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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

# Global value chains, development and the *long duree* of trade and investment law

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## Abstract

This article takes issue with the assumption the policy research literature, specifically that produced by the World Trade Organization (WTO), makes about the role of law as one which is mainly reactive to an exogenous economic reality, that of value chain trade. It argues instead that law has played a much more active role, shaping the so-called fragmentation and fractionalization of production that has led to the proliferation of Global Value Chains (GVCs). By tracing the evolution of post/colonial international economic law, the article shows how trade and investment provisions in particular have been (and still are) an important terrain over which the relationship between companies and states is articulated, with important consequences for all actors involved in GVCs. If this active role is acknowledged then law can be seen not only as contributing, together with other market-making mechanisms, to the making of those economic processes it is assumed to only respond, but also as a means through which these processes can be shaped otherwise.

**Keywords:** international economic law; post/colonial law; PTAs/DTAs; structural inequalities; WTO

## 1. Introduction

Production chains are not new. However, a consensus is emerging within the multilateral trade community, expressed in various reports by the WTO, that ‘value chain’ trade, propelled by the functional ‘fractionalization’ and geographical ‘dispersion’ of production, is replacing ‘classic’ international trade.<sup>1</sup> Specifically, whereas ‘classic’ international trade consisted of the exchange of products manufactured for the most part within national borders, ‘value chain’ trade is characterized by products made through parts, components and tasks that originate in different parts of the world. This shift has implications for the way in which international trade is regulated: as the economist Richard Baldwin has put it, unlike twentieth century trade which was concerned mainly with border measures such as tariffs, twenty-first century trade ‘is a richer, more complex, more interconnected set of cross-border flows of goods, investment, technology, services,

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<sup>1</sup>Other international economic institutions (IEIs) have focused on global value chains, including the World Bank and the OECD. See, for instance, World Bank, *World Development Report 2020: Trading for Development in the Age of Global Value Chains*, 2020; OECD, ‘New approach to globalization and global value chains needed to boost growth and jobs’, 28 May 2013, available at [www.oecd.org/newsroom/newapproachtoglobalisationandglobalvaluechainsneededtoboostgrowthandjobs.htm](http://www.oecd.org/newsroom/newapproachtoglobalisationandglobalvaluechainsneededtoboostgrowthandjobs.htm).

technicians, managers and capital ... [and this] quantum leap in complexity and interconnectedness has had momentous implications for world trade governance ...'.<sup>2</sup> One consequence is that past development-related trade policies, in particular those that have relied on import restrictions to support domestic production and industrialization, have become inadequate.<sup>3</sup>

What is needed, according to this narrative, is for states – especially so-called developing countries – to appreciate that to ‘develop’, they have to adjust to this new economic reality by creating a regulatory environment that enables their companies to insert themselves in GVCs, upgrade and capture an increasing share of the economic rewards produced along these chains. This environment consists of ‘deeper commitments’ with regard to intellectual property rights (IPRs), services and non-tariff barriers; and of the strengthening of the protection of investors’ rights and the free(r) movement of capital.<sup>4</sup> Failure to adopt a new set of provisions that encapsulate these commitments not only jeopardizes states’ chances to develop; it also risks shifting world trade governance away from multilateralism, thereby eroding the centrality of the WTO as the rule-maker of the twenty-first century.<sup>5</sup> Trade law is here seen as instrumental to the pursuit of pre-existing ends (i.e., the facilitation of value chain trade); while development is understood as insertion of efficient firms into GVCs.

This article takes issue with the assumption the trade policy research literature, specifically that produced by the WTO, makes about the role of trade law as one which is mainly reactive to an exogenous economic reality.<sup>6</sup> It argues instead that law has played a much more active role, shaping the so-called fragmentation and fractionalization of production that has led to the proliferation of GVCs. Acknowledging this role is important because if GVCs are shown not to be the outcome of natural, objective and inevitable processes to which law needs to adapt, but a complex reality made of different processes, including legal ones, then it becomes easier to see that law can also contribute to shaping this reality otherwise. Although the article focuses on trade law, it acknowledges that there are other realms of trans/national law with which this sphere interacts, forming a complex web of legal arrangements that uphold GVCs in their current form.<sup>7</sup>

Indeed, the article contributes to the broader agenda set up by those scholars who have started to map out the multifaceted ways in which law participates in the shaping of economic forces around the world. The manifesto published in 2014 by the Law and Global Production Working Group of the Institute for Global Law and Policy, for instance, shows there is a plurality of ways in which the law shapes, whilst in turn being affected by, the structure and organization of production globally.<sup>8</sup> Law is here conceptualized as ‘overlapping and often conflicting local, national, regional and transnational legal regimes, soft-law normative orders and private ordering mechanisms’.<sup>9</sup> How this web manifests itself in each instance is of course an empirical question but the point the authors make is that law is an active (rather than reactive) force with which entities such as companies and states engage. For example, if we think of a decision a company

<sup>2</sup>R. Baldwin, ‘Global Supply Chains: Why they emerged, why they matter, and where they are going’, in D. Elms and P. Low (eds.), *Global Value Chains in a Changing World* (2013), 39–40.

<sup>3</sup>*Ibid.*, at 24, 318; WTO, *Global Value Chain Development Report 2019: Technological Innovation, Supply Chain Trade, and Workers in a Globalized World*, 2019 (hereafter 2019 GVCDD), at 50, 144–7.

<sup>4</sup>WTO, *World Trade Report 2011: The WTO and Preferential Trade Agreements: from co-existence to coherence*, 2011, at 132; Baldwin, *supra* note 2, at 42; *ibid.*, at 15; World Bank, *supra* note 1, at 166.

<sup>5</sup>Baldwin, *ibid.*, at 40.

<sup>6</sup>*Ibid.*, at 1.

<sup>7</sup>As K. Eller has put it: ‘it is necessary to map the diverse legal arrangements that uphold GVCs in their current form ... The result is often a scattered and sometimes eclectic array of legal regimes that are however ... powerfully intertwined’. See K. Eller, ‘Cracking the Code of Global Value Chains’, *LPE Blog*, 19 December 2019, available at [lpeproject.org/blog/cracking-the-code-of-global-value-chains/](http://lpeproject.org/blog/cracking-the-code-of-global-value-chains/).

<sup>8</sup>G. Baars, J. Bair and L. Camping, ‘The role of law in global value chains: a research manifesto’, (2016) 4(1) *London Review of International Law* 57–79.

<sup>9</sup>*Ibid.*, at 58. See also K. Eller, ‘Private governance of global value chains from within: lessons from and for transnational law’, (2017) 8(3) *Transnational Legal Theory* 296.

has to make as to whether to invest directly in another country (thereby taking the form of foreign direct investment) or instead purchase the inputs it needs so not to have a physical presence in another state, we can appreciate there are several areas of law that will affect that company's decision: from corporate, property, investment and arbitration to land, labour and tax law, private contracting, licensing and standards.<sup>10</sup>

The article contributes to this emerging body of work by looking at the role that international trade law, as one aspect of what can be referred to as the post-colonial web of trans/national law, has played in the constitution and proliferation of global chains. This body is of course part of a longer enquiry into the relationship between law and the global economy that has highlighted the crucial, if varying, relationship between law, states and capital.<sup>11</sup> I emphasize the post/colonial quality of this relationship to highlight the fact that its history needs to be traced back to colonial times, rather than to the postwar or even interwar periods, as this acknowledgement has consequences for the way we view claims about the structural inequalities of the international economic system of which GVCs are part. The article also contributes to trade and development scholarship by scrutinizing the kind of regulation the WTO and other international economic institutions (IEIs) view as necessary to make value chain trade work for 'development'.

After introducing the argument about the 'momentous' shift in the global economy that we find in WTO reports, the second section identifies their assumptions about trade law's role in the unfolding of economic processes that have brought value chain trade into being. The third section looks historically, if succinctly, at the role that trade law has played in post/colonial times, highlighting both the relationship between states and companies which has affected the development of international law and legal doctrines; and the way in which trade law has in turn shaped the global economy. The point is to show there is a longer temporal arch within which law, states, and companies can be seen to have interacted than these reports account for, shaping those very economic processes which are often taken to be neutral and objective. The fourth section looks at the transformation brought about by the establishment of the WTO and the entry into force of its agreements, a moment which coincides with the explosion of value chain trade. It also considers the role played by so-called Preferential Trade Agreements (PTAs), whose number and depth of commitments included has doubled since the 1990s leading to what the policy literature have recently referred to as Deep Trade Agreements (DTAs).<sup>12</sup> It shows that, taken together, WTO and deep trade provisions have contributed to the constitution of a trans/national space characterized by increasing regulatory convergence and extensive legal entitlements for the smooth operations of dominant firms. The article concludes by reflecting on the argument that the adoption of 'deeper commitments' is a matter of economic and political necessity; and by acknowledging that any attempt to carve out policy/regulatory autonomy needs to confront the complexity of the post/colonial web of transnational law and governance of which inter/national trade law is only a part.

## 2. Global trade and its 'momentous' shift

WTO research into GVCs and development is recent. There have been only two 'Global Value Chain Development' reports co-published with the World Bank in 2017 and 2019. The other two significant documents are the 2011 WTO report on Preferential Trade Agreements (PTAs), which

<sup>10</sup>Baars, Bair and Campling, *ibid.*, at 65–6.

<sup>11</sup>See generally P. Jessup, *Transnational Law* (1956); D. Vagts, *Transnational Business Problems* (1998); J. Braithwaite and P. Drahos, *Global Business Regulation* (2000); C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (2003), 16; R. Wai, 'Transnational Private Law and Private Ordering in a Contested Global Society', (2005) 46 *Harvard International Law Journal* 471, at 471; F. Macmillan, 'From Empire to Austerity: The Golden Thread of International Economic Law', in M. Salomon and B. de Witte (eds.), *Legal Trajectories of Neoliberalism* (2019), 7–12.

<sup>12</sup>A. Mattoo, N. Rocha and M. Ruta, *Handbook of Deep Trade Agreements* (2020), available at [openknowledge.worldbank.org/handle/10986/34055](https://openknowledge.worldbank.org/handle/10986/34055).

looks at the explosion of these treaties within the broader context of the ‘internationalization’ of production, therefore touching on GVCs; and the 2013 report on ‘Global Value Chains in a Changing World’, which the WTO has co-published with other international bodies.<sup>13</sup> There are also a series of research papers and documents available on the WTO website.<sup>14</sup> However, the focus of this section is on the narrative about law and regulation that emanates from reports the WTO has contributed to in an official capacity.<sup>15</sup> This is because, despite the fact that not all (or even some of the) recommendations in these reports directly shape the policy of the WTO or that of its members states, the narrative they produce represents an influential story about the need to adopt particular regulatory regimes to respond to the development challenges of value chain trade. They have, therefore, discursive significance in that they define the space within which it is possible to think about development-related trade policies both at a national and international level.

The main assumption these reports share is that trade law has responded, albeit somewhat inadequately in the last twenty years, to exogenous economic processes. For the 2011 report, which is the one that most specifically addresses the link between trade treaties and GVCs, GATT-led tariff reduction has facilitated the fragmentation of production initiated by companies,<sup>16</sup> enabling more cross border activity in the 1980s; and PTAs after the 1990s have intensified this process, albeit only at the regional level.<sup>17</sup> The need for coherence between regional and multilateral trade law (i.e., the need to multilateralize the ‘deeper commitments’ found in PTAs) is what states have to focus on.<sup>18</sup> For the 2013 report, WTO law is at risk of becoming redundant, its role being confined to that of a rule-taker, unless efforts are made to make it relevant to twenty-first century trade issues, first and foremost by adopting the ‘deeper commitments’ that can be found in PTAs. The need for states to unilaterally bring their domestic regulatory systems in line with provisions that facilitate value chain trade is reiterated in the 2017 and 2019 reports, and the call for multilateralizing these rules by reforming WTO agreements has recently been reiterated by the World Bank.<sup>19</sup>

What these reports have in common is that they see trade regulation (whether at multilateral, bilateral or unilateral level) as needing to respond, catch up with or adjust to those economic processes that are considered the source of the transformation in global production and trade.

<sup>13</sup>See WTO, *supra* note 4; Baldwin, *supra* note 2, at 39–40; Since 2017 the WTO has collaborated with The World Bank Group, the Organization for Economic Co-operation and Development (OECD), the Institute of Developing Economies (IDE-JETRO), and the Research Center of Global Value Chains of the University of International Business and Economics (UIBE) to co-publish Global Value Chain Development reports every two years. See World Bank and WTO, *Global Value Chain Development Report: Measuring and analyzing the impact of GVCs on Economic Development* (2017) [hereafter 2017 GVCD]; 2019 GVCD, *supra* note 3.

<sup>14</sup>See WTO ‘Global Value Chains’, 21 March 2022, available at [www.wto.org/english/res\\_e/status\\_e/miwi\\_e/miwi\\_e.htm](http://www.wto.org/english/res_e/status_e/miwi_e/miwi_e.htm).

<sup>15</sup>The reports were analysed to understand the way in which law was conceptualized and presented, particularly in its relation to the economic processes variously referred to as the internationalization/fragmentation/dispersion of production and trade. Law was searched as a key word together with a number of other keywords such as rules, regulation, governance, standards, policies, reforms.

<sup>16</sup>The General Agreement on Tariffs and Trade (GATT) was the precursor of the WTO. It is today one of its multilateral agreements.

<sup>17</sup>See WTO, *supra* note 4, at 10: ‘The recent wave of preferential agreements may (at least in part) be an institutional response to new circumstances created by the growth in offshoring; ‘The continuous expansion of production sharing between developed and developing countries requires deeper agreements to fill the governance gap between countries’.

<sup>18</sup>*Ibid.*, at 198: ‘... ideas advanced for promoting a coherent trade policy are the acceleration of multilateral trade opening, addressing deficiencies in WTO agreements, initiatives to complement the existing legal framework (i.e. soft-law approach), and multilateralizing regionalism (i.e. extension of existing preferential arrangements in a non-discriminatory manner to additional parties)’.

<sup>19</sup>As the editors of the 2020 World Bank Handbook on Deep Trade Agreements (DTAs) note, there are substantial similarities in the provisions of both developed-developed and developed-developing DTAs, and these similarities can be deemed to provide a basis on which multilateral rules can be agreed upon in the near future. Mattoo, Rocha and Ruta, *supra* note 12, at 18.

The information and communication technology (ICT) and retail revolutions in particular are seen as having instigated the ‘fragmentation’ and restructuring of global production, leading to the ‘momentous’ shift in global trade. Of particular relevance is Baldwin’s argument about the unbundling of global production, which puts the ICT and retail revolution in a longer historic context.<sup>20</sup> Baldwin argues that the first ‘unbundling’ of the global economy was made possible because the steam revolution, which expanded railroads and steamships, enabled the spatial separation between production and consumption between the 1830s and the 1870s. Economies of scale and comparative advantage then made international trade profitable. This stage ‘was characterized by industrialization and rapid growth in today’s developed economies, a widening of the income divide between North and South, booming trade and migration, and local production agglomeration’.<sup>21</sup> The second ‘unbundling’, which is what has entailed the ‘momentous’ shift in global trade, took place during the 1980s. As spatially separated production and consumption have entailed co-ordination costs, especially communication-related costs, the mid-1980s are seen as the moment when the ‘ICT’s melding of telecommunications, computers, and organizational software’ dramatically reduced these costs whilst ‘[t]he vast wage differences between developed and developing nations made [the further] separation profitable’.<sup>22</sup>

GVCs have emerged during this second unbundling with all the complexities that networked trade, investment, services and innovation entail. It is this exogenous economic context that Baldwin sees the establishment of the WTO responding to. By bringing the liberalization of services and the protection of IPRs within the purview of the international trade system, WTO law has attempted to respond to economic phenomena external to it. The issue according to this narrative is that the WTO has since not been able to get countries, especially developing countries, to make further meaningful commitments in these areas, thereby failing to adequately adjust to the new economic reality.<sup>23</sup>

This narrative about a fundamental change occurring between the 1970s and 1980s – to which trade law responds in the 1990s – resonates with the accounts provided by some (non-legal) value chain scholarship.<sup>24</sup> Despite the existence of different strands of value chain literature,<sup>25</sup> they seem to support the narrative about the momentous change in production and trade processes, with significant development implications. It is therefore important to examine the claim about the substance and magnitude of this shift in order to assess the argument we find in WTO reports about the need for developing states to reform their trade regimes, before moving to consider the role that inter/national trade law itself has played in the proliferation of GVCs.

The argument in GVC literature is that international production and trade have been affected since the 1970s by the ‘ability of producers to slice up the value chain, [that is the ability to break] a production process into many geographically separated steps’;<sup>26</sup> leading to the ‘disintegration

<sup>20</sup>See Baldwin, *supra* note 2, at 39–40. Other scholars have studied the long historic and spatial trajectory of GVCs. World-systems analysis, from which GVC studies have emerged for example, has emphasized the colonial division of labour and resulting unequal core-periphery relations within the global economy. See T. Hopkins and I. Wallerstein, ‘Commodity chains in the world economy prior to 1800’, (1986) 10(1) *Review* 157. I focus on Baldwin’s account, however, because it informs the policy research literature of IELs, and the WTO in particular.

<sup>21</sup>Baldwin, *ibid.*, at 2.

<sup>22</sup>*Ibid.*, at 16.

<sup>23</sup>*Ibid.*, at 42–3, 45.

<sup>24</sup>In terms of legal scholarship Bollyky and Mavroidis have acknowledged the importance of value chain trade for the structure and negotiating activity of the WTO. They recognize that reduction of tariffs in the 1970s and 1980s has enabled the proliferation of GVCs but see trade law as largely responding to the unbundling of production. See T. Bollyky and P. Mavroidis, ‘Trade, Social Preferences and Regulatory Cooperation: The New WTO-Think’, (2017) *Journal of International Economic Law* 1, at 20. As for trade scholarship seeing GVCs as economic phenomena trade law responds to, see B. Hoekman, *Supply Chains, Mega-Regionals and Multilateralism: A Road Map for the WTO* (2014).

<sup>25</sup>For a genealogy of thought on commodity chains, production network and global value chains see J. Bair (ed.), *Frontiers of Commodity Chain Research* (2009).

<sup>26</sup>P. Krugman, ‘Growing World Trade’, (1995) 1 *Brookings Papers on Economic Activity* 327, at 332.

of production'.<sup>27</sup> Hamilton and Gereffi, two of the major exponents of GVC literature, have attempted to describe the qualitative difference of these networks compared to earlier ones, which they refer to as producer-driven commodity chains. An example of these earlier chains is the big car industry of the postwar period, where manufacturers controlled production processes and also participated in the making of consumer markets for their products.<sup>28</sup> Something different happens in the 1960s, and in particular since the retail revolution in the US, as retailers and merchandisers gain more power to affect both consumer and supplier markets.

This process leads to the development of what Feenstra and Hamilton describe as 'demand-responsive economies', that is economies that 'develop ... in direct response to the demand of intermediary actors in global commodity chains'.<sup>29</sup> This is, for instance, how Hamilton and Gereffi have interpreted East Asian industrialization, particularly that of Taiwan and South Korea.<sup>30</sup> What explains it, according to them, is the ability of these states to respond successfully to the new economic reality (i.e., the power of retailers and merchandisers). By focusing on this 'demand' side of the story, they argue, we can see how 'market-making' processes, which include the activities and strategies of global retailers and merchandisers, can play a 'causative' role in industrialization and development, and in the global economy more generally.<sup>31</sup> It is here that GVC literature intersects with the WTO's story about the development implications of value chain trade: 'GVCs have transformed the world. They have revolutionized development options facing poor nations; now they can join supply chains rather than having to invest decades in building their own.'<sup>32</sup> This transformation has, for Baldwin, clear trade policy implications: countries need to focus not on industrialization stages as they have done in the past but on enabling their firms to specialize in parts and components so they can insert themselves in GVCs. In time these firms will technologically upgrade and perform higher value-added activities, thereby contributing to the 'development' of their economies. In order to do so, these countries need to embark on extensive policy reforms, starting with the 'deeper' commitments referred to earlier.<sup>33</sup>

Other value chains researchers, however, have complicated the argument about the momentous shift in the world economy. Drawing on the legacy of world system theorists, Jennifer Bair has importantly argued that commodity chains and production networks are connected to the history of capitalism and, whilst value chain analyses have given us a new appreciation of what happens at firm level, particularly in relation to the corporate restructuring of so-called lead firms, it is also important to keep in mind the *long duree* of which these chains are part of.<sup>34</sup> For example,

<sup>27</sup>R. Feenstra, 'Integration of Trade and Disintegration of Production in the Global Economy', (1998) 12(4) *Journal of Economic Perspectives* 31.

<sup>28</sup>G. Hamilton and G. Gereffi, 'Global Commodity Chains, Market Makers, and the Rise of Demand-Responsive Economies', in Bair, *supra* note 25, at 150.

<sup>29</sup>*Ibid.*

<sup>30</sup>*Ibid.*, at 150–1.

<sup>31</sup>*Ibid.*, at 152.

<sup>32</sup>Baldwin, *supra* note 2, at 13.

<sup>33</sup>The examination of the development assumptions underlying this narrative is beyond the scope of this article.

<sup>34</sup>Bair, *supra* note 25, at 2–8. Indeed, the term commodity chain was first coined by world system theorists who saw the 'chain' as being constituted at the macro-level by 'relations between the "core", "periphery" and "semi-periphery"', which underpinned the expansion of the worldwide division of labour and consequent reproduction of structural hierarchy for the purpose of value extraction. See G Arrighi and J. Drangel, 'The stratification of the world economy', (1986) 10(1) *Review* 9; Hopkins and Wallerstein, *supra* note 20; C. Chase-Dunn, *Global Formation: Structures of the World-Economy* (1998). GVC literature initially focused on the opportunities that insertion in GVCs presented in terms of technological upgrade and development for firms in the 'developing' world. More recently, however, the literature on GVCs and global production networks (GPNs) has placed greater emphasis on the variable outcomes for regions joining these networks, also considering the downsides of insertion into global chains, including the limited power of local actors to move up the development ladder and the deterioration of working conditions. See M. Hess and H. W. C. Yeung, 'Whither global production networks in economic geography? Past, present, and future', (2006) 38(7) *Environment and Planning A: Economy and Space*, 1193; N. M. Coe and H. W. C. Yeung, *Global Production Networks: Theorizing Economic Development in an Interconnected World* (2015).

adopting a longer historic perspective allows us to see that, although the ratio of global trade to GDP have increased since the 1980s, they are only marginally higher than they were at the previous high point of international economic activity (i.e., 1914).<sup>35</sup> The other important point, which WTO reports acknowledge, is that 80 per cent of value-added in the world is still domestically produced and consumed, while only 20 per cent is traded.<sup>36</sup>

This does not mean that trade has not been subject to transformations, but that adopting a longer historic perspective is helpful when evaluating claims about seismic changes on which policy prescriptions, including the need to reform entire trade regimes, are based. Thus, bearing in mind that we are referring to changes pertaining to that 20 per cent share, there are at least three changes worth pointing to. Firstly, the composition of global trade has changed since the 1940s, as value chain trade today accounts for 60–67 per cent of all global trade in value-added terms.<sup>37</sup> Global trade, in other words, consists mainly of exchange of parts, components and tasks. The second change concerns its structure as one third of global trade occurs between affiliates of the same corporation operating in different countries, and therefore is intra-trade,<sup>38</sup> whilst the rest is happening between nominally independent supplier firms, which increasingly rely on contracts.<sup>39</sup> This means that private contracting is becoming an important means through which value chain trade relations are regulated around the globe.<sup>40</sup> Thirdly, its geography is different from that of the immediate postwar period because, since the 1970s, the tendency of the US, EC and Japan ‘to dominate world exports has been halted or even reversed’, with Asia, and particularly China, taking a leading position.<sup>41</sup> As the WTO also acknowledges, most value chain trade today takes place around three major hubs, the US, Europe and China.<sup>42</sup> Participation by other so-called developing and least-developed countries is, however, much more limited.<sup>43</sup>

Now, WTO reports argue that countries have not adequately appreciated the significance of value chain trade and that this translates into ill-thought trade policies. Members, for instance, underestimate the ‘damage’ that tariffs and non-tariff barriers can cause to domestic industries as the latter may rely on imported parts and tasks to produce domestic and export goods.<sup>44</sup> Similarly, countries are unable to appreciate that without proper protection of foreign companies’ assets, particularly intangible ones and contractual rights, they will not attract foreign direct investment or merchandisers and retailers’ contracts.<sup>45</sup> This is why trade policy reform is deemed necessary. The question, however, is whether the changes in the share of global trade described above, especially in relation to the structure and geographical significance of GVCs, warrant the kind of blanket trade reforms called for in WTO reports. I will come back to this question in Section 4 when I examine the substance of the provisions that are being recommended. There is another question I want to address first which concerns the story about law that emerges from the policy-research literature I have referred to. As value chain trade, that is the majority of global trade, is assumed to be the result of exogenous economic forces such as the ICT/retail revolutions

<sup>35</sup>P. Gibbon and S. Ponte, *Trading Down: Africa, Value Chains, and the Global Economy* (2005), at 4.

<sup>36</sup>Although this latter share has increased by 5% since the WTO came into existence, and in particular since China joined the Organization in 2001. See Baldwin, *supra* note 2, at 2; see also 2017 GVC Report, *supra* note 13, at 7.

<sup>37</sup>*Ibid.*, at 2.

<sup>38</sup>R. Lanz and S. Miroudot, ‘Intra-Firm Trade: Patterns, Determinants and Policy Implications’, (2011) 114 *OECD Trade Policy Paper*, available at [dx.doi.org/10.1787/5kg9p39lrwnn-en](https://doi.org/10.1787/5kg9p39lrwnn-en).

<sup>39</sup>P. Dicken, *Global Shift: Mapping the Changing Contours of the 21st Century* (2011).

<sup>40</sup>See N. Perrone, ‘Speed, Law and the Global Economy: How Economic Acceleration contributes to Inequality and Precarity’, (2020) 33(3) *Leiden Journal of International Law* 557.

<sup>41</sup>Gibbon and Ponte, *supra* note 35, at 5.

<sup>42</sup>2017 GVC Report, *supra* note 2, at 7.

<sup>43</sup>Gibbon and Ponte, *supra* note 35, at 4–5. See also B. Los, M. Timmer and G. de Vries, ‘How Global are Global Value Chains? A New Approach to Measure International Fragmentation’, (2015) 55(1) *Journal of Regional Science* 55, at 66–92.

<sup>44</sup>N. Ahamad, ‘Estimating trade in value-added: why and how’, in D. Elms and P. Low (eds.), *Global Value Chains in a Changing World* (2013), at 88.

<sup>45</sup>R. Baldwin, ‘WTO 2.0: Governance of 21<sup>st</sup> century trade’, (2014) 9(2) *Review of International Organizations* 261.



and the consequent restructuring of lead-firms operations, the implication is that law – whether multilateral trade law or the domestic legal systems of individual WTO members – needs to adjust to this new reality. Unlike the ‘market-maker’ quality of firms and technology, in other words, law is seen a market-taker, as the institutional background which enables these forces to play out, for instance by guaranteeing and strengthening the rights of investors and contractors.<sup>46</sup>

In what follows, I argue instead that law has actively participated in producing those processes that are considered exogenous to it. Take, for instance, the retail revolution, which is often considered responsible for having transformed global retail. Starting in the 1960s in the US, we have seen retail markets become increasingly characterized by globally organized firms that engage exclusively in contract manufacturing and actively bid on big-buyer contracts.<sup>47</sup> As a result, world retail sales are today dominated by groups operating not only across countries but also across regions, with 20 ‘lead-firms’ responsible for 12 per cent of world retail sales.<sup>48</sup> In looking at the factors that have contributed to both the ‘concentration’ and ‘internationalization’ of these lead-firms, including their movement into emerging markets, Gibbons and Ponte point to a combination of: low levels of economic growth that have led to market saturation in retailers’ northern markets;<sup>49</sup> and changing corporate strategies aimed at attaining greater scale through the acquisition of competitors’ stores via mergers and acquisitions, and through geographical expansion.<sup>50</sup> They note that the pursuit of expansion at home through bigger supermarkets and hypermarkets was constrained by ‘tight property rights and planning restrictions’.<sup>51</sup> Domestic law, from property rights and planning restrictions to corporate and taxation laws, conflicted with the opportunities for upscaling and expansion which then started the ‘merger frenzy’ at home and in emerging markets, particularly in Latin America and Asia.<sup>52</sup> Furthermore, the liberalization of global financial markets, which occurred in the 1980s with the opening of Northern countries’ stock markets to foreign participation,<sup>53</sup> and the removal of restrictions on foreign exchange, led to a massive increase in mobile international private capital that supported the geographical expansion of these firms, their concentration and financialization.<sup>54</sup>

<sup>46</sup>GVC literature acknowledges – under the rubric of governance – that institutions are important, but it rarely goes into tracing the interaction between firms’ governance and law and regulation. See G. Gereffi, J. Humphrey and T. Sturgeon, ‘The Governance of Global Value Chains’, (2005) 12(1) *Review of International Political Economy* 78.

<sup>47</sup>Hamilton and Gereffi, *supra* note 28, at 150–2.

<sup>48</sup>These are firms which dominate global markets. See Gibbon and Ponte, *supra* note 35, at 7; see also S. Barrientos, G. Gereffi and J. Pickles, ‘New Dynamics of Upgrading in Global Value Chains’, (2016) 48(7) *Environment and Planning* 1214.

<sup>49</sup>5.4 % in the 1950s; 4.1% in the 1970s; 3.5% in the 1980s, and 2.3% in the 1990s. See Gibbon, *ibid.*, at 17.

<sup>50</sup>*Ibid.*

<sup>51</sup>*Ibid.*

<sup>52</sup>P. Nolan, ‘Industrial policy in the 21st century: the challenge of the global business revolution’, in Chang H-J (ed.), *Rethinking Development Economics* (2003).

<sup>53</sup>Gibbon and Ponte, *supra* note 35, at 15.

<sup>54</sup>As the UN Special Rapporteur on the right to food has recently pointed out: ‘The degree of market concentration in the global input sector (including seeds, fertilizers, chemicals, machinery and animal feed) has risen significantly in the past few decades. From 1994 to 2009, for example, the largest four firms in the global input sector accounted for at least 50 per cent of global sales. This was most rapid in the seed industry, where the market share of the four largest firms more than doubled from 1994 to 2009.’ See M Fakhri, ‘The right to food in the context of international trade law and Policy’, (2020) General Assembly A/75/219 22, at 9. Ferrando has pointed to the role that financial actors and interests have increasingly played not only with regard to derivatives contracts which have been linked to sharp commodity price fluctuations but also in terms of the impact on structures and stages of production in food chains. See T. Ferrando, ‘How Finance Structure Global Value Chains’, *LPE blog*, 1 June 2020, available at [lpeblog.org/2020/01/06/how-finance-structures-global-value-chains/#more-3156](https://lpeblog.org/2020/01/06/how-finance-structures-global-value-chains/#more-3156); In considering the factors that have led to concentration of wealth and power across sectors, Kaplinski has emphasized the role of rents (‘a situation where the parties who control a particular set of resources are able to gain from scarcity by insulating themselves from competition’) and examined the effects of rent generation and appropriation on the current ‘global interpersonal’, ‘class-based’, ‘skills-based’, and ‘interfirm’ distribution of income. See R. Kaplinsky, ‘Rent and Inequality on Global Value Chains’, in S. Ponte, G. Gereffi and G. Raj-Reichert (eds.), *Handbook on Global Value Chains* (2019), at 153.

This is a story saturated by law. From property rights and planning permissions to the liberalization of domestic stock markets and foreign exchange, corporate strategies were motivated, constrained, enabled and shaped by legal events. International trade law too played a role in enabling expansion abroad, and not only in global retail. Expansion required firms to be able to navigate very different international regulatory environments consisting not only of rules regarding trade in goods, on which there was a certain level of convergence thanks to the WTO precursor, the GATT, but also of rules concerning the provision of services and the treatment of investment, the protection of what countries considered technological innovation, the kind of standards and regulations concerning products and their quality, and so on.<sup>55</sup> On these kinds of regulation, however, there was much less convergence. The 1980s therefore saw the beginning of intense legal work that made services, investment, technology, and an increasing number of standards and regulations, ‘trade-related’. This regulatory convergence relied on corporate strategies and government policies, particularly those in the so-called QUAD countries (Europe, US, Japan, and Canada), becoming more deeply interrelated; and this process in turn contributed to the changes in the composition, structure and geography of global trade described above.

Before turning to this process in Section 4, however, the next section shows that the interplay between law (as treaties, doctrines and legal categories), companies and states did not start in the 1970s; it is part of a much longer historic trajectory critical legal scholars have charted for some time. By tracing this trajectory, Section 3 shows not only that the changes to global trade were not the outcome of inevitable economic processes but also that some of the provisions WTO reports see as necessary to deal with these changes – particularly those concerning the treatment of investors’ assets – have been the subject of long and intense international controversy.

### 3. The *long duree* of trade and investment law

As critical legal scholars have pointed out, international treaties and doctrines have been powerful techniques of geographical expansion since at least the sixteenth century.<sup>56</sup> Francisco de Vitoria, the Spanish theologian and jurist, asserted the ‘natural law’ right to freely trade, forcefully in the event this right was denied by another country. As gold was ‘discovered’ in America in the fifteenth century, and the feudal law of the time applied only to members and enemies of the *Respublica Christiana*, a different legal regime was needed to discipline relations with the native populations. According to Vitoria, the natives possessed ‘reason’ but were also governed by a law of nations (*jus gentium*) which included the right to trade, and denying such right could give rise to ‘just war’. The regime of early colonialism led by the Spanish was to give way in the seventeenth century to the mercantilist system led by the Dutch and the British.<sup>57</sup> This system was centred around trade monopolies exercised through trading companies. The role played by legal doctrines to instantiate this regime was, however, crucial. Thus, writing in the seventeenth century, Hugo Grotius developed the theory according to which the sea was open to the trade of all nations. Interestingly, the doctrine of *Mare Liberum* was his response to a request by the then Dutch United East India company for a legal opinion that would grant them the right to trade in the East Indies against Portuguese claims of exclusive rights.<sup>58</sup>

Companies were therefore granted the right to trade, make peace and war, as well as the power to exercise sovereign rights over non-European peoples, which included profiting from the slave

<sup>55</sup>E. H. Preeg, *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System* (1995).

<sup>56</sup>See R. Knox, ‘Valuing race? Stretched Marxism and the logic of imperialism’, (2016) 4 *London Review of International Law* 81.

<sup>57</sup>See B. S. Chimni, *International law and world order: A critique of contemporary approaches* (1993).

<sup>58</sup>S. Esmeir, ‘Bandung: Reflections on the sea, the world and colonialism’, in L. Eslava, M. Fakhri and V. Nesiha (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (2017), at 83.

trade and the sale of slave-produced goods;<sup>59</sup> but whereas in the sixteenth and seventeenth centuries they were mainly concerned with making profits, in the eighteenth and nineteenth centuries companies became increasingly involved in acquiring, investing in and governing foreign territories.<sup>60</sup> This shift was connected, at least in part, to the changing circumstances of capital accumulation within the global economy: as the British industrial revolution revealed the need for colonies to absorb the ‘flood of products pouring out of the new factories’,<sup>61</sup> direct control became the preferred means for transforming their societies into markets for manufactured goods. Positivist international lawyers contributed to this enterprise by crafting the standard of ‘civilization’ which, relying on ideas of racial inferiority, granted some non-European territories legal personality (particularly in order to sign treaties) depending on whether or not they were deemed to meet European social norms, including those which guaranteed the rights of property and the freedom of commerce.<sup>62</sup> The relationship between trading companies and states from the sixteenth to nineteenth century has therefore been a close one, and law has been as central to the shaping of the global economy as the activities of states and companies. This is a much more complex story than the one Baldwin recounts in terms of the first ‘unbundling’ of the global economy that happened thanks to the steam revolution and companies’ growing economies of scale.

The advent of free trade theory in the eighteenth and nineteenth centuries, however, is often presented as having heralded a new era in international trade relations as its principles provided the international order with an objective economic, as opposed to political, foundation.<sup>63</sup> Informed by values of universalism and multilateralism, this system is seen as having eventually dispensed with colonialism.<sup>64</sup> The entry into force of the General Agreement on Tariffs and Trade (GATT) – the WTO precursor – signalled the moment when the free trade tenets of non-discrimination and equal treatment in trade relations were enshrined in legally binding multilateral trade law. As scholars have argued,<sup>65</sup> however, the problem with this view of the postwar international trade system – as one based on universal and objective principles – is that it cannot explain why sectors of major export interest to the soon-to-be independent countries – taking the logic of comparative advantage at face value – were excluded from liberalization. GATT achieved between 1950s and 1980s a substantial reduction of tariffs and quantitative restrictions on industrial goods.<sup>66</sup> Agriculture, however, was never subject to the same liberalization rules that applied to manufacturing and remained largely protected in industrialized countries through tariffs, non-tariff measures and subsidies. Textile, the other sector of export interest to newly-independent countries, was also exempted in the 1960s through a different framework called

<sup>59</sup>Knox, *supra* note 56, at 14.

<sup>60</sup>A. Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-century International Law’, (1999) 40 *Harvard Journal of International Law* 1, at 32.

<sup>61</sup>See Chimni, *supra* note 57, at 228.

<sup>62</sup>M. Koskenniemi, *The Gentle Civilizer of Nations the Rise and Fall of International Law, 1870–1960* (2002); A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005).

<sup>63</sup>See M. Trebilcock and R. Howse, *The Regulation of International Trade* (2005).

<sup>64</sup>The classic theory of ‘free trade’ appears when French physiocrats and British classical political economists rejected the economic assumptions of the mercantilist system that had dominated over the past two centuries, posing instead the universal applicability and desirability of what were to become the twin pillars of free trade: international specialization and comparative advantage. According to these principles, provided each country specialized in the production of the goods it could produce more efficiently (i.e., at a lower cost), and exchanged them for those it could not produce efficiently at home, all countries would benefit from trading with one another. In other words, international specialization guided by comparative advantage promised to deliver world prosperity. Today comparative advantage in parts and components supplants that in single products, but the rationale is similar.

<sup>65</sup>D. Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO’s Development Mission* (2010).

<sup>66</sup>See Trebilcock and Howse, *supra* note 63.

the Multifibre Arrangement (MFA) 'which laid down parameters for bilateral compacts covering export restrictions on producing countries in relation to specific importing countries'.<sup>67</sup>

Therefore, the economic principles of free trade that were said to inform the GATT legal system could not explain the political practice of selective trade liberalization, which favoured exporting firms from so-called industrialized countries.<sup>68</sup> Furthermore, far from consisting of uniform rules, the multilateral trade system was a patchy and fragmented one. GATT worked together with a series of international commodity agreements for coffee, cocoa, sugar, natural rubber, and tin. These were multilateral contracts over price and supply conditions between the main exporting and importing countries in force until the end of the 1980s.<sup>69</sup> The international trade system after de-colonization therefore consisted of overlapping, and often conflicting, regulation that shaped the global economy along certain geographical lines. The result, according to many newly-independent countries, was a legally sanctioned international division of labour that 'structurally' disadvantaged their trade, for at least three reasons. First, GATT law treated industrial products differently from primary products, enabling protection of the latter and therefore curtailing the export earnings they were expected to make according to free trade theory. Secondly, as more and more independent countries came to specialize on raw materials and primary commodities (the other sector of export relevance to their economies), their prices started to plummet because of the 'rigid' demand from industrialized countries, again compromising their export earnings. And finally, as GATT law did not allow 'developing' countries to support their 'infant' industries, their manufactures were unable to compete with goods from industrialized countries.<sup>70</sup>

These concerns were articulated in terms of dependency, core-periphery, and world systems theories.<sup>71</sup> Despite their differences, these schools placed their emphasis on the structural inequalities generated by the international legal system, of which the trading regime was an integral part. Their insight was that past colonial and capitalist relations had generated an international system in which those countries which were the centres of capital accumulation (still) relied on the economies of other countries to export goods and capital and extract cheap materials to sustain under-consumption or over-production at home. This system in turn generated unequal relations concerning technological development and terms of trade.<sup>72</sup> This is why a series of UN resolutions, such as the one on Permanent Sovereignty over Natural Resources, the Charter of Economic Rights and Duties of States and the one launching the New International Economic Order were

<sup>67</sup>See Gibbon and Ponte, *supra* note 35, at 56.

<sup>68</sup>See R. Hudec, *Developing Countries in the GATT legal system* (1987).

<sup>69</sup>See Gibbon and Ponte, *supra* note 35, at 45–8; see also M. Fakhri, *Sugar and the Making of International Law* (2014).

<sup>70</sup>These concerns were first expressed during the Havana conference that led to the adoption of the GATT by Cuba, Brazil, Russia, China, Lebanon, Syria, and Czechoslovakia. See W. A. Brown, *The United States and the Restoration of World Trade* (1950), at 633–5. They were re-iterated in point 5 of the Bandung Communiqué of the Asian-African Conference of 1955, which called for collective action among members directed at stabilizing 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 A. Anghie, 'Bandung and the Origins of Third World Sovereignty', in L. Eslava, M. Fakhri and V. Nesiiah (eds.), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (2017), at 547–8. The Harberler report, which was then commissioned by GATT contracting parties to investigate such concerns 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 this activity hindered the industrialization process of developing countries. It also highlighted the heavy use of export subsidies by the US and Europe. See GATT, *Trends in international trade: a Report by a Panel of Experts* (1958), at 18.

<sup>71</sup>E.g., R. Prebisch, 'Commercial policy in the underdeveloped countries', (1959) 49 *American Economic Review* 251–273; F. H. Cardoso, 'Associated-dependent development: Theoretical and practical implications', in A. Stepan (ed.), *Authoritarian Brazil: Origins, Policies, and Future* (1973); S. Amin, *Unequal Development. An Essay on the Social Formations of Peripheral Capitalism* (1976); I. Wallerstein, *The Capitalist World Economy: Essays by Immanuel Wallerstein* (1979).

<sup>72</sup>A. Fischer, 'The end of peripheries? On the enduring relevance of structuralism for understanding contemporary global development', (2015) 46 (4) *Development and Change* 700–32.

passed and extended beyond trade to contain proposals for reforming international economic relations, including those concerning foreign investment.<sup>73</sup>

As seen above, trade and investment interests had been central to the colonial enterprise; and trade and investment laws were seen as closely connected in the 1950s and 1960s too since they concerned the regulation of the movement of goods and capital.<sup>74</sup> Originally, when the rules of the postwar international economic system were designed, the International Trade Organization (ITO) was meant to administer both trade and investment rules. It never came into force due to the refusal of the US Congress to ratify the Charter, and what was instead adopted was its chapter on trade, which then became the GATT. The attempt to obtain multilateral rules favourable to foreign investors was however never abandoned. As Sornarajah has argued, the emerging international law on foreign investment, also a creature of the post-colonial period, represented an attempt by capital exporting countries to argue for the existence of international norms and standards that allowed for the protection of foreign investors beyond the level provided by the domestic laws and courts of the newly independent states.<sup>75</sup> These efforts were successful to an extent, particularly as Bilateral Investment Treaties (BITs) signed between capital importing and capital exporting countries in the 1980s and 1990s contained high standards of protection, including the obligation to not discriminate between foreign and domestic investors. But these efforts did not succeed at the multilateral level as capital-importing countries resisted both the call to adopt a Multilateral Agreement on Investment (MAI) that would have provided uniform high standards of treatment;<sup>76</sup> and also attempts made through arbitration to universalize these standards by deeming them to have acquired the status of customary international law.<sup>77</sup> It is important to keep in mind this succinct account of the development of the ‘international law of foreign investment’ when examining the substance of ‘deeper’ value chain trade provisions in Section 4.

Legal reforms were, however, achieved within the multilateral trade system. Developing countries’ engagement with the structural inequalities of the GATT resulted in their right to not reciprocate when industrialized countries made tariff concessions. This exception to the reciprocity principle of the GATT prepared the ground for so-called import substitution industrialization (ISI). Whilst for some scholars non-reciprocity – together with the refusal to extend national treatment to foreign investors at the multilateral level – resulted in considerable levels of industrialization because countries could support their nascent industries,<sup>78</sup> others point to the fact these countries would have achieved better results had full liberalization been rolled out.<sup>79</sup> And, as seen in the previous section, some GVC researchers considered the rise of ‘demand-responsive economies’ to be more appropriately explained by their ability to facilitate their firms’ insertion in global chains, rather than through either export-oriented growth or GATT non-reciprocity alone. By the time the WTO came into existence in 1995, however, ideas about structural inequalities in the trading system, on which the legal categories of non-reciprocity and

<sup>73</sup>M. Salomon, ‘From NIEO to Now and the Unfinishable Story of Economic Justice’, (2013) 62 *International and Comparative Law Quarterly* 31.

<sup>74</sup>K. J. Vandeveld, ‘A Brief History of International Investment Agreements’, (2005) 12(1) *University California at Davis Journal Law and Policy* 157, at 168–70.

<sup>75</sup>M. Sornarajah, *The International Law on Foreign Investment* (1994); see also R. N. Gardner, ‘International Measures for the Promotion and Protection of Foreign Investment’, (1960) 9 *Journal of Public Law* 176, 180–5; N. Perrone, *Investment Treaties and the Legal Imagination* (2021).

<sup>76</sup>S. Picciotto, ‘Linkages in international investment regulation: The antinomies of the draft multilateral agreement on investment’, (1998) 19 *University of Pennsylvania Journal of International Economic Law* 731.

<sup>77</sup>Sornarajah, *supra* note 75; see also M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (2015); M. Sornarajah, ‘The Case Against a Regime on International Investment Law’, in L. E. Trakman and N. W. Ranieri (eds.), *Regionalism in International Investment Law* (2013), 475, 479–85; J. Ho, *State Responsibility for Breaches of Investment Contracts* (2018).

<sup>78</sup>D. Rodrik, ‘Globalisation, social conflict and economic growth’ (1997), Prebisch Lecture delivered at UNCTAD, Geneva, 24 October 1997.

<sup>79</sup>D. Lal, *The Poverty of Development Economics* (1983); see also Hudec, *supra* note 68.

special and differential treatment (SDT) were based, had been replaced by a new legal lexicon which included a 'level-playing field' and 'full reciprocity' regarding countries' legal commitments.

This is not to say that legal ideas and categories on their own produced what scholars have called the neo-liberal revolution of the multilateral trade regime.<sup>80</sup> There were certainly important material factors that played a role in such a transformation, including: the end of Cold War with the respective spheres of geo-political influence; the debt crisis that many countries in the Global South which had borrowed from the US experienced as a result of its decision to increase interest rates (the so-called Volcker shock); the structural adjustment policies that were imposed to reschedule their debt requiring countries to liberalize their tariff and investment regimes; and, importantly, the loss of competitiveness in the old industrial centres (US, Europe, and Japan), with both the saturation of markets in the North and the lead in manufacturing achieved by countries in Asia other than Japan.<sup>81</sup> Indeed, if in 1972 North Western European countries and the US were still responsible for over a half of world exports, the situation had drastically changed by the end of the 1990s as Asia had increased its share 'from about a sixth to a third, at the expense of all other continents'.<sup>82</sup> The search for new comparative advantage in the three industrial centres was therefore on and it accelerated at the end of the 1980s: as trade scholars have shown, a policy discourse started to gain ground according to which the loss of competitiveness in Northern manufacturing could be compensated by the gains to be made through the liberalization of services and capital on the one hand, and the protection of intellectual property rights (IPRs) – particularly those on technological innovations – on the other.<sup>83</sup>

It is at this point that we witness the beginning of intense legal activity, consisting of the development of legal arguments, ideas and categories that would eventually lead to the establishment of the WTO. Without this activity it is highly unlikely that the agreements relating to services, investment and IPRs would have been adopted; and it is also unlikely that value chain trade would have picked up the way it did. Although direct causation cannot be demonstrated, we know that it is by the end of the 1990s that both the rise of value chain trade – which went in tandem with the internationalization of lead-firms' operations – and Asia's share in it, have been documented in WTO reports. This legal activity was underpinned by careful co-ordination between government policies and corporate strategies in the QUAD countries;<sup>84</sup> and led to the extension of the service-investment-technology driven model of market integration – first achieved with the EU, NAFTA, and ASEAN agreements – to other GATT contracting parties. As the next section shows, the WTO agreements have made an important contribution to the internationalization of firms' activities by 'constitutionalizing' the rules of trade (and to an extent investment), providing foreign companies with unprecedented legal entitlements and a certain degree of regulatory convergence across WTO member states, consequently leading to the post-1990s explosion of value chain trade.

#### 4. Smoothing capital's path: Regulatory convergence and strengthened investors' rights

The GATT only dealt with trade in goods – and, as seen above, mainly certain industrial goods given that agriculture continued to be protected and some goods were the object of commodity

<sup>80</sup>A. Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (2011), at 194–6; see also Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018). Slobodian traces the efforts of lawyers and economists he identifies with the Geneva school of neo-liberal thought within the GATT/WTO system in constitutionalizing and judicializing the rules of trade.

<sup>81</sup>See D. Alessandrini, 'Global Free Trade, Imperialism and International Trade Law', in I. Ness and Z. Cope (eds.), *The Palgrave Encyclopedia of Imperialism and Anti-Imperialism* (2018), at 6–7.

<sup>82</sup>G. Federico and A. Tena-Junguito, 'The world trade historic database', 28 July 2018, available at [voxeu.org/article/world-trade-historical-database](https://voxeu.org/article/world-trade-historical-database).

<sup>83</sup>Preeg, *supra* note 55.

<sup>84</sup>C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (2003); P. Drahos and J. Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy* (2002).

agreements and export restraints; while clothing and textile were subject to bilateral arrangements under the framework of the MFA. Established in 1995, the WTO did something different: it extended its non-discrimination rules – most favoured nation (MFN) and national treatment (NT) – to areas not covered by the GATT, including services, investment, and IPRs. But there was also a qualitative change in the way the multilateral trade system was to approach the regulatory powers of member states. This change had two consequences: it conferred new rights to foreign firms and initiated a process of regulatory convergence in many areas congenial to the international operations of these firms.<sup>85</sup>

Whereas the GATT had embodied a system of negative regulation in that it prevented states from discriminating against foreign goods for protectionist purposes, the WTO enacted a system of positive regulation<sup>86</sup> detailing what states have to do to comply with WTO norms and mandated standards such as those relating to sanitary and phyto-sanitary measures and so-called technical barriers to trade – which usually mirrored those of so-called developed countries. As Lang has pointed out ‘ideas’, particularly those articulated by trade lawyers, played a crucial role in this transformation. Chief among these was the adoption and elevation of the world market as a ‘free’ market, a space unencumbered by obstacles, particularly those posed by government regulation, that may disturb the conditions of ‘perfect’ competition. The key move, he has argued, was:

to define a barrier to trade primarily in terms of its economic effects, rather than its form or intention [as it was with GATT].<sup>87</sup> In this approach, a governmental action constituted a barrier to trade if – 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 . . .<sup>88</sup>

This imagined ‘free’ market was a level playing field where restrictions on the movement of goods, services and capital, and the inadequate protection of technological innovations could be seen as unnecessary and distortive – regardless of whether they were discriminatory – depending on whether they disturbed the conditions of perfect competition.<sup>89</sup> The General Agreement on Trade in Services (GATS),<sup>90</sup> for example, deals with both domestic and border issues. As barriers to trade in services are qualitatively different from those which apply to goods (i.e., tariffs), at issue with services are the domestic laws and regulations that may act as barriers to their trade. Examples include: certification and qualification requirements a country might require for a

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<sup>85</sup>I take the terms convergence and coherence from Bollyky and Mavroidis, *supra* note 24, at 23. They argue that the WTO’s approach remains largely one of negative integration as little progress has been made in terms of achieving regulatory coherence in relation to what they call ‘social preferences’ of civil society with regard to production, which are embodied in labour, product safety and environment standards. My argument is that a certain degree of convergence, however, has been achieved in relation to the regulatory interests of internationalized firms. See also Puig for an argument about convergence and ‘minilateralism’ in trade and investment rules which focuses on application of such rules rather than on their origin as this article does: S. Puig, ‘International Regime Complexity and Economic Law Enforcement’, (2014) 17 *Journal of International Economic Law* 491, at 515.

<sup>86</sup>S. Ostry, *Governments and Corporations in a Shrinking World: Trade and Innovation Policy in the United States, Europe and Japan* (1990). Cottier sees the WTO as having accomplished a ‘shift from classical trade liberalization and negative integration to trade regulation and positive integration’ going on to argue that ‘[t]oday, trade law essentially is about product regulation of goods and services’. See T. Cottier, ‘International Economic Law in Transition from Trade Liberalization to Trade Regulation’, (2014) 17 *Journal of International Economic Law*, 671–7.

<sup>87</sup>Lang, *supra* note 80, at 226–7.

<sup>88</sup>*Ibid.* As Slobodian has argued this move was part of a broader and longer-term strategy to ‘encase the market’ from the political interference of both the redistributive state of the postwar period and the international efforts of newly-independent states to structural transform the international economic system. See Slobodian, *supra* note 80.

<sup>89</sup>Services, investment and IP are also made trade-related; they did not appear as trade-related issues under the GATT. The role that lawyers played in constructing services as trade related has been the subject of numerous studies: see, for instance, Lang, *supra* note 80.

<sup>90</sup>1994, General Agreement on Trade in Services (hereafter GATS).

service to be provided on its territory; immigration controls on the so-called natural persons providing the service; or restrictions on the type of legal entity through which foreign service providers might operate (i.e., joint ventures). GATS lays down a few general provisions all member states have to abide by. First, the requirement of transparency – so that each state is made aware of the regulatory environment of other states; and can consequently challenge these rules when they are not complying with GATS law. Secondly, the so-called MFN provision, that is, the requirement for each state to extend any advantage it may grant to the services and service providers from one particular state to the services and service providers from all other WTO members. Thirdly, the obligation to agree on new rules for the scrutiny of domestic regulation regardless of whether they are discriminatory or not.<sup>91</sup>

In addition to these general rules, GATS also provides for specific commitments states have to gradually make, in particular NT – the obligation to not discriminate against foreign service or foreign service providers; and market access (MA) – the obligation to not impose certain restrictions, including those on the number of service providers operating in one's territory, on the value of transactions, and on the legal entity of the service provider. As the latter provisions concern a specific 'mode of supply' – what is referred to in GATS terminology as 'commercial presence' – at issue with the gradual removal of these restrictions is mainly the activity of foreign companies. As seen in Section 3, once countries achieved independence they sought to regulate foreign investment to ensure the gains would accrue to host states as well as investors. They could for instance limit the number, or equity participation, of foreign investors operating in specific sectors to support capacity building; and/or require investors use a certain legal entity such as joint venture to ensure transfer of technology. These are the restrictions states can no longer use in the service sector if they fully commit to market access.

Thus, underlying these provisions is not only the idea that regulatory convergence or alignment is the long-term objective to pursue in order to realize a level playing field where goods, services, capital and technological innovation can move without unnecessary frictions. The imagined 'freedom' involved in this global market is specifically that of foreign firms as both the Agreement on trade-related Investment Measures (TRIMs)<sup>92</sup> and the one on trade-related aspects of Intellectual Property rights (TRIPs)<sup>93</sup> point to. TRIMs' significance can be seen in the context of the post/colonial regulation of foreign investment. Many countries, especially traditional capital-importing ones, had made use of legislation to impose so-called performance requirements, such as local content and import-export balancing requirements. TRIMs has banned these provisions as they are deemed to constitute restrictions on trade, while other performance requirements, for instance the requirement to transfer technology, are open to challenge, if they are shown to be trade distortive. The extent to which the conferral of these new rights (without corresponding legal obligations) is significant becomes evident when one considers the rights bestowed by the TRIPs agreement on foreign firms.

This agreement has not only universalized minimum standards of protection of IP rights (i.e., copyrights, patents, trademarks, etc.) – according to the standards prevailing in QUAD countries – and imposed NT and MFN so that these become universal minimum standards of protection all IP holders can expect across borders. It has also enabled individual IP holders to have recourse to the domestic courts of WTO member states to enforce these rights. This recourse is not contemplated under other WTO agreements, which provide only for state-to-state dispute resolution. Should the protection afforded by national legislation and courts be inadequate, the state can be taken in front of the WTO dispute settlement system by the IP holder's home state. These are unprecedented rights conferred on foreign firms, particularly in light of the fact that there are not corresponding obligations that can be seen within the international legal

<sup>91</sup>GATS, *supra* note 90, Art. VI.

<sup>92</sup>1994, Agreement on Trade-Related Investment Measures (hereafter TRIMs Agreement).

<sup>93</sup>1994, Agreement on Trade-Related Aspects of Intellectual Property Rights (hereafter TRIPs).



system more broadly.<sup>94</sup> The presumption is that benefits will trickle down once local firms will start using the protected technology. This remains to be seen though as the evidence up to date is scant,<sup>95</sup> and also, transfer of technology-related performance requirements may be open to challenge, a point to which I'll return when looking at the 'deeper' provisions of PTAs. As Gibbon and Ponte have highlighted however: 'the institutionalization of securer rents for innovation embedded in TRIPs is likely to benefit most those firms with the largest research and development capacities. This is likely to speed up industry concentration, depress competition in the longer term, and thus amplify already enhanced capacities to charge oligopolistic prices.'<sup>96</sup> Nolan indeed reports that the world's top 100 firms account for '60 per cent of the total R&D spending of the G1400, while the bottom 100 firms account for less than 1 per cent of the total'.<sup>97</sup> This means lead-firms 'possess the technology and/or brand name which indirectly provides sales to the supplier firms. They are therefore able to ensure that [they] obtain the lion's share of the profits from the transactions between the two sets of firms'.<sup>98</sup> Indeed, as Durand and Milberg have pointed out, of all patent applications registered since TRIPs came into force only 3.5 per cent are registered in China, who has the lion share among developing countries, whilst 82 per cent are registered in the EU, US and Japan; international receipts from patent protection going to higher income countries are also 100 times higher than those going to middle and low income countries, again pointing to high concentration of gains.<sup>99</sup>

Thus, when the rules on the uniform protection of IPRs and the liberalization of services and investment are considered together with those requiring countries to adopt standards and regulations which have been set in the global North – the WTO emerges as a powerful regulatory structure, laying the ground for the subsequent raft of PTAs which have included deeper commitments. This structure is supported by a dispute settlement system that provides extensive rights for foreign firms whilst also realizing a certain degree of regulatory convergence that supports the fragmentation of production, particularly with the agreements on technical barriers to trade (TBT) and sanitary and phyto-sanitary measures (SPS). When it comes to those areas of interest to so-called DCs, however, the achievement of full liberalization on which the simultaneous adoption of all WTO agreements (according to the so-called single undertaking approach) was predicated has been much slower, with the US and EU still restricting entry, particularly through high tariffs and export subsidies in agriculture.<sup>100</sup>

The other significant outcome of this process of gradual regulatory convergence is that the idea about the structural inequalities of international trade regime, which as seen in Section 2 had informed much development-related trade activity, disappears and gets substituted by the image of a level playing field where all participants are bound by the same rules which deliver liberalization for all. Whilst, as mentioned above, liberalization continues to be selective, reciprocity has become legally binding and SDT is re-conceptualized to mean longer implementation and technical assistance. The Doha negotiations launched in 2001 were meant to address these shortcomings. It is in the context of their crisis, as negotiations have yet to conclude, that the new phase of PTAs, which contain many 'deeper' provisions, can be analysed. Whereas for developing countries the redressing of past imbalances was the primary objective of the negotiations,

<sup>94</sup>See J. Salminen and M. Rajavuori, 'Transnational sustainability laws and the regulation of global value chains: comparison and a framework for analysis', (2019) 26(5) *Maastricht Journal of European and Comparative Law* 602–27.

<sup>95</sup>C. Durand and D. Milberg, *Intellectual Monopoly in Global Value Chains* (2018).

<sup>96</sup>Gibbon and Ponte, *supra* note 35, at 62.

<sup>97</sup>P. Nolan, 'Globalisation and Industrial Policy: The Case of China', (2014) 37(6) *World Economy* 747, at 750.

<sup>98</sup>P. Nolan, 'Industrial Policy in the 21st century: The Challenge of the Global Business Revolution', in H.-J. Chang (ed.), *Rethinking Development Economics* (2003).

<sup>99</sup>Durand and Milberg, *supra* note 95, at 15–16.

<sup>100</sup>At the Nairobi Ministerial Conference countries agreed to eliminate export subsidies by 2023, although there is still no agreement on the reduction of domestic subsidies, and no progress on the liberalization of 'movement of natural persons', where developing countries are supposed to have a comparative advantage in service liberalization.

for economists like Baldwin, and as inferred in other WTO reports, these countries' inability to understand that twenty-first century trade requires 'deeper' commitments in service, investment and capital liberalization, and stronger IPRs protection, is the cause of both the WTO standstill and the rise of PTAs.

Before moving to analysing this new phase, however, let us sum up the points made so far. Rather than being a mere institutional background against which economic forces play out (i.e., GVCs exponentially increasing from the 1980s onward due to the ICT and retail revolutions, requiring trade law to adjust to this new reality) international trade law has played an important role in global chains' formation and proliferation. Although we cannot infer causation between GATT/WTO law and the internationalization of firms' operations, there is evidence of a dramatic increase in the trade of parts and components, an aspect often used to define 'the level of integration', since the 1990s within Europe, the US and Japan first and extending to Asia immediately after.<sup>101</sup> By the end of the 1990s, it became clear that Asia had overtaken the North Atlantic economies,<sup>102</sup> with North-South value chain, and more recently South-South trade, becoming prominent in the 21<sup>st</sup> century.<sup>103</sup> The geography of apparel manufacturing has also changed as the WTO phased out the MFA in 2005 and 'the supply of apparel products has become increasingly concentrated in a few countries and regions, those being mainly East, Southeast, and South Asia'.<sup>104</sup> It is also clear that new PTAs signed outside the GATT/WTO since the late 1980s have played a crucial role in the dramatic increase of value chain trade. The next section looks at their rise, the substance of their provisions and their changing nature in the last 25 years, arguing that the most innovative aspects they display are the conferral of extensive rights upon foreign firms, which go beyond those granted by WTO agreements; and the further convergence with regard to standards and regulations.

#### **4.1 WTO-Plus and WTO-Extra provisions: Regulatory alignment and investors' rights re-loaded**

Between 1958 and 2014, 279 PTAs were notified to the WTO.<sup>105</sup> They present two significant aspects. The first is that they have more than doubled since the 1990s.<sup>106</sup> The second consideration is about their changing nature. Up to the end of the 1990s most of them concerned the reduction of border measures and involved tariff reductions. Since then, PTAs, referred to most recently as DTAs, have included regulatory areas such as services, investment, competition policy, movement of capital, intellectual property rights protection, and harmonization of product regulations, pointing to the intensification of the regulatory alignment process and to the conferral of ever

<sup>101</sup>WTO, *supra* note 3, at 18; *ibid.*, at 9. The EU, US, and Asia (particularly China) remain the most important hubs of GVCs. Indeed, the law of GATT/WTO, as well as that of PTAs, has not produced uniform effects. In some countries, services have hardly been liberalized since the GATS came into force, and investment has not increased despite the entry into force of BITs that provide extensive legal rights to foreign investors. This is because a number of factors impact on firms' decisions to invest directly or entertain contractual relations with entities in another country, in addition to trade and investment policy (i.e., factor endowments; geography; institutional quality, connectivity, and macroeconomic factors). Trade and investment regimes, however, are identified as a crucial area of government intervention for countries wishing to facilitate integration of their firms into GVCs. See A. Fernandez et al., 'Determinants of Global Value Chain Participation: Cross-Country Evidence', at 2, available at [documents1.worldbank.org/curated/en/930751585234915451/pdf/Determinants-of-Global-Value-Chain-Participation-Cross-Country-Evidence.pdf](http://documents1.worldbank.org/curated/en/930751585234915451/pdf/Determinants-of-Global-Value-Chain-Participation-Cross-Country-Evidence.pdf).

<sup>102</sup> *Ibid.*

<sup>103</sup>2017 GVCD Report, *supra* note 13, at 2.

<sup>104</sup>T. Bernhardt and R. Pollak, 'Economic and social upgrading dynamics in global manufacturing value chains: A comparative analysis', (2016) 48(7) *Environment and Planning* 1220, at 1227.

<sup>105</sup>2017 GVCD Report, *supra* note 13, at 12.

<sup>106</sup>N. Limao, 'Preferential Trade Agreements', in K. Bagwell and R. W. Staiger (eds.), *Handbook in Commercial Policy* (2016), 18–19.

more extensive rights to foreign firms.<sup>107</sup> Hofmann, Osnago, and Ruta (2017) have collected information on all PTAs in force in 2015.<sup>108</sup> The database they have created contains information on 279 agreements among 189 countries. They distinguish provisions between so-called ‘WTO-plus’ or ‘WTO+’ provisions – rules that apply to areas regulated by the WTO agreements – and ‘WTO-extra’ or ‘WTO-X’ provisions, rules which extend to areas not yet regulated by the WTO.

Relying on the above database, the 2017 WTO report points to the fact that WTO+ provisions include – in addition to the reduction of subsidies, export taxes and antidumping measures, a higher level of commitments among members with regard to customs regulations, sanitary and phyto-sanitary standards and technical barriers to trade.<sup>109</sup> With regard to the latter, the most common provisions are ‘mutual recognition of conformity assessment [and] harmonization of technical regulations’.<sup>110</sup> Although the highest degree of standards and technical regulations’ integration appears to be found in PTAs between developed countries, many agreements between developed and developing countries contain these provisions too. Many PTAs also provide for the creation of institutional bodies to oversee the development of, and compliance with, these regulations and standards. These features therefore continue the convergence trend initiated by the WTO. As Gibbon and Ponte have noted in relation to conformity assurance practices, there has been a shift from product testing to process conformity. They argue that:

intentionally or unintentionally, process based assurance involves a passing of the burden of monitoring costs from buyers to suppliers, with strong implications for entry barriers to supplier roles. Furthermore it may require restructuring of production processes and value chains. Thus at the same time as they are faced with escalating costs of in-country regulatory conformity, developing countries are also faced with an institutionalization of more restrictive entry barriers in their export as market access becomes conditional on the satisfaction of country-specific regulatory standards.<sup>111</sup>

With regard to services, there are two distinctive features that set PTAs aside from the GATS. The first is that unlike the GATS, these agreements use a negative-list modality for the scheduling of commitments. This means that instead of listing the services and modes of supply countries decide to subject to GATS rules of NT and MA, as it happened under the GATS, countries have to specifically list the exceptions, otherwise these provisions apply to all service sectors and modes of supply. The bottom-up logic of service liberalization is therefore reversed, with full liberalization applying unless otherwise stated. Foreign companies can expect to be treated according to NT. They can also expect the state in which they operate not to limit: the number of service providers; the amount of transactions in and out of the country; the type of legal entity in which they can invest and so on, unless they have made specific exceptions under MA. As the WTO notes, service commitments in PTAs go beyond GATS commitments currently in force; and go much further than GATS offers tabled so far in the Doha Development Agenda (DDA), particularly in areas such as business, environmental services, distribution, education and postal-courier services: ‘Overall, PTAs have narrowed the gap in commitment levels between developed and developing countries.’<sup>112</sup>

<sup>107</sup>H. Horn, P. C. Mavroidis and A. Sapir, ‘Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements’, (2010) 33(11) *World Economy* 1565. See also WTO, *World Trade Report 2011*, *supra* note 4; Mattoo, Rocha and Ruta, *supra* note 12.

<sup>108</sup>C. Hofmann, A. Osnago and M. Ruta, *Horizontal Depth: A New Database on the Content of Deep Agreements* (2017). See also A. Osnago, N. Rocha and M. Ruta, *Deep Trade Agreements and Global Value Chains* (2016).

<sup>109</sup>See 2017 GVCD Report, *supra* note 13, at 176–8.

<sup>110</sup>See WTO (2011), *supra* note 4, at 140.

<sup>111</sup>Gibbon and Ponte, *supra* note 35, at 65–6. See also P. Antras and R. W. Staiger, ‘Offshoring and the Role of Trade Agreements’, (2012) 102 *American Economic Review* 3140.

<sup>112</sup>WTO, *supra* note 4, at 136.

The second feature is that when services are provided through commercial presence, that is through foreign direct investment, they are taken out of the services chapter and are subject to the rules of the investment chapter. WTO reports show that the majority of PTAs have adopted a negative list approach to investment commitments.<sup>113</sup> In other words, NT and MA apply to all ‘investors who wish to establish a presence, or acquire or resell holdings’.<sup>114</sup> These provisions apply to the four modalities that determine investment conditions: establishment, acquisition, post-establishment operations, and resale. Furthermore, most deep trade agreements also have protection guarantees which entitle investors to have recourse to national courts or arbitration should the guarantees not materialize, for instance in the event of contract breaches, and provide investors with the right to dispute settlement, which marks another significant departure from the WTO state to state dispute resolution approach.<sup>115</sup> It is clear that WTO reports see these service-investment-IP provisions, as well as those on the liberalization of capital,<sup>116</sup> important to enable value chain trade. As the WTO has argued: ‘Since firm-specific assets such as human capital (management or technical experts) and intellectual property (patents, blueprints) give international firms a competitive edge, protecting these assets against expropriation will encourage more production sharing.’<sup>117</sup> Thus, 80 per cent or more of PTAs also provide for protection against denial of benefits, restrictions such as minimum limitations on the nationality of management and the board of directors, guarantees against expropriation and, significantly, against performance requirements.<sup>118</sup> These are those mechanisms which have enabled states to ensure foreign investment have socio-economic benefits for the host state as well as for the foreign investor. They include limits on: repatriation of profits, foreign ownership share, type of legal entity through which to invest, and requirements about local content and transfer of technology.<sup>119</sup> They also include protection of contracts, which is important in the context of the change in the structure of global trade observed in Section 3. As two thirds of value chain trade takes place between independent firms, contracts become an important means through which their relations are disciplined, and WTO reports have emphasized the significance of their legal protection.<sup>120</sup> Whereas firms will have ‘internationalized’ means of enforcing contracts, however, countries have no similar recourse in case contractual terms end up harming workers or being unfavourable to the socio-economic interests of their population. Adopting such rules, especially for states which are peripheral to value chain trade, risks opening up their countries to more investment disputes.

WTO-X provisions therefore confer extensive rights upon foreign firms without corresponding legally binding obligations,<sup>121</sup> since performance requirements are prohibited in many PTAs and the legal force of international obligations on corporations is very limited, as many scholars have

<sup>113</sup> *Ibid.*, at 139.

<sup>114</sup> *Ibid.*

<sup>115</sup> See A. Buser, ‘Recalibrating Policy space in Bilateral Investment Treaties: Is There a Common B(R)ICS Approach?’, in C. Congyan, C. Huiping and W. Yifei (eds.), *The BRICS in the New International Legal Order on Investment: Reformers or Disruptors* (2020).

<sup>116</sup> WTO, *supra* note 4, at 132. Figure D.8 shows movement of capital to be the fourth highest recurring WTO-extra provision in PTA agreements.

<sup>117</sup> WTO, *ibid.*, at 11.

<sup>118</sup> *Ibid.*

<sup>119</sup> Sornarajah, *supra* note 75.

<sup>120</sup> As the 2017 GVC report, *supra* note 13, at 11, notes ‘Another way to think about products that have complex value chains is that they are contract-intensive goods ... GVC research shows that, other things equal, countries with better institutions such as stronger property rights and rule of law participate more in GVCs.’

<sup>121</sup> Except for the competition rules, which are also categorized as WTO-X provisions. These rules, however, can be argued to be more about enabling foreign firms to compete internationally on an ‘equal footing’ than about the regulatory powers of member states. As the WTO argues, the aim of competition policy is to dilute or prevent the abuse of market power: ‘... “horizontal principles” applying to various areas and relating to the non-discrimination, procedural fairness and transparency provisions in the agreements’. See WTO, *supra* note 4, at 142.

already pointed out.<sup>122</sup> Now, it is true that some of these extensive provisions can be found in the most aggressive BITs. However, their incorporation into PTAs and the argument in WTO reports that they should be adopted by states willing to participate in value chain trade points in the direction of their attempted ‘multilateralization’ – exactly the attempt that scholars like Sornarajah have argued has been resisted during the 1960s and 1970s up to the WTO Singapore conference.<sup>123</sup> The attempt to multilateralize these rules through the reform of WTO agreements may have been put on hold for a while, particularly as the Trump administration signaled a shift away from multilateralism.<sup>124</sup> The narrative about the need to adopt these rules, however, remains influential as states are encouraged to adopt them either unilaterally or through preferential or multilateral agreements.<sup>125</sup> Trade scholars have also supported this narrative. As Petersmann has argued:

In view of the past opposition by less-developed WTO members against dealing with competition and investment rules in the WTO and the importance of such rules for liberalizing and regulating trade in services and closer cooperation among national regulatory agencies, it is to be hoped that free trade and plurilateral agreements outside the WTO will set new standards for economic and legal integration and future WTO reforms.<sup>126</sup>

What this narrative pushes out of sight, however, is the longer historic trajectory this article has attempted to trace, a trajectory that sheds a different light on the need to adopt WTO plus and extra measures.

## 5. Conclusions

This article has challenged the view that undertaking ‘deeper commitments’ is a matter of adapting to an exogenous economic reality, consequently calling into question the need to embark in far reaching trade reforms which confer extensive rights on corporations without corresponding obligations. It has done so in two ways: First, by demonstrating that international trade law has played a much more active role in the proliferation of GVCs than WTO reports acknowledge; secondly, by tracing the evolution of post/colonial trade law, the article has shown that trade and investment provisions have been and still are an important terrain over which the relationship between companies and states is articulated, with important consequences for all involved in GVCs, including workers and local communities.<sup>127</sup> If this active role is acknowledged then law can be seen not only as contributing – together with the other market-making mechanisms the GVC literature has brought to light – to the making of those economic processes it is assumed to only respond to, but also as a means through which these processes can be shaped otherwise.

What other role, then, can trade law play? Cottier has invited the international trade community to resist the fragmentation of trade law. His argument is that the WTO should evolve into a global regulator, shifting its focus from trade liberalization to trade regulation where states

<sup>122</sup>E.g., C. Gammage and T. Novitz, ‘The concept of sustainability and its application in international trade, investment and finance’, in C. Gammage and T. Novitz (eds.), *Sustainable Trade, Investment and Finance: Toward Responsible and Coherent Regulatory Framework* (2019).

<sup>123</sup>Sornarajah, *supra* note 75. See also F. Jawara and A. Kwa, *Behind the Scenes at the WTO: The Real World of International Trade Negotiations* (2004).

<sup>124</sup>See F. Mayer and N. Phillips, ‘Global Inequality and the Trump Administration’, (2019) 45(3) *Review of International Studies*, at 502–10.

<sup>125</sup>*Ibid.*, at 18.

<sup>126</sup>E. Petersmann, ‘Multilevel Governance Problems of the World Trading System’, (2014) 17 *Journal of International Economic Law* 233, at 267.

<sup>127</sup>The article has not touched on this important aspect. See B. Selwyn, ‘Poverty chains and global capitalism’, (2019) 23(1) *Competition & Change* 71. See also M. Werner and J. Bair, ‘Global Value Chains and Uneven Development: A Disarticulations Perspective’, in Ponte, Gereffi and Raj-Reichert, *supra* note 54, at 183.

negotiate, together with stakeholders such as civil society, a ‘global common law’ with regard to standards and norms that are by their very nature transnational; whereas market access should be left to bilateral and regional negotiations.<sup>128</sup> This article has shown this ‘global common law’, rather than the fragmentation of trade law itself, to be a contested terrain. Indeed, as Tzouvala has argued:

states use fragmentation as a manoeuvring tool, and . . . their intention is to return to some form of “universal” framework for trade (and perhaps investment) once they assume control over the substance of international legal rules and they by-pass the resistance of the South.<sup>129</sup>

This resistance was visible during GATT life, ending with the successful effort to block structural reforms attempted through the NIEO project,<sup>130</sup> and during the Singapore Ministerial conference of the WTO,<sup>131</sup> when states from the global South opposed efforts to multilateralize rules on investment, competition, and trade facilitation. The surge of PTAs and DTAs can be seen in part as a response to that stalemate.<sup>132</sup> It is certainly the case that emerging economies, especially China, have become competitive players in value chain trade, and that hardly any country within the WTO officially challenges the neo-liberal mantra of market access.<sup>133</sup> There are two points in this respect. The first is that the need to appreciate what GVCs are doing on the ground, whether in fact they are leading to the welfare gains IEIs assume, is of paramount importance if we want to assess whether GVC-led market access in its current form is desirable. The World Bank has for instance acknowledged that ‘the concentration of wealth in a few importing-exporting firms is extreme’, and that countries are experiencing socio-economic inequalities.<sup>134</sup> The recommendation, however, is for states, particularly developing states, to undertake deeper trade commitments since the gains from value chain trade are thought to provide them with the resources needed to redress such inequalities. Trade and investment provisions, however, are considered to have neither contributed to wealth concentration nor to socio-economic inequalities. If anything, the trade liberalization they have facilitated has, since the 1990s, lifted people out of poverty. However, as Linarelli, Solomon and Sornarajah have pointed out, this argument holds water mainly because the baseline year international institutions like the Bank have adopted is 1990, which allows for the incorporation of China’s (and to a lesser extent India’s) gains against poverty in the 1990s, and because the international poverty line they refer to is the highly contested US\$1.90 a day.<sup>135</sup> The point is that the

<sup>128</sup>T. Cottier, ‘The Common Law of International Trade and the Future of the World Trade Organization’, (2015) *Journal of International Economic Law* 3, at 19–20. His argument is that the WTO should evolve into a global regulator, shifting its focus from trade liberalization to trade regulation where states negotiate, together with stakeholders such as civil society, a ‘global common law’ with regard to standards and norms that are by their very nature transnational; whereas market access should be left to bilateral and regional negotiations such as through PTAs. A similar approach to the division of labour between multilateral and plurilateral negotiations is put forward by B. Hoekman, *Supply Chains, Mega-Regionals and Multilateralism: A Road Map for the WTO* (2014).

<sup>129</sup>N. Tzouvala, ‘The academic debate about mega-regionals and international lawyers’, (2018) 6(2) *London Review of International Law* 189, at 202.

<sup>130</sup>See A. Getachew, *Worldmaking After Empire* (2019); J. Tumlrir, ‘Can the International Economic Order Be Saved?’, (1977) 1 *World Economy* 3.

<sup>131</sup>Jawara and Kwa, *supra* note 123, at 118.

<sup>132</sup>N. Tzouvala and A. O’Donoghue, ‘The Rise of the “Mega-Market” Agreements and Its Potential Implications for the Global South’, (2016) *Trade, Law and Development* 8.

<sup>133</sup>K. Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (2016).

<sup>134</sup>World Bank, *supra* note 19, at 30.

<sup>135</sup>As they also point out the official success story ignores that ‘. . . China’s growth strategy was not neoliberal but heterodox; that its policies have been premised on rapid urbanization and state-orchestrated land grabs; that its policies threaten both stability and sustainable development; that the growth in both China and India has been fuelled by a scramble for resources in the South; and that they both retain significant aspects of underdevelopment’. If the threshold was increased to US\$5 a day, which many economists believe is a more appropriate international poverty line, 3.5 billion people globally would be considered poor. J. Linarelli, M. Solomon and M. Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2020), at 12–13.

relationship between trade liberalization, the law supporting it, and socio-economic inequalities requires much more careful consideration than it has presently been accorded.

Therefore, the second point is that the ‘common core’ of trade and investment rules needs to be open up to scrutiny, paying particular attention to the effects of the distribution of rights and obligations between companies and states on workers and communities involved in GVCs.<sup>136</sup> This scrutiny needs to extend beyond international trade and investment law, and encompass ‘the vast array of rules, practices and regimes that shape the division of labor, bargaining power and distribution of surplus among all states and firms in the global economy’.<sup>137</sup> This article has touched on contracts, which today tie together lead-firms and suppliers defining the terms and duration of their relationship, with consequences for the workers and communities involved,<sup>138</sup> but there are other areas of regulation that are shaping GVCs beyond trade and investment law, including IPRs, tort, standards, labour law, competition, and taxation policy.<sup>139</sup> Attending to the connections between these different areas of international economic regulation is crucial for understanding the relationship between law and political economic processes, including those that generate global inequalities.

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<sup>136</sup>See D. Alessandrini, ‘A not so “New Dawn” for International Economic Law and Development: Towards a Social Reproduction Approach to GVCs’ (forthcoming).

<sup>137</sup>D. Danielsen, ‘Trade, Distribution and Development under Supply Chain Capitalism’, in D. Trubek, A. Santos and C. Thomas (eds.), *World Trade and Investment Reimagined: A Progressive Agenda for an Inclusive Globalization* (2019).

<sup>138</sup>Perrone, *supra* note 40.

<sup>139</sup>Danielsen and Bair add ‘corporate codes of conduct, policies regarding subcontracting by suppliers or intermediaries, punitive commercial measures that punish non-compliant firms, multi-sourcing practices that leverage competitive pressure, strategic use of anti-trust concerns to limit calls for transparency into chain operations by suppliers and workers, limitations on supplier sourcing of production inputs, and many others’. See D. Danielsen and J. Bair, ‘The Role of Law in Global Value Chains: A Window into Law and Global Political Economy’, *LPE blog*, 16 December 2019, available at [lpeblog.org/2019/12/16/the-role-of-law-in-global-value-chains-a-window-into-law-and-global-political-economy/](https://lpeblog.org/2019/12/16/the-role-of-law-in-global-value-chains-a-window-into-law-and-global-political-economy/).