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A Not So 'New Dawn' for International Economic Law and Development: Towards a Social Reproduction Approach to GVCs

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Abstract

This article has three aims. First, it takes issue with the argument of international economic institutions according to which states need to adopt deeper trade and investment commitments to sustain value chain trade if they wish to either 'develop' or continue being competitive in the global economy. It scrutinizes the evidence on the basis of which this argument is formulated and finds it to be tenuous at best. It also finds that current data is unable to account for the variety of factors that contribute to so-called 'social downgrade' – that is, the deterioration of working and living conditions, including the presence of informal and migrant workers. Second, it draws on feminist political economy to make sense of the co-existence of 'economic upgrade' and 'social downgrade' in global value chains. Specifically, it adopts a social reproduction lens to shed a light on the increasingly relevant, but invisibilized and/or devalued, role that social reproductive labour and informal labour play in processes of trans/national value creation. Third, it argues that a social reproduction lens can offer valuable insights on international economic agreements and the impact of their provisions on the ability of states and communities to improve working and living conditions.

1 Introduction

The 2000s have been dubbed 'the value chain development decades' by major international economic institutions (IEIs) like the World Trade Organization (WTO) and the World Bank, with calls for deeper trade commitments to be made by states, especially

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'developing' countries, to speed up the integration of their firms in the world economy. In one of its first engagements with global value chains (GVCs), a 2013 WTO report presents them as the outcome of economic and technological processes that have unfolded since the 1970s, radically affecting the nature of trade, thereby requiring a different kind of international regulation.[1] The claim is that, unlike the post-war period when most international trade consisted of the exchange of products or intermediary goods, and tariff barriers were the obstacles international regulation had to target, the 1980s witnessed an increase in value chain trade, which is the international exchange of parts, components and tasks, with many non-tariff barriers emerging as the hurdles that the new rules have to target.[2] Noting that such provisions have already been negotiated in preferential trade arrangements (PTAs) by those states that have benefited from GVCs the most, the report invites WTO members to consider 'multilateralizing' them so to expand the benefits that value chain trade can generate.[3]

Referred to as WTO-plus and extra provisions because they go well beyond current liberalization commitments and concern areas not currently regulated by the institution, these rules include the strengthening of the protection of investors' rights – in particular, intellectual property rights (IPRs) – the further liberalization of investment and services and the free(r) movement of capital.[4] Adopting such rules was, at one point, considered necessary to prevent the collapse of the multilateral trade system, as major trading partners were pursuing this new regulatory agenda outside the WTO.[5] Since 2016, however, the argument for multilateralizing these provisions has subsided given the inward-looking turn of major economies, some of which have invoked trade-induced social and economic inequalities as reasons for such action.[6]

1 World Trade Organization (WTO), *Global Value Chains in a Changing Word* (2013), at 13–55, available at www.wto.org/english/res_e/booksp_e/aid4tradeglobalvalue13_intro_e.pdf; see also WTO, *The WTO and Preferential Trade Agreements: From Co-existence to Coherence* (2011), at 44, available at www.wto.org/english/res_e/publications_e/wtr11_e.htm. Since 2017, the WTO has collaborated with the World Bank Group, the WTO, the Organization for Economic Co-operation and Development, the Institute of Developing Economies and the Research Center of Global Value Chains of the University of International Business and Economics to co-publish Global Value Chain Development (GVCD) reports every two years. The first was published in 2017 and the second in 2019. This article draws on both reports as well as on other publications by the WTO and World Bank group.

2 WTO, *Global Value Chains*, *supra* note 1, at 55.

3 *Ibid.*, at 43; WTO, *Preferential Trade Agreements*, *supra* note 1, at 196–198; see also Baldwin 'WTO 2.0: Governance of the 21st Century Trade', 9 *Review International Organization* (2014) 261.

4 WTO, *Global Value Chains*, *supra* note 1, at 42.

5 The rise of deep trade agreements (DTAs) has been attributed by many scholars to the slow progress made within the WTO to further 'behind-the-borders' measures. See WTO, *Global Value Chains*, *supra* note 1, at 55. Baldwin, *supra* note 3, at 280. See also a Group of Seven (G7) communiqué as to the need for new rules to be adopted to ensure the WTO does not become redundant. G7, *G7 Leaders' Declaration*, 26 August 2019, available at www.consilium.europa.eu/en/press/press-releases/2019/08/26/g7-leaders-declaration-biarritz-26-august-2019/.

6 One of the arguments employed by the Trump administration was that trade liberalization has not benefited American workers because of the unfair trade advantage (ab)used by other countries. It is ironic, although not a new strategy, that the country invoking unfair trade advantage-fuelled inequalities was also the country that has most engaged in selective trade liberalization since the post-war period. The claims about inequalities and their relation to trade, however, are important as they are fuelling anger and the loss of trust in multilateral institutions. See Mayer and Phillips, 'Global Inequality and the Trump Administration', 45 *Review of International Studies* (2019) 502.

The WTO and the World Bank have responded to these concerns by investigating the links between GVCs and these inequalities through collaborative initiatives such as the Global Value Chain Development (GVCD) reports.[7]

The conclusion of the 2017 and 2019 GVCD reports is that, whilst there may be links between GVCs and these inequalities, and states need to enact domestic measures that ensure labour, social and environmental protection, the adoption of WTO-plus and extra provisions remains a necessary step for countries wishing to develop. It is indeed the adoption of these rules that will provide states with the resources needed to ensure such protection. The argument about the link between value chain trade and development therefore remains strong,[8] and states are encouraged to adopt these rules.[9] As the 2020 *Handbook on Deep Trade Agreements*, published by the World Bank, has put it, these agreements 'matter for economic development', and the fact that there is a consistent level of similarity with regard to their provisions points to the possibility of building multilateral trade rules on them.[10]

It therefore becomes important to scrutinize the assumptions on which this argument is based. The claim is that 'developing' countries should put in place a regulatory environment that enables their firms to insert themselves into GVCs because linking up with lead firms (that is, firms that are dominant in the market) fosters technology transfer and innovation, which in turn enables firms to technologically upgrade and get a larger share of the value added along these chains. This process is thought to contribute to the development of their economies by increasing employment, including women's participation in the workforce, wages and income.[11] From this perspective, greater trade openness becomes the rational policy to enact.

This article problematizes both the assumptions on which this argument is based and the policy recommendations that follow. It asks: what if the link between insertion, upgrade and value added is weaker than what the WTO and World Bank reports assume? What if upgrade, where it happens, is not translating into better working and

[7] Inequalities are mainly considered at the level of distribution of the economic rewards produced along global value chains (GVCs). They are associated with profit capture by corporations located in the global North at the expense of labour in the global North and global South and of capital in the global South. See World Bank and WTO, *Global Value Chain Development Report: Measuring and Analyzing the Impact of GVCs on Economic Development* (*GVCD Report 2017*) (2017), available at www.wto.org/english/res_e/booksp_e/gvcs_report_2017.pdf; World Bank and WTO, *Global Value Chain Development Report 2019: Technological Innovation, Supply Chain Trade, and Workers in a Globalized World* (*GVCD Report 2019*) (2019), available at www.worldbank.org/en/topic/trade/publication/global-value-chain-development-report-2019. World Bank, *World Development Report 2020: Trading for Development in the Age of Global Value Chains* (2020), available at www.worldbank.org/en/publication/wdr2020.

[8] It underpins not only the Doha discussions on the liberalization of services – in particular, the negotiations on domestic regulation (General Agreement on Trade in Services 1994 [GATS], 1869 UNTS 183, Art. Vi.4) but also the call for further agricultural liberalization. See WTO, *Doha Round: What Are They Negotiating?* (2021), available at www.wto.org/english/tratop_e/dda_e/update_e.htm.

[9] *GVCD Report 2019*, *supra* note 7; World Bank, *supra* note 7.

[10] World Bank, *Handbook of Deep Trade Agreements*, edited by A. Mattoo, N. Rocha and M. Ruta (2020), at 18, available at https://openknowledge.worldbank.org/handle/10986/34055.

[11] *GVCD Report 2019*, *supra* note 7 at 3–4; World Bank, *supra* note 7 at 3.

living conditions and is at times even leading to their worsening? What are we, then, to make of the call for 'deeper commitments' through WTO-plus and extra provisions? By addressing these questions, this article comes to a different conclusion with regard to the international regulation of GVCs. Whereas the GVCD reports claim that the adoption of 'deeper commitments' is a necessary step for countries wishing to develop and get the resources needed to enhance social and environmental protection, the article questions such necessity and suggests their adoption may further entrench the conditions for social and environmental inequalities. To be clear, the article does not claim that a direct causal relationship between the provisions in deep trade agreements (DTAs) and inequalities can be empirically demonstrated.[12] The argument it makes is that the link that IEIs have established between 'deeper commitments' and GVCD is based on a set of contestable assumptions that warrant further reflection by institutions, states and the global community.[13]

The article is organized in six sections. Section 2 introduces the WTO / World Bank assumption that participation in GVCs and technological upgrade are key to development understood as increased employment and income. Section 3 shows that, once qualitative as well as quantitative analyses of workers' conditions are taken into account, a much less confident picture emerges. This picture is one in which 'social downgrade' – that is, the deterioration of working and living conditions – can happen at the same time that a country or industry experiences 'technological upgrade'.

In section 4, I draw on feminist political economy to make sense of what critical GVC analysts have described as the co-existence of economic upgrade and social downgrade in many GVCs.[14] Specifically, I adopt a social reproduction lens to highlight the unacknowledged contributions that reproductive and informal labour make to the trans/national production of economic value. By adopting this lens, this section shows that conventional understandings of value added 'invisibilize'[15] such contributions and privilege specific kinds of labour, thereby promoting an unequal distribution

[12] Demonstrating it would require complex empirical tracing of the links between specific agreements' provisions, their domestic implementation and their effects on the ground, which include many social spheres within which inequalities unfold, including the workplace, household, community, state provision of basic services and so on. Section 6 of this article alludes to the spheres of life with which trade provisions interact, but such empirical tracing is beyond the scope of this article, which takes issue with the knowledge and 'truth claims' made in the reports. However, some evidence is starting to emerge with regard to the link between 'deeper commitments' and social inequalities in the workplace. In their study of European Union (EU) trade agreements with the CARIFORUM Group, South Korea and Moldova, Adrian Smith and colleagues carefully trace the links between the commercial provisions of these agreements and the deterioration of working conditions. A. Smith *et al.*, *Free Trade Agreements and Global Labour Governance: The European Union's Trade-Labour Linkage in a Value Chain World* (2020), at 126, 131–132.

[13] In other words, the link between GVCs, development and international economic law may not be as straightforwardly positive as the World Bank puts it when it says that 'deep trade agreements matter for economic development'. World Bank, *supra* note 10, at 18.

[14] Generally, social reproduction encompasses all the activities (paid and unpaid) that are necessary for the daily and generational reproduction of the population.

[15] 'Invisibilization' is used in this article to highlight the active nature of the process of labour devaluation, which, as will be argued in section 5 of this article, serves the purpose of accumulating economic rewards.

of economic rewards along global chains. From this angle, social downgrade appears not as an anomaly but, rather, an integral part of the trans/national system of value production. As section 5 argues, this different understanding of value production and distribution has implications beyond the current GVCD agenda as it calls into question the comparative advantage logic that informs trade law and policy.

Specifically, this lens enables us to see that the process through which firms and states become competitive is permeated by social inequalities and that the way workers, including migrants and women as well as the environment,[16] are treated and regulated is constitutive of what we call 'comparative advantage'. In other words, it helps us appreciate that, unless the contribution that workers (and the environment) make to the generation of value is properly acknowledged, treated and remunerated, its invisibilization and/or devaluation will continue to provide a source of competitiveness in the global economy. Section 6 brings this insight to bear on the substance of WTO-plus and extra rules, holding them to account for the way in which they affect our daily and generational reproduction.

The article therefore makes two specific contributions: the first is to the policy-research literature on GVCs and development, as it points to the need for GVCD research to take into serious consideration the qualitative work produced by scholars over the past three decades, particularly on women's, informal and migrant labour, which paints a different story from that presented in their reports.[17] Equally important is the need to scrutinize the substance of trade law: whilst these reports acknowledge the existence of inequalities and the need for states to address them, they hardly contemplate the possibility that international trade rules may generate/exacerbate them.[18]

The second contribution is to critical trade and development literature. Scholars have pointed out that the ratcheting up of the rights of multinational enterprises (MNEs), epitomized by the WTO agreements, has had profound implications for the regulatory autonomy of states, constraining their ability to provide social and environmental protection.[19] The article argues that WTO-plus and extra provisions may contribute to this process, intensifying the inter/national protection of lead firms' rights whilst constraining states' ability to redress inequalities – not necessarily by preventing states from regulating in the public interest but by enabling lead firms to govern economic relations, even in spite of state regulation, thereby also impacting

[16] This article does not deal with the relationship between value chain trade and environmental-related inequalities in any meaningful way, except for acknowledging the reliance of production and trade on environmental resources. See J.W. Moore, *Capitalism in the Web of Life* (2015).

[17] Some of this research has been produced by academics under the aegis of the World Bank. Their findings, however, are not engaged with in the GVCD reports.

[18] WTO researchers interviewed for this article acknowledge that it may be necessary to take labour adjustment measures given the impact of value chain trade on low-skilled labour. See also *GVCD Report 2019*, *supra* note 7, at 56–58. The role of trade law in producing these inequalities, however, is rarely acknowledged.

[19] See, e.g., Schneiderman, 'Investment Rules and the New Constitutionalism', 25 *Law and Social Inquiry* (2000) 757; Gill, 'Constitutionalizing Inequality and the Clash of Globalizations', 4 *International Studies Review* (2002) 47; Wade, 'After the Crisis: Industrial Policy and the Developmental State in Low-Income Countries', 1 *Global Policy* (2010) 150.

on the production, distribution and availability of resources.[20] Indeed, the article acknowledges that states' policy space is affected by a variety of legal and extralegal mechanisms, other than international law, that need to be scrutinized to understand how lead firms exercise power in GVCs.

The article argues that taking the substance of trade law seriously opens up a space where multilateral trade law can be re-imagined in ways that are more supportive of the well-being of actors involved in value chain trade. This is especially important at a time when responses to labour, social and environmental inequalities oscillate between the defence of the *status quo* that has contributed to them and withdrawal from the multilateral trade system, and multilateralism altogether, with the pursuit of competitive interests along nationalistic lines.

2 The 'GVCD' Agenda

The insistence on so-called developing countries to acknowledge and adjust to the prevailing development-related trade rationality is not something new within the international legal system.[21] One common issue with the various development agendas since decolonization, including the current one, is that the right to claim knowledge about the world (in this case, the world of value chain trade) has important material effects with regard to the way societies are regulated (in this case, through the WTO-plus and extra rules).

This article engages with the knowledge produced by the GVCD reports, reflecting on the international economic action – in particular, the form of trade regulation – to which this knowledge may give rise. It sees these reports as constructing an authoritative discourse about the nexus between GVCs and development that gets repeated, picked up and embedded in subsequent research, advice and policy-making, thereby

[20] There are ways in which trade and investment agreements can limit policy options – for example, as section 6 in this article shows, through the prohibition of performance requirements included in service and investment provisions or through the fear of litigation in relation to particular domestic measures when investor–state dispute settlement is contemplated in these agreements. Contracts between suppliers and lead firms can also shape economic conduct and may contribute to social downgrade despite the existence of social regulation; taxation and intellectual property (IP) law can shift resources transnationally, impacting on the ability of states to pursue policies of redistribution; and business practices, some of which are not necessarily regulated by law, are able to shape the formation of GVCs and the distribution of economic rewards in a way that also impacts on states' availability of resources. This is not to disregard states' role in the formation and operations of GVCs but, rather, to acknowledge that there are limits to the notion of the self-governing nation state. See Danielsen, 'Trade, Distribution and Development under Supply Chain Capitalism', in D. Trubek, A. Santos and C. Thomas (eds), *Globalization Reimagined: A Progressive Agenda for World Trade and Investment* (2019) 121. Two further aspects of business power that this article does not engage with are the roles of logistics and finance. See Chua *et al.*, 'Introduction: Turbulent Circulation: Building a Critical Engagement with Logistics', 36 *Environment and Planning D: Society and Space* (2018) 617, at 619; Ferrando, 'How Finance Structures Global Value Chains', 6 November 2020, available at https://lpeblog.org/2020/01/06/how-finance-structures-global-value-chains/.

[21] See A. Escobar, *Encountering Development: The Making and Unmaking of the Third World* (1995); S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2013).

shaping institutions' and states' mindset and conduct.[22] The focus of this section is on the assumptions that the GVCD agenda makes about the role of 'insertion', 'upgrade' and 'value-added' trade in the pursuit of development so as to scrutinize the link between these assumptions and the legal provisions that they are thought to justify. The first claim is that the nature of international trade has shifted significantly in the last four decades, necessitating different regulatory responses.

The GVC academic literature has seen the rise of global chains as a phenomenon linked with the outsourcing of production by lead firms in the global North to suppliers in the global South, which started in the 1970s and intensified in the 1990s,[23] thereafter witnessing a significant change, with lead firms and consumer markets extending beyond North America and Europe.[24] This phenomenon has given rise to a number of important questions about the qualitative difference with earlier commodity chains, resulting in different strands in the literature.[25]

The GVCD reports, however, use the term GVCs as a descriptive reality to point to a shift in the nature of trade – from 'classic' international trade based on the exchange of products manufactured largely within national borders to 'value chain' trade, consisting of exchange of parts, components and tasks. Gradually increasing from the 1980s onwards, the latter type of trade today accounts for 60–67 per cent of all global trade. The 2017 GVCD report acknowledges that most value chain trade takes places around three hubs (North America with the USA as its core, the European Union [EU] with Germany as its core and Asia with China),[26] and, indeed, it poses the question of whether at issue are regional, rather than global, value chains, also noting that the

[22] See Haas, 'Introduction: Epistemic Communities and International Policy Coordination', 46 *International Organization* (1992) 1. This does not mean that the knowledge produced by the research division of the WTO and World Bank necessarily translates into trade policy or regulation. Making such a claim would require empirically tracing how the reports' recommendations shape the design and adoption of agreements or policy reforms as well as following the implementation and impact on the ground. However, it is clear that the knowledge produced by these reports circulates in policy circles. As the authors of the World Bank's 2020 report have pointed out, data in these reports has been 'extensively employed for policy advice by the World Bank in several developing countries in Africa, Latin America, East Asia, and the Balkans'. World Bank, *supra* note 10, at 5. Also, as one delegate from least-developed countries put to me in the course of interviews conducted for this project, the knowledge produced by the WTO Secretariat and the research division informs their trade practice during negotiations, especially as many states are unable to produce independent research (on file with the author). Interviews for this project included members of the WTO research division and delegates from developing and least-developed countries in Geneva in February 2020. The article relies on mixed socio-legal methods combining desk-based research with semi-structured expert interviews.

[23] Barrientos, Gereffi and Pickles, 'New Dynamics of Upgrading in Global Value Chains: Shifting Terrain for Suppliers and Workers in the Global South', 48 *Environment and Planning A: Economy and Space* (*EPA: ES*) (2016) 1214.

[24] Gereffi, 'Global Value Chains in a Post-Washington Consensus World', 21 *Review of International Political Economy* (*RIPE*) (2014) 9; Kaplinsky and Farooki, 'Global Value Chains, the Crisis, and the Shift of Markets from North to South', in O. Cattaneo, G. Gereffi and C. Staritz (eds), *Global Value Chains in a Post-crisis World: A Development Perspective* (2010) 125.

[25] See P. Gibbon and S. Ponte, *Trading Down: Africa, Value Chains, and the Global Economy* (2005); J. Bair (ed.), *Frontiers of Commodity Chain Research* (2009).

[26] *GVCD Report 2017*, *supra* note 7, at 7.

proliferation of both has slowed down around the world.[27] However, the 2019 GVCD report sees value chain trade destined to increase in developing and least developed countries, provided that they adopt the appropriate regulatory framework that will enable their firms to insert into GVCs, so they technologically upgrade and move up the value ladder. This is also what the 2020 World Bank report recommends: trade policy reform consisting of service and investment liberalization, IPR protection and labour 'flexibilization' enable states to integrate in the world economy and get the resources they need to tackle the inequalities produced and sustained by globalization.[28] And there is evidence that agreements containing these provisions are on the rise: although the 'deepest commitments' have so far been included in agreements between developed countries, and the 'shallowest' are to be found in those between developing countries (with the exception of the Pacific Alliance signed in March 2021), a new dataset analysed by the World Bank shows that DTAs between developed and developing countries have been gradually increasing since 2010.[29]

The narrative about 'development' as 'insertion *cum* technological upgrade and greater value-capture' has become stronger, with participation in GVCs and value capture heralded as a 'new dawn for development'.[30] The first question therefore concerns the way in which 'development' and 'value added' are understood in these reports. Despite references to a 'new dawn', the concept of 'development' is still associated with the process of actively promoting export-oriented economic growth. What is unique to this development agenda is that export-oriented growth is to be achieved not through the establishment of a whole industrial base or the support of specific national sectors but, rather, through the creation of a regulatory environment that enables firms to specialize in parts, components and tasks so to link up with lead firms; upgrade thanks to the innovation made possible by their transfer of technology; and, eventually, move up the value-added ladder of economic activities, capturing greater economic gains.[31] The focus is therefore on increasing domestic value added. Domestic 'value added' refers to the share of domestic content – of what is produced nationally – that gets destined to export.[32] The assumption is that 'value added' will be shared between firms, through profits, and workers, through wages, consequently

[27] *Ibid.*, at 69, 37–38. And the growth is expected to be further reduced after the COVID-19 crisis as some states attempt to regain domestic capacity building in essential goods/services. See United Nations Conference on Trade and Development (UNCTAD), *The COVID-19 Shock to Developing Countries* (2020), available at https://unctad.org/en/PublicationsLibrary/gds_tdr2019_covid2_en.pdf.

[28] World Bank, *supra* note 7, at 5–6.

[29] For the list of developed–developing country DTAs in 2020, see World Bank, *supra* note 10, at 26–32 and, specifically, Annex Table O.A.1: Number of Provisions Included and Coverage Ratio – by Agreement. The authors of the handbook point to a high degree of similarity with regard to the 'depth' of provisions included in DTAs within each block because of what they call a 'template effect', 'where the EU, the US, and Japan tend to negotiate based on a template offered to third countries'. *Ibid.*, at 18.

[30] World Bank, *End of an Era? Global Value Chains, Trade and Development*, 17 October 2019, available at https://live.worldbank.org/end-era-global-value-chains-trade-development.

[31] WTO, *Global Value Chains*, *supra* note 1, at 24; *GVCD Report 2019*, *supra* note 7, at 15; World Bank, *supra* note 7, at 166.

[32] WTO, *Global Value Chains*, *supra* note 1, at 86–87; *GVCD Report 2019*, *supra* note 7, at 6.

increasing states' income through taxation. Increasing domestic value added is therefore key to the development potential of value chain trade. However, the 2019 GVCD report warns countries against policies aimed at increasing the share of domestic content through import substitution because substituting imported inputs – which are assumed to be cheaper and of better quality – with domestic inputs is thought to compromise the efficiency of the country's exports.[33]

Greater trade openness therefore becomes the recommended policy. The provisions that are considered necessary for expanding value chain trade consist of the reduction and preferably elimination of import tariffs, which are relatively higher in developing economies;[34] the protection of IPRs and other intangibles, which is seen as the precondition for knowledge transfer from lead firms to supplier firms;[35] the liberalization of services and investment, particularly the limitation of performance requirements that impose conditions on foreign investors that make their economic activity more costly;[36] and the fre(er) movement of capital.[37] The adoption of these rules is therefore predicated on the assumption that the insertion in GVCs of technological upgrade and value capture delivers 'development', which brings us back to the question of what the benefits of development *qua* export-oriented growth are in real terms.

If we take at face value the orthodox view that development has to do with growth, job creation and higher income,[38] we need to acknowledge that participation in value chain trade cannot be evaluated as an end in itself (as 'a measure of success of integration in the world economy')[39] but, rather, in relation to its effects on domestic economies, including employment and income distribution and, importantly, working and living conditions. Indeed, the 2019 GVCD report is more explicit and detailed than previous World Bank and WTO reports about these effects, claiming that participation in GVCs leads to higher employment, wages and national income for developing countries.[40] This is the main claim on which the value chain development agenda is based. And the 2020 World Bank report is adamant that, despite the social and environmental inequalities that may have been generated by GVCs, the link between participation in GVCs, employment, income and even poverty reduction is strong and needs to be sustained through appropriate regulation.[41] Both the WTO and the World Bank

[33] *GVCD Report 2019*, *supra* note 7, at 15, 58; World Bank, *supra* note 7, at 166.

[34] WTO, *Global Value Chains*, *supra* note 1, at 42; *GVCD Report 2017*, *supra* note 7, at 12; *GVCD Report 2019*, *supra* note 7, at 58, 134; World Bank, *supra* note 7, at 5.

[35] WTO, *Global Value Chains*, *supra* note 1, at 42; *GVCD Report 2017*, *supra* note 7, at 176; *GVCD Report 2019*, *supra* note 7, at 148; World Bank, *supra* note 7, at 6.

[36] WTO, *Global Value* Chains, *supra* note 1, at 42; *GVCD Report 2017*, *supra* note 7, at 11–12; *GVCD Report 2019*, *supra* note 7, at 95–96; World Bank, *supra* note 7, at 5–6.

[37] WTO, *Global Value* Chains, *supra* note 1, at 42; *GVCD Report 2019*, *supra* note 7, at 95; World Bank, *supra* note 7, at 4.

[38] *GVCD Report 2017*, *supra* note 7, at iii; *GVCD Report 2019*, *supra* note 7, at v; World Bank, *supra* note 7, at 66.

[39] WTO, *Preferential Trade Agreements*, *supra* note 1, at 10; WTO, *Global Value Chains*, *supra* note 1, at xv; *GVCD Report 2017*, *supra* note 7, at 17, 72.

[40] *GVCD Report 2019*, *supra* note 7, at 63.

[41] World Bank, *supra* note 7, at xi–xii.

have also been vocal about the benefits of GVC participation for women, including their increased participation in the workforce.[42]

The problem with this argument, as I demonstrate below, is that there is little unequivocal evidence that insertion into GVCs is resulting in firms in developing countries getting a higher share of the value added produced as a consequence of technological upgrade, especially if one looks beyond the so-called dynamic (and mainly Asian) emerging economies.[43] And even in the dynamic economies where 'technological upgrade' and greater value capture are believed to have taken place, it cannot be asserted that the increased share of rewards that firms have captured is going to workers or that it is translating into better working and living conditions, including for women. Indeed, there are two fundamental issues with the evidence upon which the GVCD reports rely. The first is that the available quantitative data concerning 'economic and social upgrade' is open to different interpretations and is therefore inconclusive. The second issue is that the qualitative analyses produced by academics and non-governmental organizations (NGOs) over the last three decades – specifically, those focusing on informal, migrant and women workers – are not taken into any systematic account. I take these issues in turn in the next section.

3 Technological Upgrade and Social Downgrade: The Evidence So Far

The first issue is that the studies referred to in the GVCD reports rely primarily on quantitative parameters, particularly employment levels and real wages.[44] Since they show that there has been an increase of both employment and wage levels when firms have integrated into GVCs and technologically upgraded – particularly, in developing countries – the 2019 GVCD report concludes that insertion and upgrade are key to development. This conclusion leads to the argument that changes in the regulatory environment are necessary to sustain this process. However, not all quantitative analyses reach the same conclusion. The most up-to-date comprehensive cross-sectoral study, which focuses on 30 countries and four chains, paints a more ambiguous picture. Thomas Bernhardt and Ruth Pollak define 'economic upgrade' as a mix of growth in export market shares and export unit values and 'social upgrade' as increases in sectoral employment and real wages.[45] They conclude that 'the promise of industrial upgrading through participation

[42] *GVCD Report 2019*, *supra* note 7, at 3, 67; World Bank, *supra* note 7, at 3–4.

[43] Y. Akyuz (ed.), *Developing Countries and World Trade: Performance and Prospects* (2003); Fischer, 'The End of Peripheries? On the Enduring Relevance of Structuralism for Understanding Contemporary Global Development', 46 *Development and Change* (2015) 700. There is, however, some evidence that suggests that South–South GVCs can be tools for promoting value added in global South countries, but this remains contested. See International Trade Centre, *The Power of Global Value Chains in the South* (2019), available at www.intracen.org/uploadedFiles/intracenorg/Content/Publications/Global%20South%20value%20chains_final_Low-res.pdf.

[44] See *GVCD Report 2019*, *supra* note 7, at 63–81 (Hollweg's chapter, in particular).

[45] Bernhardt and Pollak, 'Economic and Social Upgrading Dynamics in Global Manufacturing Value Chains: A Comparative Analysis', 48 *EPA: ES* (2016) 1220. They have analysed four global chains (apparel, wood furniture manufacturing, automotive, mobile phones) and 30 countries.

in GVCs does not materialize for everyone. Indeed, economic upgrading has taken place in just over a quarter of the countries in our sample, among them mainly developing countries. … [And] [o]verall upgrading, i.e. the concurrence of both economic upgrading and social upgrading, has therefore been rather scarce'.[46]

Besides arguing that the evidence about social and economic upgrade is not conclusive, Bernhardt and Pollak reflect on the inherent limitations of the parameters at issue (that is, employment and wage levels), and, by doing so, they show how they are poor indicators of economic and social welfare. They note that those developing countries that have increased their world export market shares have also seen 'decreasing unit values relative to industry averages'. This outcome can mean one of two things: either they have upgraded and become efficient in producing components in larger quantities but at lower prices, or lower prices are the result of lead firms exercising pressure on suppliers, with the latter finding it very difficult to upgrade. In other words, even for developing countries that have seen an increase in their exports, this increase does not imply that a larger share of the value added has been captured by their firms, and it says nothing about the share that is actually going to workers.

They make a similar observation regarding 'developed' economies that have 'experienced increased unit values with market share losses, and also employment decreases with wage increases'.[47] As they emphasize, this could point either to the fact that these economies are shifting production to fewer, higher value-added and better-paid sectors or to increasing inequality within the country with regard to the kind of production and the workers involved. This is a point that the 2019 GVCD report makes as well, acknowledging the negative effects of restructuring on low-skilled workers in the global North.[48] Bernhardt and Pollak's overall argument, however, is that these indicators allow researchers to 'neither identify the specific form of upgrading (or downgrading) nor the underlying factors that have driven a country's performance'.[49] Indeed, the data on wages does not say anything about firms' improvements in working or environmental conditions, and, importantly, data on employment does not include informal workers. This is a crucial point as informal firms and workers in many developing countries account for 70 per cent or more of the labour force, and the informal economy is also a domain where women and migrant labour are over-represented and 'where entitlements and social benefits are typically non-existent and labor laws not enforced'.[50] And as legal scholars have demonstrated, informality is also on the rise in the global North, despite being often portrayed as an exception to the formality rule of labour relations.[51] This is

[46] *Ibid.*, at 1238–1239.

[47] *Ibid.*, at 1239.

[48] *GVCD Report 2019*, *supra* note 7, at 45.

[49] Bernhardt and Pollak, *supra* note 45, at 1239.

[50] *Ibid.*, at 1240.

[51] As Diamond Ashiagbor has argued, informality takes place across the global North and the global South, despite prevalent narratives placing it in the latter. See Ashiagbor, 'Introduction: Narratives of Informality and Development', in D. Ashiagbor (ed.), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (2019) 1 at 1.

why, Bernhardt and Pollak conclude, 'case study literature is needed to shed light on more specific information hiding beneath [the] data'.[52]

To sum up, indicators such as employment and wage levels say little about the quality of working and living conditions. Indeed, once we move from the realm of quantitative indicators to that of qualitative analysis, social science scholars have found evidence of so-called social downgrade – that is, the deterioration of working and living conditions. This is the second problem with the evidence WTO/WB reports rely on. Benjamin Selwyn's survey of case studies conducted by NGOs regarding Cambodian garments and Chinese electronics, for example, paints a starkly different picture regarding pay and working conditions.[53] He finds that the benefits of recent wage increases in Cambodia have been neutralized by employers with the intensification of work and the reduction of non-wage benefits.[54] Across the sector, wage increases have also been accompanied by a reduction of fixed duration contracts from six to three months, and the number of these contracts has increased, with workers consequently losing many non-wage benefits. Overtime payments have also been reduced 'from double-time to only 30% above the normal working time wage rate'.[55] These findings resonate with research carried out in India: Alessandra Mezzadri's extensive study of the garment industry has traced the precarious conditions not only of workers in factories but also of those in workshops and homes that are linked to factories, emphasizing the depleting effects 'on the health and wellbeing of [these] multiple subjects'.[56]

A similar phenomenon can be observed in China where increases of minimum wages in electronics have been met with the intensification of the labour process so that the quantity of items that workers have to produce daily has skyrocketed. Also, 'workers are housed in dormitories with strict conditions; and some manufacturers are reducing workers' overall compensation by cutting worker subsidies, making them liable for work-place insurance and hiring interns', which do not appear in the employment figures.[57] And there are firms where interns account for the majority of the labour force. The point is that these deteriorating working conditions, including those of informal workers on which GVCs rely, are not taken into account in a quantitative analysis. This is a point that WTO researchers acknowledge in their chapter on 'advanced' economies, warning that the findings from the literature they survey have limitations in that they do not include informal workers.[58] This acknowledgement becomes more important in a global context where, as Nicola Phillips has pointed out, 'the MNC sector – which we could redefine as the structures of GVCs – incorporates

[52] Bernhardt and Pollak, *supra* note 45, at 1238–1239.

[53] Selwyn, 'Poverty Chains and Global Capitalism', 23 *Competition and Change* (2019) 71.

[54] *Ibid.*, at 84.

[55] *Ibid.*, at 84–85.

[56] A. Mezzadri, *The Sweatshop Regime: Labouring Bodies, Exploitation and Garments Made in India* (2017), at 15.

[57] Selwyn, *supra* note 53, at 88.

[58] Bacchetta and Stolzenburg, Trade, Value Chains and Labour Markets in Advanced Economies, in *GVCD Report 2019*, *supra* note 7, at 45.

vast swathes of the formal and informal economies to the extent that the distinction breaks down as a useful descriptor of the landscape of labour relations'.[59]

These qualitative studies therefore show that increases in real wages and employment levels can be accompanied by the intensification of work, the reduction of social entitlements and the increasing precarity that result in the worsening of working and living conditions of formal and informal labourers. This may not always be the case, and it is important to acknowledge that case studies do not allow researchers to generalize their findings given the specificity of the contexts they examine. However, the evidence about social downgrade is so abundant in the qualitative literature as to deserve proper attention,[60] certainly on a par with the quantitative indicators that are currently been relied on to make universal arguments about the beneficial impact of integration into GVCs.

To reiterate the point, qualitative studies show that employment and wage levels are poor indicators of workers' well-being, to say nothing of the 'environmental downgrade' to which they may contribute.[61] First, employment levels may increase with participation in GVCs, but this increase says nothing about the composition, duration and quality of employment. Second, official employment data does not account for the vast number of informal workers on which GVCs rely, many of whom are women and migrants.[62] Third, insertion in GVCs may lead to an increase in wages, but the effect of wage increases can be offset by the reduction of social entitlements.[63] Also, wage

[59] Phillips, 'Labour in Global Production: Reflections on Coxian Insights in a World of Global Value Chains', 13 *Globalizations* (2016) 594, at 598.

[60] See Palpacuer, 'Bringing the Social Context Back In: Governance and Wealth Distribution in Global Commodity Chains', 37 *Economy and Society* (2008) 393; Rammohan and Sunderasan, 'Socially Embedding the Commodity Chain: An Exercise in Relation to Coir Yarn Spinning in Southern India', 31 *World Development* (2003) 903; Raworth and Kidder, 'Mimicking "Lean" in Global Value Chains: It's the Workers Who Get Leaned On', in Bair, *supra* note 25,; Barrientos, Gereffi and Rossi, 'Economic and Social Upgrading in Global Production Networks: A New Paradigm for a Changing World', 150 *International Labour Review* (2011) 319; Prentice *et al.*, 'Health and Safety in Garment Workers' Lives: Setting a New Research Agenda', 88 *Geoforum* (2018) 157. The problems arising from 'social downgrade' have become apparent in the context of the current pandemic in the global North as well as in the global South as workers have been subject to life-threatening working conditions. See Labour behind the Label, 'Bohoo and COVID-19: The People behind the Profit' (2020), available at https://labourbehindthelabel.org/report-boohoo-covid-19-the-people-behind-the-profit.

[61] Although environmental degradation is acknowledged in World Bank, *supra* note 7, at xi.

[62] A. Barrientos and S. Barrientos, *Extending Social Protection to Informal Workers in the Horticulture Value Chain* (2002); Barrientos and Kritzinger, 'Squaring the Circle: Global Production and the Informalization of Work in South African Fruit Exports', 16 *Journal of International Development* (2004) 81; Barrientos, Kothari and Phillips, 'Dynamics of Unfree Labour in the Contemporary Global Economy', 49 *Journal of Development Studies* (2013) 1037; Meagher, 'Working in Chains: African Informal Workers and Global Value Chains', 8 *Agrarian South: Journal of Political Economy* (2019) 64; Hamada, 'Migrant Labour in Global Value Chains in Asia', in D. Nathan, M, Tewari and S. Sarkar (eds), *Labour in Global Value Chains in Asia: Development Trajectories in Global Value Chains* (2016) 212; Fudge, 'Global Care Chains, Employment Agencies, and the Conundrum of Jurisdiction: Decent Work for Domestic Workers in Canada', 23 *Canadian Journal of Women and the Law* (2011) 235.

[63] D. Nathan and V. Kalpana, *Issues in the Analysis of Global Value Chains and Their Impact on Employment and Incomes in India* (2007), at 10.

increases usually refer to national levels and do not present disaggregated data on gender, race and migration. Ultimately, case studies challenge the straightforwardly positive value added–development link on which the case for 'deeper commitments' is built. Thus, the case for 'deeper commitments' through WTO-plus and extra measures is built on a link between value capture and development that is very tenuous, even within the orthodox terms of the development discourse.

But there is another way in which these studies challenge the value chain trade–development narrative. They show that 'social downgrade' may happen not only in vertical chains, which are formed when the know-how from the North joins up with the low unit labour costs from the South. This is especially the case for commodity-intensive GVCs in which many low-income countries participate and which studies have now linked to new cycles of workers' exploitation, extractivism and environmental degradation.[64] Social downgrade also happens in so-called horizontal ones across both the global North and the global South.[65] Horizontal chains are supposed to be about 'complementarity in excellence', where what matters is not low-cost labour but, rather, productivity and innovation. Yet the fact that 'social downgrade' takes place in sectors like electronics in China, which are said to be characterized by relatively higher productivity when compared to natural resource, garment or food sectors, problematizes the argument about the need to endure harsh working conditions before achieving higher productivity that will then afford firms and workers better working conditions. Moving up the value-added ladder does not necessarily dispense with harsh working conditions. There is, therefore, a problem with the modernizing assumption that cheap labour is a natural 'comparative advantage' that countries have to temporarily 'exploit' in order to develop.

The question therefore becomes: how do we make sense not only of the inconclusive evidence about the link between upgrade, value addition and 'development' but also of the co-existence between social downgrade and technological upgrade that qualitative studies have revealed? One way to address this question is to produce richer empirical evidence – for instance, by devising more inclusive indicators.[66] Selwyn has reflected on the argument, frequently rehearsed by IEIs, that GVCs are lifting people out of poverty.[67] He has scrutinized the World Bank's dominant

[64] See A. Bowman *et al.*, *Mining in Africa after the Supercycle: New Directions and Geographies Area* (2021). R. Baldwin argues that, when chains originated in the global North in the 1950s–1960s, what mattered was 'complementarity in areas of excellence', which gave way to so-called horizontal chains. In contrast, so-called vertical value chains have developed between firms of the global North and global South as the know-how from the North joins up with the low cost of labour from the South (not so much in terms of wages but of unit labour costs). Baldwin, 'Global Supply Chains: Why They Emerged, Why They Matter and Where They Are Going', in WTO, *Global Value Chains*, *supra* note 1, 13, at 48.

[65] The case of electronics in China discussed by Selwyn, *supra* note 53, illustrates this point as the involvement of the Taiwanese-owned Foxconn, which employs over 1 million workers across China, has been linked to factory workers' suicide in 2010.

[66] See Perry-Kessaris, 'Prepare Your Indicators: Economics Imperialism on the Shores of Law and Development', 7 *International Journal of Law in Context* (2011) 401.

[67] World Bank, *supra* note 7, at xii. For a comprehensive critique, see J. Hickel, *The Divide: A Brief Guide to Global Inequality and Its Solutions* (2017).

conception of poverty – the so-called 'dollar-a-day' approach – and pointed out that this claim is possible because workers in most chains 'earn enough to consume above the World Bank-designed International Poverty Line (IPL) (currently $1.90 PPP 2015)'. However, the problem with this measure is that it does not consider workers' 'survival needs'. If the latter were taken into account – for instance, by adopting alternative concepts like the 'living wage' employed by the Clean Clothes Campaign and the Asian Floor Wage, we may indeed realize that most workers do not have their survival needs met through value chain employment.[68] This is why he concludes that we need to find out the percentage of GVCs where formal and informal workers do not get living wages and that to do so we need 'improvements in our ability to trace value formation, movement and capture throughout GVCs/GPCs'.[69]

It is worth noting that the WTO and the Organisation for Economic Co-operation and Development (OECD) have attempted to better trace the composition of value by devising the Trade in Value Added (TiVA) database.[70] TiVA allows for the decomposition of gross exports in domestic and foreign value added. This decomposition enables us to see what share of the value of a particular good or service destined to export has been produced in a particular country. The OECD is also currently working on mechanisms for tracing ownership to be able to distinguish between the share of the domestic value added produced by foreign firms and the share produced by domestic ones.[71] However, as a WTO statistician has confirmed, there are two main limitations: TiVA cannot provide a breakdown of the share of domestic value added going to workers (that is, labour) and that going to firms (that is, capital), and, importantly, it cannot provide disaggregated data by gender, migration status, duration and type of employment and working conditions.[72] Therefore, there are significant qualitative gaps in the data, which is why it is necessary to continue with case studies that can provide this kind of information.

The question becomes: how else can we make sense of the co-existence of economic upgrade and social downgrade? In the next section, I put forward a different lens for understanding this relationship, which abstracts from the context specificity of case studies. Its strength is that it speaks directly to the issues raised by them – in particular, the deterioration of working conditions and the presence of informal workers, migrants and women, which are fundamental aspects of GVCs that official data does not account for. It therefore 'resonates' with, and gives voice to, accounts that, at the

[68] As the Clean Clothes Campaign and Asian Floor Wage have put it, '[a] living wage should be earned in a standard working week (no more than 48 hours) and allow a worker to be able to buy food for herself and her family, pay the rent, pay for healthcare, clothing, transportation and education'. Clean Clothes Campaign, 'Calculating a Living Wage', in Selwyn, *supra* note 53, 71, at 74, available at https://cleanclothes.org/livingwage/calculating-a-living-wage.

[69] *Ibid*.

[70] See WTO, *Global Value Chains*, *supra* note 1, at xvi, 4.

[71] This information is important for understanding whether, in the presence of limitations on the repatriation of profits, the state can gain in terms of taxation, a point that I will return to in section 6 of this article.

[72] Interview with WTO statistician (on file with author).

moment at least, quantitative data cannot recognize by offering a narrative that links these aspects together, providing a more systematic sense of their relationship. This narrative may be seen as 'grand' since it concerns the world capitalist economy, and this is its important limitation. However, it is neither grand(er) than the IEIs' narrative, according to which GVCs deliver development and 'lift people out of poverty', nor meant to overshadow the discordant findings of case studies. Indeed, the narrative that this lens provides remains open to be challenged, confirmed and/or transformed by the rich context-specific accounts of case studies.

4 GVCs through a Social Reproduction Lens

In this section, I introduce a social reproduction lens through which to look at the global economy, including value chain trade, to shed a different light on the co-existence of economic upgrade and social downgrade. Viewed from this lens, 'social downgrade' appears not as an anomaly but, rather, as the norm and reflects the ways in which particular forms of labour (and environmental resources) are often treated, including through regulation, in processes of trans/national value creation. The argument I subsequently make (in section 5 of this article) is that trade theory, law and policy, including the current value chain development agenda, are predicated on a systematic invisibilization and/or devaluation of the contribution that particular kinds of labour make to the trans/national production of economic value. This invisibilization/devaluation is what enables value to be produced, accumulated and unequally distributed along GVCs, making the pursuit of development, according to its orthodox understanding of improved working and living conditions, unattainable.

Social reproduction can be understood as encompassing biological reproduction, including sexual, affective and emotional services; unpaid production of goods and services in the home and within the community; and the reproduction of culture and ideology, which are all aspects necessary for the daily and generational maintenance of populations.[73] There are two reasons that I focus on the work of feminist political economists.[74] The first is that these scholars have considered the separation between the sphere of economic production (where we produce goods and services) and that of social reproduction (where we re/produce the conditions of life), which is an essential feature of capitalism and, therefore, of our world economy. Their specific argument has been that, by making reproductive labour invisible and by devaluing or considering it non-productive of value, profits can be made and capital can accumulate. Therefore, their central point is that the separation between the two realms has

[73] See S. Rai, C. Hoskyns and D. Thomas, *Depletion and Social Reproduction* (2010), at 3.

[74] See, in particular, S. Federici, *Caliban and the Witch: Women, the Body and Primitive Accumulation* (2004); L. Fortunati, *The Arcane of Reproduction* (1995 [1981]); A. Picchio, *Social Reproduction: The Political Economy of the Labour Market* (1992); Elson, 'The Value Theory of Labour', in D. Elson (ed.), *Value: The Representation of Labour in Capitalism* (1979) 115; A. Mezzadri, 'On the Value of Social Reproduction' (2019), available at www.radicalphilosophy.com/article/on-the-value-of-social-reproduction; S. Natile, *The Exclusionary Politics of Digital Financial Inclusion: Mobile Money, Gendered Walls* (2020).

been at the heart of capitalism with its compulsion to generate profits and accumulate value.[75] The general point in relation to the value produced along GVCs is that it, too, relies on unremunerated and/or partially remunerated re/productive labour.[76]

This body of work becomes important for two further reasons: the first is that, despite their initial focus on domestic labour in the 1970s, these scholars soon realized there was a larger pool of unwaged labour (well beyond domestic labour) that, on the one hand, sustains the life process and, on the other, generates surplus value for capital.[77] Their argument therefore challenged the analytical and political privileging of wage labour in analyses concerning post/Fordist economies, showing that 'informality' was the rule and not the exception for the vast majority of people in the world. Today, the significance of informal and informalized labour in the global economy has become more apparent. As data by the International Labour Organization shows, this is the labour with which the majority of the world population engages.[78]

The second reason for drawing on this body of work is that it emphasizes the crucial role that social divisions and hierarchies play in processes of labour de/valuation and capital accumulation. In addition to gender, sexuality and class, scholars have shown how race, geography and migration status have been used to devalue certain types of labour in order to extract value. Since the 1990s, case studies have demonstrated how women's reproductive labour, informal labour and migrant labour have provided a subsidy to production under supply chains the world over.[79] This is the case not only in vertical value chains like minerals, garment and agriculture sectors where low unit labour costs are seen as the crucial factor in the linking up between firms but also in horizontal ones, increasingly characterized by formal and informal working arrangements in the global North as well as in the global South.[80]

The way informal labour and social hierarchies connect to processes of value creation and accumulation in each country is an empirical question. However, in abstract terms, we can appreciate the point that informal labour entails fewer guarantees and, therefore, lower costs. We can also contemplate that the devaluation of reproductive labour (both at home and in the market) as well as that of women, migrants and

[75] Such a concept of (capitalist) value departs from so-called subjective accounts that attribute value to consumers' preferences as it recognizes the centrality of labour in producing it (not as a universal and objective substance but, rather, as pertaining to the historically contingent form of capitalist production). It also goes beyond so-called objective accounts that see reproductive labour as the realm of 'non-value' as it regards it as inextricably linked to processes of value production and extraction. See D. Alessandrini, *Value-Making in International Economic Law and Regulation: Alternative Possibilities* (2016).

[76] See M. Waring, *If Women Counted: A New Feminist Economics* (1988).

[77] Salleh, 'From Metabolic Rift to Metabolic Value: Reflections on Environmental Sociology and the Alternative Globalization Movement', 23 *Organization and Environment* (2010) 205.

[78] 85.8 per cent in Africa; 71.4 per cent in Asia and the Pacific; 68.6 per cent in the Arab States; and 53.8 per cent in the Americas. International Labour Organization (ILO), *Women and Men in the Informal Economy: A Statistical Picture* (2018), available at https://www.ilo.org/global/publications/books/WCMS_626831/lang--en/index.htm.

[79] Kabeer, 'Globalization, Labor Standards, and Women's Rights: Dilemmas of Collective (In)Action in an Interdependent World', 10 *Feminist Economics* (2004) 3; Palpacuer, *supra* note 60; W.A. Dunaway, *Gendered Commodity Chains: Seeing Women's Work and Households in Global Production* (2013).

[80] Ashiagbor, *supra* note 51.

ethnically minoritized groups translates into more profit opportunities – for instance, through informalization, feminization, segregation and pay gaps, which are in turn supported by a mix of social norms and inter/national laws.[81] Social divisions such as gender, race and migrant status remain key to the devaluation of particular kinds of labour and the overvaluation of others. For example, we can think of care construed as intrinsically low skilled / slightly productive, on the one hand, and of branding, design and marketing, constructed as high skilled / highly productive, on the other. And we encounter this process of 'de/overvaluation' in discussions about the so-called 'smile curve', which is supposed to 'rationally' explain what activities attract more value in different stages or segments of production and to which stages/segments companies should aspire to upgrade.[82]

A social reproduction lens invites us to question this hierarchy and to consider the de/overvaluation of certain kinds of labour along the chains – indeed, the very setting of 'production tangible activities', which are performed by the majority of people against research and development, design, logistics, after-sale services and marketing activities, which are performed by the minority – as a political rather than an objective and rational economic process.[83]

At an abstract level, therefore, a social reproduction lens sheds light on the fact that the value created along GVCs owes its existence much more to labour (and the environment) than to 'innovation', as assumed by mainstream GVC literature, and to the fact that a share of this value is systematically invisibilized or devalued so as to be appropriated by capital.[84] Concretely, this means that workers and those who support them are only partially remunerated, or not remunerated at all, for their labour, which raises the twofold question of who benefits from the gains created along GVCs and how this unequal distribution happens. Before moving to the question of benefits, I want to pause on the challenge this different understanding of value production brings to conventional accounts of value added that are employed by the policy research literature. To recap from section 2, this literature considers value added, at the national level, as the share of exports that is produced domestically and, at the level of market entities, as the sum of wages and profits. Whichever concept is adopted, this literature views an increase in domestic value added as beneficial to the development and well-being of states and people because it associates it with higher rates of employment and wages and, consequently, with higher income for firms, workers and states. These are the reasons why IEIs encourage states to increase this share, including through the adoption of 'deeper commitments'.

[81] Immigration, family, inheritance, labour and taxation law are some examples, but international trade law plays a role too and not only through IP law, which, as the smile curve discussion below illustrates, constructs the domain of supposedly innovative, mostly immaterial, labour as highly valued and pits it against a supposedly imitative, mostly material (and, therefore, low-valued) labour with which the majority of the world's population is involved. As section 6 in this article shows, commitments in trade agreements such as those on tariffs, services and investment can also devalue or squeeze reproductive labour – for instance, by limiting access to, and employment in, public services and subsistence agriculture, by restricting affordability and availability of relatively cheap drugs and so on.

[82] The 'smile curve' was originally introduced by Acer's founder Stan Shih in the mid-1990s.

[83] Robinson, 'The Second Crisis of Economic Theory', 62 *American Economic Review* (*AER*) (1972) 1; G. Bhattacharyya, *Rethinking Racial Capitalism: Questions of Reproduction and Survival* (2018).

[84] Baglioni, Campling and Hanlon, 'Global Value Chains As Entrepreneurial Capture: Insights from Management Theory', 27 *RIPE* (2019) 903.

As already seen, however, this line of reasoning is flawed. As for the benefits allegedly accruing to workers, it can be argued that increases in employment levels and wages say very little about workers' well-being and that 'social downgrade' can happen at the same time as workers receive higher wages. As for the benefits potentially accruing to states, it is problematic to claim that an increase in the share of domestic value translates into benefits in terms of taxation. Indeed, as David Quentin and Liam Campling have shown, value added remains 'blind to the further distributional effects of the tax system of the jurisdiction in which the value added arises'.[85] In other words, profits may be shifted away from those countries where value is actually produced.

But there is a more fundamental problem that a social reproduction lens reveals. Even if it became possible to distinguish between the share of domestic value added that goes to workers and that which goes to firms, conventional understandings of value added do not contemplate the possibility that value might be created elsewhere in the chain and be 'merely captured rather than substantively "added" by any firm in which it arises'.[86] Here, we return to the question about the distribution of benefits generated along GVCs. If increases in value added are not translating into benefits for workers in terms of better wages and working conditions – and, for states, in terms of taxation – they are arguably accruing to firms and to lead firms in particular: a point that the World Bank has acknowledged, claiming that '[t]he concentration of trade in a few importing-exporting firms is extreme'.[87]

Indeed, the 'chain governance' strand of GVC literature has demonstrated that the power of lead firms, most of which are MNEs located in the global North, has increased exponentially in the last four decades. This process has led to what the 2017 United Nations Conference on Trade and Development's report has defined as 'a new form of global rentier capitalism to the detriment of balanced and inclusive growth for the many', where living and working conditions deteriorate and 'the winner takes most'.[88] Scholars have analysed how this increase in power has taken place. As some have argued, a characteristic of lead firms that has emerged from the competitive pressures of the 1970s is the power to restrict or set the terms of entry to the market by smaller firms, thereby affecting production directly.[89] Others have highlighted the plurality of mechanisms through which dominant firms have come to exercise control

[85] Quentin and Campling, 'Global Inequality Chains: Integrating Mechanisms of Value Distribution into Analyses of Global Production', 18 *Global Networks* (2018) 33, at 34.

[86] *Ibid.*

[87] World Bank, *supra* note 7, at 30.

[88] UNCTAD, *Beyond Austerity: Towards a New Global Deal* (2017), at 119, 125. The 2018 *World Inequality Report* found that the top 10 per cent of earners capture a significant and increasing proportion of the national income: 37 per cent in Europe, 41 per cent in China, 46 per cent in Russia, 47 per cent in the USA and Canada, 54 per cent in Sub-Saharan Africa, 55 per cent in Brazil and India and 61 per cent in the Middle East. Since 1980, the share of national income accounted for by the top 10 per cent of earners has risen in nearly all countries. F. Alvaredo *et al.*, *World Inequality Report 2018* (2018), at 9–10, available at https://wir2018.wid.world/.

[89] Baglioni, Campling and Hanlon, *supra* note 84.

over geographically dispersed production without direct ownership.[90] One important legal mechanism for understanding how the squeeze of productive and reproductive costs takes place is contracts: case studies have shown supplier firms are often under pressure to meet expectations set by big buyers, particularly in terms of prices and delivery times, to the point where the improvement of pay and working conditions is virtually impossible, even when there have been improvements in private standards, including labour, health and safety.[91]

Another important area concerns rights over intangibles. Cédric Durand and William Milberg, for instance, have illustrated the efforts by lead firms to capture market power through the creation of intangible assets, which states then protect through IPRs, which the WTO's TRIPs Agreement 'multilateralized' in 1995.[92] They show how 'the share of intangibles in the value of final products has increased over the last two decades' and how power over these intangibles is concentrated in lead segments of the chains benefiting particular lead firms and states.[93] This means not only that lead firms have been so far able to capture most of the gains but also that the value produced somewhere in the chain can be captured by lead firms located somewhere else thanks to their quasi-monopoly market power.[94] This power is sanctioned by law and reinforced by social divisions that naturalize particular ways of de/overvaluing certain kinds of labour. Critical legal scholars have started to map out the plurality of legal arrangements though which this power is exercised: they include, in addition to contract and IPRs, standards, tort, competition and taxation law.[95] I would like to add another dimension to this important debate that has been less scrutinized so far and this is the role that international trade (and investment) law – in both its ideational dimension and its concrete rules – plays in the process of trans/national value creation and capture.

5 Comparative Advantage and Social Reproduction

International trade law is based on the free trade assumption that countries trade with one another because they have different competitive advantages and that, as a

[90] Hymer, 'The Efficiency (Contradictions) of Multinational Corporations', 60 *AER* (1970) 441; Hymer, 'The United States Multinational Corporations and Japanese Competition in the Pacific', in R. B. Cohen *et al.* (eds), *The Multinational Corporation: A Radical Approach* (1979) 162; Gereffi, Humphrey and Sturgeon, 'The Governance of Global Value Chains', 12 *RIPE* (2005) 78.

[91] Smith *et al.*, *supra* note 12; Salminen and Rajavuori, 'Transnational Sustainability Laws and the Regulation of Global Value Chains: Comparison and a Framework for Analysis', 26 *Maastricht Journal of European and Comparative Law* (2019) 602.

[92] C. Durand and D. Milberg, *Intellectual Monopoly in Global Value* (2018); Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, 1869 UNTS 299.

[93] Patents and international trademarks are still concentrated in specific countries (Japan, USA and EU), which account for 82.5 per cent of patents registered in 2013. This represented a reduction from a previous share of 93 per cent in 2000, but 'among developing countries only China made its way to the top ten and still accounts for just 3.5 per cent of these patents'. Durand and Milberg, *supra* note 92, at 15.

[94] See Quentin and Campling, *supra* note 85, at 34.

[95] G. Baars *et al.*, 'The Role of Law in Global Value Chains: A Research Manifesto', 4 *London Review of International Law* (2016) 57.

consequence, all countries gain from trading with one another not only in material terms – as they have access to more and cheaper goods and services – but also in terms of employment and, as argued more recently by the WTO, gender equality.[96] These aspects are considered positive externalities or beneficial consequences of trade liberalization. Thus, WTO law, as well as the law of PTAs and DTAs,[97] is built on this mindset.

The problem with this assumption is that the acquisition of comparative advantage – the way in which states and/or companies come to be competitive in producing/performing some things or activities – is a process already permeated by social inequalities (that is, gender, race, class, geography and so on). As feminist economists have argued, underpinning gender inequalities in the labour market, for instance, is the pursuit of comparative advantage by avoiding to pay the full costs of the reproduction of the labour force.[98] This pursuit can take different forms: firms may select workers with little or no caring responsibilities, and they may establish themselves or, as it is increasingly the case, sign contracts with companies based in jurisdictions where they pay less tax to support public education and health services or where environmental regulation allows them to appropriate what Jason Moore calls 'cheap natures' – that is, a rising stream of low-cost food, energy and raw materials.[99]

Contracts themselves have become tools through which to squeeze re/productive labour costs; as mentioned above, terms regarding prices and delivery times effectively 'force' supplier firms to worsen working conditions by intensifying the work process, reducing social entitlements and/or introducing competition between formal and informal workers.[100] Granted, historic, political, cultural, economic and social factors all contribute to the re-production of gender and other inequalities and in ways that are context specific. However, trade law plays a role too, although the ways in which it interacts with these specific contexts, and the effects it gives rise to, are empirical questions. In abstract terms, however, we can appreciate that it is because of agreements liberalizing trade and investment regimes that companies have been able to offshore production to 'low-cost locations' and states have been able to present 'low unit labour costs' as sources of competitiveness and development.[101] And, as section 6 in this article shows, trade rules on tariffs,

[96] WTO, *Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017* (2017), available at www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf.

[97] From 50 in 1995 to 279 in 2015. *GVCD Report 2017*, *supra* note 7, at 12.

[98] I. van Staveren *et al.*, *The Feminist Economics of Trade* (2007); N. Folbre, *Valuing Non-market Work* (2015); Folbre, 'The Care Penalty and Gender Inequality', in S. Averett *et al.*, *The Oxford Handbook of Women and the Economy* (2018) 749.

[99] Moore, *supra* note 16; see also R.C. Patel and J.W. Moore, *A History of the World in Seven Cheap Things: A Guide to Capitalism, Nature and the Future of the Planet* (2018).

[100] For the centrality of contracts in global chains, see Perrone, 'Speed, Law and the Global Economy: How Economic Acceleration Contributes to Inequality and Precarity', 33 *Leiden Journal of International Law* (2020) 557.

[101] As feminist economists have pointed out, traditional trade agreements have mixed effects on women and minority racial and ethnic groups: they can be a source of formal employment, higher wages and better working conditions when coupled with domestic reforms that enable access to public services, social security, property, land and credit. See van Staveren *et al.*, *supra* note 98. However, as this article also argues, women's inclusion in export sectors and GVCs does not necessarily translate into decent working and living conditions. This is because increases in employment levels can be accompanied by the intensification of work, unsafe working conditions and the reduction of social entitlements, resulting in heavier workloads in the household and within the community.

services, investment and IPRs can impact – in different and context-specific ways – the ability of populations to support their daily and generational needs.

A social reproductive lens therefore enables us to see that the way in which workers and the environment are treated and regulated – not only though treaties but also through private and soft law orderings like contracts – is constitutive of what we call comparative advantage rather than being a mere consequence or externality. This insight sheds a different light on the reasons why 'social downgrade' takes place even when there is technological upgrade. From this perspective, 'social downgrade' is not an anomaly: it is integral to the way in which capital accumulation takes place. More precisely, it is integral to the way it has taken place since the 1970s when the breakdown of the pact between capital and labour in the global North,[102] and the defeat of the attempt by countries of the global South to introduce a New International Economic Order,[103] resulted in the intensification of international competition and the technology-enabled fragmentation of production, of which GVCs are part.

This is not to say that all lead firms are currently involved in practices of value 'capture' (that is, appropriating value through the de/overvaluation and informalization of particular forms of labour). It is also not to imply that the effects of trade liberalization on workers are the same in time and space; indeed, they differ depending on countries, sectors and many other factors.[104] It is however to say that the space for firms to depart from these practices is severely limited under global competition[105] and, as mentioned earlier, that it is up to case studies to provide us with examples of different commercial practices so as to invalidate/question/transform this narrative. The importance of this narrative is that it enables us to take seriously the phenomenon of 'social downgrade' and the reliance of many GVCs on re/productive labour and informal workers. These are aspects that official data is still unable to account for. It consequently allows us to ask: what would it mean to consider working and living conditions as constitutive, rather than consequences, of 'comparative advantage'?

Addressing this question requires a change of focus in trade theory, law and policy, and this shift is both a conceptual and a practical exercise. There are indeed concrete ways of putting decent working and living conditions at the centre of international trade activity, and one way – which I focus on in the remainder of this section – is to challenge the way 'labour', 'sustainable development' and 'gender equality' provisions are currently regulated as separate chapters in trade agreements.[106] The problem with this separation is that it leaves intact the substance of 'commercial provisions' and

[102] Fudge, 'The Future of the Standard Employment Relationship: Labour Law, New Institutional Economics and Old Power Resource Theory', 59 *Journal of Industrial Relations* (2017) 374.

[103] A. Getachew, *World Making after Empire: The Rise and Fall of Self-Determination* (2019).

[104] M. Jansen and E. Lee, *Trade and Employment: Challenges for Policy Research* (2007).

[105] See Ashwin, Kabeer and Schuβler, 'Contested Understandings in the Global Garment Industry after Rana Plaza: Contested Understandings', 51 *Development and Change* (2020) 1296.

[106] The WTO and preferential trade arrangements (PTAs) understand women's increased participation in the labour force (particularly entrepreneurship) as a measure of gender equality even though there are numerous studies that show that women's movement to formal employment does not necessarily improve their working and living conditions. See the *Declaration on Joint Declaration on Trade and Women's Economic Empowerment*. WTO, *supra* note 96.

their supremacy over non-commercial ones, contributing to the process of invisibilization that I have explored above. This supremacy is what we see at play in the 2020 World Bank report, which claims that enacting WTO-plus and extra provisions is the *conditio sine qua non* for ensuring social and environmental protection.

Let us take the relation between 'labour' and 'commercial' provisions to illustrate this point. Several studies have attempted to assess the effectiveness of labour provisions included in trade agreements. In their recent survey of the literature on US and EU treaties, Adrian Smith and colleagues have shown how, whatever changes to domestic regulation may have happened as a result of treaty activity, there is yet no clear causal evidence that these changes have improved the 'lived experiences of workers'. Their own eight-year-long investigation into whether labour provisions in EU treaties with Korea, Moldova and Guyana have generated regulatory change and improved working conditions in the sectors analysed has concluded that they have not and, also, that working conditions have in many instances deteriorated.[107] They are clear that their findings cannot be generalized because they are specific to the workers, sectors and countries that they have examined – each with different extra-treaty factors playing a role – although one recurrent factor is the mismatch between the core labour standards included in these treaties and the specific needs of workers on the ground.[108]

There are two further insights from their investigation worth mentioning. The first is that, in all three cases, firms have increasingly relied on informal, migrant and women's labour; the second is that the commercial provisions of these agreements have ended up taking priority over workers' rights as states have had to deal with the legally binding obligation to liberalize trade.[109] The pressure on states and firms to abide by the 'commercial provisions' of these treaties (to say nothing of the private contracts signed between firms) and the increasing reliance on devalued forms of labour speaks exactly to the point that, unless the contribution that workers make to the generation of value

[107] Smith *et al.*, *supra* note 12, at 120, 121. Their innovative methodology has consisted of a two-step approach. They have first identified those export industries in EU trade partners that it was reasonable to expect would be affected by the PTA provisions (that is, sugar in Guyana, automobiles in South Korea and clothing in Moldova). They have then looked at the negotiations, implementation and compliance stages to assess the effects of both the civil society consultation mechanisms for workers' rights included in the PTAs and the effect of both these mechanisms and the labour provisions on workers in these sectors. In the context of the EU–Colombia–Peru and EU–Vietnam FTA negotiations, it was shown that labour standards were lower during the implementation of those agreements. Trade Agreement between the European Union and its Member States, of the one part, and Colombia and Peru, of the other part O J L 354, 21 Dec. 2012, p3-2607; Free Trade Agreement between the European Union and the Socialist Republic of Vietnam O J L 186, 12 June 2020, p3-1400.

[108] Smith *et al.*, *supra* note 12. The protection of 'core labour standards' such as freedom from discrimination, forced labour and child labour and collective bargaining may not be tailored to the labour needs of the country.

[109] *Ibid.*, at 132. For instance, they showed how, through tariff reduction and other 'commercial provisions', the agreement between Moldova and the EU not only consolidated Moldova as a provider of low-cost labour for EU firms but also, and despite including labour protection provisions, resulted in the weakening of the labour inspectorate, intensification of work, routinized overtime and pressures by employers' associations to reduce the costs of maternity leave and sick pay. These are all ways though which to squeeze, by invisibilizing and devaluing, both productive and reproductive labour.

is properly acknowledged, treated and remunerated, its invisibilization and/or devaluation will continue to provide a source of competitiveness in the global economy (that is, keeping costs down for many firms and increasing profits for few lead firms).

How else, then, can this contribution be acknowledged in international trade regulation so that 'employment', 'environmental protection' and 'gender equality' concerns – to use the terminology of these treaties – can transform the substance of 'commercial provisions'? One example of the latter provisions is provided by the 'deeper commitments' that IEIs encourage states to adopt. If we start from the premise that the composition and conditions of re/productive labour vary from country to country, depending on gender, class, race, ethnicity, migration flows and so on, then uniform and universal labour regulation through multilateral trade rules is undesirable, particularly when linked to trade sanctions.[110] What is possible and necessary, however, is to hold the 'commercial provisions' of trade treaties to account, and we can start by scrutinizing their effects on working and living conditions. A further step would involve rethinking trade treaties and international economic relations more broadly from the standpoint of social reproduction, putting decent working, environmental and living conditions, rather than global competition and capital accumulation, at the centre of trade policies.

6 Holding WTO-plus and Extra Provisions to Account

In this section, I provide an illustration of what the first step of such an approach would look like by reference to some of the WTO-plus and extra provisions that the GVCD reports encourage states to adopt. These provisions have been selected because their significance for working and living conditions is most readily discernible. An observation needs to be made first. This practical exercise brings to mind so-called impact assessments: economic assessments of trade agreements that already exist and have been subject to critique and refinement by feminist economists.[111] Certainly, more work is needed to improve the ability of, for example, equality impact assessments to account for the ways in which gender interacts with other inequalities such as ethnicity, class, age, language, religion, immigration status, disability and so on to devise 'intersectional impact assessments'.[112] *Ex ante* and *ex post* intersectional

[110] Naila Kabeer, for instance, has argued 'for or a universal social floor that would protect the basic needs of all citizens, regardless of their labor market status, instead of a social clause that would only serve the needs of a minority'. Kabeer, *supra* note 79, at 4.

[111] Computable generable equilibrium modelling has been used since the early 1970s to predict the economic impact of proposed trade policies. Feminist economists have tried to develop alternative models that take into account how changes in trade policy affect men and women differently, considering their different roles in society. They have relied on so-called social accountability matrices to capture all transactions (market-based and household-based activities, including care and leisure) between sectors and institutions in a particular economy. See A. Roberts and S. Trommer, *Gender Impact of Trade and Investment Agreements* (2019), available at https://wbg.org.uk/analysis/uk-policy-briefings/gender-impacts-of-trade-and-investment-agreements/.

[112] Women's Budget Group, *Equality Impact Assessment* (2020), available at https://wbg.org.uk/analysis/uk-policy-briefings/2019-wbg-briefing-equality-impact-assessments/. In addition to intersectional impact, meaningful equality impact assessment should include the impact on individuals as well as households, the impact over a lifetime and the impact on unpaid care.

analyses may help us to get a better sense of the diverse impacts of trade and investment rules on different groups within each country and monitor the consequences of these rules throughout the lifetime of agreements, paying attention to their effects on standards and regulations in non-trade policy areas such as work, care, health, social protection, food safety, education, essential services and so on. However, the point of the sketchy illustration provided below is to show that social reproduction considerations can be made an integral part of the conceptualization, design, implementation and monitoring of trade and investment agreements and international economic law more broadly. Social reproduction as an approach or method, in other words, can be made integral to trade theory, law and policy.

A *Tariffs Reduction*

Most tariffs have been reduced during the negotiating rounds of the General Agreement on Tariffs and Trade (GATT) and the WTO Agreement, although developing states have, on average, relatively higher tariffs on industrial products.[113] The GVCD argument is that import/export tariffs need to be reduced and possibly eliminated if better integration by developing countries' firms is to be achieved. This is because tariffs translate into higher costs for firms, especially for those that import inputs that go into the manufacturing of goods destined to be exported, thereby making the latter more costly and less competitive, in turn reducing opportunities for linking up with transnational firms.

What this argument does not acknowledge, however, is that the reduction of tariffs may entail less revenue for states, which affects their ability to provide essential public services and, in turn, impacts on working and living conditions. In some states, this reduction has a particular impact on women who are the principal users of such services. It may be that the loss of revenues does not occur because tariff reduction translates into more parts, components and goods being imported, which results in higher employment and income from taxation. However, section 3 of this article has pointed to the lack of solid evidence concerning the beneficial effects for workers in terms of higher income and better working conditions as well as for states in terms of income from taxation. Thus, rather than assuming the universal beneficial impact of tariff reduction, a social reproduction approach would ask: how is the ability of states to provide essential services affected by the reduction of tariffs? And what kinds of jobs are created as a result of the linking up with global chains (that is, what is the quality of working conditions, duration of employment and so on)?

B *Agricultural Liberalization*

The rules of the GATT and the WTO Agreement on Agriculture[114] have long assumed that developing countries have a 'comparative advantage' in the production and export of agricultural products, which today can be better 'exploited' through

[113] General Agreement on Tariffs and Trade 1994, 55 UNTS 194; Agreement Establishing the World Trade Agreement 1994, 1867 UNTS 154.

[114] Agreement on Agriculture 1994, 1867 UNTS 410.

participation in food and horticulture chains. The argument is that small-scale farmers, including women, and small enterprises will benefit from the elimination of agricultural protectionism in countries of the global North. Evidence from previous waves of liberalization, however, has shown that in many cases agribusinesses, rather than small farmers, have gained from liberalization.[115] In some cases, cheaper imports have forced out of the market subsistence farmers, many of whom were women, who have had to seek employment in the export sector, where working conditions have not necessarily resulted in improved living conditions.[116] Studies have shown, for instance, that women's entry into the labour force (usually in export sectors) has often been accompanied by a decrease in the care they provided at home or in the community.[117] And when additional resources are not provided by states to support the reproductive labour that is needed for our daily and generational maintenance, working and living conditions deteriorate. At the very least, a social reproduction approach would ask: how are the benefits from liberalization being distributed between small farmers and agribusiness? How does agricultural liberalization affect the working and living conditions of subsistence/small farmers and the employees working for agribusiness, many of whom are women and migrant workers?[118] More broadly, how sustainable and desirable are export-oriented agricultural sectors and food chains where eight companies control 90 per cent of our food supply globally?[119]

C *Services Liberalization*

The General Agreement on Trade in Services requires states to progressively liberalize their service sectors.[120] The GVCD reports argue that the movement of services (transport, business, finance, telecommunication, logistics and so on) is as important as the movement of goods since services are embedded in almost all stages of production and, therefore, that there can be no integration into GVCs without further liberalization of services. Developing countries, in particular, are regarded as not having made adequate

[115] See M. Trebilcock, R. Howse and A. Eliason, *The Regulation of International Trade* (2012).

[116] Or migrate to countries of the global North to provide care and send remittances back home. However, it is also important to recognize that for many women access to export sectors has meant access to work 'with dignity'. Kabeer, *supra* note 79, at 4.

[117] See R. Bergan, *Gender Equality and Trade: Recent Developments and Ways Forward* (2018); see also S. Hardefeldt, *Patriarchy and Profit: A Feminist Analysis of the Global Trade System* (2019).

[118] In Italy, for example, 1,200 orange pickers that supply the Italian market are all migrants living in the most exploitative conditions. See V. Nicolosi, 'I dimenticati di Losarno tra paura e non lavoro', 1 April 2020, available at https://ilmanifesto.it/i-dimenticati-di-rosarno-tra-paura-e-non-lavoro/.

[119] This is a system where domestic agricultural sectors produce very little of the food their populations eat, while relying on just-in-time supply chains and production methods that are damaging to the environment and human health. See T. Lang, 'Diet, Health, Inequality', *The Guardian*, 20 March 2020, available at www.theguardian.com/environment/2020/mar/22/tim-lang-interview-professor-of-food-policy-city-university-supply-chain-crisis. For an insightful account of the role financial actors play in structuring food chains, see Ferrando, 'Financialisation of the Transnational Food Chain: From Threat to Leverage Point?', 9 *Transnational Legal Theory* (2018) 9, at 3–4.

[120] GATS, *supra* note 8.

liberalization commitments to enable their firms to successfully insert in GVCs. They are therefore being encouraged to adopt measures consisting of (i) the adoption of the so-called negative list approach to liberalization and (ii) the full commitment to National Treatment (NT) and Market Access (MA) rules.[121] When states adopt the negative list approach, they commit to liberalizing all service sectors unless they have listed specific exceptions. This means that, unless they have explicitly excluded health and education, for example, these sectors will be subject to rules such as NT and MA. NT is the obligation to treat foreign service providers no less favourably than domestic providers, which therefore prevents states from according any preferential treatment – for instance, subsidies to domestic service providers. And when states bind themselves to MA they can no longer limit the number of foreign providers, the share of foreign equity, the value of the service provided and the kind of legal entity required to operate in their country (that is, a joint company or cooperative).

These rules have been the subject of intense scrutiny by scholars and civil society who have highlighted the risk of marketization and privatization of public services as well as the limitation of the right to regulate in the public interest.[122] A social reproduction approach would require us to first acknowledge that services contribute to our daily and generational maintenance. Public services like health, education and social care, in particular, complement social reproductive activities that are carried out at home or in the community. Any limitation on these services disproportionately affects women's lives because they are the main users and workers in many of these sectors and because they remain the main providers of unpaid labour when these services are reduced.[123] Such an approach therefore enables us to ask: what are the consequences of the adoption of these rules for the ability of states to provide these services and/or to guarantee their quality, geographical reach and affordability?[124]

D *Investment Liberalization*

The WTO Agreement on Trade-Related Investment Measures has not adopted a multilateral agreement on the definition of investment, the standards of treatment of foreign investors and the rules on expropriation and dispute settlement, as these areas have been a matter of contention since decolonization between developed and developing countries.[125] The GVCD reports, however, argue that integration in GVCs

[121] *Ibid.*, Arts XVI, XVII.

[122] K. Fernandez-Stark, V. Couto and P.S. Bamber, *Background Paper for WBG-WTO Global Report on Trade and Gender: How Can Twenty-First Century Trade Help to Close the Gender Gap? - Industry 4.0 in Developing Countries: The Mine of the Future and the Role of Women* (2019).

[123] *Ibid.*

[124] A related question concerns the current negotiations under GATS, *supra* note 8, Art. VI.4, which affect states' right to regulate as they are meant to adopt standards against which to assess 'domestic regulations'. A standard that is being discussed is the 'necessity' test. This would translate into an obligation for states to adopt domestic regulations that are 'no more trade restrictive than necessary'. This standard may have 'chilling' effects on the ability of states to determine appropriate social, health-related, environmental and labour standards/rights.

[125] Agreement on Trade-Related Investment Measures 1994, 1868 UNTS 186; M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (2015).

requires the adoption of more stringent protection of investors' rights so they can safely invest in other states in the knowledge that their property will be protected. Stronger protection is assumed to make them more willing to contract out production to firms in host states. As a consequence, an increasing number of DTAs include investment provisions that consist of, in addition to the 'negative list' approach and NT that apply to services, a number of other features that affect the policy space of states.

The prohibition of performance requirements, for instance, prevents states from imposing local content and the transfer of technology requirements on foreign investors and limits on their repatriation of profits. These are measures states have employed in the past to make sure investments were beneficial to their economies by accessing material resources such as technology, know-how and a share of the profits. Technology transfer and increased income for states are also the presumed benefits deriving from participation in GVCs, so that preventing states from ensuring that there is transfer of technology or that only a percentage of profits is repatriated, as the prohibition of performance requirements implies, seems contradictory. Furthermore, provisions on 'indirect expropriation' (that is, the erosion of ownership rights through regulation) are also included, sometimes accompanied by the establishment of so-called investor–state dispute settlement (ISDS). ISDS provisions give investors the right to bring cases against states in arbitration tribunals for breaches of standard of treatment and indirect expropriation. Scholars and civil society have pointed to the risks deriving from these rules since arbitrators may find social, environmental and labour standards to compromise the legitimate expectations of investors, and, regardless of whether arbitration takes place, these provisions may have a chilling effect on states that refrain from regulating for fear of litigation.[126] A social reproduction approach would therefore ask: what effects do investment rules have on the ability of governments to regulate economic activity so as to meet socio-economic goals such as labour and environmental protection and/or enact positive action measures for minoritized groups?[127]

E *Strengthening of IPR Protection*

The TRIPs Agreement requires all states to provide minimum standards of protection in relation to patents, copyrights, trademarks and other forms of intangible assets.[128] In the case of patents, for example, these standards consist of the temporary exclusive right granted to an inventor of a new product or process (20 years) and the right to set up the price of the patented product or process. The GVCD reports argue that these standards of intellectual property (IP) protection have to be increased, as intangibles are one of the most valuable assets of lead firms so their protection by states is

[126] In these cases, states have to pay damages, and even when damages are not awarded, states have to use resources on arbitration instead of other legitimate social goals. See J. Ho, *State Responsibility for Breaches of Investment Contracts* (2018).

[127] For example, Veolia, the French company that operates in Australia and worldwide, has claimed compensation again from Egypt for an increase in the minimum wage under a new labour law. Its claim was for €174 million (AUS $268 million) and was launched in 2012. The claim was lost, but Egypt incurred legal costs.

[128] Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, 1869 UNTS 299.

paramount if they want to give IP holders/investors the confidence to contract out production to their firms. An added benefit of strengthening IP rights, in addition to employment, is thought to be the technology transfer that results from local firms accessing the advanced technology of lead firms, which stimulates innovation. However, available empirical evidence casts doubts on whether technology transfer, innovation and greater value capture by smaller firms and countries of the global South has actually taken place since the TRIPs Agreement came into force.[129] The materialization of such benefits can be expected to be even more difficult if stronger IP protection is considered together with WTO-extra investment provisions prohibiting performance requirements such as technology transfer. From a global public health and food perspective, this ratcheting up of rights becomes even more problematic. A social reproduction approach would therefore ask: what are the effects of protecting IPRs not only on technology transfer but also on access to health and food? The most immediate concern is access to medicines since patents increase the price of pharmaceuticals – as the current controversy over allowing a TRIPs Agreement waiver in the context of the COVID-19 pandemic demonstrates[130] – but there are also concerns about the kind of health research being pursued, when it is not profitable, for example. And there are also effects on local farmers as to how access to seeds is affected by IP law.

This is only a cursory look at the 'deeper commitments', whose adoption the GVCD reports consider necessary for integration in the global economy. There are other commercial provisions that need to be scrutinized – for instance, those calling for the liberalization of capital.[131] The general point is that these are important questions to ask in order to hold trade rules to account for the way they affect our daily and generational reproduction. There are concrete mechanisms through which we can embed these questions in the architecture of international trade regulation. In the short term, these mechanisms could include the incorporation of *ex ante* and *ex post* intersectional/environmental/labour impact assessments, which need to include the possibility of terminating negotiations and agreements;[132] carve-out clauses that exclude ISDS and the abolition of capital controls; adjustment mechanisms for workers that are negatively affected by the

[129] See Durand and Milberg, *supra* note 92.

[130] See S. Thambisetty *et al.*, *The TRIPS Intellectual Property Waiver Proposal: Creating the Right Incentives in Patent Law and Politics to End the COVID-19 Pandemic* (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3851737.

[131] As the COVID-19 crisis has shown, developing/emerging economies face huge pressure when there are large outflows and sudden stops in private investment. A new round of sovereign debt crises in the global South would produce further inequality as public spending on basic services such as education, welfare and crucially health care will be reduced as deficit reduction conditions are put in place to ensure debt repayment. See International Economic Law Collective, *International Economic Law ad COVID-19* (2020), available at https://medium.com/iel-collective/international-economic-law-and-covid-19-d46e17fdcd3f.

[132] Some of the methodologies for assessment and monitoring are reflected upon by the Women Budget Group in their recent report, where they also call for enshrining labour rights in trade agreements. See A. Roberts, S. Trommer and E. Hannah, *Gender Impacts of Trade and Investment Agreements* (2019); see also UNCTAD, *Implementing Gender-Aware Ex Ante Evaluations to Maximise the Benefits of Trade Reforms for Women* (2016), available at http://unctad.org/en/PublicationsLibrary/presspb2016d7_en.pdf

agreements; and renegotiation clauses to amend provisions found to negatively impact the ability of states to provide social reproduction-related goods and services.[133]

More broadly, adopting a social reproduction lens enables us to problematize assumptions about the gains from competitive advantage for workers, the environment and states between and within the global North and the global South. By analysing the effects of trade rules on the ability of populations to re/produce life, and by demanding they account for the contribution that social reproductive/informal/informalized labour and environmental resources make to the trans/national generation of value, we may even conclude that no 'comparative advantage' exists where it was previously thought to and that such rules may not be needed after all.

7 Conclusions

Trade agreements are not the end of the story as there are other areas of law, public and private, soft and hard, through which power is exercised by lead firms. Interesting initiatives in this respect are those that target the phenomenon of concentration and centralization of lead firms (beyond the feeble standards of conducts that have proliferated in recent years with very little effect),[134] such as the push for mandatory due diligence and joint liability,[135] as well as those that target the ability of firms to shift profits between jurisdictions and those that introduce mandatory contract terms and conflict-of-law rules that 'help to re-embed these transactions into the place impacted by the social effects of GVCs'.[136] Law itself is not the end of the story either, for addressing the various ways in which lead firms exercise power in the global economy requires that we explore how 'value chain capitalism' works and how labour internationalism can be made possible along global chains.[137]

Law, however, remains an important strategy for curbing the power of MNEs, a power that has exponentially increased thanks also to the legal entitlements conferred by international economic law.[138] Although this article has linked 'social downgrade' in GVCs to the dynamics of capital accumulation and global competition, it does not

[133] WTO and ILO researchers, for instance, have suggested income-supporting programmes for so-called low-skilled labour, which they recognize has been affected by GVCs more negatively than so-called high-skilled labour. See *GVCD Report 2019*, *supra* note 7; ILO, *What Works: Promoting Pathways to Decent Work* (2019), available at www.ilo.org/global/publications/books/WCMS_724097/lang--en/index.htm. Operationalizing the latter is highly problematic as material resources matter and are unequally distributed between and within countries of the global North and global South.

[134] Examples include codes of conduct and certification schemes for cross-border supply chains, global framework agreements negotiated between trade union federations and multinational companies, social principles adopted by institutional financial investors and multi-stakeholder initiatives such as the United Nations Global Compact.

[135] Anner, Bair and Blasi, 'Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks', 35 *Comparative Labour Law and Policy Journal* (2013) 1.

[136] Perrone, *supra* note 100.

[137] Danielsen, *supra* note 20. Ashwin, Kabeer and Schüßler, *supra* note 105, at 8; see also A. Toscano, *Lineaments of the Logistical State*, 28 September 2014, available at www.viewpointmag.com/2014/09/28/lineaments-of-the-logistical-state/.

[138] See Schneiderman, *supra* note 19; K. Pistor, *The Code of Capital* (2019).

see law as overdetermined by these dynamics. Law may indeed contribute – in particular, when aligned with other forms of collective action and struggle[139] – to different forms of production, different distributions of resources and different forms of social life. And a social reproduction lens offers the possibility of remaining attentive to the mechanisms that enable capitalist value to be produced on a global scale, whilst also paying attention to other 'values' – which are actually existent or prefigured – that coexist with, even as they are obfuscated by, those informing dominant socio-economic action.[140] Indeed, social reproduction is not just the realm on which capital relies to extract value but also the terrain on which we struggle to engender alternative valorization processes.[141]

Ultimately, if the global economy is to support desirable life-enhancing trans/national practices and relations, GVCs and economic relations need to be radically rethought.[142] But adopting a social reproduction approach to trade theory, law and policy can contribute to such rethinking in both practical and conceptual terms. Practically, scrutinizing the effects of trade rules on re/productive and informal labour constitutes a very different endeavour from treating gender, labour and sustainable development chapters as add-ons that do not challenge the substance of commercial provisions. And adopting such a lens enables us to see that there is a conceptual dimension to this treatment too: it is because employment, environmental protection and gender equality are construed as 'positive externalities', or consequences of comparative advantage-led trade liberalization, that trade agreements can treat them as stand-alone provisions, with this separate treatment doing nothing to effectively challenge the substance and primacy of 'commercial provisions' that affect working and living conditions.

This is the main challenge that a social reproduction approach brings to the conventional policy research literature: claiming, as the GVCD reports do, that the only way to address social and environmental degradation is for states to adopt domestic regulation, whilst, at the same time, enacting WTO-plus and extra rules, obscures and absolves the role that these provisions may play in such degradation, shifting responsibility onto individual states. Understanding instead how these rules affect states' ability to 'enhance labour and environmental protection', including by affecting the trans/national production and distribution of resources, is a first step towards holding (some of) the rules that sustain the global economy to account.[143]

[139] M. Brookes, *Varieties of Power in Transnational Labor Campaigns: Understanding Workers' Structural, Institutional, and Coalitional Power in the Global Economy* (2013).

[140] A. Kothari *et al.*, *Pluriverse: A Post-Development Dictionary* (2019); Hannah, Roberts and Trommer, 'Towards a Feminist Global Trade Politics', 18 *Globalizations* (2021) 70.

[141] Alessandrini, 'Of Value, Measurement and Social Reproduction', 27 *Griffith Law Review* (2018) 393.

[142] Tsing, 'Supply Chains and the Human Condition', 21 *Rethinking Marxism* (2009) 148; M. Williams, *Tensions between the Role of Trade, Development and Gender Equality* (2005).

[143] J. Linarelli, M. Solomon and M. Sornarajah, *The Misery of International Law* (2019). The authors emphasize the importance of adopting a pre-distributive, as opposed to re-distributive, approach to the analysis of rules that govern global economic relations.