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THE TIME THAT BINDS THE 'TRADE-DEVELOPMENT' NEXUS IN INTERNATIONAL ECONOMIC LAW

DONATELLA ALESSANDRINI*

This article takes issue with the conventional story about 'trade and development' according to which their nexus emerged in the immediate post-war period when the international community came to realise the wisdom of trade liberalisation and translated it into law. It argues that the trade-development nexus has a much older history, one in which continuities and (dis)continuities with the colonial period need to be taken into account to appreciate how, despite the seven decades long efforts of the international trade community, 'development' remains to be achieved and its promise continues to hold such normative force. This force reverberates within current development-related trade prescriptions, such as those that encourage developing countries to insert their firms into Global Value Chains and technologically 'upgrade' in order to develop. The article shows that once the continuities and (dis)continuities with the colonial period are made apparent, multilateral trade law can be seen as elevating a particular understanding of economic life (i.e., trade for growth) to a universal standing whilst at the same time enabling selective commercial interests to be pursued, thereby contradicting the free trade assumption about universal beneficial gains.

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I. INTRODUCTION

This article traces the links that were established in the immediate post-war period between trade and development thinking on the one hand and multilateral trade law and policy on the other. Trade textbooks acknowledge that international trade has a long history; most, however, start with the birth of 'free trade' thinking in Europe, and in particular, with the theories of Adam Smith and David Ricardo which first impacted European State practices in the 19th century, but which are seen to have emerged as the dominant trade wisdom at the end of World War II. It is also in the historic context of the post-war period that 'development' is supposed to have emerged as an issue to be dealt with by the newly formed multilateral trade community: as 'development' was identified with growth, trade liberalisation became one of its most important vehicles, particularly for those countries which came to be regarded as 'less developed' or 'developing'.

Developing countries' participation in the international trading system is thus supposed to have started with them entering the General Agreement on Tariffs and Trade (GATT) in 1947. Their accession is presented as the moment in time when the trade and development link was forged, and the multilateral trading system started reflecting on the applicability of its economic assumptions to developing countries.¹ 'Trade and Development' or 'Trade and Developing Countries' is invariably one of the last chapters in these textbooks, an add-on issue to an otherwise universally valid multilateral trade law and rationale which finds its beginning in the post-war period.² 'Trade and Development' also forms part of

¹ See, e.g., MICHAEL J. TREBILCOCK ET AL., *THE REGULATION OF INTERNATIONAL TRADE* 605 (4th ed. 2012) [hereinafter Trebilcock et al.]; MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANISATION: LAW, PRACTICE AND POLICY* 763 (2d ed. 2006) [hereinafter Matsushita et al.]; BERNARD M. HOEKMAN & MICHAEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM* 532 (2d ed. 2001) [hereinafter Hoekman & Kosteki]; BRIAN McDONALD, *THE WORLD TRADING SYSTEM* 47 (1998) [hereinafter Brian].

² Virtually all trade textbooks present this history and have a chapter dedicated to developing countries, only after presenting the general rules of trade, the history of the

both the first and second moments of the Law and Development (LAD) discipline as described by Trubek and Santos: international trade is managed by the State in the first moment, directed by market forces in the second and now governed by a mix between the two to achieve competitiveness in the global market.³ Common to both narratives is the acknowledgement that 'development' remains to be achieved and it is important to re-orient our trade tools in order to do so.

This article tells a different story: it argues that the trade-development link has a much older history than textbooks account for, one in which continuities and discontinuities with the colonial period need to be taken into account to appreciate how, despite the seven decades long efforts of the international trade community, 'development' remains to be achieved and its promise continues to hold such normative force. Drawing on the insights of decolonial, post-development, and Third World Approaches to International Law (TWAAIL), this article argues that another way to approach 'development' is to see it as an apparatus that has enabled forms of knowledge about 'Third World' societies to be linked with forms of power and intervention, resulting in the transformation of such societies in the name of a supposedly superior and universal economic rationality. I have argued elsewhere that the development-related trade activity that emerged at the end of the colonial era has functioned on the basis of a universal economic rationality which relies on an unquestionable dichotomy between 'advanced' and 'backward' societies. The reliance on supposedly neutral economic theories then becomes the terrain that bridges this gap, together with the help and expertise of the most advanced members of the international community.⁴ Trade theory, law, and regulation have provided one such means and site of intervention, although it has not been a case of straightforward translation of economic rationality into law and State practice.

The story told in this article is therefore not one of a master plan that was devised and smoothly realised with the transition from the colonial to the post-colonial period, but one of confluence of different historic, political, social, economic, and legal factors. Whilst aiming to highlight as many factors as possible, aware of the fact that this account can only be partial, I explicitly focus on one of them, which is, the modality through which a particular economic rationality was elevated to universal standings. This modality can be seen at play in two distinct moments of

GATT, and the specific WTO agreements. For instance, Trebilcock et al, *supra* note 1; Matsushita et al., *supra* note 1; Hoekman & Kostecki, *supra* note 1; Brian, *supra* note 1.

³ See DAVID TRUBEK, THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1-18 (David Trubek & Alvaro Santos eds., 2006) [hereinafter Trubek & Santos].

⁴ DONATELLA ALESSANDRINI, DEVELOPING COUNTRIES AND THE MULTILATERAL TRADE SYSTEM: THE FAILURE AND PROMISE OF THE WTO DEVELOPMENT MISSION 4-10 (2010) [hereinafter Alessandrini].

‘trade and development’ post-war history, those which resulted in the creation of the GATT and the World Trade Organization (WTO). As development was made to coincide with economic growth, and those countries which lacked growth were considered, which to an extent identified themselves as economically ‘backward’, a particular (temporal) understanding of ‘development’ emerged and crystallised into multilateral trade law and practice. According to this understanding, those countries which ‘failed to develop’ their trade as fast as industrialised nations, would have to adopt certain policies in order to ‘catch up’.⁵ Infused with this linear and progressive understanding of trade history (i.e. societies follow the same path and are destined to the same universal end), the terms of the trade-development nexus were set: multilateral trade rules could be reformed to better enable trade to deliver development so that, more or less trade liberalisation could be debated – but the ‘trade for growth’ premise was hardly ever called into question.⁶

What is at stake in the story thus told? The point is not to present it as *the* alternative story, but as a different lens for looking at the relationship between trade and development. Mignolo and Walsh have argued that, the point from which one starts the story (in this case the one about trade and development) has important implications on the conclusions that one reaches about that story.⁷ So if we start, as trade lawyers normally do, from the post-war period and the political-economic decision of the international community to translate free trade theory into multilateral trade law, we will arrive at certain conclusions, which are different from the ones we may arrive at, if we start with colonialism and the ‘civilizing

⁵ As will be seen below, this ‘failure’ structured the mandate of the first committee of experts tasked by the GATT parties to investigate the problems that developing countries faced while trading in the world market, which resulted in the Haberler Report of 1957 that was to set the parameters of GATT development-related trade activity of the subsequent decades, *see*, note 59. The broader imperative to ‘catch up’ however can be seen underpinning the set of theoretical and policy interventions that came to be grouped under the banner of ‘development economics’, in particular Rostow’s linear stages of growth and Lewis’ dual economy models, which were also published in the 1950s and emphasised, in different ways, the need for structural changes that would lead to rapid capital accumulation. For reference, *see* WALT W. ROSTOW, *THE STAGES OF GROWTH: A NON-COMMUNIST MANIFESTO* 4-16 (3d ed. 1990) [hereinafter Rostow]; W. Arthur Lewis, *Economic Development with Unlimited Supplies of Labor*, 22 (2) *Manchester Sch.* 139-91 (1954).

⁶ Fakhri, for instance, argues that this conceptualisation of trade is a recent development as trade used to be about procuring means of subsistence or luxury before the emergence of capitalism. It is with the shift to capitalism, where societies no longer produce in order to reproduce themselves but in order to accumulate capital that trade becomes instrumental to economic growth and capital accumulation. *See* MICHAEL FAKHRI, *SUGAR AND THE MAKING OF INTERNATIONAL TRADE LAW* 4 (2014) [hereinafter Fakhri].

⁷ WALTER MIGNOLO & CATHERINE WALSH, *ON DECOLONIALITY: CONCEPTS, ANALYTICS, PRAXIS* 237 (2018).

mission' that accompanied the pursuit of particular trade interests. The different lens presented in this article matters because it shows the constraining effects that the positing and elevation of a particular economic rationality as a universal truth (i.e. growth as the maximisation of material wealth through competitive advantage and accumulation) has on the possibility of experimenting with different socio-economic systems, including those which may not have growth, competition and accumulation as their ultimate objectives. Although, the third LAD moment seems to inaugurate a 'time' which is marked by the recognition that development "lies as a battlefield" where all dogmas about State and market have been defeated,⁸ and despite the resulting emphasis on experimentation with different development models we can see with the Law and New Developmental State (LANDS) approaches; the "need to prosper in conditions of global competitiveness" remains firmly in place today.⁹ Global competitiveness, orders countries along a teleological spectrum that prescribes certain courses of action over others and this continues to be the case although challenges to the primacy of growth have entered the mainstream debate.¹⁰

The complex interaction between trade, colonialism and development that this article highlights, continues to unfold, and in ways which are different in different parts of the world. However, the point that I wish to make, which is important for theoretical and practical reasons, is that, the trade-development nexus has both: a history which is longer than what is often presented; and a temporal quality that limits the possibility of experimenting with different socio-economic models, which might be more desirable than the current ones. To make this point, the first part focuses on the 'translation' aspect of the trade-development story, which is found in trade textbooks: I excavate the free trade principles of non-discrimination and equal treatment, which are said to inform the legal apparatus of multilateral trade and to deliver gains for all - including 'development' for countries which lack it - to show that they cannot account for the selective liberalisation practice that has characterised post-war trade relations. This meticulous, and at times prosaic account of the inconsistencies between theory, law and practice is necessary, given the prominence that textbooks accord to the story about an international community which realizes the universal validity and desirability of these principles and strives to translate them into law. Once the continuities with colonialism are made apparent, these principles can instead be seen as elevating a particular

⁸ David Trubek, *Developmental States and the Legal Order: Towards a New Political Economy of Development and Law* 1-16 (U. Wis. Legal Stud. Research Paper No. 1075, 2008).

⁹ David Trubek, *Law, State and the "New Developmentalism": An Introduction*, in LAW, STATE AND DEVELOPMENT IN LATIN AMERICA CASE STUDIES 19 (Trubek et al. eds., 2013).

¹⁰ With respect to current global well-being and happiness agendas, see Donatella Alessandrini et al., *Exploring Well-Being and Gross National Happiness in Sustainable Development Policy Making*, 7 INDIAN J. INT'L ECON. L. 52, 88 (2015).

understanding of economic life (i.e. trade for growth) to universal standings whilst at the same time enabling selective trade interests to be pursued, thereby contradicting the free trade assumption about universal beneficial gains. I then show that, this dynamic unfolded due to the positioning of an undisputed 'lack', 'inadequacy' or 'failure' on part of developing countries' regimes on whom, overcoming 'development' was believed to rely. Subsequently, in the second part, I argue that the acceptance of these terms, severely limited the possibility of affecting change within the GATT. A similar dynamic could be seen to be unfolding with the establishment of the WTO when developing countries' 'failure' was re-conceptualised and the reach of free trade principles was extended to new areas in order to overcome the failure, while selective trade liberalisation continued to characterise multilateral trade practice. I conclude by reflecting on the reverberations of this modality within the current development-related trade prescriptions, particularly those that focus on Global Value Chains (GVCs).

II. THE LINK BETWEEN TRADE THEORY AND LAW: AN UNEASY TRANSLATION

The WTO is what comes to mind when we think of multilateral trade, even though, the multilateral level is only one site of legal intervention concerning trade.¹¹ Unlike its predecessor, the GATT, WTO's sphere of competence goes well beyond trade in goods to encompass trade in services, trade-related investment measures, and intellectual property (IP) rights, and its laws have an acknowledged environmental, labour and human rights dimension. It is, therefore, considered to be one of the cornerstones of the current international economic order. As a legal regime, the WTO is thought to embody a liberal economic philosophy, in particular, the belief that trade liberalisation, that is the removal of tariff and non-tariff barriers, is conducive to employment, growth and ultimately 'development'.¹²

¹¹ Fakhri, critiques the focus on multilateral trade fora, such as the GATT and the WTO, arguing that placing our emphasis on such institutions obfuscates the myriad of other important micro sites in which international trade is conducted and constituted. Whilst an intervention such as Fakhri's, reminds us of the crucial significance of these often-forgotten fora, the WTO remains one important site: its sphere of competence is extensive as the law of its seventeen agreements is binding on 164 Member States and its reach is effective as the organisation is endowed with a dispute settlement mechanism, which has been defined as a world economic court in all but name. For reference; See Joseph H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement* (Harv. L. Sch., Harvard Jean Monnet Working Paper No. 9/00, 2000).

¹² Indeed, the Preamble recognizes that trade relations 'should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.' See General Agreement

The economic principle informing this edifice is that of comparative advantage, a concept which most trade textbooks refer to when explaining the benefits of trade liberalization, which the WTO is supposed to facilitate. Formulated in the 18th and 19th centuries, and revised since, this theory is believed to have provided the most cogent explanation as to why it makes sense for States to trade with one another.¹³ The conventional story is that when this 'common sense' was received in the post-war period, it got translated into the law of the GATT, albeit with several exceptions.¹⁴ As the story goes on to argue, the consolidation of this 'common sense' occurred fifty years later with the establishment of the WTO in 1995 and the extension of its free trade rationale to new areas, thereby perfecting the regime inaugurated by the GATT.

The story told in this part is different, because it shows that the translation of free trade theory into law was not as straightforward in either moment. The emergence and consolidation of this rationality or 'common sense' entailed much more than 'rationally' accepting the intellectual wisdom and superiority of the free trade theory, since other historic, social, and economic factors also played an important role, including the imminent end of formal colonial rule in many parts of the world. Furthermore, multilateral trade law did much more than just receiving and embodying this 'common sense': it contributed towards making it.¹⁵ Multilateral trade rules were important factors that shaped this emergent economic rationality: as we shall see, principles of non-discrimination and equal treatment in trade relations presented themselves as commonsensical and a universally valid set of rules which represented and furthered particular trade interests.

The point that this part makes is that, looking at the free trade theory and multilateral trade law alone provides a very limited understanding of the trade-development nexus forged in the post-war period. We also need to explore the continuities and discontinuities of the colonial enterprise that was formally about to come to an end, in order to understand how it became possible for particular forms of knowledge to be elevated to universal truths, thereby providing the terms within which the trade-development nexus could be articulated.

on Trade in Services, pmbL, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994).

¹³ See Trebilcock et al., *supra* note 1, at 2-6.

¹⁴ The author uses the phrase 'common sense' as a way to see and approach the world, in this case, the world of 'trade and development'.

¹⁵ Alessandrini, *supra* note 4 at 7-9.

A. *The 'Common Sense' of Free Trade Theory: International Specialisation and Comparative Advantage*

The free trade theory combines two theoretical innovations introduced by Adam Smith and David Ricardo in the 18th and 19th centuries respectively. Succinctly, and quite reductively, Smith introduced the concept of international specialisation and Ricardo, that of comparative advantage.¹⁶ With these two tenets, the free trade theory has been ascribed the status of the most efficient global trade policy as it leads to the best allocation of worldwide resources and the greatest generation of material wealth in terms of goods and services that are produced.¹⁷ Consumer sovereignty and freedom of choice are identified as corollaries of this theory, and the main indicator of its success remains the Gross Domestic Product (GDP).¹⁸

This theory, purporting to be universally valid and applicable, is supposed to have informed State practices during the golden age of economic liberalism.¹⁹ However, as scholars have pointed out²⁰, the significance of this period should not be exaggerated since liberal trade relations among European powers lasted only two decades (1850-1870) and bilateral treaties on selected goods rather than extensive liberalisation were the norm (mainly by Britain, France and Germany). Moreover, the application of this theory was never universal: the repeal of the Corn Laws – often cited as an example of unilateral free trade - took place at a moment when Britain had achieved manufacturing capacity and could focus on 'value-added' production, while importing cheaper grains from abroad.²¹ As Chang has argued, Adam Smith himself encouraged the former American colonies to specialize in

¹⁶ Reacting to the mercantilist theory which encouraged States to promote exports and limit imports so as to have a positive balance of payments, Smith argued that it made sense for States to import what they could not produce efficiently at home whilst specialising on those goods that they were more efficient in producing. By exporting the latter, States would acquire the currency needed to pay for imports. Ricardo refined the theory by arguing that what mattered in identifying the line of production to specialise on was not an 'absolute' but a 'comparative' advantage: not what a State can produce more efficiently *vis-à-vis* another State but what it can produce more efficiently at home along with its production frontiers considering its resources are limited. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 30-32 (1776); DAVID RICARDO, PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 338 (1817).

¹⁷ *Id.*

¹⁸ Donatella Alessandrini, *Transnational Corporations and the Doctrine of Comparative Advantage: A Critique of Free Trade Normative Assumptions* 11 INT'L TRADE L. & REG. J. 14, 23 (2005) [hereinafter Alessandrini 'Transnational'].

¹⁹ Trebilcock et al., *supra* note 1, at 20-24.

²⁰ HA-JOON CHANG, BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM 23-40 (2007) [hereinafter Chang].

²¹ *Id.* at 24-25.

agriculture and disregard manufacturing while supplying Britain with 'efficient' (i.e. cheap) agricultural goods; and Hamilton's disregard for Smith's recommendation paved the way for industrialisation in the United States (US).²²

Also, as soon as the economic crisis hit Germany, Bismarck retreated from bilateral free trade treaties and increased tariffs, followed by France and Britain.²³ Countries, in other words, abandoned their (selective) liberalisation by raising tariffs, bringing them back to their pre-liberalisation levels. Furthermore, the US Smoot-Hawley Act – often portrayed as having worsened States' relations and precipitated the conditions which led to World War II - increased duties on imported goods. However, it is important to note that tariffs were already quite high, even before being increased by the Act.²⁴ The point is that, the impact of free trade theory on States' practice was much more modest than what it is often presented as, and its wisdom did not straightforwardly translate into liberalising laws and policies for the countries which are said to have adopted it. Rather, it was instrumentally and selectively employed to further national trade interests.

A more coordinated multilateral activity took place in the early 1940s when States attempted to design the rules of the post-war international order. It is at this point, that the theory was finally accepted by the international community and translated into legally binding rules (the GATT's). The neo-classical reformulation of the free trade doctrine, also known as the 'factor endowment' model, is shown to have provided the theoretical underpinnings of such rules. In 1933, Swedish economists Heckscher and Ohlin emphasised that what encompasses international trade is not just the productivity of labour, which is the only factor of production considered by the classical free trade theory; rather, trade arises because of the differences in the supply of factors of production (the higher the supply, the cheaper the price).²⁵ Countries' comparative advantage therefore, lies in those goods which intensely utilise factors that are present in large supply. The implication is that, countries 'endowed' with a large labour supply should specialize in labour-intensive products such as raw materials and primary commodities, whereas countries 'endowed' with capital and technology should specialise in capital-intensive, technology-intensive, products. The scene was therefore set for States to receive and 'translate' the reformulated free trade wisdom, which crucially provided the theoretical basis for the post-war international division of labour into multilateral trade law.

²² *Id.*

²³ *Id.* at 4.

²⁴ *Id.* The tariffs were increased from 37% in 1925 to 48% in 1930.

²⁵ MARK BLAUG, *The Heckscher–Ohlin theory of international trade*, in THE METHODOLOGY OF ECONOMICS: R, HOW ECONOMISTS EXPLAIN 185, 185 (2d ed. 1992).

Yet, as we shall see, the extent to which States departed from the selective liberalisation practices of the past needs to be closely scrutinised. Most trade scholars would agree that the GATT did not realise a 'pure' free trade order overnight, since free trade was taken to be the horizon, but States were provided with time-limited exceptions to assist with the journey. However, whilst some of these exceptions could be explained in terms of temporary departures from free trade, put in place to assist the liberalisation journey - this is particularly the case with the infant industry argument,²⁶ Keynes' unemployment argument,²⁷ and Chamberlain and Robinson's claim of imperfect market competition,²⁸ others

²⁶ The infant industry argument challenges the free trade assumption that all countries know what their comparative advantage is at any moment, and that this advantage is given by current rates of technological development. It posits that States where industries are not well established find it difficult to compete internationally even though they might become efficient once these industries are well established and can avail itself of economies of scale. A temporary departure may therefore be needed to enable these industries to be in that position. This argument emerged in the context of the American colonies when Hamilton rejected Smith's recommendation to specialise in agricultural production to enable its manufacturing to take off. The departure is therefore valid until industries have reached 'maturity' and are able to compete internationally. At that point, free trade is re-instated as the best theory informing policy action. *See* Chang, *supra* note 20.

²⁷ Keynes' argument challenged the assumption that all factors of production (i.e. labour, land, raw materials, capital) are employable at any time. Keynes argued that there are circumstances in which this does not happen, as in the case of involuntary unemployment (i.e. people willing to work but not able to find employment). Involuntary unemployment, according to him, took place because of a shortage of aggregate demand which instigated a downward spiral of income, demand and production: workers were laid off; their purchasing power decreased, as well as their demands of consumer goods; firms made more employees redundant because of lack of demand, and the cycle continued. The point of Keynes' argument was that there are circumstances which demand a temporary departure from free trade to stimulate employment, income, domestic demand and therefore, production. If consumers could go for cheaper imported products, then domestic demand and production would not be stimulated by government intervention. As soon as domestic demand, employment and production resumed, tariff protection would be lifted. *See* Alessandrini Transnational, *supra* note 18.

²⁸ *See* EDWARD CHAMBERLAIN, THE THEORY OF MONOPOLISTIC COMPETITION 349 (1929); JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 307 (1931). Robinson and Chamberlain's argument challenged one of the core assumptions of free trade that is the belief that markets function in a state of perfect competition where atomistic producers respond to the needs expressed by atomistic consumers which therefore creates the demand that producers satisfy. Robinson and Chamberlain's analysis of imperfect competition showed that in reality, markets oscillate somewhere between pure competition and monopoly. Indeed, if we take into account the activity of oligopolistic producers then the result is a more fundamental challenge to the intellectual superiority of free trade thinking in that it shows that demand, production and prices are actually shaped by the activities of big conglomerates that are able to influence prices but also shape

cannot be explained in this light. Indeed, the latter exceptions represented a fundamental departure from free trade thinking that ended up contradicting the theory's own logic of universal validity and applicability as well as its claims of universal gains. We therefore need to consider factors external to the theory itself, in order to make sense of this contradiction. While the next sub-part illustrates this 'contradiction', the one following it introduces elements external to the theory, in particular, the end of formal colonial rule and the beginning of economic and political sovereignty over resources for the soon-to-be independent countries.

B. Enters Trade Law: The Limits of Non-Discrimination and Equal Treatment

GATT law is said to be governed by the principles of non-discrimination and equal treatment in trade relations. These principles are supposed to take the international trade community as close as possible to the workings of comparative advantage by enabling market prices to reflect real prices more closely, so that countries specialise in goods, which they are efficient in producing. How? There are four legal rules that are supposed to give effect to these principles. Most Favored Nation (MFN) is the obligation to not discriminate amongst 'like' (similar) foreign goods; and National Treatment (NT) targets the discrimination between 'like' domestic and foreign goods once the latter have crossed the border. The obligation to reduce tariffs reduces discrimination against 'like' foreign goods before they enter the country, and the obligation to eliminate quantitative restrictions on imports (and exports) does away with the most distortive protectionist measure, that is, a partial or total ban.²⁹ Underlying all these rules is the assumption that, for comparative advantage to work and deliver gains for all, market prices need to reflect real prices. Therefore, the actions targeted by the rules are those which artificially construct that advantage, thereby preventing free trade from delivering its twin promise of most efficient allocation of worldwide resources and the greatest generation of material wealth.

As mentioned above, the GATT contemplated some exceptions to these rules, for instance: it allowed States to raise tariffs and impose quantitative restrictions for balance of payment purposes; when a sudden surge of imports resulting from liberalising commitments threatened to cause material injury to the domestic

consumers' tastes and preferences through market power, advertising and other means. The implication is that, there is no comparative advantage-led allocation of worldwide resources on the basis of which all States benefit from trading with one another. Unlike Hamilton and Keynes' argument, the imperfect competition argument did not enter the discursive sphere of GATT law, except in the form of anti-dumping rules which aimed to target unfair trade practices. See Alessandrini Transnational, *supra* note 18.

²⁹ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT, 1947] arts. I, III, XXVIII and XI respectively.

industry, it gave firms a time-limited protection to adjust, or otherwise perish,³⁰ and when unfair trade practices such as dumping were believed to confer an unfair (i.e. artificially constructed) advantage to exporters.³¹

What one can infer from analysing GATT obligations and their exceptions is the belief that trade liberalisation is a positive strategy when coupled with an appropriate State intervention.³² This is not a new observation. What is less acknowledged, however, is the fact that whilst this legal apparatus can be explained in terms of liberal trade cum State intervention (i.e. the emerging Keynesian or ‘embedded liberalism’ consensus of the post-war period) there is one particular set of exceptions from the rules that can be explained neither in terms of the free trade theory (with due adjustments) nor in terms of Keynesian consensus. The agricultural and fishery exceptions, which were followed in the 1960s by the textile exception, cannot be explained in terms of the time-limited exceptions touched upon in this part,³³ since these were the sectors in which, according to the neo-classic re-conceptualisation of the free trade theory and the resulting post-war international division of labour, certain countries (i.e. former colonies) were supposed to have their ‘comparative advantage’. The universality of free trade resides upon this very basis that, all countries have an advantage in trading with one another because of a comparative advantage in the production of certain goods, with the “factor endowment” theory suggesting that it was those goods which made more use of the abundant factors of production. We therefore need another lens to make sense of this strange amalgam of theory, law and practice, one that looks at it in a historic context and acknowledges the links between trade, development, and post-colonialism.³⁴

³⁰ The adjustment rationale is consistent with the free trade theory: firms are given the time to adjust to the reduction of the protection that they have enjoyed thus far, but if they are unable to do so, they are considered inefficient and bound to become extinct.

³¹ ‘Dumping’ is the practice of selling a product in the export market at a price lower than the one applied in the domestic market. Although not necessarily the case, it is often assumed to be motivated by predatory intent (i.e. attempt to force out competition) and was disciplined by GATT Art. VI when it resulted in a material injury to the domestic industry.

³² This was also a consensus regarding the first moment of Law and Development. *See* Trubek & Santos, *supra* note 3.

³³ *See* Chang, *supra* note 20.

³⁴ The argument that agriculture was singled out from liberalisation needs to be substantiated. The GATT distinguished between primary and non-primary products. Primary products are those which are derived from farm, forestry and fishery. Whereas the GATT law on non-primary products (i.e. industrial products) provided for a prohibition of QRs (art XI); export subsidies were highly disciplined (States could use so-called countervailing measures) and reduction of tariffs took place through successive rounds of

C. Colonialism, Trade and Development: The Missing Link

The first time we encounter the term 'development' within the multilateral trade arena is in the context of the Havana Conference of 1946 in which seven so-called 'less developed' countries participated. We will see how these countries objected to the agricultural and fishery exceptions and how the rules entered into force as originally drafted, nonetheless. For the time being, there are three aspects of this early engagement I want to pause on, because they say a lot about the trade-development nexus that this article is trying to describe.

The first aspect concerns the historic and institutional separation between the political and economic realms of the international legal order which was about to be set up. The Dumbarton Oaks Conference led to the creation of the United Nations (UN) whilst the Bretton Woods Conference was supposed to create the three legs of the post-war international economic system: the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (IBRD) and the International Trade Organisation (ITO). The latter never materialised because of the refusal of the US Senate to ratify its charter.³⁵ What came into force in its place was the GATT, whose rules were negotiated principally between the US and the United Kingdom (UK).³⁶ Once an agreement on the legal norms described earlier was reached between the two powers, negotiations were made open to the rest of the world in 1946. A vast majority of the countries of the world at this point were still under colonial rule and in fact acceded to the GATT after independence by means of an accession mechanism negotiated on their behalf by their former colonial rulers.³⁷

The seven 'less-developed' countries were therefore those, which had already acquired independence or had not been subjected to formal colonial rule.³⁸ When

negotiations; the law was different for primary products as QRs were allowed, subject to two conditions, and so were subsidies, whereas tariffs were not reduced.

³⁵ This was due to the investment provisions, particularly those on expropriation, which were considered to be not sufficiently protective of US investment abroad. See WILLIAM A. BROWN, *THE UNITED STATES AND THE RESTORATION OF WORLD TRADE: AN ANALYSIS AND APPRAISAL OF THE ITO CHARTER AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 152 (1950) [hereinafter Brown].

³⁶ A few other countries were involved. See RICHARD N. GARDNER, *STERLING-DOLLAR DIPLOMACY: ANGLO-AMERICAN COLLABORATION IN THE RECONSTRUCTION OF MULTILATERAL TRADE* 491, 493 (1956).

³⁷ See KENNETH W. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 346 (1970).

³⁸ These seven less developed countries were Cuba, Brazil, Russia, China, Lebanon, Syria, and Czechoslovakia.

the text was shared with them, they objected to it because agricultural exports was the sector in which they were supposed to have a comparative advantage.³⁹ Their objection was dismissed on the basis that agriculture was a sensitive issue since it involved an access to food on which the survival of each country's population relied, therefore making it eligible for a different treatment. Attempting to adopt a similar logic, the 'less-developed' countries argued that given their past of colonial exploitation and the fact that their manufacturing capacity had been destroyed or was inexistent, industrial goods could be considered to be their sensitive issue and therefore, they should be allowed to use exceptions to build their manufacturing capacity.⁴⁰ This argument was also rejected with the 'pragmatic' point that if industry (in addition to agriculture) was singled out from liberalization, then there would be no point in having a liberalizing agreement such as the GATT at all, and that the GATT was in fact necessary as the bulk of international trade was in industrial goods. The other crucial argument advanced by the US was that, concerns expressed by these countries about colonialism were of a political nature and as such, they were to be dealt with by the UN.⁴¹

What is interesting to note about the separation of political and economic issues is that it played differently, and had a different meaning for the countries involved, for instance, for the US, GATT law reflected an objective economic reality, i.e. the universal benefits of trade liberalisation, with the differential treatment between industrial and agricultural goods being framed as economic (i.e. the self-sufficiency rationale referred to above) rather than political. And yet, the very attempt to define matters as economic and political is one example of the dynamic through which a universal discourse of trade liberalisation supposedly based on objective economic grounds is in fact, the elevation of a particular socio-economic model (liberalisation of industrial goods on the one hand and protection of agriculture on the other)⁴² serving particular interests and realising particular socio-economic effects - to which the international trade community as a whole needs to conform.

It is also important to note that the way in which matters are defined as economic or political has shifted,⁴³ however, the ability to define what counts as economic

³⁹ See Brown, *supra* note 35, at 633-35.

⁴⁰ They were, in other words, invoking the infant industry argument. See *Id.*

⁴¹ Brown, *supra* note 35.

⁴² For one of the most nuanced accounts of the relationship between international trade governance and food security and hunger, see Anne Orford, *Food Security, Free Trade, and the Battle for the State*, 11(2) J. INT'L L. & INT'L REL. 1, 67 (2015).

⁴³ See FIONA MACMILLAN, *Critical Law and Development*, in RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 428-445 (Emilios Christodoulidis et al. eds., 2018); Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, 26(1) MICH. J. INT'L L. 199, 243 (2004).

and political still remains an important way to exercise power. Claims to knowledge (what counted as sectors to be liberalised and what did not) enabled particular forms of interventions: the markets of ex-colonies were kept open for industrial goods coming from the industrialised countries but the latter continued to protect themselves from agricultural goods coming from the former. Additionally, matters framed as economic were *de facto* elevated over those framed as political through the supposed neutrality of the growth imperative and the consequent trade for growth axiom (growth becomes the pre-requisite for any other kind of political intervention, such as poverty alleviation, socio-economic equality, etc).

The second aspect, worthy of our attention, is that to an extent the seven 'less developed' countries identified themselves with the reality of 'underdevelopment', which was considered as the lack of economic growth, and they accepted the consequent need for trade to stimulate that growth so as to become developed. In other words, they accepted their 'economic backwardness' and the need to overcome it.⁴⁴ Pahuja has referred to international law more generally, and has pointed out that, while seeking admittance to the international community and to be able to affect international law, the soon-to-be newly independent States accepted being identified as economically backward, as far as their economies were concerned, despite arguing that colonialism had greatly contributed to this status.⁴⁵

Whilst decolonisation was not a *fait accompli* in the early 1940s (indeed there were different views between Keynes and the US as to its desirability and feasibility),⁴⁶ this self-identification would have become important in the 1950s and 1960s when the contours of the GATT-development related trade activity emerged. Before we turn to such activity and explore the reforms that the GATT underwent, in order to respond to the demands of its developing-country parties, there is a third aspect of this early moment, which is worth emphasising, and that is the fact that the attribution of a *less than developed status* to certain societies was quite a recent socio-legal-economic intervention. Appreciating the importance of such an intervention entails making the continuities with post-colonialism and its links to trade interests

⁴⁴ As Eslava, Fakhri and Nesiha have noted with regard to the Bandung Conference, that what united the very different positions of States attending the conference was a discourse of 'developmentalism'. See BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES 3-32 (Luis Eslava et al. eds., 2017) [hereinafter LUIS ESLAVA].

⁴⁵ See SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY 250, 251 (2013) [hereinafter Pahuja]. Her argument is about the critical instability of international law, which has both imperial and anti-imperial tendencies, the latter springing from the relationship that international law has with the idea of justice (what she calls the political quality of law), but being curtailed by developmentalism.

⁴⁶ *Id.* at 13-15.

apparent, and this is crucial for understanding the strange amalgam of theory, law and practice, which I have referred to earlier.

As post-development scholars have argued, both the terms, ‘underdevelopment’ and ‘development’ were inextricably linked to a set of theories that came to be known as ‘development economics’.⁴⁷ In his seminal study, Escobar shows how development was made to coincide with economic growth generated by industrialisation, capital accumulation, State planning and foreign aid; and how societies which lacked accumulation and growth were seen as ‘underdeveloped’.⁴⁸ Truman’s fourth point is often considered to signal the beginnings of the development enterprise.⁴⁹ However, ‘development’ conceptualised as the dividing line between certain societies that are in need of assistance and others providing such assistance can be traced further back.⁵⁰ As Anghie has argued, the first ever reference to ‘development’ in an international organisation can be found in the

⁴⁷ Although the antecedents of development economics can be brought back to mercantilism with its focus on the supply of capital and a positive balance of trade, the emphasis of mercantilist theories is on countries’ prosperity rather than ‘development.’ One of the earliest interventions focusing on the specific issues of ‘underdeveloped’ economies can be found in Rostow, *supra* note 5. Published in the early years of the Cold War, it sees the need to accelerate the accumulation of capital as paramount. For critical engagements with this literature, see, ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (1995) [hereinafter Escobar]; JAMES FERGUSON, THE ANTI-POLITICS MACHINE: DEVELOPMENT, DEPOLITICISATION, AND BUREAUCRATIC POWER IN LESOTHO (1994); GILBERT RIST, THE HISTORY OF DEVELOPMENT: FROM WESTERN ORIGINS TO GLOBAL FAITH (Zed 1997).

⁴⁸ See Escobar, *supra* note 47, at 73-89.

⁴⁹ See Text of the Speech in *Department of State Bulletin*, (Jan. 20, 1949), 123: “We must embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. More than half the people of the world are living in conditions approaching misery. Their food is inadequate. They are victims of disease. Their economic life is primitive and stagnant. Their poverty is a handicap and a threat both to them and to more prosperous areas. For the first time in history, humanity possesses the knowledge and skill to relieve suffering of these people. The United States is pre-eminent among nations in the development of industrial and scientific techniques. The material resources which we can afford to use for assistance of other peoples are limited. But our imponderable resources in technical knowledge are constantly growing and are inexhaustible.”

⁵⁰ Pahuja, *supra* note 45, at 185-86. Pahuja remarks “Development is a story about human history in which a certain number of societies have, over time, achieved the most perfect forms of social, legal, political and economic organisation which could reasonably have been achieved by now, but which other societies have not yet achieved. According to this story, ‘society’, ‘law’, ‘politics’ and ‘economics’ in their ideal forms can be found in the knowledge, if not always the practice, of societies that have already achieved development and will slowly be achieved by other societies.”

League of Nations (LON), the precursor of the UN, and in particular in the sections on the Mandate System.⁵¹ Articles 22 and 23 of the LON are worth referring to here because they enable us to tell a story which is different from the one told thus far, the one about an international trade community which realises the intellectual superiority of free trade thought and translates this thinking into multilateral law and practice. Article 22 provided that:

[t]o those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand for themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.⁵²

Anghie's work, together with that of other TWAIL scholars, has pointed to the links between the Mandate System, from which former colonies were supposed to emerge and join the international community as equal States; the old colonial regime; and post-war international institutions.⁵³ From a perspective that appreciates such continuities, Article 22 can be read as replacing the old racial and cultural differences, on which much of the colonial violence and exploitation was based, with the new category of 'economic backwardness' which is believed to prevent 'development' from taking place. Economics, on which such 'backwardness' is supposed to be 'neutrally' grounded, happens to be the domain of the more 'advanced' members of the international community that take upon themselves the task of guiding these *peoples* through rational economic policies. When read together with Article 23, we can also appreciate that the reformulated 'civilizing mission', which Anghie highlights, can be seen as going hand in hand with a reformulated trade agenda that still consists of selective trade interests instead of universal liberalisation practices.

Article 23 of the LON provides that it is the responsibility of the League and its members to "secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all members of the League"; a language we see replicated in Article IV and V of the Atlantic Charter of 1941 where parties commit, "... to further the enjoyment by all states, great or small, victor or

⁵¹ Antony Anghie, *Bandung and the Origins of Third World Sovereignty*, in LUIS ESLAVA, *supra* note 44, at 535, 547-48 [hereinafter Anghie].

⁵² Covenant of the League of Nations art. 22.

⁵³ Antony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions and the Third World*, 32(2) N.Y.U. J. INT'L L. POL. 243 (2000).

vanquished, *of access, on equal terms, to the trade and to the raw materials of the world* which are needed for their economic prosperity.”⁵⁴

The conventional story reads that these articles proclaimed the end of the old colonial system of preferences which gave former colonial powers the exclusive right to access material resources in former colonies. With non-discrimination and equal treatment being adopted as universal principles regulating post-war trade relations, these articles, as well as those of the GATT as referred to above, are considered as an evidence of both, the translation of a neutral (and superior) economic rationale into practice and of the moral repudiation of the past of colonial exploitation. However, the continuities that Anghie has highlighted, as well as the changing political-economic environment brought about by the imminent end of both, formal colonial rule and World War II, enable us to present a different story. If we start the story with colonial rule and its imminent end, we can see other factors playing an important role. Escobar for instance, has emphasised upon how important it was for the US (and former colonial powers) to access foreign markets, in order to extract raw materials and place excess commodities and capital.⁵⁵ This meant that the old colonial system of exclusive preferences had to go.

Equally important to note is that non-discrimination and equal treatment in trade relations have a long historic lineage, and the claim, that these principles were connected to the rejection of the old system of colonial exploitation and the acceptance of the free trade theory requires further scrutiny. Despite being gauged in neutral and universal terms, they refer to particular interests that are realised by presenting the material resources of specific countries as ‘common resources’, and international legal theories and rules have played an important part in this process. Esmeir for instance, has shown how Grotius’ 1609 *Mare Liberum* conceived of the sea as free and open to the trade of all nations, and how his formulation was instrumental in facilitating Dutch trade with the East Indies, which laid the basis for its subsequent formal colonisation against the Portuguese claims to exclusive rights.⁵⁶ Esmeir argues:

The coloniality of the Free Sea... persists today in the field of international law. According to this colonial vision, the oceans and the seas are not merely free and common to all humans. Their freedom is the constitutive cement for staging an enlarged world; they

⁵⁴ The Atlantic Charter, Aug. 14 1941, Department of State Bulletin (Washington DC, Government Printing Office, 1941).

⁵⁵ Escobar, *supra* note 47.

⁵⁶ Samera Esmeir, *Bandung: Reflection on the Sea, the World and Colonialism*, in LUIS ESLAVA, *supra* note 44, at 81-94 [hereinafter Esmeir].

produce a unified world and, more significantly, special-political possibilities for capturing it and intervening in it.⁵⁷

Therefore, another way to read Article 23 of the LON and Article IV and V of the Atlantic Charter of 1941, is to see them as playing an active role in the extension of the concept of the “commons” from the “high seas” to the resources of the land. As already mentioned, it is not certain whether GATT rules were designed keeping in mind, a particular international division of labour between ex-colonies and ex-colonial powers because there was no agreement as to the end of colonialism between Britain and the US back then. Once the GATT entered into force, it became clear that the effects of these (supposedly universal) rules were perceived to be such that they would penalise the trade interests of developing countries whilst promoting those of industrialised countries. This signaled the moment the GATT started to engage its developing country contracting parties’ calls for reforming the rules of the international economic system.

III. THE ‘PROGRESSIVE TIME’ OF THE TRADE-DEVELOPMENT NEXUS

As more countries achieved independence in the 1950s and 1960s, they came to articulate a collective position within the GATT, and the international economic system more broadly, which exposed the way in which international trade rules promoted unequal trade relations between ‘developing’ and ‘developed’ countries.⁵⁸ This position highlighted three important aspects of such unequal relations: first, whilst expected to adhere to a multilateral system of rules based on free trade thinking, developing countries found that the sectors in which they were supposed to have a comparative advantage, were singled out from liberalisation; second, developing countries were not allowed to protect their nascent industries (i.e. the infant industry argument) which meant that they were not able to compete with industrial products coming from industrialised countries as the latter could

⁵⁷ *Id.* at 85.

⁵⁸ Characterising this position within the international economic system more broadly was the attempt to resist the identification of their resources as ‘commons’ or as available for the common benefits of mankind. Indeed, the UN resolution on Permanent Sovereignty over Natural Resources and the Charter of Economic Rights and Duties of States can be read in this light. *See* G.A. Res. A/RES/3171, Permanent Sovereignty Over Natural Resources, (Dec. 17, 1973). Claims concerned in particular, the areas of investment and trade. With regard to the emergent international law on foreign investment, *see* MUTHUCUMARASWAMY SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 19 (1994). As for trade, countries sought to stabilise commodity prices since the 1950s. Point 5 of the Bandung Communique for instance, called for collective action among members directed at stabilising commodity prices “through bilateral and multilateral arrangements” and for the diversification of their export trade through their processing of the raw materials prior to their export. *See* Anghie, *supra* note 51, at 535, 547-48.

avail themselves of economies of scale and be therefore cheaper; and third, more and more countries achieving independence had to compete with a fixed demand for raw materials and the primary commodities from industrialised countries, which meant that prices and consequently their export earnings were decreasing.

With this background in mind, I highlight two elements of GATT-related development activity that are important for the story about the trade-development nexus, which is being told. The first is that, as a forum, the GATT enabled claims to be made about the structural inequalities of the trading system and reform projects to be articulated within it; and this points to important discontinuities with colonial forms of unidirectional knowledge production and intervention. The second is that, the potential of making claims about structural inequalities was curtailed by the particular dynamic of the trade-development nexus we have been describing thus far, that is the elevation of a particular (i.e. trade for growth) rationale, and of selective trade interests, to universal standings. This was possible due to the positing of three elements which provided the terms of the trade-development debate within the multilateral trade system: first, a 'failure', 'inadequacy' or 'lack' which was said to affect the economies of developing countries; second, an economic rationale which was construed as the neutral terrain to remedy these shortcomings; and third, the expertise of more 'developed' members, institutions or experts, which was offered to developing countries to enable them address such inadequacies.

As for the first element, it became increasingly evident that there was a profound inconsistency between the theoretical apparatus and the rules and practices of the GATT. This perception was confirmed by the Haberler Report which concluded that industrialised countries were actively hindering developing countries' trade.⁵⁹ What is interesting to note, and this takes us to the second element, is that the Haberler Committee was specifically tasked with investigating the 'failure' of developing countries in developing their trade as fast as that of the industrialised countries, rather than, one could argue, investigating the failure of industrialised countries themselves to abide by the rationale that they proclaimed as universally valid and beneficial, and which they had enshrined into their law. Whilst the committee concluded that the reasons for this 'failure' were to be found in the industrialised countries' unfair trade practices as much as in the letter of the GATT law,⁶⁰ and the acknowledgement of these reasons eventually led to the

⁵⁹ The Haberler Report was the first GATT report on 'developing countries' by a committee of independent economists. See *Twelfth Session of the Contracting Parties*, (1957), GATT B.I.D.S. (6th Supp.), at 18 (1958).

⁶⁰ Haberler focused on agriculture (high tariffs and quantitative restrictions), instability of commodity prices and tariff escalation, that is higher tariffs on processed products than raw materials (depending on the degree of processing), arguing that this activity hindered

establishment of Part IV of the GATT on Development, what was being placed beyond scrutiny was the very premise of this endeavor.⁶¹ The premise was that the developing countries needed to accelerate the pace of their trade in order to match that of industrialised countries, taken as the optimum level, to achieve growth; a particular norm was therefore posited as being universally valid. The 'particularity' of that norm concerns both: the free trade assumption - according to which free trade is the best trade theory because it leads to the maximisation of material wealth (i.e. more goods and services are produced and exchanged); and the development assumption - according to which countries at the end of the development spectrum should gradually move up the ladder by increasing growth, and the export earnings that it generates through international trade.⁶² What we encounter is the 'progressive' time of the trade-development nexus: the movement from an inadequate to a more adequate place in the development ladder through the acceleration of the pace of international trade.

This is not to say that these reforms did not produce important effects; as it will be shown below, they did. However, bearing in mind the second element about the curtailment of their potential, I want to emphasise, that leaving this rationality and its temporality undisturbed meant that the monopoly over knowledge (to start with, the claim that 'development' was to be achieved through trade *for* growth) allowed for the monopoly over the forms of intervention (as we shall see in the context of the establishment of the WTO when circumstances changed) and ultimately limited what was possible to experiment with. We look at the reforms first and then at the transformation that the establishment of the WTO entailed.

A. The Terms and Content of the Trade-Development Nexus

The first reform was the introduction of the infant industry exception in recognition of the developmental needs of some GATT parties. Although the

the industrialisation process of developing countries. It also highlighted the heavy usage of export subsidies by the US and Europe. See, GATT Secretariat, *Trends in International Trade: A Report by a Panel of Experts* (1958).

⁶¹ Part IV however did not translate into legally binding obligations, and the negotiating rounds that followed did very little to reduce those tariff barriers that most impeded developing countries' access to the markets of developed countries. See ROBERT E HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* 43 (1987).

⁶² Central to this process is the accumulation of capital. Rostow for instance, had posited that for an economy to grow, the rate of productive investment has to correspond to at least 10% of its national income; and as developing countries did not possess sufficient income, they had to import capital to kick up the industrialisation process, which would, in turn, lead to exports and the resulting earnings to be re-invested into a new cycle of production and capital accumulation. See WALT W. ROSTOW, *THE PROCESS OF ECONOMIC GROWTH* 80-108 (1962) [hereinafter Walt].

conditions under which it could be exercised were very strict (and in fact, it was used only twice);⁶³ scholars have argued that the same outcome was achieved through the introduction of Part IV and specifically the ‘non-reciprocity’ provision, which enabled the developing countries to support their industries because they did not have to reciprocate tariff reductions when the latter were negotiated by industrialised countries.⁶⁴ The other provision requiring industrialised countries to eliminate those practices which discriminated against developing countries’ trade was hortatory rather than mandatory, which meant that the protection against developing countries’ exports remained firmly in place in industrialised countries during GATT’s life.⁶⁵ The third provision enabled the developing countries to establish systems of preferences for South-South trade.⁶⁶ Taken together, these development-related provisions are referred to as Special and Differential Treatment (SDT). One cannot fail to notice the paradox with the terminology adopted since the original SDT was the one that the US and Britain carved out for themselves by exempting agriculture and fishery, and later textile,⁶⁷ from ‘universal’ liberalisation.

The conventional trade and development story however, is that SDT achieved very limited results for developing countries, particularly in terms of non-reciprocity, because by renouncing to abide by the same rules (i.e. reciprocity), developing countries missed the opportunity to demand that industrialised countries abide by those rules too and therefore eliminate their protectionism.⁶⁸ This argument is believed to have led developing countries back into accepting reciprocal obligations under the WTO. The story is therefore, one of realisation of mistakes made in relation to the adoption of failing economic policies and inadequate legal strategies; and, as seen before in relation to the adoption of the GATT, one of acceptance of a superior economic rationality which is deemed to be straightforwardly translatable into law and practice. The debate about unequal terms of trade and the structural inequality of the multilateral trading system fades in the background and what emerges instead is an argument about the need for developing countries to secure ‘market access’ to, and compete on an ‘equal playing field’ with, developed countries. In particular, obtaining access to agricultural markets in developed economies is believed to deliver development.

⁶³ GATT 1947, *supra* note 29, art. XVIII.

⁶⁴ GATT 1947, *supra* note 29, art. XXXVI.

⁶⁵ See Walt, *supra* note 62, at 56.

⁶⁶ Trebilcock et al, *supra* note 1, at 608-9; See Alessandrini, *supra* note 4, at 60.

⁶⁷ Walt, *supra* note 62, at 43.

⁶⁸ *Id.* at 58; Matsushita, *supra* note 1, at 373-93; See Hoekman & Kostecki, *supra* note 1, at 239-40.

Now, the results of non-reciprocity are mixed. While some scholars observe that flexibility from GATT rules has allowed for policy space which has in turn enabled countries (especially in Asia and Africa) to experience unprecedented levels of growth and industrialisation;⁶⁹ others have either contradicted this view or argued that the benefits from tariff protection and industrial policy were not as substantial as they would have been, if countries had liberalised more extensively.⁷⁰ Towards the end of the 1980s, the latter argument prevailed, supposedly leading to the acceptance of reciprocity within the WTO and the extension of the free trade logic to more realms. However, this story about a shared wisdom that translated into multilateral law and practice needs to be interrogated, as it obfuscates the role that various other historic, political, economic, and legal factors played in the adoption of the WTO agreements. I briefly mention them and then highlight how, despite the change in the content of the trade-development nexus, its terms remained firm in place enabling a particular story about the 'free market' and a 'level playing field' to be elevated to universal standings, while the pursuit of selective trade interests continued to take place.

To start with, by the time the WTO came into existence, the trade regimes of many developing States had already liberalised as a result of the Structural Adjustment Policies (SAPs) that they had to undergo to get their debts rescheduled. Developing countries had borrowed heavily from US commercial banks, which were eager to lend funds after being inundated with petrodollars following the oil crisis of the early 1970s. Borrowing had been encouraged by the development theories of the 50s and 60s, which had identified the lack of domestic capital as an obstacle to industrialisation, which was to be overcome by resorting to foreign capital.⁷¹ The inability of these countries to repay their debt, signaled first by Mexico in the early 1980s, followed the so-called "Volcker shock" which raised interest rates in the US overnight.⁷² This rise was orchestrated by the Federal Reserve in an attempt to curb inflation at home as the administration turned away

⁶⁹ See, Chang, *supra* note 20; United Nations Conference on Trade and Development, Prebisch Lecture by Dani Rodrik, *on Globalisation, Social Conflict and Economic Growth* UNCTAD (97/1) (Oct. 24, 1997).

⁷⁰ See, e.g., DEEPAK LAL, LONDON, INST. OF ECON. AFF., *THE POVERTY OF DEVELOPMENT ECONOMICS* 27 (1983); ANNE KRUEGER, *POLITICAL ECONOMY OF POLICY REFORM IN DEVELOPING COUNTRIES* 3-4 (1993). For a different critique of Import Substitution Industrialisation (ISI), highlighting how it challenged neither the imperative to accumulate (national) capital nor the modernisation logic that required developing countries to 'catch up', see, Luis Eslava, *The Developmental State: Independence, Dependency and the History of the South*, in *THE BATTLE FOR INTERNATIONAL LAW IN THE DECOLONISATION ERA* (J. Von Bernstorff & P. Dann eds., 2019).

⁷¹ Escobar, *supra* note 47, at 55.

⁷² Tayyab Mahmood, *Is it Greek or Deja Vu All Over Again?: Neoliberalism, and Winners and Losers of International Debt Crises* 42 *LOY. U. CHI. L. J.* 629, 687 (2011).

from Keynesianism and embraced monetarism to deal with the crisis of stagflation.⁷³ With interest rates increasing tenfold, many countries found themselves on the brink of bankruptcy: the restructuring of debt ‘offered’ by international economic institutions such as the World Bank was made dependent on these countries’ acceptance of so-called conditionalities like: deregulation, privatisation, reduction of public spending and liberalisation of their trade regimes.⁷⁴ In other words, debt restructuring was supported as long as these States recognised that their industrial policies (such as those based on the infant industry argument and non- reciprocity) had resulted in economic failure and needed to be replaced by policies of export-led growth (i.e. growth through export earnings).

This is a very cursory account of the rich web of factors that led to the re-introduction of reciprocity within the multilateral trade system. The end of the Cold War, for example, played as much of a role as the shift in comparative advantage and the concomitant loss of competitiveness in manufacturing experienced by industrialised countries *vis-à-vis* the newly industrialised countries.⁷⁵ Claims about ‘unfair trade’ practices started to be articulated by industrialised countries and relied upon, to enact protectionist measures, in a manner not too dissimilar from the rhetoric of unfair trade practices employed by more recent US administrations.⁷⁶ As Lang has pointed out, in addition to these material factors, one also has to consider the role that ideas, particularly those articulated by trade lawyers, played in the reconfiguration of the purpose of the multilateral trade system.⁷⁷ While the GATT had seen itself as policing measures affecting international trade in a patently discriminatory manner, the WTO was able to construe a whole range of domestic policies concerning services, investment, IP rights, food, animal safety, and the environment as ‘trade barriers’ potentially subject to its discipline. The key move, he argues, was:

to define a barrier to trade primarily in terms of its economic effects, rather than its form or intention [as it had been during the GATT]. In this approach, a governmental action constituted a barrier to trade if

⁷³ The co-existence of high rates of unemployment and high rates of inflation was seen as unprecedented and was considered to be a sign of the failure of Keynesianism and its tolerance of higher rates of inflation in return for low unemployment.

⁷⁴ See Celine Tan, *Reframing the Debate: The Debt Relief Initiative and New Normative Values in the Governance of Third World Debt*, 10(2) INT’L J. L. IN CONTEXT 249, 272 (2014).

⁷⁵ Anti-dumping duties were increasingly being used to allegedly target the ‘unfair trade’ practices of countries which instead claimed that cheaper prices were the outcome of efficiency gains. See Alessandrini, *supra* note 4, at 117-18.

⁷⁶ See Barry Desker, *Globalisation Under Pressure: International Trade Suffers* (S. Rajaratnam Sch. Int’l. Stud. (NTU), RSIS Commentary No. 260, 2016).

⁷⁷ ANDREW LANG, *WORLD TRADE AFTER NEO-LIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER* 223 (2011).

—and to the extent that- it 'distorted' the conditions of competition ... as compared to the conditions of competition which would exist in an imagined 'free' market...⁷⁸

This idea of a market 'free' from government intervention was 'imagined' in more than one sense, not only because it did not exist in actual practice since governments rarely gave up their regulatory powers, but more importantly because it was used to construe "institutional and regulatory *differences* between foreign markets and the domestic US market ...as 'distortions' of conditions of competition between foreign products and their domestic US counterparts".⁷⁹ Finally, it was imagined because even after giving up non-reciprocity and 'accepting' the need for a 'level playing field' in trade relations, selective and not full liberalisation continued to be the norm within the WTO, as the Doha Development Round has shown since 2001.⁸⁰ Thus, as we have seen in the context of the GATT and in relation to the introduction of the principles of non-discrimination and equal treatment, multilateral trade law did much more than simply receive or translate a 'common sense' - in this case about an imagined 'free' market and 'equal playing field' - into law; it actually contributed to making it.

Rather than being the result of one single factor, however, the extension of the free trade rationale to more areas of policy-making was the outcome of the confluence of very different historic, political and economic factors. The one which I have chosen to emphasise in this article because it is less dealt with by conventional trade and development accounts, is the framework that binds the two terms: trade and development together. A framework which relies on the positing of a universal economic rationality on the basis of which the 'lack', 'failure' or 'inadequacy' of certain systems can be addressed, aided by the expertise of international economic institutions. The problem is that, this framework creates a powerful form of knowledge reliant on a linear story of progress on which forms of intervention (such as the enactment of GATT/WTO rules) are made possible, and developing countries are in one way or another supposed to reform their inadequate regulatory systems to match those of developed countries.

⁷⁸ *Id.* at 226-27.

⁷⁹ *Id.*

⁸⁰ For instance, agriculture remains highly protected despite the commitment to eliminate export subsidies achieved at Nairobi; services negotiations continue to exclude one modality (i.e. movement of natural persons) of major export interest to developing countries whilst focusing on services (especially financial) and modalities (commercial presence which pertains mainly to the establishment and operation of foreign investors); and no progress has been achieved on the liberalisation of cotton.

Instead of considering the cumulative effects of the different factors mentioned above, the focus on (trade for) growth and development enables attention to be shifted away from structural inequalities of the international system towards deficiencies of countries, in terms of inadequate economic policies and legal systems that need to be brought into conformity with those of developed countries, that are held as the example to replicate. The time that binds trade and development is therefore one of perennial inadequacy and the need for compliance. In addition to having to comply with new standards,⁸¹ mechanisms such as the Trade Policy Review Mechanism (TPRM) and Integrated Framework (IF) ensure that countries' legal regimes, and their compliance with WTO norms, are kept in check.⁸² Furthermore, in place of the old non-reciprocity, which implicitly acknowledged inequalities in the multilateral trading system, we have SDT re-conceptualised to mean longer transitional periods and technical assistance to provide 'developing' countries with the 'time' and 'expertise' needed to bring their regimes into compliance with the WTO law. The rationale informing this law, however, is not open for questioning and the trade for growth axiom becomes stronger than ever: services and investment liberalisation on the one hand, and protection of IP rights on the other, is the way forward to deliver the maximisation of material wealth.

The WTO's re-conceptualisation of SDT and the acceptance of reciprocity was called into question with the launch of the first round of negotiations in 2001, dubbed the Doha Development Round, which is still ongoing. Among the several concerns expressed by developing countries is the fact that, the promise of a level playing field has not materialised, and their exports continue to be discriminated against whilst the new agreements on services, investment-related trade measures and IP rights have provided the first multilateral framework for the protection of investors' rights; which is why, among the specific concerns that the Round was supposed to address, the need to make SDT more effective and operational was one of them. During the Ministerial Conference at Cancun in 2003, we witnessed a resurgence of developing countries' coalitions which have opposed the further strengthening of the international protection afforded to foreign investors sought

⁸¹ IP standards, sanitary and phytosanitary standards, technical standards and regulations; shipment inspection rules etc. mandated by several WTO agreements are the ones which had already been adopted by 'developed' countries.

⁸² The TPRM for instance, monitors compliance of members with WTO law; and the IF encourages least developed countries 'to become full and active players and beneficiaries of the multilateral trading system'. WTO, *Integrated Framework Fact Sheet*, https://www.wto.org/english/tratop_e/devel_e/teccop_e/if_factsheet_e.htm.

by 'developed' countries whilst seeking to obtain stronger and more effective SDT provisions.⁸³

There are however, two notes of caution that I want to end the story with: the first is that developing countries' opposition to this enlarged mandate has resulted in 'developed' countries pursuing their agenda through bilateral and regional treaties.⁸⁴ The rise of the so-called mega treaties points in this direction, with stronger investors' rights set through treaties such as the now defunct Trans – Pacific Partnership (TPP) concluded by strong trading partners with a view to gradually attract those members that are reliant on access to their markets.⁸⁵ The second is the fact that, as Faundez has pointed out, coalitions between developing countries are much more difficult to forge and maintain today than they were in the past because of the sheer variety of issues regulated by the WTO compared to those that the GATT dealt with. This means that developed and developing countries are not just opposed but are also aligned on specific issues.⁸⁶ He also invites us to reassess GATT's history in relation to the policy space that it is believed to have provided countries with, and see that regional blocs (or spheres of influence) rather than multilateral trade liberalisation, have been the norm in the post-war period, arguing that this bloc mentality is resurfacing now more evidently. He therefore, raises the question of whether the developing/developed countries distinction within the multilateral trade system is outdated; and concludes that it is not, because of the normative force that 'development' exerts as developing countries continue to be addressed, and many continue to identify themselves within the multilateral trade system.⁸⁷

⁸³ In Singapore, an attempt was made to further enhance the protection of foreign investors, as well as to agree on the regulation of so-called trade facilitation, competition and government procurement. See J.S. Odell, *The Seattle Impasse and its implications*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOUR OF ROBERT HUDEC 403 (Daniel Kennedy & James Southwick eds., 2002).

⁸⁴ See Wang Yong, *The Political Economy of the Rise of Mega-regionals*, in MEGA-REGIONAL TRADE AGREEMENTS: GAME-CHANGERS OR COSTLY DISTRACTIONS FOR THE TRADING SYSTEM? 20 (Global Agenda Council on Trade & Foreign Direct Inv., World Economic Forum Ed., 2014).

⁸⁵ For the crucial significance of securing market access to big markets by countries whose economies are dependent on exports, see DIANA TUSSIE & MARCELO SAGUIER, THE SWEEP OF ASYMMETRIC TRADE NEGOTIATIONS (2011); See also Ooife Donoghue & Ntina Tzouvala, *TTIP: The Rise of 'Mega-Market' Trade Agreements and its Potential Implications for the Global South*, 8(2) TRADE L. & DEV. 30 (2016).

⁸⁶ See Julio Faundez, *Between Bandung and Doha' in Bandung, Global History and International Law*, in LUIS ESLAVA, *supra* note 44, at 508-14.

⁸⁷ *Id.*

Whether or not old and new coalitions will be formed and around what specific issues will they be formed remains to be seen. This article has highlighted *one* modality that binds trade and development together, a characteristic of which is its positing of a universal economic rationality, on the basis of which the ‘lack’, ‘failure’ or ‘inadequacy’ of certain systems can be remedied and the normative force that Faundez refers to can be exerted. The reverberations of this modality can be seen at play in current theoretical debates about the changes in the nature of global trade and the resulting policy prescriptions concerning development.

B. Value Chain Trade and the New Development Wisdom

Theoretical innovations in the field of trade theory have recently pointed to the fact that GVCs are challenging the State-centric focus of neo-classical trade theories and the multilateral trade law based on it, pointing to the increasing irrelevance of concepts such as the international division of labour and the developing/developed country distinction built on it.⁸⁸ The argument is that, the pace, level, range, and intensity of global interactions are rapidly changing with value chain trade, consisting of the ever more functional ‘fractionalisation’ and geographical ‘dispersion’, destined to replace inter-national trade (i.e. exchange of products manufactured almost entirely within national borders).⁸⁹ Within the fields of business, economics, and statistics for instance, the claim is that these changes have profound development implications for the multilateral trade community.⁹⁰

What is needed, according to this narrative, is an appreciation that ‘development’ *today* entails the ability of the States to create a regulatory environment that enables efficient companies to insert themselves in GVCs and ‘technologically upgrade’ so as to attract a greater share in the value added produced along these chains. The WTO’s commissioned report on GVCs, for instance, makes a clear recommendation: as GVCs are the result of inevitable economic and technological processes, it becomes important to accept a new set of rules supposed to facilitate and expand the value – chain trade.⁹¹ Referred to as the ‘WTO-extra’ provisions because they go well beyond the current liberalisation commitments, these rules consist of the strengthening of the protection of investors’ rights and the free

⁸⁸ See Rory Horner & Matthew Alford, *The Roles of the State in Global Value Chains: an Update and Emerging Agenda* (U. Manchester, GDI Working Paper Series, 2019-036, 2019).

⁸⁹ Gary Hamilton & Gary Gereffi, *Global Commodity Chains, Market Makers, and the Rise of Demand-Responsive Economies*, in *FRONTIERS OF COMMODITY CHAIN RESEARCH* 144 (Jennifer Bair ed., 2009) [hereinafter Jennifer Bair].

⁹⁰ *Id.*

⁹¹ Richard Baldwin, *Global Supply Chains: Why They Emerged, Why They Matter, and Where They are Going*, in *GLOBAL VALUE CHAINS IN A CHANGING WORLD* 13 (D. Elms & P. Low eds., 2013).

movement of capital. The acceptance of such 'wisdom' and its translation into law is also believed to be necessary to prevent the collapse of the multilateral trade system as major trading partners pursue their agenda outside the WTO given the negotiating impasse of its Doha Round.⁹²

Indeed, the underlying argument is that these changes have been inadequately understood to date, particularly by developing countries, with the result that world trade governance is shifting away from multilateralism, thereby eroding the centrality of the WTO as the pre-eminent contemporary rule-maker. Now, the reality of global value trade requires much more research than I was able to carry out in this article. Some questions include: whether value-chain trade accounts for the majority of global trade as it is claimed; whether a technological upgrade and the insertion of developing countries' firms into established chains has so far resulted in a greater share of the value accruing to such firms; and what have been the effects of this restructuring on workers' conditions and well-being.⁹³ What we can already detect, however, are the similarities that this argument displays with the modalities which we have described in this article according to which a failure is posited, once again, on the part of certain countries' legal and economic regimes, and a solution is offered on the basis of an objective economic reality, this time that of a value chain trade.

IV. CONCLUSION

I conclude by reiterating that this story is a partial one as there are other lenses that could have been adopted to look at the trade-development nexus. I could have for instance emphasised upon the spatial dimension of the nexus, paying attention to the connections that have made the world economy since colonial times, and in

⁹² There are other issues that have impacted the protracted duration of the Doha round (which this article has not engaged with), including the US insistence that the WTO prevent some States from adopting the 'developing country' status; See Alex Wayne, *Trump Wants to Strip China of its 'Developing Nation' WTO Status*, AL JAZEERA (July 27, 2019), <https://www.aljazeera.com/ajimpact/trump-strip-china-developing-nation-wto-status-190726205231578.html>; the rise of protectionist narratives; See Frederick Mayer & Nicola Phillips, *Global Inequality and the Trump Administration*, 45(3) REV. INT. STUDIES 502-510 (2019); the increase of bilateral, regional and free trade agreements, some of which seek to harness the collective strength of developing countries; See Biswajit Dhar, *The Regional Comprehensive Economic Partnership (RCEP): An Assessment of the Negotiations*, BILATERALS.ORG (Nov. 2016), <https://www.bilaterals.org/?the-regional-comprehensive>).

⁹³ The little empirical work on gender available to date for instance shows that the process of 'technological upgrade' is going hand in hand with that of 'social downgrade' (the deterioration of working conditions). See Kate Raworth & Thalia Kidder, *Mimicking 'Lean' in Global Value Chains: It's the Workers Who Get Leaned On*, in FRONTIERS OF COMMODITY CHAIN RESEARCH 165 (Jennifer Bair ed., 2009).

particular, the role played by the compulsion to accumulate capital (which I have referred to but have not adequately explored). Another point for further analysis could have been the fact that some countries experimented with different socio-economic systems under the GATT and still do, under the WTO;⁹⁴ and that these systems were not entirely geared towards growth maximisation or capital accumulation.

It is however, important to note that this article has focused on the temporal dimension of the trade-development nexus, to make two observations. The first is that the time of the trade-development nexus has a much longer history than what is often acknowledged in the trade and development section of most textbooks on the subject; and the second is that this history has a specific temporal quality which shares its origins with the colonial encounter, and which continues to exert its effects within the multilateral trade system, in a non-predetermined and always different manner, when a certain confluence of factors enables its operation.

What the GATT and the WTO do have in common is the fact that, despite all their development – related trade activity (including the nineteen years long Doha Development Round), ‘development’ remains yet to be achieved. One could go with the conventional story that if only market access was duly granted to developing countries and the comparative advantage was left free to operate this time through insertion into GVCs and technological upgradation, then the multilateral trading system would finally be able to deliver development.

Alternatively, this article has argued that if one looks at the trade-development nexus in a different way - highlighting the discontinuities and continuities with the colonial period concerning both the selective trade interests being pursued and a reformulated ‘civilizing mission’ based on the positing of undisputed ‘inadequacy’, ‘lack’ or ‘failure’ on the part of developing countries’ legal and economic regimes, one gets a different story. This is a story that sees the nexus working in a way that elevates, at certain moments in time, particular ways of seeing the world by asserting their universal validity and applicability, and that makes the promise of development anew, each time.

This story should however not be treated as one, which presents an all-encompassing and inescapable dynamic or logic. This is an important point, particularly if we want to think of desirable alternatives to the current multilateral trade system that neither uphold the undisputed superiority and universal validity of trade liberalisation nor retreat into the defense of nationalistic interests through protectionist policies. Thinking about the resurgence of the latter approach, this

⁹⁴ See Alvaro Santos, *Carving Out Policy Autonomy for Developing Countries in the World Trade Organisation: The Experience of Brazil and Mexico*, 52 VA. J. INT'L. L. A. 551, 577(2012).

story could lead one to conclude that the pursuit of selective trade policies informed by national interests is what has always been at stake, confirming that post-war multilateralism has been an illusion, and that what we are witnessing today is a more realistic, if less palatable, description of inter/national trade and relations. Yet, the fact that, countries have come together and have attempted to articulate a different vision about how trade relations can be conducted, from The New International Economic Order (NIEO) to the Bolivarian Alliance for the Peoples of Our America (ALBA), should not be easily dismissed simply because these attempts have not been successful. Their privileging of complementarity, solidarity and sustainability instead of comparative advantages and global competitiveness, for instance, may well be more desirable than the pursuit of competitive interests along nationalistic lines.⁹⁵ The modest point that this article has made to conversations about alternative trading arrangements is that, more desirable experiments may be enabled by keeping in mind the terms of the trade-development nexus, as described above.

⁹⁵ See DONATELLA ALESSANDRINI, *VALUE MAKING IN INTERNATIONAL ECONOMIC LAW AND REGULATION: ALTERNATIVE POSSIBILITIES* (2016).