The Law of Global Value Chains as Transmission Nodes for Global Inequality

By:

Celine Tan

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Global Value Chains and the Promise of Sustainable Development

Global value chains (GVCs) have been promoted as the ideal platforms for ratcheting up the global development agenda. The 2030 Agenda for Sustainable Development (Agenda 2030), the international blueprint for operationalising the United Nations (UN) Sustainable Development Goals (SDGs), recognises international trade as an 'engine for inclusive economic growth and poverty reduction'.

Although perspectives on how best to achieve this vary across different institutions, the overarching rationale is that insertion into GVCs will necessarily procure greater jobs, foster technology transfer and expedite industrialisation and other economic sectoral upgrades that will 'trickle down' to communities residing in developing countries. In tandem with this discursive push is the

attendant policy and operational drive to embed private finance and transnational business interests into the core of the global development agenda.

More circumspect perspectives from other international organisations, such as the UN agencies, have argued that in order to achieve the promise of GVCs as levers for more sustainable and equitable economic transformations, they must be located within the context of a 'supportive international economic environment'. These approaches recognise that the capacity of developing countries to extract value from GVCs is highly dependent on the international legal and policy architecture into which they are inserted, including the extent to which this external environment constraints or facilitates domestic 'policy space' to capture the value created along these chains.

However, as others here will point out, a significant part of international economic law-making for the last three decades has been focused on developing a favourable 'enabling' domestic environment for firms and other 'economic' actors to be inserted into GVCs, such as the liberalisation and deregulation of economic sectors mandated by trade and investment agreements and through policy conditionalities of international financial institutions (IFIs). These policy and legal manoeuvres have often resulted in structural and sectoral reforms that favour lead-firms, usually large multinational corporations based in developed countries, to the detriment of firms and the labour force in developing countries and an externalisation of social and environmental costs to these countries and their communities. Less thought however has been focused on the impact of GVCs in producing the private legal drivers for creating the enabling environment for transnational capital extraction in host states as we shall see below.

Governing Chains of the Global Economy

The prevalence of GVCs as a vehicle for international trade relations means that GVCs constitute important networks of transnational social and economic governance. GVCs are enabled through complex webs of transnational public and private legal arrangements that structure the relationships between actors within the GVC, thereby determining their relative power. GVCs constitute more than commercial relationships, they restructure social contracts and reorganise

domestic law and policy to accommodate these relationships. The normative orders underpinning GVCs constitute and organise not only the global patterns of economic production and consumption but also the modalities for transnational social reproduction.

A significant outcome of the law and policy of GVCs is the increasing privatisation of law and regulation in the global economy. While facilitated and buttressed by public international law – notably trade and investment legal regimes – GVCs are primarily governed by private contracts, private forms of dispute settlement and commercial corporate governance regimes. These complex globalized contractual arrangements can serve as transmission nodes for global inequality, establishing the terms of global trade that privilege one set of actors over another, one geographical community over the other.

Depending on the type of contracts, they can be both positive and negative for local communities but more importantly these private legal arrangements can serve, alongside the reforms mandated by international trade and investment law, to reorganise domestic law and policy in relation to the conduct of firms within GVCs in developing countries. The interplay between the public and private legal and regulatory regimes of GVCs exemplify the shifting forms of authority in the governance of the global economy, a phenomenon conceptualised by Cutler and Dietz as 'private transnational governance by contract' in which private contracting regimes emerge increasingly as important vectors for not only for regulating market relations but also shaping social reproduction and managing ecological sustainability.

Due to their embeddedness within an external environment that is conducive to forms of asymmetrical value extraction, the private law of GVCs are incredibly porous to interests of the powerful corporate and state actors controlling these production and supply chains and can therefore serve as transmission nodes of global inequality. GVC contracts can ensure that value is extracted up the chain to the lead-firm or headquarters of the MNC while ensuring that precarity remains at the bottom of the chain and the environmental dislocations are externalised away from the sites of consumption (a phenomenon known as ' waste distancing'). In this way, GVCs have been described as 'global poverty chains' as regulatory gaps emerge, whether by omission or design, that lead to immiseration of labour and a disregard for human rights and environmental

abuses at the precarious end of the supply chain.

Private Transmission Nodes of Global Inequality

GVCs by design attempt to exploit the 'comparative advantage' of nation states by relying on pre-existing inequalities of a gendered, racialised and imperial system of economic extraction and capitalising on the unequal bargaining positions of lead-firms vis-à-vis sub-contractors and workers at the lower end of the chain. At the same time, these chains leverage the gains of an international trade and investment system that has primarily served to protect MNCs and foreign investors from interference in their economic activity in host states, placing significant constraints on the capacity of states to intervene in a myriad of corporate malfeasance, ranging from poor pay and working conditions and inadequate environmental protections to egregious health and safety violations, human rights abuses and violent displacement of indigenous populations.

The 'regulatory chill' of trade and investment treaties in particular can dovetail with domestic incentives to create conditions for regulatory arbitrage, fragmenting not only production and supply processes but also mechanisms for accountability and investor responsibility. In this way, GVCs reproduce and magnify the social and economic inequalities that exist both within and between nation states by allowing firms to 'forum shop' and establish operations and engage sub-contractors and suppliers in jurisdictions that have lower business transaction costs, including lower wages, less onerous labour and environmental protection, fewer land tenure rights, etc.

These regulatory gaps are poorly overcome by the private governance regimes that have come to dominate normative and policy solutions to the social, economic and ecological 'externalities' of GVC operations. On the contrary, private governance regimes can further exacerbate the aforementioned transnational inequalities and entrench power and influence of dominant firms. Specifically, the use of private contracts as key mechanisms for governing GVCs, including as means of managing the social and environmental dislocations of global production, marginalises more endogenous regulatory forms and pre-empts more cohesive and transformative measures for corporate accountability.

First, the focus on private regulatory regimes, including private audit regimes, certification schemes, supplier codes of conduct and other contractual remedies, as social and environmental governance mechanisms, displaces the state from the oversight and supervision of key social and economic sectors. These private standards and norms and their attendant supervisory mechanisms have been described as ‘norm-rich and compliance poor’, often poor cousins of state-sponsored public regulation. Additionally, many of these privatised schemes are standardised boilerplates and often pay little heed to the domestic circumstances in which they operate as they are driven less by public interest concerns and more by imperatives to manage business risks along extended supply chains.

Coupled with the removal of state powers to direct investment flows through domestic policy instruments, the marginalisation of public authority in this way can lead to: a) the ratcheting down and fragmentation of social and environmental protection and b) a retrenchment in the state capacity to regulate more generally due to deskilling of civil servants and sidelining of domestic regulatory authorities (such as environmental agencies or labour inspectorates). Corporate social responsibility (CSR) regimes can and do operate as technocratic responses to fundamentally political questions of social and economic distribution, neutralising resistance to unequal forms of social and economic organisation at local and transnational levels.

Second, the reliance on externally imposed private regulatory regimes, notably those set, implemented and supervised by lead-firms based in developed countries, removes the power to set labour, environmental and other social protection standards away from local communities through traditional forms of civic engagement and law and policymaking, placing it in the hands of private actors, notably lead-firms within GVCs and MNCs. In doing so, it allows firms and other private actors, such as non-governmental organisations (NGOs), to set and maintain the rules and processes that govern social and economic transactions. As Cutler argues, this shifts regulatory control ‘from what was traditionally state-based, constitutionally backed, and socially embedded production to private hands’. This means that matters of key public interest, such as labour and environmental standards, are outsourced to private contracting regimes rather than developed in a participatory and universal manner through local and national law and regulatory-making processes. This

leads to forms of legal transplantation through the back door, resulting in the large-scale transfer of normative orders from legal regimes of lead-firms' home states, mainly developed countries, to developing countries, thereby shaping legal and regulatory developments inasmuch a significant way as their entry into international trade and investment agreements.

Many of these private governance regimes and CSR frameworks have emerged as powerful normative orders that operate outside state institutions. These regimes often end up determining what constitutes social, environmental or sustainability values within GVCs that are to be 'protected' and they act as powerful gatekeepers to inclusion or exclusion of other firms in GVCs. At the same time, they deflect attention away from more substantive efforts to enshrine legal responsibility of investors and other MNCs within international law and further entrench the power of lead-firms that set the terms and conditions for participation of other firms and actors within GVCs.

GVCs and the Crisis of Responsibility

The fragility of GVCs as a modality of production has been laid bare in the current COVID-19 pandemic with much written already about the precarity of global supply chains that are not only heavily reliant on open borders but also of transnational labour. These vulnerabilities impact not only on consumers, notably in terms of disruption to the food, agriculture and medical supplies, but also, importantly on the workers at the lower end of the GVCs. The pandemic has laid bare the fragilities of a system of social protection heavily reliant on private commitments and the goodwill of lead-firms while marginalising the role of the state and local regulatory mechanisms.

The costs of shouldering the crisis has been externalised to developing countries as contracts are terminated by transnational corporations based in the global north without due regard for the social and economic dislocations of businesses and workers in the global south, even as these corporations benefit from financial, policy and regulatory support from their home states. In the meantime, developing countries, for whom the developmental promise of GVCs was held out like a golden chalice, have struggled to cope with the onslaught of the pandemic and the ensuing economic and financial crises, locked in by what Gallagher and Kozul-Wright have termed 'the double squeeze' – the lack of

fiscal and policy space in which to navigate their way out of the crisis.

The COVID-19 pandemic has therefore exposed the weaknesses of the current patterns of production and consumption, exemplified by GVCs and the global trade and investment order in which they operate. These fragilities have resulted in the aforementioned social, economic and financial crises but what they represent most of all, is a crisis of responsibility in which powerful actors, state and private, that have been the main beneficiaries of GVCs, have failed to discharge their ethical and normative obligations to those most vulnerable within their production and supply chains. To this end, a new approach is sorely needed to address the vulnerabilities of a global economy built on fragile GVC governance that serves as new nodes of global inequality and precarity.

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