitation of land and labor that shaped today's national and international economic landscapes.[4]

A Case Study in Racialized Global Political Economy: The Cotton Story

Racialized histories can be traced through many aspects of the trade regime. These national and global histories can also be interconnected, as in the case of cotton.[5] While the grand narrative of the Industrial Revolution heralds textile mills and other early manufacturing as the birthplaces of contemporary capitalism, increasingly prominent economic histories have centered the crucial role that forced labor played in making that production profitable, by controlling the prices of raw material inputs.[6] When the U.S. Civil War outlawed forced labor in its territory, industrialists expanded cotton production to Africa and Asia,[7] and availed themselves of a labor system that escaped the abolition of chattel slavery.[8] The concentration of those territories in cotton exports survived the end of formal colonial rule, so that, for example, a number of West and Central African countries remain heavily dependent on cotton production for their export revenues.

Meanwhile, in the United States, the emergence of the twentieth-century administrative state, with its New Deal focus on socioeconomically supportive regulations, brought about the beginnings of the contemporary U.S. system of farm subsidies. Yet these subsidies were granted on a basis that reflected pre-existing racialized hierarchies and accompanied a precipitous decline in Black-owned farms. In 1999, a class action brought by Black farmers successfully showed that the U.S. Department of Agriculture's administration of these subsidies had violated U.S. anti-discrimination law.[9]

At roughly the same time that Black farmers were contesting U.S. subsidies as exclusionary domestically, African governments were contesting those same subsidies in World Trade Organization (WTO) negotiations as exclusionary internationally, by creating barriers to their countries' access to global markets. These governments called for accelerated progress on subsidies negotiations on the grounds that the harmful impact of cotton subsidies was particularly stark: U.S. average cost of production in cotton more than doubled that of the West and Central African countries, and yet it was the United States, not the West and Central African countries, that led global cotton exports.[10] Ultimately, West and Central African efforts obtained commitments through the Doha Development Round of WTO Negotiations on the elimination of export subsidies, but left the much more impactful realm of domestic subsidies largely untouched.

The cotton story illustrates how primary factors of production both within the United States and internationally were historically formed within an ideological context of racialization. These structural elements continued to shape the participation of Afro-descended persons in this particular economic sector through to the contemporary era.

[3] *See* Chantal Thomas, *Race as a Technology of Global Economic Governance*, 67 UCLA L. Rev. 1860 (2021).

[4] *See id.* at 1869–73 (discussing racial capitalism).

[5] *See* Chantal Thomas, *International Trade and African Heritage: The Cotton Story*, 31 Temple Int'l & Comp. L.J. 225 (2017).

[6] *See, e.g.*, Edward E. Baptist, The Half Has Never Been Told: Slavery and the Making of American Capitalism (2014).

[7] Thomas, *supra* note 5, at 227–28.

[8] The 1926 Slavery Convention, which codified the international abolition of chattel slavery, nevertheless permitted "compulsory or forced labor for public purposes." League of Nations, Slavery Convention, Art. 5, 60 LNTS 253 (Sept. 25, 1926). This provision was understood to condone conscripted labor in colonial territories. *See* Jean Allain, The Slavery Conventions 9–10 (2008).

[9] Pigford v. Glickman, 182 F.R.D. 82, 85 (1999).

[10] Thomas, *supra* note 5, at 231–32.

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International Economic Law and the Racialized Landscape of Global Markets: The United States

Relatively early into the turn-of-the-twentieth-century era of globalization, critical analysis of international economic law predicted that, in the United States, the shift from manufacturing to a services-based economy would disproportionately harm racial minority groups.[11] Very unfortunately, this came to pass essentially as predicted. The decline of manufacturing hit working communities hard, and hit workers of color harder though the loss of comparatively rarer sources of stable employment.[12]

This interaction of economic marginalization of racial minorities and trade liberalization did not only exacerbate inequalities forged in the distant past. Instead, early inequalities have often widened over time, not through inertia, but rather through concerted public policies and private actions in successive periods. For example, nineteenth-century gaps in wealth-building between white communities, who had easier access to land and who were compensated for their labor, and Black communities who were coerced into unpaid labor and denied land ownership, widened over the course of the twentieth century through such factors as the discriminatory denial of access to credit that obstructed wealth-building not only commercially, as in the case of the agricultural subsidies referenced in the foregoing section, but also through home ownership; the amplification of wealth discrepancies related to home ownership through tax policies such as the mortgage interest deduction; the segregation of housing that further blocked access to wealth-building through property acquisition; the segregation and discriminatory funding of schools that antagonized education-based upward mobility; and employment discrimination in hiring and promotion.[13] Well into the twenty-first century, the racially biased effects on generational wealth of the sub-prime mortgage boom and bust continued to widen these gaps.[14]

In such a context, the economic vulnerability of racially othered communities—their more precarious access to remunerative employment and their lower level of financial resilience—became predictably exacerbated by the effects of globalization on their jobs. This was not inevitable. A better social policy for supporting communities adversely affected by trade, coupled with broader social policies aimed at increasing economic stability and prosperity within these communities—could have led to different outcomes.[15] But both the historical legacies of racialized governance and the ideological adversity to redistributive social policy blocked progress along that alternate path.

Developing Countries and Colonial Legacies

If this is a snapshot of effects in the United States, what of the global distributive effects of international economic law? If the Global South was drawn into economic production in early modern capitalism on the basis of extractive relationships justified by a racialized ideology of civilizational hierarchy, is the continuation of global economic inequality attributable to more than this historical legacy? The historical legacy of racialized and racially justified conquests remains in the landscape of the global economy, in terms of the relative concentration of sectoral endowments in territories as differentiated by colonial history. That legacy, as reflected in the

[11] Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. Davis L. Rev. 1451, 1486–96 (2000).

[12] Daniella Zessoules, *Trade and Race: Effects of NAFTA 2.0 and Other Low-Road Approaches to Trade on Black Communities*, Ctr. Am. Progress 4 (2009); Sandra Polaski et al., *How Trade Policy Failed U.S. Workers – And How to Fix It*, Inst. Pol'y Stud. 10 (2020); Matthew Groch, *New Data Analysis Reveals Black and Latino Workers Disproportionately Harmed by U.S. Trade Policies*, Pub. Citizen Glob. Trade Watch (Jan. 8, 2021).

[13] Thomas, *supra* note 11, at 1455–76.

[14] Emma Coleman Jordan & Angela Harris, Economic Justice: Race, Gender, Identity and Economics 73–127 (2011).

[15] Chantal Thomas, *Income Inequality and International Law: From Flint, Michigan to the Doha Round and Back* (2019).

https://doi.org/10.1017/aju.2022.12 Published online by Cambridge University Press

power relations between the formerly colonized and formerly colonizing territories, can be further traced through the contours of contemporary international economic law.

To begin with, the colonial landscape is reflected in the architecture of international economic law. The world as it existed in 1948, the year that the foundational instrument of contemporary international trade law—the General Agreement on Tariffs and Trade (GATT)—was established, directly reflected the colonial encounters that had served to organize territories around Northern centers and Southern peripheries. Such territorial organization was reflected in the very first article of the GATT, which establishes the principle of non-discrimination for GATT member states.[16] While GATT Article I, paragraph 1, establishes the non-discrimination principle, the remainder of Article I sets out exceptions to that principle permitting the cost-discounted movement of inputs within economic spheres of influence reflecting British,[17] French,[18] and U.S. colonial or neo-colonial hegemonies.[19]

Following formal decolonization, economic hegemony by the Global North manifested itself not through formal exceptions for Northern states' desired territorial preferences as had existed in GATT Article I, or, as was sought by developing country governments through the principle of special and differential treatment, but rather through informal, de facto exceptions for sectors where industrialized country governments wished to maintain particular spheres of exceptionality, namely, textiles and agriculture. These areas of relative comparative advantage for developing countries were effectively withdrawn from the reach of GATT formal trade disciplines (such as the non-discrimination principle and the ban on quotas). For textiles, rich countries negotiated an elaborate system of "multifiber arrangements" that carefully controlled imports—freestanding arrangements well out of the reach of the GATT and never formally permitted through any exemption or waiver.[20] For agriculture, the existence of limited exceptions in the GATT text thinly veiled enormous systems of quotas and subsidies maintained by industrialized countries. The existence of off-books and highly protectionist practices for textiles and agriculture prior to the establishment of the WTO plainly contradicted the narrative of progressive trade liberalization. The oft-cited datum that weighted average tariffs declined to under 5 percent over the life of the GATT obscured the reality that significant sectors of the global economy were not represented in this portrayal.

Notwithstanding this preferential treatment for hegemonic territorial economic systems, the efforts by developing countries following their formal independence to establish trade preferences for the same territories as sovereign entities faced deep resistance. Trade preferences negotiated by developing countries on the basis of the principle of special and differential treatment—not to promote the interests of economic powers, but to facilitate growth in their formerly colonized economies—have operated as politically contested and precarious exceptions to the principle of non-discrimination and the practice of reciprocity.[21]

[16] General Agreement on Tariffs and Trade, Art. I, Oct. 30, 1947, 61 Stat. A-11, 55 UNTS 194 (establishing the "most favored nation treatment" rule).

[17] *Id.* Art. I, para. 2(a) & Annex A.

[18] *Id.* Art. I, para. 2(b) & Annex B.

[19] *Id.* Art. I, para. 2(b)–(c) & Annex D. Article I, paragraph 2 also permitted the more "horizontal" economic arrangements of the Benelux Customs Union (a precursor to the European Economic Communities) and, fascinatingly, economic alliances among Latin American and Middle Eastern states (para. 2(d) & Annexes E & F). There is a need for greater research into the post-colonial context for the GATT, along the lines of Faizel Ismail's analysis of South Africa in Faizel Ismail, An Empirical Analysis of Apartheid South Africa's Ideas and Practices in the GATT: 1947 to 1994 (Thesis, University of Manchester, 2015).

[20] *See* Chantal Thomas, *The East African Community's Used Clothing Policy and International Trade Law*, *in* The Routledge Handbook of African Law (Muna Ndulo & Cosmas Emeziem eds., 2022).

[21] These include the Generalized System of Preferences, as reflected in the 1971 Decision of the Contracting Parties and the 1979 Enabling Clause, and the waiver for the Lome systems of preferences among African, Caribbean, and Pacific formerly colonized territories

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The history of the trade regime also points to spaces for countermovement by developing country governments. While developing countries were unable to advance on agricultural trade in the context of multilateral negotiations, some emerging developing country powers were able to acquire the capacity to litigate their interests in the WTO dispute settlement system. For example, Brazil successfully obtained a WTO ruling that U.S. agricultural subsidies were WTO non-compliant. Yet the United States ultimately was able to avoid bringing its practices into WTO compliance, as the dispute settlement system nominally requires, by effectively reaching a settlement with Brazil. As such, the positive spillover effects of Brazil's victory for smaller developing countries has been limited.

Moreover, the contemporary trade regime has achieved massive poverty reduction in some areas of the developing world. While such victories should not be downplayed, the ongoing marginalization of other developing economies should also not be overshadowed. Developing countries with smaller markets, with resource endowments in primary products as a legacy of colonialism, and with the lower access to capital and political instability that the colonial legacy also bequeathed, have continued to struggle.

While some portion of these characteristics operate independently of international economic law, the field also continues to reflect substantive inequalities discussed above. All that is required to understand the effects of racialization in international economic law is to recall that the colonial encounters that have shaped this landscape were themselves justified by an account of civilizational supremacy centrally defined in racialized terms.

The Current Moment's Epistemic Possibility

The normative constructs of international economic law reflect epistemic limitations on questions of distributive justice. Ricardo's theory of comparative advantage posited gains across territories taken as individual units, with little curiosity about distributional effects internal to those territories.[22] The Kaldor-Hicks model posited optimality based on whether the economic winners from a policy shift could *hypothetically* compensate the losers.[23] And the mechanisms of trade liberalization focus on reducing prices and boosting consumption, without an endogenous consideration of effects on employment, let alone other social or socioeconomic objectives. As students of the field know, competing social policies are typically formulated in the language of exception to the rules of trade discipline.

Given that international economic law has operated according to theoretical and policy commitments that have not sufficiently incorporated distributive analysis, it is not surprising that one category of distributive justice—racial justice—has been sidelined, along with others (gender justice, climate justice, labor justice, to name a few). Close attention to the historical foundations of racialization in global political economy, such as that briefly suggested here, helps to open the analytical frame. Much more remains to be done, however, to realize the potential of that opening frame.

We live in an era in which market fundamentalism in international economic law has faced challenges from across the political spectrum. On one side, a resurgence of economic nationalism has often been laced with openly avowed racial supremacism. On the other side, an emerging vision of solidarity for redistributive justice has often centered race consciousness, and a reinvigorated, and transnational, racial justice movement is emerging. There are innumerable exigencies created by this moment. Among them is the need to rethink international economic law from the ground up. The epistemic closure of trade theoretics must be challenged through both a new analytics

and the European Economic Communities. Accounts of this resistance can be found in Robert E. Hudec, Developing Countries in the GATT Legal System (2010).

[22] David Ricardo, On the Principles of Political Economy and Taxation (1817).

[23] J.R. Hicks, *The Foundations of Welfare Economics*, 49 Econ. J. 696 (1939); Nicholas Kaldor, *Welfare Propositions in Economics and Interpersonal Comparisons of Utility*, 49 Econ. J. 549 (1939).

https://doi.org/10.1017/aju.2022.12 Published online by Cambridge University Press

and a new praxis. Analytically, we need a dynamic trade model that can understand the effect of trade not only on consumption and production but specifically on employment; not only on aggregate, but also on distributive impact; and not only sectorally, but according to other social categories, such as class, race, and gender. Although there are promising efforts in this direction currently underway,[24] much more remains to be done. Equally as crucially, the formulation of international trade law must be informed by a more participatory politics.

One landmark moment in which both the solidarities and complexities of racialization on a global scale were deliberated was the 1955 Asian-African Conference in Bandung, Indonesia.[25] The Bandung Conference is often taken to symbolize the ideal of an interconnected vision for the self-realization of colonized peoples, emphasizing among other principles the importance of self-determination and the eradication of racialism and racial discrimination.[26] While the Bandung Conference identified racialism as a globally pernicious force, it resisted race as a monolithic framework, instead highlighting a number of other metrics—language, culture, and color—that mediated colonial oppression. Such indeterminacy could be seen to problematize efforts to define race-critical analysis internationally. It may also point the way forward to an open-ended, exploratory, and dialogic approach to understanding racial justice in international law in its pasts, presents, and futures.

[24] Office of the U.S. Trade Rep. Press Release, USTR Requests ITC Investigation of Trade Distribution Effects on Workers and Underserved Communities (Oct. 15, 2021).

[25] *Final Communiqué*, Sec. C, 1955 Asian-African Conference at Bandung, Indonesia (Apr. 24, 1955).

[26] Luis Eslava, Michael Fakhri & Vasuki Nesiah, The Spirit of Bandung (2017).

https://doi.org/10.1017/aju.2022.12 Published online by Cambridge University Press