
FOOD SECURITY, FREE TRADE, AND THE BATTLE FOR THE STATE

ANNE ORFORD*

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* Michael D Kirby Chair of International Law and an Australian Research Council Laureate Fellow at Melbourne Law School. Research on this project was funded through an Australian Research Council Future Fellowship (Project ID: FT110100214). Thanks to Professors Karen Knop, Jutta Brunnée and Kerry Rittich for the invitation to present the Katherine Baker Memorial Lecture, Professor Andrew Robertson for his comments and suggestions on the lecture, the journal editors for their work in putting together this symposium issue, and the commentators for their thoughtful responses.

Food security has re-emerged as a major global problem over the past decade, during which it has become clear that the capacity to access adequate food is strikingly unevenly distributed, both within states and between states. Yet there is little agreement amongst scholars and policy-makers as to the reasons for the persistence of that uneven distribution of hunger and undernourishment in the world today. This article is part of a broader project exploring the role played by law over the past two centuries in constituting an international economic order that enables individuals and corporations to profit from human dependence upon food while growing numbers of people globally are undernourished. The aim of the project is to understand why food security remains so unevenly distributed in the twenty-first century, and whether those patterns of vulnerability have anything to do with international law and the legacies of imperialism.

The immediate impetus for the project was the disruption to the global food economy that began with the food price crisis of 2006. In that year, food shortages and a dramatic rise in food prices led to a significant increase in the number of people globally who were undernourished, either because they could not produce enough food for themselves and their families or because they could not purchase enough food for an adequate diet.¹ Between 2006 and 2008, food shortages and the rise in food prices caused political instability and were met by food riots in at least thirty countries, including Bangladesh, Egypt, Haiti, India, Indonesia, Mexico, Morocco, Senegal, and Somalia.² By 2009, the Food and Agriculture Organization of the United Nations (FAO) estimated that “more than a billion people, one in every six human beings may be suffering from under-nourishment.”³ In 2010, food prices again rose worldwide as a result of a series of crop failures caused by bad weather, aggravated when Russia implemented an export ban on wheat.

¹ The definition of food security commonly used by international organisations is that adopted by the World Food Summit in Rome in 1996 and reaffirmed in the Declaration of the World Summit on Food Security in Rome in 2009: “Concept of Food Security: Food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. The four pillars of food security are availability, access, utilization and stability. The nutritional dimension is integral to the concept of food security”: Declaration of the World Summit on Food Security, Rome, 16-18 November 2009, WSFS 2009/2. Food security understood in relation to individuals thus refers to the capacity of people to have physical and economic access to sufficient quantities of safe and nutritious food to meet their dietary needs and food preferences on a consistent basis, while food security understood in relation to states refers to the capacity of the state to ensure adequate food supplies to feed its population, whether through domestic production, food imports, or food aid.

² FAO, “Price surges in food markets: How should organized futures markets be regulated?”, *Economic and Social Perspectives Policy Brief* (9 June 2010); Walden Bello, *The Food Wars* (London: Verso, 2009) [Bello].

³ FAO, Committee on World Food Security, 35th session, *Reform of the Committee on World Food Security*, CFS: 2009/2Rev.1, October 2009 [Howse and Josling].

Thirteen people were killed during protests in Mozambique triggered by the subsequent rise in the cost of bread.⁴ In December 2010 and again in February 2011, the FAO Food Price Index hit its highest levels since the measure was first calculated in 1990, surpassing those seen during the 2006-8 crisis. In response to such developments, the United Nations Conference on Trade and Development (UNCTAD) called on governments to “wake up before it is too late.”⁵ UNCTAD’s 2013 Trade and Environment report noted the continued concerns for food security caused by high and volatile food prices internationally, triggered in large part by climate change, food price speculation, and the direct link between fuel and food prices created by the growth of the biofuel industry. According to the report’s authors, the crisis facing agriculture “may well turn out to be one of the biggest challenges, including for international security, of the 21st century.”⁶

In order to grasp the past and present role of international law in contributing to the creation of the global food economy, the broader project on which this article draws is structured around five concepts that have been integral to debates over the constitution of transnational food regimes since the late eighteenth century—free trade, investment, population control, intervention, and rights. Each of these concepts has been articulated, enshrined and debated in legal texts over the past two hundred years, and all are intimately related. While debates about free trade and investment often have an abstract and rationally persuasive quality to them, the schemes they propose are dependent upon controlling people and territory. The question of what to do with “surplus,” “redundant,” or internally displaced populations is a question that has haunted attempts to constitute a market-oriented agricultural order since the nineteenth century, as has the question of how to secure foreign investments and ensure the free movement of goods and people necessary to enable profits to be made. Acquisition of territory and dispossession of peoples are both defended and debated in the language of rights. In the broader project I explore the movement and transformation of these interrelated concepts, as they travel from intellectual treatises, campaigning speeches, political rhetoric, official reports, treaties, commission reports, and legislative reforms in the nineteenth century, to collaborative projects developed by international lawyers, economists, sociologists, and historians turning their minds to how the colonial system might peacefully change during the inter-war period, and on to their institutionalisation post-1945 in separate international regimes dealing with free trade and investment, population control, intervention, and human rights.

⁴ Raj Patel, “Mozambique’s Food Riots: The True Face of Global Warming”, *The Guardian* (5 September 2010), online: <<http://www.theguardian.com/commentisfree/2010/sep/05/mozambique-food-riots-patel>>.

⁵ UNCTAD, *Trade and Environment Review 2013: Wake Up Before It Is Too Late* (UNCTAD: Geneva, 2013).

⁶ *Ibid* at 1.

This article focuses on the first of those principles, that of free trade. It argues that attending to the legal framework that underpins the project of global economic integration can help in the process of understanding and responding to the uneven distribution of food insecurity, but that this will require a deep engagement with the history and politics of the free trade project. Parts I and II of this article set out the broad contours of the project, and introduce the methodological approach I develop to grasp how international law has contributed to constituting a global political economy of food over the past two hundred years, and how attention to history can help us understand that process more clearly. The goal is to suggest what a study of international law and institutions can tell us about the material question of access to food, and how such a study might be conducted.

Parts III and IV offer a substantive account of how the concept of free trade has moved across a two hundred year period since the late eighteenth century. Studying the transmission and institutionalisation of the free trade concept involves considering how dominant meanings of free trade are consolidated, contested, and transformed through interactions between institutions, norms, practices, networks, and powerful sponsors. Two things that remain relatively constant over this period, however, are that the argument for free trade has been located within a much broader debate about the proper relation between the state and the market, and that securing access to food has been a recurring theme in determinations of what a commitment to the free trade principle should mean in practice.

Part V concludes that we can see being consolidated over the past decades a highly controversial account of what free trade means, and that this account produces, but paradoxically is also fuelled by, persistent crises over rural livelihoods and access to food. The free trade project carries with it a commitment to creating the free trade state—that is, a form of the state that will allow the maximum freedom for the laws of the market to unfold. That complex and potent anti-statist tradition informs contemporary international legal debates about free trade. The dominance of this tradition for thinking about international ordering constrains the capacity to think in new and imaginative ways about the possibilities that have been, and still are, available for using the state form more democratically and progressively.

I. FOOD SECURITY AS AN INTERNATIONAL PROBLEM AND PROJECT

There is widespread consensus amongst government officials, nongovernmental organisations, and academics that the repeated food crises of the past decade are manifestations of a global problem requiring international solutions. In a transnational food system characterised by economic interdependence and shared vulnerability, states can no longer (if they ever could) guarantee access to food for their populations through domestic means alone.

Commentators suggest that “international agricultural prices will remain significantly higher than pre-crisis levels for at least the next decade.”⁷ The demand for food, particularly meat and dairy products, is predicted to increase globally as a result of population growth and rising incomes, with the UN predicting in 2011 that global population would increase from 7 to 10 billion by 2100. That increasing demand for food will have to be met in a context of growing limits to food production imposed by climate change, rises in the price of inputs such as fertilisers and fuel, and competition for agricultural land from biofuel producers and urban expansion. Increasing water scarcity and soil losses are major contributors to the risk of food scarcity. More than half the world’s population live in countries in which water tables are falling, with many forms of irrigation having now depleted available aquifers and ground water.⁸

Many analysts also predict that volatile food prices will also be a feature of the global food economy for the foreseeable future, as the growing use of biofuels has linked the price of grain with the volatile energy market. Price volatility also attracts new investors and speculators into commodity markets, thus exacerbating rather than stabilising price swings.⁹ In the face of ongoing fluctuations in grain prices, the FAO predicted in 2010 that commodities markets will remain volatile into the indefinite future and declared that “the international community will need to develop appropriate ways” of responding to a long-term situation of food insecurity.¹⁰ Some form of mechanism for achieving greater international coordination, cooperation or policy coherence has been perceived as necessary if the vision of ending world hunger is to be achieved.

Certainly this has been the view taken by international organisations. Achieving food security has in fact been a project of international institutions throughout the 20th century, and a transnational project long before that. The United Nations (UN) signalled the importance to be given to the question of agrarian reform with the creation of the FAO in 1945, with the objectives of raising levels of nutrition, improving agricultural productivity, bettering the lives of rural populations, and contributing to the growth of the world economy. The FAO’s activities in the fields of technical assistance, development aid, and humanitarian action have been concerned with preventing and responding to food shortages and achieving “freedom from hunger.”¹¹ Along with the

⁷ Timothy A Wise and Sophia Murphy, *Resolving the Food Crisis: Assessing Global Policy Reforms Since 2007* (Medford: Institute for Agriculture and Trade Policy, 2012) at 6 [Wise and Murphy].

⁸ Lester R Brown, *Full Planet, Empty Plates: The New Geopolitics of Food Scarcity* (New York: WW Norton & Co) at 3 [Brown].

⁹ Jane Harrigan, *The Political Economy of Arab Food Sovereignty* (London: Palgrave Macmillan, 2014) at 5 [Harrigan].

¹⁰ FAO, “No food crisis seen, but greater market stability needed” (7 September 2010), online: <<http://www.fao.org/news/story/en/item/45178/icode/>>.

¹¹ Amy LS Staples, *The Birth of Development* (Kent: Kent State University Press, 2006).

Rockefeller Foundation and the World Bank, the FAO was a driving force of the “Green Revolution” designed to replace peasant agriculture with an input-intensive and industrialised form of agricultural production as a means of increasing plant yields and Third World food exports during the 1960s.¹²

Famine and hunger begin to be considered in the language of food security in the late 1970s, and the term came to dominate international debates in the mid-1980s in the context of the rise of neoliberalism.¹³ In 1979, the FAO published *The Struggle for Food Security*, which represented food security as a global problem that required a better distribution of the world’s food supply through increasing national self-reliance and reducing inequalities in income and landholdings.¹⁴ In 1986, the World Bank published quite a different account of food security in its policy study, *Poverty and Hunger: Issues and Options for Food Security in Developing Countries*.¹⁵ The Bank there strongly resisted a vision of food sovereignty as the basis of food security, and instead declared that food insecurity resulted from “a lack of purchasing power of individuals and nations.”¹⁶ It followed that food security would not necessarily be achieved in a country through food self-sufficiency or through an increase in food production,¹⁷ but could better be ensured through alleviating poverty, accelerating economic growth, structural adjustment, and building the capacity to purchase food in the globalized market. Beginning in the 1980s, the International Monetary Fund (IMF) and the World Bank began to condition the use of their resources on market-oriented agrarian reform. Many of the programmes implemented by UN agencies and the Bretton Woods institutions have since focused upon encouraging chemical-intensive commercial agriculture, the aggregation of landholdings, and the replacement of subsistence farming with export-oriented production. With the creation of the World Trade Organization (WTO) in 1995, pressure has increasingly been brought to bear on states to allow a free market in agricultural products, abandon state support for agricultural producers, and abolish measures that restrict international movement in foodstuffs.

Nonetheless, the current situation represents an intensification of international ownership of food security as a global project. There is an “increasing density of international institutions involved in food security

¹² John H Perkins, *Geopolitics and the Green Revolution* (New York: Oxford University Press, 1997).

¹³ Lucy Jarosz, “Defining World Hunger: Scale and Neoliberal Ideology in International Food Security Policy Discourse” (2011) 14 *Food, Culture and Society* 117.

¹⁴ Robin Sharp, *The Struggle for Food Security* (Rome: FAO, 1979).

¹⁵ World Bank, *Poverty and hunger: issues and options for food security in developing countries* (Washington DC: World Bank, 1986).

¹⁶ *Ibid* at 10.

¹⁷ *Ibid* at 31.

issues.”¹⁸ Numerous high-level international summits and meetings have been held in response to the food crisis, and a plethora of declarations and frameworks for international action adopted since 2007, with governments and international agencies all committing to make food security a priority issue.¹⁹ The UN Secretary-General established a High-Level Task Force on the Global Food Security Crisis in 2008, designed to bring together the heads of all the major international economic, security, humanitarian, and development organisations in order to work towards “strengthened partnership and increased actions by all stakeholders in a comprehensive, coordinated, and coherent manner” in response to the food crisis.²⁰ The FAO in turn undertook fundamental reform of its Committee on World Food Security (CFS) in 2008, with a view to developing “effective solutions to ending hunger” and making the CFS the “foremost inclusive and intergovernmental platform dealing with food security and nutrition.”²¹ The World Bank had already signalled a major pre-crisis policy shift with the publication of its first World Development Report with a focus on agriculture in twenty-five years, the 2008 *Agriculture for Development* report. The Bank has since turned around its drop in lending for agricultural projects, with a raft of new financing initiatives aimed at market-oriented agrarian reform and promoting the expansion of high-input agriculture. The UN Special Rapporteur on the Right to Food from 2008 to 2014, Olivier de Schutter, was something of an international phenomenon, publishing detailed reports at an extraordinary rate on all aspects of the global food system.²² At the G8 Summit held at L’Aquila in 2009, heads of state and representatives of international and regional organisations adopted the L’Aquila Food Security Initiative, agreeing to take “decisive action to free humankind from hunger and poverty.”²³ And at the UN World Summit on Food Security held in November 2009, world leaders adopted the “Five Rome Principles for Sustainable Global Food Security,” and pledged their renewed commitment to eradicating hunger from the face of the earth.²⁴

¹⁸ Rosemary Rayfuse and Nicole Weisfelt, “The international policy and regulatory challenges of food security: an overview” in Rosemary Rayfuse and Nicole Weisfelt, eds, *The Challenge of Food Security: International Policy and Regulatory Frameworks* (Cheltenham: Edward Elgar, 2012), at 13.

¹⁹ Wise and Murphy, *supra* note 7 at 6.

²⁰ High Level Task Force on the Global Food Security Crisis, *Comprehensive Framework for Action* (2008); High Level Task Force on the Global Food Security Crisis, *Updated Comprehensive Framework for Action* (2010).

²¹ FAO, Committee on World Food Security, 35th session, *Reform of the Committee on World Food Security*, CFS: 2009/2Rev.1, October 2009.

²² See the collection of Olivier de Schutter’s reports as Special Rapporteur at <http://www.srfood.org/en/official-reports>.

²³ G8, “L’Aquila’ Joint Statement on Global Food Security: L’Aquila Food Security Initiative (AFSI),” 10 July 2009.

²⁴ Declaration of the World Summit on Food Security, Rome, 16-18 November 2009, WSFS 2009/2.

As an international legal scholar with a long-standing interest in the interrelationship of economic and security questions and in the relevance of imperial legacies for modern international law,²⁵ my interest in these developments was particularly informed by four aspects of those food price crises and international responses to them.

1. *Feeding the world: food security beyond the state*

The first aspect of the response to the food crises that appeared noteworthy was the widespread sense that food security was properly a global problem that required international solutions. Securing access to sufficient supplies of safe food has of course long been a problem with transnational dimensions. For centuries, European food security was guaranteed through the consolidation of imperial systems that enabled the movement of core resources and foodstuffs from the colonies to the imperial centres. Famine was a significant factor motivating the work of thinkers who have since been claimed as founders of liberal internationalism, such as Hugo Grotius and John Locke.²⁶ The first European colonial settlers came from societies that were “constantly on the edge of famine and demographic collapse,” and the liberal theories that justified their appropriation of the “waste lands” occupied by hunter-gathers were an attempt “to save the lives of Europeans.”²⁷ European lawyers developed doctrines that rationalised the acquisition of territory for agricultural settlement, posited freedom of trade and navigation as inalienable rights, justified the enclosure of common land, authorised the conduct of imperial trading companies, and justified the policing of dispossessed people who resisted such practices.²⁸ These legal doctrines formed the normative foundation to the expansion of Dutch, British, and French colonialism that fundamentally reshaped the world from the seventeenth century onwards, and to the constitution of imperial food systems that largely ended famine

²⁵ See Anne Orford, “The Past as Law or History? The Relevance of Imperialism for Modern International Law” in Mark Toufayan, Emmanuelle Tourme-Jouannet & Hélène Ruiz Fabri, eds, *International Law and New Approaches To The Third World* (Paris: Société de Législation Comparée, 2013) at 97; Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003) at 40-81 (analyzing the continuity of imperialism understood primarily as a system of exploitation rather than domination); Anne Orford, “Locating the International: Military and Monetary Interventions after the Cold War” (1997) 38 *Harv Intl LJ* 443.

²⁶ For a detailed discussion of the significance of this case for the issue of food security, see Howse and Josling, *supra* note 3.

²⁷ *Ibid* at 233; Andrew Cunningham and Ole Peter Grell, *The Four Horsemen of the Apocalypse: Religion, War, Famine and Death in Reformation Europe* (Cambridge: Cambridge University Press, 2000) at 201.

²⁸ See for example Hugo Grotius, *Commentary on the Law of Prize and Booty* (Indianapolis: Liberty Fund, 2006); John Locke, *Two Treatises of Government* (London: Everyman, 1993, 1st published 1689).

in Europe.²⁹ In addition, the ideas and techniques developed by the political economists, politicians, and colonial civil servants who were responsible for administering the colonies ensured that settler colonialism and imperial trade networks contributed to guaranteeing the food security of Europe until the twentieth century.³⁰

The transnational nature of responses to food insecurity did not end with decolonisation. International lawyers and political economists worked throughout the 1930s and 1940s to design the institutional and philosophical foundations for a new international economic order that would ensure the upheavals of world war, depression, and decolonisation did not interrupt ongoing access to raw materials. And food security clearly remains an issue with transnational dimensions today, given the possibility that national responses to intensifying competition for food supplies, land, water, and energy will include measures such as the imposition of food export bans and foreign land acquisitions that could give rise to international tensions.³¹

Yet what seemed to go without saying in the response to food crises over the past decade was not only that food insecurity was a problem with transnational dimensions, but also that it was a problem to be dealt with by international organisations or through international negotiations. In many ways, that aspect of the response seemed surprising. After all, ensuring the safety and welfare of its population is widely considered to be one of the primary duties of the state. Guaranteeing food security to a population in times of crisis requires complex political choices about the obligations of states to protect their own populations versus their obligations to protect the rights of those in need in other countries, how national communities might protect particular kinds of rural livelihoods, the forms of political action that are necessary to preserve democracy in the face of rural despair and dispossession, how states can support non-industrial approaches to agriculture, and how states might enable the survival of traditional relationships to land within their territory or jurisdiction. The novelty of the current situation lies in the growing sense that these were political choices to be made by the international community acting on behalf of humanity as a whole, rather than states acting in the interests of their populations. Yet in response to the persistent hand-wringing over the question “how will we feed the world,” Timothy Wise has argued that this

²⁹ Martine J von Ittersum, “The long goodbye: Hugo Grotius’ justification of Dutch expansion overseas, 1615-1645” (2010) 36 *History of European Ideas* 386; James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Anglo-World, 1783-1939* (Oxford: Oxford University Press, 2009); Diana K Davis, *Resurrecting the Granary of Rome: Environmental History and French Colonial Expansion in North Africa* (Athens: Ohio University Press, 2007); James Tully, *An approach to political philosophy: Locke in contexts* (Cambridge: Cambridge University Press, 1993).

³⁰ See further the discussion in Part III below.

³¹ Brown, *supra* note 8 at 4.

representation of the problem as one facing humanity, to be resolved through first-world efficiency and benevolence, is deeply flawed:

There is no 'we' who feed the world. There are, mostly, hundreds of millions of small-scale farmers. And there is no abstract 'world' out there needing to be fed. There are about one billion hungry people, nearly all in developing countries. The majority are some of those same small-scale farmers. The rest are poor because they are unemployed or underemployed. Increasing the industrial production of agricultural commodities does almost nothing for these people. Oddly enough, it can even make them hungrier.³²

The industrialised countries with their high-input farming produce 30% of the food consumed globally, while 70% is produced by small-scale farmers.³³ 15% of food is traded across borders, while 85% is produced by the farming households that consume it, or exchanged locally.³⁴ Nonetheless, international experts continue to argue for increased high-yield, export-oriented agricultural production as the solution to food insecurity, and to ignore the implications this has for the people currently working on small-scale farms.

Thus the first question motivating this project is how and why it has become commonplace to think about food security as a global problem requiring international solutions by bodies that are not directly democratically accountable, so that "how can we feed the world?" becomes an intelligible and meaningful question, while how a state can protect the welfare of its population becomes a more contested one.

2. *Nature versus politics: the causes of food insecurity*

The second striking aspect of debates around the food crises was the lack of consensus around the causes of those problems or the solutions to them. Despite the proliferating number of international summits, meetings, and plans of action that had developed in response to the food crisis, and the widespread agreement that food insecurity is a global problem, there was no real agreement in either the policy or the scholarly literature about the causes of that problem. Thus while it appears clear that a global response to food security is needed, there is no real agreement on what that should mean in practice. Indeed, ever since the creation of the FAO in 1945, while establishing an international commitment to work for a hunger-free world has been straightforward, reaching consensus on how to achieve it has not.

³² Timothy A Wise, "Feeding the World: The Ultimate First-World Conceit" (7 October 2014), Triple Crisis Blog, online: < <http://triplecrisis.com/feeding-the-world-the-ultimate-first-world-conceit/> [Triple Crisis Blog].

³³ Karla D Maass Wolfenson, *Coping with the food and agriculture challenge: smallholders' agenda* (Rome: FAO, 2013) at 1, 22.

³⁴ Triple Crisis Blog, *supra* note 32.

Perhaps the most significant dividing line in that debate is between those who see food insecurity as a problem essentially caused by natural limits that can best be addressed by scientific measures to increase crop yields and control population growth, and those who see the problem as essentially one caused by political factors that could best be addressed by governance measures aimed at better allocating entitlements to available food. Much policy debate about food insecurity continues to focus on scientific solutions to increasing crop yields. Indeed, I have been asked at a meeting of scientists what an international lawyer could possibly have to say about food security—isn't it self-evident that addressing food security is a scientific and technological project? For the advocates of scientific and technological means of responding to food crises, hunger and starvation are a result of the lack of available food. The global supply of food needs to increase in order to cope with the growth of the global population. Increased agricultural productivity requires access to fertilisers, pesticides, new seeds and irrigation canals or research into new technologies that can increase crop yields. Many such scientists and international agricultural experts argue that it was the "green revolution" of the 1960s and 1970s that increased the production of food in Latin America and Asia through the introduction of high-yield genetically modified grains and the increased use of fertilizers, pesticides and irrigation. This literature treats the lack of a "green revolution" and the related failure to develop commercial farming in Africa as major causes of the persistence of famine on that continent and elsewhere.³⁵

That view has existed for centuries, and can be traced back at least as far as the influential *Essay on the Principle of Population* first published by Thomas Malthus in 1798.³⁶ Yet there has been a counter view, stretching back at least as far as Malthus, that uneven development is not simply a matter of natural limits—that it raises more troubling ethical and political questions. Some eighteenth century thinkers had already set themselves the task of thinking about and acting within the world "in a manner that respects and takes responsibility for humanity" and the planet as a whole, and were concerned about uneven development and the ethical problems that resulted from European land appropriation, slavery, and exploitation.³⁷ Following this line of thinking, the uneven distribution of food security can be seen as not simply a technical issue about the quantity of food that is available at any given time, but also a legal, social, and political issue about which groups have access to food and why.

³⁵ For a different view on export tariffs, see Howse and Josling, *supra* note 3 at 17-18.

³⁶ T R Malthus, *An Essay on the Principle of Population as it Affects the Future Improvement of Society: with Remarks on the Speculations of Mr Godwin, M Condorcet, and Other Writers* (Oxford: Oxford University Press, 1993, 1st published 1798) [Malthus].

³⁷ John K Noyes, "Commerce, colonialism, and the globalization of action in late Enlightenment Germany" (2006) 9 *Postcolonial Studies* 81 at 81-3.

This point was made decisively in 1981, when the economist Amartya Sen published his ground-breaking book *Poverty and Famines: An Essay on Entitlement and Deprivation*.³⁸ Sen argues that famine is not only a technical or scientific question, but also a political question. “Starvation,” he says in the opening paragraph, “is a characteristic of some people not having enough food to eat. It is not a characteristic of there not being enough food to eat.”³⁹ It concerns “the *relationship* of people to food.”⁴⁰ That relationship in turn involves questions of power, authority, property, and law.⁴¹ Whether a person can access food depends upon the “entitlement systems” or sets of rules governing access to food.⁴² Starvation depends not only on the supply of food and the distribution of food but on the legal and political question of “what determines distribution of food between different sections of the community,” including for our purposes the international community. Sen famously shows that “some of the worst famines have taken place with no significant decline in food availability per head” and little or no reduction in the overall *supply* of food.⁴³ What determines whether a person starves is whether he or she has the ability “to establish entitlement to enough food.”⁴⁴ Thus Sen concludes that “law stands between food availability and food entitlement.”⁴⁵

Today we can say the same thing of international law. The world already produces sufficient calories per head to feed a global population of 12-14 billion—“hunger and malnutrition are not phenomena of insufficient physical supply, but results of prevailing poverty, and above all problems of access to food.”⁴⁶ The entitlement regimes that shape access to food in parts of Somalia, Egypt, Mozambique or India, to name some places that have seen food riots in recent years, are not determined by the governments of Somalia or Egypt or Mozambique or India alone. Those systems of entitlement are also shaped by the international legal regimes that have contributed to managing the production, distribution, and supply of food globally for many decades.

This view is increasingly being put by scholars and officials who see the present food crisis as evidence that the “international governance framework for food and agriculture of the last 50 years has failed to provide a sustainable food supply that is accessible to all.”⁴⁷ Yet even here there is no consensus over

³⁸ Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Oxford University Press, 1981) [Sen].

³⁹ *Ibid* at 1.

⁴⁰ *Ibid* at 154.

⁴¹ E P Thompson, *Customs in Common: Studies in Traditional Popular Culture* (New York: The New Press, 1993) at 287 [Thompson].

⁴² Sen, *supra* note 38 at 1.

⁴³ *Ibid* at 7.

⁴⁴ *Ibid* at 8.

⁴⁵ *Ibid* at 166.

⁴⁶ UNCTAD, *supra* note 5 at iii.

⁴⁷ Daniel J Gustafson and John Markie, “A Stronger Global Architecture for Food and Agriculture: Some Lessons from FAO’s History and Recent Evaluation” in Jennifer Clapp and

what reforms are needed to improve the governance of food and agriculture. Many scholars and policy-makers in the fields of trade law and economics continue to argue that the most significant cause of persistent food insecurity is the “lack of substantial liberalisation of trade in agriculture.”⁴⁸ They critique forms of state intervention that are seen to “distort” the market in agricultural commodities or act as barriers to trade,⁴⁹ such as the provision of subsidies to farmers in the EU and the US,⁵⁰ the imposition of export restrictions on food commodities in situations of crop failure,⁵¹ the use of trade barriers to protect domestic farmers from foreign competition, and the use of “non-genuine” food aid to swamp developing countries with cheap produce.⁵² The IMF, the World Bank, and the WTO see the further liberalisation of markets, the intensification of agricultural industrialisation, and the removal of remaining state supports for domestic farming as the solution to food insecurity.⁵³

In contrast, a growing group of scholars in the fields of ecology, development studies, and human rights sees both the global free market in agricultural commodities and the green revolution embrace of new technologies and expensive inputs as part of the problem.⁵⁴ According to this literature, the proposed causes of food insecurity include speculation in commodity futures,⁵⁵ the effect of structural adjustment programmes

Marc J Cohen, *The Global Food Crisis: Governance Challenges and Opportunities* (Ottawa: Wilfred Laurier University Press, 2009) at 179.

^{48.} Baris Karapinar, “Introduction: Food Crises and the WTO” in Baris Karapinar and Christian Häberli, eds, *Food Crises and the WTO* (Cambridge: Cambridge University Press, 2010) [Karapinar and Häberli] at 1.

^{49.} John Williams, *Competition and Efficiency in International Food Supply Chains: Improving Food Security* (London and New York: Routledge, 2012); Kym Anderson, “Agricultural policies: past, present and prospective under Doha” in Karapinar and Häberli, *supra* note 48 at 167.

^{50.} ICTSD, “WTO Chief Slams ‘Starve-thy-Neighbour’ Export Restrictions” (2012) 12:3 Bridges Trade BioRes; Declaration by Agricultural Economists, *For an Ambitious Reform of the Common Agricultural Policy* (2010), online: <<http://www.reformthecap.eu/declaration>> [Declaration by Agricultural Economists].

^{51.} Howse and Josling, *supra* note 3; Robert Zoellick, “Free markets can still feed the world”, *Financial Times* (5 January 2011), online: <<http://www.ft.com/cms/s/0/64ccfdae-1904-11e0-9c12-00144feab49a.html#axzz3jwWooT40>> [Zoellick].

^{52.} Susan Prowse, “Responses by the international trade and aid community to food security” in Karapinar and Häberli, *supra* note 48 at 273.

^{53.} Zoellick, *supra* note 51; Pascal Lamy, “Trade is part of the answer, not part of the problem”, WTO Director-General’s Opening Address to the Berlin Agriculture Ministers’ Summit (22 January 2011), online: <http://www.wto.org/english/news_e/sppl_e/sppl183_e.htm>.

^{54.} Bello, *supra* note 2; Eric B Ross, *The Malthus Factor: Poverty, Politics and Population in Capitalist Development* (London and New York: Zed Books, 1998) [Ross]; Raj Patel, *Stuffed and Starved: The Hidden Battle for the World Food System* (Brooklyn: Melville House Publishing, 2007).

^{55.} From an extremely broad literature on commodities speculation, see Jennifer Clapp and Eric Helleiner, “Troubled futures? the global food crisis and the politics of agricultural derivatives regulation” (2012) 19 *Review of International Political Economy* 181; Oxfam, *Not a Game: Speculation versus Food Security*, Oxfam Issue Briefing, 3 October 2011; World Development Movement, *Broken markets*, September 2011; Jayati Ghosh, “The Unnatural Coupling: Food and Global

on the agricultural capacity of developing countries,⁵⁶ the social, legal, and environmental legacies of exploitative settler colonialism,⁵⁷ the diversion of land and crops from food production to biofuels,⁵⁸ and the displacement of peasant agriculture and family farms through large-scale land acquisitions and resource-intensive agribusiness.⁵⁹ Critics argue that international experts are overly dependent on technical solutions, scientific models, “principles of rational calculus” and “supply chain principles,” and do not take sufficient account of the rituals and traditions associated with the distribution of food, the centrality of land tenure to the broader organisation of societies, or the insight that “the division of food necessarily reinforces or changes the social order.”⁶⁰ Peasant groups and small farmers are organising worldwide to defend traditional modes of production against chemical-intensive industrial agriculture and biotechnology.⁶¹

Finance” (2010) 10 *Journal of Agrarian Change* 72; UN Special Rapporteur on the right to food, *Food Commodities Speculation and Food Price Crises: Regulation to reduce the risks of price volatility. Briefing Note 02*, September 2010; Institute for Agriculture and Trade Policy, *Betting against Food Security: Futures Market Speculation. Trade and Global Governance Programme Paper* (Minneapolis, MN: Institute for Agriculture and Trade Policy, 2009); Institute for Agriculture and Trade Policy, *Commodities Market Speculation: The Risks to Food Security and Agriculture* (Minneapolis: Institute for Agriculture and Trade Policy, 2008).

⁵⁶ Bello, *supra* note 2.

⁵⁷ Pauline E Peters, “Land appropriation, surplus people and a battle over visions of agrarian futures in Africa” (2013) 40:3 *J Peasant Studies* 537.

⁵⁸ From an extremely broad literature on commodities speculation, see Jennifer Clapp and Eric Helleiner, “Troubled futures? The global food crisis and the politics of agricultural derivatives regulation” (2012) 19:2 *Rev Intl Political Economy* 181; Oxfam, “Not a Game: Speculation versus Food Security”, *Oxfam Issue Briefing* (3 October 2011); Jayati Ghosh, “The Unnatural Coupling: Food and Global Finance” (2010) 10:1 *J Agrarian Change* 72; UN Special Rapporteur on the right to food, *Food Commodities Speculation and Food Price Crises: Regulation to reduce the risks of price volatility, Briefing Note 02* (September 2010); Institute for Agriculture and Trade Policy, “Betting against Food Security: Futures Market Speculation”, *Trade and Global Governance Programme Paper* (Minneapolis, MN: Institute for Agriculture and Trade Policy 2009); Institute for Agriculture and Trade Policy, “Commodities Market Speculation: The Risks to Food Security and Agriculture” (Minneapolis: Institute for Agriculture and Trade Policy, 2008).

⁵⁹ See Ian Scoones et al, “The Politics of Evidence: Methodologies for Understanding the Global Land Rush” (2013) 40:3 *J Peasant Studies* 469; Lorenzo Cotula, “The International Political Economy of the Global Land Rush: A Critical Appraisal of Trends, Scale, Geography and Drivers” (2012) 39:3-4 *J Peasant Studies* 649; Philip McMichael, “The Land Grab and Corporate Food Regime Restructuring” (2012) 39:3-4 *Journal of Peasant Studies* 681; Ray Bush, Janet Bujra & Gary Littlejohn, “The Accumulation of Dispossession” (2011) 38:128 *Rev African Political Economy* 187; A Haroon Akram-Lodhi and Cristobal Kay, eds, *Peasants and Globalization: Political Economy, Rural Transformation and the Agrarian Question* (Oxon: Routledge, 2010).

⁶⁰ Paul Richards, “Ritual dynamics in humanitarian assistance” (2010) 34 *Disasters* S138 at S143-4; Bello, *supra* note 2; Ross, *supra* note 54.

⁶¹ Akram-Lodhi and Kay, *supra* note 59; Eric Holt-Giménez and Raj Patel, *Food Rebellions: Crisis and the Hunger for Justice* (Oakland, CA: Food First Books, 2009); Jan Douwe van der Ploeg, *The New Peasantries: Struggles for Autonomy and Sustainability in an era of Empire and Globalization* (London: Earthscan Publications, 2008).

Thus while the dominant response to food crises remains scientific and technical, there is increasing pressure to see access to food as about political limits rather than natural limits. Indeed the intensity of this debate is itself a sign that the barrier between science and politics is beginning to break down. The (unstable) dividing lines between science, politics, and law that we inherit from the nineteenth century are being redrawn by the ecological crises of climate change and the politics of resource depletion. In the words of Bruno Latour: “Every single issue about energy, transportation, production of food and so on, has become mixed, which is an understatement. So now it is very difficult to separate what is about science and what is about politics.” In the current situation, “to do politics is to deal with nature.”⁶²

A second aim of this project is thus to explore what a study of international rules and institutions dealing with the material question of access to food can tell us about the nature of global governance in the world today. In order to make proposals for reforming the global governance of food, it is necessary to understand the nature of that international governance framework. There is at present no adequate account of the overall legal and institutional structure of the international food system. Which rules and institutions enable the current uneven patterns of vulnerability and insecurity that I described above? Whose access to food is secured through current international rules and institutions, and by what means? Is the current institutional commitment to achieving food security (with its focus on a new green revolution and the strengthening of securitization, economic liberalisation, and population control) part of the solution to food security, or is it part of the problem? And what can be learnt from the strategies that are currently being adopted to negotiate or resist the international legal rules that seek to determine access to food and land, the forms of rural life, and the role of the state?

3. *Explaining the uneven character of food security*

The third aspect of food price crises that seemed noteworthy was their uneven nature. The humanitarian and political effects of the recent food crises have been strikingly differentiated by region. The FAO reported that by the end of 2010, 29 countries were in crisis requiring external food assistance—20 of them in Africa, seven in Asia and two in Latin America and the Caribbean.⁶³ According to the FAO, almost all—about 98%—of the “people whose calorie intake is too low to meet their basic physiological needs are located in developing countries.”⁶⁴ The Middle East and North Africa, as the most

⁶² “French Anthropologist Contemplates New Ways To Think About Human Impact on the Planet”, *The Wall Papers Magazine*, (Fall 2013) at 16.

⁶³ FAO, *Crop Prospects and Food Situation*, Number 4, December 2010.

⁶⁴ Olivier De Schutter and Kaitlin Y Cordes, “Accounting for Hunger: An Introduction to the Issues” in Olivier De Schutter and Kaitlin Y Cordes, eds, *Accounting for Hunger: The Right to Food in the Era of Globalisation* (Oxford and Portland: Hart, 2011) at 1.

food import dependent region in the world, was particularly hard hit by the volatility of food prices from 2007.⁶⁵ IMF officials and other commentators have suggested that the wave of protests across the Arab world in early 2011 were about both “bread and freedom,” with sharply rising food prices in countries such as Tunisia, Egypt and Jordan fuelling unrest.⁶⁶

In addition, food insecurity does not seem to have been dependent upon the capacity to produce food—of the 75 countries affected by food insecurity between 2003 and 2006, more than 20% were net food exporters.⁶⁷ Indeed many of the countries facing persistent food insecurity have a relatively strong specialization in agricultural production, a relatively high proportion of the labour force working as agricultural labourers, and a relatively high proportion of land used for agriculture.⁶⁸ Similarly, roughly 70 per cent of the almost one billion people who chronically suffer from starvation are themselves involved in food production, whether as small farmers or agricultural labourers.⁶⁹

How then to make sense of the uneven nature of food insecurity, and the tendency to reproduce patterns familiar from the colonial era in which poorer countries shipped the food they produced to richer countries, while at home their people starved?⁷⁰ After all, international law no longer allows the older forms of colonial power to operate—it has prohibited annexation of territories through force or the use of gunboat diplomacy. Yet other forms of colonial power, organised around free trade and constraints on local administrators, perhaps do continue to hold sway. Something in the routine operation of international economic life, organised around global value chains, free trade, and open markets, produces a system of compulsion such that food is exported to foreign lands while the people who grow it are undernourished. In order to understand how food insecurity continues to be patterned in this way, it is necessary first to grasp the broad regulatory environment that shapes access to food, allocates the authority to make decisions about the allocation of resources, and leads to the stark distributive consequences of the global food economy.

4. *Being John Malkovich: the strange ubiquity of liberalism*

The final aspect of international responses to the food crises that motivated this study can perhaps best be introduced by reference to the 1999 film *Being*

⁶⁵ Harrigan, *supra* note 9 at 6.

⁶⁶ Thomas Helbling and Shaun Roache, “Rising Prices on the Menu: Higher Food Prices May be Here to Stay” (March 2011) *Finance and Development* 24; Guardian Editorial, “Food Security: Bread and Freedom,” 1 February 2011.

⁶⁷ Michael Herrmann, *Food security and agricultural development in times of high commodity prices: UNCTAD Discussion paper No 196*, November 2009, 7.

⁶⁸ *Ibid.*

⁶⁹ UNCTAD, *supra* note 5 at 111.

⁷⁰ For this pattern in the context of the nineteenth century Irish and Indian famines, see Part III below.

John Malkovich. To cut a long and quite surreal story short, the film's narrative turns around the discovery of a portal that leads into the mind of (the real-life actor) John Malkovich. The unsuccessful puppeteer who discovers the portal lets other people use it for \$200 a turn. When John Malkovich finds out what is happening, he follows the puppeteer, tries the portal, and enters a world where everyone looks like him and can only say "Malkovich."⁷¹ In the world of debates about food security and international economic law, a similar scenario plays out. Characters we might have expected to play more varied parts end up looking and sounding much the same—instead of the word "Malkovich," we hear the repetition of liberal concepts such as "trade distortion" and "discrimination," the denunciation of agricultural subsidies, and cynicism about state planning.

Two aspects of that continued commitment to neoliberal ways of understanding the nature and stakes of current food crises seem curious. The first is the ongoing dominance of liberal solutions to the problem of food insecurity, despite what might be seen as a challenge to that dominant liberal paradigm by the intertwined food, financial, and energy crises of the twenty-first century. The view within major international institutions that the solution to food insecurity was increased market liberalisation seemed to be unshaken by the food price crises of 2006-08 and 2011, despite the fact that the high and volatile food prices that marked those periods were particularly damaging for countries that had open agricultural sectors and depended heavily on imported food.⁷² Due to the policy advice and conditions imposed by the World Bank since the 1980s, the majority of those were developing countries. During the debates over appropriate responses to food crises, it became clear that many commentators still felt it was appropriate that countries should not only be encouraged to maintain open markets in agricultural commodities, but that international trade rules should be extended to constrain states from stockpiling food as a protection against famine, supporting their farmers, imposing export controls on raw materials during periods of scarcity, or regulating food additives.

The second surprising feature of the dominance of liberalism as a frame and reference for thinking about global economic ordering is its capacity to shape even critical responses to the current global food economy. One example is the widespread denunciation of agricultural subsidies. Almost every critical commentator on the current international governance of food treats subsidies as a problem, often using the language of "artificiality" and "distortion" to express their concerns. So US and European subsidies are said to "distort" the

⁷¹ The final scene of the official film trailer gives a good sense of Malkovich's experience through the portal: <http://www.youtube.com/watch?v=K7ahIGLNNwo>.

⁷² International Food Policy Research Institute, *Global Hunger Index—The Challenge of Hunger: Taming Price Spikes and Excessive Food Price Volatility* (October 2011) at 22.

market, and create “artificial” or even “dishonest” prices for food.⁷³ Yet the idea that the provision of state support to industrial or agricultural producers is somehow an illegitimate intervention in the free operation of the market is politically a contested one. It is premised upon a liberal philosophy that sees the price mechanism as the proper instrument for economic coordination and governance, and believes that prices should therefore not be “distorted” by state action. That philosophy is an expansionist one, and through the language of subsidies it seeks to ensure that states all take the same (minimal) form so that economic integration can be frictionless.

Of course there might well be reasons to argue that a particular kind of state support for agricultural production is misconceived. For example, in the case of US subsidies, there are indeed serious problems caused by the practice of subsidising corn as enshrined in serial US Farm Bills. These problems include the role now played by corn products in the US diet, the ways in which that diet is producing a generation with diabetes and other health problems, the dependence of industrial corn production upon oil, the transformation of corn into mass-produced beef, and the use of corn as biofuel, all of which strengthen relationships between US agri-corporations, the US state, and markets in energy. However rather than articulate why it is a bad thing for a state to support particular activities or economic actors, the critique of subsidies, and the related idea of “distorted” or “dishonest” prices, treats state support as a problem per se. In so doing critics have already accepted a liberal framework for thinking about the proper role of the state in relation to the market. Underpinning that approach is a vision of politics that treats attempts at social engineering or state planning with cynicism and even disdain. That approach offers little purchase on a neoliberal political and legal culture that now depends upon such cynicism towards the state and social planning for its consolidation and expansion. We are left with a choice between authentic freedom and artificial society, between nature and engineering, between human and machine.

⁷³ For examples from a wide-ranging literature committed to the position that agricultural subsidies are bad because they distort the market, see Jean-Christophe Bureau, David Laborde & David Orden, “The Subsidy Habit” in *Global Food Policy Report* (Washington DC: International Food Policy Research Institute, 2012); Christian Häberli, “The WTO and Food Security: What’s Wrong with the Rules” in Rosemary Rayfuse and Nicole Weisfelt, eds, *The Challenge of Food Security: International Policy and Regulatory Frameworks* (Cheltenham: Edward Elgar Publishers, 2012) at 149; Margaret A Young, “Food Security, Sustainability and Trade Distortions: Fisheries Subsidies and the WTO” in Rosemary Rayfuse and Nicole Weisfelt, eds, *The Challenge of Food Security: International Policy and Regulatory Frameworks* (Cheltenham: Edward Elgar Publishers, 2012) at 190; Jennifer Mersing, “How to Phase Out Rich Country Agricultural Subsidies Without Increasing Hunger in the Developing World” in Olivier De Schutter and Kaitlin Y Cordes, eds, *Accounting for Hunger: The Right to Food in the Era of Globalisation* (Oxford and Portland: Hart, 2011) at 193, Martin Wolf, *Why Globalization Works* (New Haven: Yale University Press, 2004) (describing EU, Japanese and US agricultural subsidies as “obscene”). The activist film *Food Inc* talks about “dishonest” prices for subsidised corn.

Thus the final motivation for this study is to unsettle the oppositions between state planning and freedom, distorted prices and market prices, or artifice and nature, that underpins much debate about food security. I will suggest that the choice is not one between on the one hand engineering our food systems or planning our economies, and on the other hand leaving our food systems or our economies to develop freely. Giving up on state involvement in agriculture does not mean that agriculture will not be engineered. Rather, in the absence of conscious state planning, food production and distribution will be engineered by a narrow group of people representing a very particular set of interests. The choice we face thus relates to the values according to which we engineer our food or produce nature. Our romantic distaste for the image of the machine in the garden extends not just to concerns with machines conventionally understood,⁷⁴ but also (and perhaps even more strongly) with the machine that we call the state. Neoliberal ideology presents a choice between state control and freedom, and seeks to discredit state planning as discriminatory and protectionist. This study will explore the meaning of “freedom” upon which that opposition is based—one that has been developed over two hundred years through attempts to limit the role of the state.

II. MAPPING INTERNATIONAL LAW AND THE GLOBAL FOOD ECONOMY

This project is, then, an attempt to understand how food security came to be so unevenly distributed in our closely integrated international economy, and the role of international law and governance in causing or responding to that uneven patterning of vulnerability. It explores whether and how current legal food regimes depart from or continue the doctrines, concepts, practices, and forms of justification developed as part of the European imperial project. It asks what a focus on international law can tell us about the project of securing access to food, and what a focus on securing access to food can tell us about international law.

In many ways existing methods of studying international law make it harder rather than easier to answer those questions. In part the difficulty arises because the object of study is at once so vast and yet so elusive—what exactly might it mean to think about the role of international law in constituting a global food economy, and how would one go about studying a phenomenon like food insecurity across time and on a global scale?

1. *International law and economic order*

First of all, this involves deciding what the object of study is, and which fields or forms of international law relate to securing access to food on a world

⁷⁴ Leo Marx, *The Machine in the Garden: Technology and the Pastoral Ideal in America* (35th Anniversary Edition) (Oxford: Oxford University Press, 2000).

scale. International law encompasses a very wide body of practices, concepts, ideas, processes, and techniques, and is claimed by an equally wide range of actors, experts, and institutions. The forms of international law that have constituted the global food economy are not necessarily those that overtly regulate agricultural production or address the politics of food in some direct sense. In setting out to study the role of international law in constituting entitlements to food, both in the past and in the present, this project has had to take a position on what “international law” is and where it is to be found.⁷⁵ My working premise is that international law is not an object that exists in the world prior to its conceptualisation. The production of knowledge, including knowledge of the past, does not simply offer a reflection or a copy of an object that is already given in the world, but nor is its goal to search for an object in the world that is already given in theory. Rather, the goal of scholarship, or at least of critical scholarship, is consciously to comprehend its object—here “international law”—in a theoretically and politically productive way. In this sense, “international law” is not just a fact or an object waiting to be found—it is a “virtual object” that is neither purely factual nor purely fictional.⁷⁶

From that starting point, the materialist focus of this study then presents a new object for critical reflection—an “international law” that is not (or not only) the stuff of elite European diplomats and philosophers, their correspondence, their treatises, and the interests of the nation states on whose behalf they develop arguments. A focus on the material question of securing access to food directs us to a set of practices, concepts, laws, and actors which are often not included in the more idealist histories of international law. In order to understand the roles that international law has played and continues to play in shaping the contemporary global food economy, it is necessary to be aware of its potentially varied modes, forms, effects, and functions—as regulative, distributive, normative, punitive, and constitutive.⁷⁷ Governing the production, distribution, movement, and exchange of foodstuffs requires forms of law that allow control over and access to land and territory, determine who owns particular goods, enable the movement not only of foodstuffs but

⁷⁵. See Anthony Carty, “Doctrine versus State Practice” in Bardo Fassbender and Anne Peters, eds, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) 972 at 974 (“the reason international legal history is almost impossible to write is that there is no consensus on what international law is”); Martti Koskenniemi, “A History of International Law Histories” in Bardo Fassbender and Anne Peters, eds, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) 943 at 970 (“What we study as history of international law depends on what we think ‘international law’ is in the first place”).

⁷⁶. On this way of thinking about the “virtual object” of critical theory, see Henri Lefebvre, *The Urban Revolution* (trans Robert Bononno) (Minneapolis: University of Minnesota Press, 2003, 1st published 1970) at 3, 5.

⁷⁷. Kerry Rittich, “The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social” in David M Trubek and Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 203 at 215-6.

also labour and capital across distances, deal with the “surplus” populations who are removed so that agricultural lands can be exploited more efficiently, and distribute the authority to decide about those things. In addition, as the commodification of goods that pre-exist the market, such as food and land, have historically provoked crises and forms of resistance,⁷⁸ any legal responses to such resistance should also be considered as part of the project of international economic integration through law.

My aim is also to hold on to the significance of land and the people who have inhabited it (whether figured as indigenous peoples, peasants, rural labour, internally displaced peoples, or migrants) to this story about famine and food security. As noted above, much internationalist discussion of food security argues that feeding the world requires agricultural improvements, technological innovations, and industrially-informed modes of production. In this vision science, technology, and capital-intensive agriculture are the future, and subsistence, small-scale or peasant agriculture are the past. That approach assumes that the livelihoods of the human beings who currently occupy and work small-scale farms, and their relation to land, are of comparatively little significance. Yet constituting and regulating a global food system also involves people, their forms of life, their labour, and their relationship to land and resources. Access to land and food is central to “the social foundations of the political system” in most countries, and as a result any changes in the management of agriculture and the control of a country’s food resources involve “complex political decisions” and negotiations.⁷⁹ Focusing on the regulation of land and people in debates about food suggests the need to explore a broad range of international legal rules and regimes as relevant to food security. The current international legal regime governing the production, consumption, and distribution of food thus includes not only agricultural law and policy but also laws addressing the policing of rural unrest, land ownership, famine relief, intellectual property, and financial liberalisation. In addition to the more conventional international legal rules governing agrarian reform, property tenure, agricultural patents, resource management, freedom of trade and investment, I therefore also examine the part that the regulation of international intervention, population control, and the displacement of peoples plays in constituting the legal foundations of the contemporary global food system.

It is difficult to tell that kind of story about international law for a number of reasons. First, international law in the form that we recognise it today emerged as a liberal project sometime in the late nineteenth century.⁸⁰

⁷⁸ See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001, 1st published 1944); Thompson, *supra* note 41.

⁷⁹ Alan S Milward, *The European Rescue of the Nation-State* (2nd edition, London and New York: Routledge, 2000) at 224-26 [Milward].

⁸⁰ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2002); Martti Koskenniemi, “International

In that form it shares with liberalism a tendency to reflect upon itself within a language and framework organised around the notion of freedom, including free labour and a free market. Liberalism avoids consciously thinking about the way it institutes and regulates authority, labour, and goods,⁸¹ while liberal legalism ignores both “the legal ordering of economic policy” and the inherently political nature of that legal ordering.⁸² This project is thus overtly working against a liberal account in trying to reflect consciously upon these aspects of international law. Concern with the tendency to think about international law as if it did not deal with the work of ordering economic relations is an old trope of critical writing about international law—many of us have sought to bring the political and the economic, the public and the private, into relation in our work for decades. And yet it remains surprisingly difficult to grasp how international law has structured economic relations in the sense I have just described.

Second, and more pragmatically, “international law” is not an object that can readily be comprehended at any given moment, let alone across a span that encompasses multiple countries or extends across time. The potential object is so vast that some decisions have to be made about what will be included in any given study. The dominant tendency today is to do so by specialising in a specific sub-field of international law, often organised around a particular treaty or institution. This is now described in the field in terms of a process of “fragmentation.”⁸³ The fragmented international regimes that shape the global food system each have their own principles, forms of expertise, objectives, and values, which often conflict and clash with those of other regimes. Most legal commentators focus upon one of these regimes as the basis for developing responses to the food crisis, and proceed to develop proposals for reform premised upon the assumption that the normative underpinnings of that particular regime should govern the future system. Thus while human rights lawyers argue that food security should be founded upon the right to food, trade lawyers and economists assume that food security should be founded upon free trade liberalisation and market-oriented agrarian reform, humanitarian actors prioritise protecting civilians in famine zones over achieving greater market efficiency, national security

Legislation Today: Limits and Possibilities” (2005) 23 *Wis Intl LJ* 61 at 91 (arguing that international law started out in the late nineteenth century as a political project “for the spread of liberal ideas in Europe and beyond” but became bureaucratic and opaque to itself).

⁸¹ A Javier Treviño, “Introduction” in Karl Renner, *The Institutions of Private Law and their Social Functions* (New Brunswick and London: Transaction Publishers, 2010) at xvii-xviii.

⁸² Christian Joerges, “Europe’s Economic Constitution in Crisis and the Emergence of a New Constitutional Constellation” (2014) 15 *German LJ* 985 at 987 [Joerges].

⁸³ International Law Commission, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”, Report of the Study Group of the International Law Commission, Finalized by M Koskenniemi, UN Doc A/CN.4/L.682 (13 April 2006) [International Law Commission].

specialists argue for vital systems security as the basis for responding to insurgencies in geopolitically important countries, environmentalists elevate resource conservation over economic growth, and the refugee system focuses upon containing and managing the mass movements of peoples that result from famine and rural impoverishment. More ambitious scholarly work seeks to develop ways to enable the interaction of these regimes.⁸⁴

It is important to recognise, however, that the conflicts and clashes between “regimes” have not emerged “as legal-technical ‘mistakes’,” but instead reflect the different preferences and interests of actors in a pluralist global society.⁸⁵ Very often new laws and regimes, such as human rights law or trade law, developed precisely because some group within the international community was dissatisfied with the existing law and sought to bring a new law into being that articulated their values. In accepting the fragmentation of the field into specialised regimes and working within or across it, scholars are taking up positions that are part of ongoing attempts to claim jurisdiction and authority in particular areas. Rather than start with categories that have been created as a means of achieving other institutional or political goals, I wanted to try and see if there was some way to organise a study of international law that would allow the parts to be brought into relation for another politics.

Third, international lawyers have developed an account of international law as a form of law directed to external aspects of the government of modern states. In this account, international law is concerned with the social life of states. It is the law that binds sovereigns in their dealings with other states—it sets out their rights and obligations and the way they conduct relations with each other through war, treaties, and diplomacy. This also shapes the way in which people write histories of international law. Many studies of the foundational texts in international legal theory treat modern international law as a discipline that is essentially concerned with questions of relations between sovereign states, such as those involved in the doctrines on resort to force, diplomatic protection, or territorial acquisition. These studies therefore look to history to find examples of thinkers who were concerned with war, diplomacy, or the acquisition of territory. However modern international law is a project that is concerned as much with the regulation and administration of life *within* states, through international economic law, international law and development, international administration, and international human rights law, as it is with formal questions of relations *between* states.

Of course there are many aspects of the practice of international law that are overtly organised around the external aspects of state conduct. Just as often, however, international law is and has been about enabling particular kinds of administration by one group of people over another, about entrenching

⁸⁴ Margaret A Young, ed, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012).

⁸⁵ International Law Commission, *supra* note 83.

particular state forms and not others, about securing particular vital systems of resource exploitation, and about constituting property relations. International law is intimately concerned with internal as well as external aspects of government. It offers a particular way of approaching the government of modern states and a set of practices designed to entrench particular forms of the state. This is a project that international lawyers have pursued in an ever closer relation with economists throughout the twentieth and twenty-first centuries. Yet the idea that international law is concerned with the foreign relations of states and the external aspects of government is so ingrained in the tradition of thinking about international law that it is hard to think outside it in a sustained way.

My aim in trying to think more broadly about the ways that international law constitutes the global food economy is to avoid reproducing the dominant liberal narrative I have already mentioned, in which state planning and support for agriculture is a problem, and the dismantling of that support is the solution. Similarly I want to avoid a story that ends up with a zero-sum choice between sacrificing the European social state on the one hand or the livelihood of peasant farmers in the South on the other. Many of the solutions that adopt those kinds of choices (such as the ending of state support for agriculture, the move to market-based agrarian reform, and the displacement of peasants and customary law) require anti-democratic means to implement them. The production of food and the relation of this production to land and labour are at the heart of politics, and yet the conscious attempt to institute democratic control of these features of social life is made to seem illegitimate—a barrier to trade, protectionist, the capture of the state by special interests, and even imperialist. It is not simply coincidental that doctrines and practices aimed at mandating free trade and investment emerge alongside those related to population control and intervention, and that these legal institutions need to be studied together. Attempts to introduce what logically seem from an investment and cost/benefit perspective to be more efficient systems for dealing with land and population have often been accompanied by force in order to secure the conditions that are necessary for the market system to operate.

2. *International law as routine: embedding liberalism*

International law is not only a body of concepts, doctrines, and practices. It is also a way of going about things. In particular, law involves the transmission of concepts or ideas between legal actors, so that those concepts or ideas are worn smooth and cease to be politically volatile. This can be a very useful technique. For example, the resort by international lawyers to debates about the objective “sources” of law when involved in international negotiations or dispute settlement allows them to avoid deep-seated disagreements about the proper values or goals that should be recognised by the law, and to find ways of resolving conflicts between states that are bearers of quite different

philosophical, legal, and political traditions.⁸⁶ Teaching students to be lawyers in part involves initiating them into the meaning of particular kinds of legal shorthand, so that they learn, for example, to treat certain legal fictions as if they were facts or assimilate the complex set of political choices condensed into a legal concept.

Annelise Riles has invoked this mode of legal production through transmission in her discussion of the “afterlife” of legal judgments, exploring the way that legal fictions are sustained through being “passed from legal hand to legal hand”—analysed by scholars in journal articles, invoked in arguments before courts and tribunals, cited by later judges, and taught in classrooms.⁸⁷ Legal knowledge is not simply the product of a single act of creation by a powerful agent at a particular moment, but is also produced through the process of handing on from one legal actor to the next. Through the often arcane rituals of legal life involving transmission and testing of such interpretations, lawyers give to legal texts a heightened sense of reality and purpose—as if these texts really could do something, and were meant to do something, in the world. In so doing, lawyers participate in producing law.

While we might want to study the moment in which a text is written, whether through the writing of a court judgment, the drafting of legislation, or the negotiation of a legal treaty, what is more emblematic of legal knowledge production is the practice of repetition through which legal concepts, principles, and fictions come to seem—indeed come to be—real. Legal fictions and legal concepts are highly condensed forms of rhetorical material that allow often highly-controversial political or philosophical propositions to be passed on as part of legal routine. In studying the role of international law in constituting the global food economy, it is therefore essential to grasp not only how the concepts, principles, and institutions that shape the field came to be developed and enshrined in particular treaty texts or judgments, but also how legal techniques have given such concepts, principles, and institutions authority and meaning.

While international legal texts contain precedents, concepts, and arguments that the tools of legal reasoning can potentially use to any end, that potential is also constrained through the ritualised processes of transmission and interpretation. Legal interpretations can both open up and constrain the meanings that count as law.⁸⁸ Legal officials confront “the luxuriant growth of a hundred legal traditions” and their role is often to “assert that *this one* is law

⁸⁶ Martti Koskenniemi, “Introduction” in Martti Koskenniemi, ed, *Sources of International Law* (Dartmouth: Ashgate, 2000) at xi.

⁸⁷ Annelise Riles, “Is the Law Hopeful?” (Cornell Law Faculty Working Papers, Paper 68, 2010), online: <http://scholarship.law.cornell.edu/clsops_papers/68>, 18-20.

⁸⁸ Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003) at 35.

and destroy or try to destroy the rest.”⁸⁹ Thus while I do not treat the dominant interpretation of the rules governing the global food economy as inevitable, predetermined, or unambiguous, I also consider how particular alternative interpretations of legal concepts have been closed off.

In taking that approach, I am departing from a more confidently optimistic tradition of US-inspired critical legal scholarship that stresses the capacity of legal techniques to shape the law in any direction.⁹⁰ In the words of Mark Tushnet, divergent and often conflicting lines of argument “pervade every area of law, and the standard tools of legal reasoning allow us to use those lines to any end we choose.”⁹¹ I agree with the political project that critical theorists like Tushnet were developing during the 1980s in reaction to an emerging law and economics account that presented an evolutionary history of law working itself pure, and I agree that there is nothing inevitable about the particular forms that governance takes today. On the other hand, it is still necessary to explore empirically how governance has come to take the forms it has taken, and the role that particular dominant modes of legal interpretation have played in that process.

The work of transmitting, testing, and handing on particular legal concepts is not undertaken by lawyers in isolation from other actors or fields. In relation to the forms of international law governing economics and access to resources, this can best be characterised as a project of entrenching liberalism—a project shared with a broader interpretative community that at different periods has included diplomats, colonial administrators, political economists, politicians, civil servants, and corporate executives. By entrenching liberalism, I mean that international law has been a project that seeks to transform all states into liberal states, entrench market principles at the heart of government both domestically and internationally, and organise itself around ideas of freedom. In recent decades, the process of securing the foundations of a liberal market economy through international law using the language of rational choice and efficiency “has become a joint enterprise,” carried out “by economists, international lawyers, and rational-choice political scientists,” with a particular focus upon informing doctrinal scholarship and institutional design through

⁸⁹. Robert R Cover, “Foreword: Nomos and Narrative” (1983) 97 Harv L Rev 4 at 53, discussed *ibid*.

⁹⁰. In the field of international economic law, see for example Andrew Lang, *World Trade Law after Neoliberalism* (Oxford: Oxford University Press, 2011) [Lang] and the review by Michael Fakhri, “Book Review of Andrew Lang, *World Trade Law after Neoliberalism*” (2012) 23 Eur J Intl L 901 (applauding Lang for showing “how trade law is in fact ambiguous” and commenting that “Lang rightfully warns us that if we do not appreciate law’s ambiguity as a principal feature of contemporary trade law practice and scholarship then we will maintain a very narrow understanding of the WTO”).

⁹¹. Mark V Tushnet, “Dia-Tribe (Book Review)” (1980) 78 Mich L Rev 694 at 704.

diagnosing “substantive problems” and proposing legal solutions.⁹² The field of international economic law was one of the first issue areas in which rational choice analysis was applied, with international economic lawyers and trade economists developing a detailed literature on international trade norms and their economic rationale.⁹³ Studying the history of international law as a practice of entrenching liberalism (and, increasingly, neoliberalism) thus involves studying the work of that broader interpretative community, and tracing an overlapping set of intellectual movements “with shared concepts, theorists, and institutional support networks.”⁹⁴

International law thus shares a tendency with other forms of law to create routines out of politics. And this is after all something for which we look to law. Rather than resort to force to achieve security or protect property, states look to law not only for particular outcomes but also for processes that will allow conflict to be avoided and channelled to more productive ends. Yet when we want to remember the politics that are embedded in the law, the successful operation of legal routines can make it harder to do so. This is particularly striking in the field of international law, where lawyers go to work within the kinds of functional specialisations noted above, very swiftly taking up the language drafted by state officials and putting aside questions about what political viewpoints that language embodies, how conflicts are addressed by that language, what new ways of ordering the world are mandated, and what kinds of authority relations are needed to realise that way of ordering the world. Increasingly, international legal scholars are trained not to ask those questions if they are to be credible as experts in a specialist field.

This may not be the best way for legal scholars to approach the project of transmitting contested concepts that deal with inherently political aspects of economic ordering. Christian Joerges argues that too many analysts “treat the results of political negotiations” such as those embodied in trade agreements “as though they were the results of an assembly drawn up to convene a constitution.”⁹⁵ This is the great strength of law, but in a sense also its great weakness. Lawyers analyse texts with focused attention, an armoury of skills in interpretation, and the goal of making language work in the interests of their clients and not their opponents. When the legal texts in question were

⁹² See Anne van Anken, “Rational Choice Theory” in Tony Carty, ed, *International Law: Oxford Bibliographies Online* (Oxford, Oxford University Press, 2012), noting the joint projects between lawyers and economists systematically commenting on WTO Appellate Body jurisprudence, such as that initiated by Petros Mavroidis through the American Law Institute in which each decision is analysed by a legal scholar and an international trade economist, as well as the training program financed by the European Union for Law and Economic Analysis in “Dispute Settlement in Trade: Training in Law and Economics.”

⁹³ *Ibid.*

⁹⁴ S M Amadae, *Rationalizing Capitalist Democracy: The Cold War Origins of Rational Choice Liberalism* (Chicago and London: The University of Chicago Press, 2003) at 251.

⁹⁵ Joerges, *supra* note 82 at 991.

understood to be divinely inspired or are the product of great democratic assemblies gathered together to draw up a constitution or even a piece of legislation, the motivation behind the full deployment of the techniques of scholarly legalism is understandable and the resulting effects of treating a text in such a way can be justified. However it is an open question as to how lawyers should approach texts that result from political negotiations between government delegations representing states with wildly varying degrees of bargaining power, in which governments under enormous external pressure agree to transfer control over central aspects of political, social, and economic decision-making to transnational authorities. As we will see, international lawyers working closely with international economists have approached these texts the way they would statutes or even constitutions, using all the tools of their legal training. If the goal is to understand how a particular form of international law is being consolidated to order economic relations globally, the increasing specialist expertise of international lawyers is a barrier rather than an aid to comprehension.

3. *Towards a history of international law and economic ordering*

In an attempt to address some of the barriers to comprehension that I have already described, such as fragmentation, routinisation, and the lack of conscious attention to economic ordering, this project takes a longer historical view of international law's contribution to constituting a global economy. A historical approach makes it possible to consider the interrelated operation of legal practices and concepts before they were fragmented into separate fields. It can also make familiar concepts appear strange again, through attending to the debates that took place in order to secure their acceptance, the alternatives that they displaced, or the attempts to resist their adoption. It serves as a reminder that currently dominant approaches to managing agrarian reform and ensuring food security are neither inevitable, apolitical, nor uncontested. History can also allow us to see "what is to be undone."⁹⁶ The shape of the world today is not a result of the natural unfolding of God's providence, as the nineteenth political economists and their political allies believed.⁹⁷ It is a consciously planned and directed human process involving embedding in legislation and treaties political choices to limit the capacity of the state to intervene in the operations of "the market." Revealing the forms of regulation that are largely rendered invisible in liberal theory and opaque in market practice can allow us to see what might be undone or done differently to achieve other goals. In the words of EP Thompson:

⁹⁶ For this reworking of Lenin's question, see Andrew Kliman, *The Failure of Capitalist Production* (London: Pluto Press, 2012) at 181.

⁹⁷ See further Part III below.

In some of the lost causes of the people of the Industrial Revolution we may discover insights into social evils which we have yet to cure ... Causes which were lost in England might, in Asia or Africa, yet be won.⁹⁸

The material focus of a history of international law organised around the constitution of a global food economy departs from the more traditional intellectual histories of international law, pointing in a different direction and to new actors and collaborators. In this view, international law does not derive purely from the genteel world of diplomats in European capitals, but also from the slightly dustier one of colonial administrators, company civil servants, Treasury officials, political economists, and even theologians. In taking that approach I am rejecting the dominant version of history that anchors international law in the natural law tradition of continental Europe. The project offers an alternative account of the development of contemporary international law to that offered by the focus on international law as an inheritor of the *ius publicum europaeum*. At least as relates to the forms of law that I am exploring here, there has been insufficient attention paid to the ways in which international law also emerges out of a set of imperial relations and practices organised within and in relation to empire. While looking back to the pre-nineteenth century period for the origins of international law is a standard move for liberal internationalists of the late nineteenth and early twentieth centuries, what this ignores is the colonial history of the doctrines that are now foundational to the operation of international law and international institutions. International lawyers have a hard time grasping the operation of those doctrines conceptually and strategically because we continue to treat them as if they are not part of the real discipline of international law. The real discipline of international law is treated as deriving from the conduct of external relations between European states.

Yet much modern international law is built upon a set of relations, institutions, norms, and techniques that have their origins in colonial administration and governance.⁹⁹ If we look at material rather than idealist aspects of international law, we see that many of the international legal concepts and practices that shape our contemporary global economy emerge out of imperial law and legal relations. The history of international law is not only to be found in the work of diplomats reflecting on their craft but also in the work of colonial administrators reflecting on theirs. In the era of decolonisation, international law has more and more come to be concerned with what happens within states, particularly postcolonial states. In order to understand the genealogy of that law, we need a new and different history, both in terms of our capacity to grasp the contemporary situation analytically

⁹⁸ E P Thompson, *The making of the English working class* (New York: Vintage, 1966) at 13.

⁹⁹ See further Anne Orford, "International Territorial Administration and the Management of Decolonization" (2010) 59 ICLQ 227.

and in terms of our capacity to understand the stakes of the twentieth-century mythologising of international law.¹⁰⁰ In part this requires attending to the ways that imperialism itself is transformed over the course of the nineteenth century. As territories were settled and colonial rulers were increasingly faced with “rebellion, resistance, and instability,”¹⁰¹ lawyers and colonial officials moved from developing doctrines justifying war to those explaining the principles of administration and policing.¹⁰²

From the beginning of the twentieth century onwards, much of the work of international law was devoted to mediating the end of formal imperial relations. Again, this is an aspect of international legal history that has received insufficient weight. The crisis of world order that accompanied the formal commitment to decolonisation arose from the need to externalise what had been internal aspects of colonial law and governance. This was concerned first with what we might call the internal features of colonial life—that is, the acquisition of land, the movement of people, and the prevention of revolution. It was also concerned with what we might now think of as the external features of colonial life—that is, the security of metropolitan access to resources, labour, and markets. The development of international law in the twentieth century was one response to that threatened crisis of world order.¹⁰³

Tracing attempts to guarantee food security offers one way to see this clearly, as it allows us to watch the ways in which control over resources, land, labour, and markets is secured after decolonisation. The study of international law can help to understand the means by which vital systems were secured for states and elites, as international lawyers in conversation with economists and policy-makers sought to mediate the end of empire. Thus the focus of this study from the beginning of the twentieth century is on why and how the influence of international integration on the governance of states becomes a subject matter for international lawyers and economists more broadly, and how this transforms the existing relations established under imperial rule.

¹⁰⁰ See further Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Orford, *supra* note 25.

¹⁰¹ Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton and Oxford: Princeton University Press, 2010) at 17.

¹⁰² Oscar Salemink, “Ethnography as Martial Art: Ethnicizing Vietnam’s Montagnards, 1930-1954” in Peter Pels and Oscar Salemink, eds, *Colonial Subjects: Essays on the Practical History of Anthropology* (Ann Arbor: The University of Michigan Press, 1999) at 282, 283.

¹⁰³ Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011).

III. RETHINKING THE HISTORY OF FREE TRADE AND FOOD SECURITY

How then does this approach to thinking about the past of international law allow us to see free trade differently? Taking a historical view reveals that free trade is an expansive and contested concept, which has been invoked over the past two hundred years to further a diverse range of political projects. A consideration of the example of free trade illustrates the way in which international law has worked to embed what were initially highly controversial political projects, philosophies, and approaches to government into the routine of legal interpretation and transmission. Concepts such as free trade (and related concepts such as discrimination, market distortion, protection, subsidies, and even food security) are the product of political struggles over particular ways of understanding the world, justifying entitlements to resources, explaining why some people should profit from the labour of others, and legitimising the exercise of power. And the struggle over the meaning of free trade continues: as with other concepts that do a lot of political work, the concept of free trade is “simultaneously unavoidable, ambiguous, and continuously contested.”¹⁰⁴

As with any history that engages with figures, texts, or concepts that are central to disciplinary formations, writing a history of free trade involves engaging with an “invented tradition.”¹⁰⁵ The method of lining up authorities in order to “establish continuity with a suitably historic past” is one that plays a central role in both popular discourse and academic argument.¹⁰⁶ The idea that there is a free trade tradition that we might oppose to a mercantilist or protectionist tradition plays an important part in disciplinary histories of international economics and of international economic law, and involves the invocation of past masters such as Adam Smith to support a particular view of disciplinary progress.

Intellectual historians have responded to this mainstream disciplinary history-writing by pointing out that in fact Smith was not a doctrinaire advocate of free trade, and similarly that the traditions of “protectionism” and even “mercantilism” that free traders attacked did not exist as a coherent school of thought or creed until they were conjured up by Smith and more importantly by the later generation of free trade advocates associated with Richard Cobden. Smith painted a “deceptively coherent” portrait of a “mercantilist system” organised around monopolism, militant economic nationalism, and balance of trade as a means of achieving balance of power, all driven by a strong and coherent nation state acting to protect the economic interests of powerful

¹⁰⁴ Jan-Werner Müller, “On Conceptual History” in Darrin M McMahon and Samuel Moyn, eds, *Rethinking Modern European Intellectual History* (Oxford: Oxford University Press, 2014) at 74, 87.

¹⁰⁵ Lars Magnusson, *The Tradition of Free Trade* (London and New York: Routledge, 2004) [Magnusson].

¹⁰⁶ Eric Hobsbawm, “Introduction: Inventing Traditions” in Eric Hobsbawm and Terence Ranger, eds, *The Invention of Tradition* (Cambridge: Cambridge University Press, 1992) at 1.

domestic producers with a view to enhancing the power of the state.¹⁰⁷ That vision of early modern political economy has been effectively challenged, with commentators arguing compellingly that mercantilism as a concept “owes a fare greater debt to its foremost critic than to any of its supposed advocates.”¹⁰⁸ Yet the dichotomy between free trade and protectionism, often presented as mapping onto an ethos of liberal commercial sociability versus one of nationalist economic militancy, continues to serve as a building block for disciplinary self-constitution in both international economics and international economic law.

This Part considers what the concept of free trade meant as it was taken up during the nineteenth century primarily in Britain and its colonies by those who sought to translate the free trade concept into a coherent set of policy prescriptions. In particular, I want to emphasise one aspect of this story that is often ignored or forgotten. Free trade is often envisaged primarily as an approach developed in opposition to protectionist trade barriers, typically the imposition of tariffs or quotas on imported goods. The history of free trade in international policy is narrated as one of oscillation between protectionism and free trade, with the tariff question as the key political issue and economic actors with special interests as the key actors. Yet the philosophy of free trade has since the eighteenth century been concerned not only with regulating government controls over imports and exports, but also, and perhaps more importantly, with the attempt to shape the form of the state and challenge certain forms of government intervention in the operation of the market. Free trade is a way of arguing about the role of the state in relation to the operation of the market—its intellectual history involves elements of theology, political economy, and law. The philosophy of free trade played a part in shaping the form of the state and colonial administration from the eighteenth century, and of international law and institutions from the nineteenth century.

1. *Political economy, free trade, and the science of the legislator*

Free trade emerged as a foundational concept of political and legal transformation in nineteenth century Britain, but its philosophical origins are often traced back to two late eighteenth century thinkers, Adam Smith and Thomas Malthus. Adam Smith had sought to promote and systematise the concept of free trade in *The Wealth of Nations* published in 1776.¹⁰⁹ His overall argument concerned the need for economic reform within Britain and between

¹⁰⁷ Philip J Stern and Carl Wennerlind, “Introduction” in Philip J Stern and Carl Wennerlind, eds, *Mercantilism Reimagined: Political Economy in Early Modern Britain and its Empire* (Oxford: Oxford University Press, 2014) at 3.

¹⁰⁸ *Ibid* at 3.

¹⁰⁹ Adam Smith, *The Wealth of Nations Books IV-V* (London: Penguin Books, 1999) [Smith].

Britain and its colonies.¹¹⁰ Smith considered political economy as “a branch of the science of a statesman or legislator” and the principle of free trade as part of a much broader philosophy of government.¹¹¹ His systematic approach to government, strongly influenced by the French Physiocrats, criticised Britain’s mercantilist regulation of its economic affairs and its colonial relations with America. Smith opposed government regulation of economic matters on the basis that it was subject to “that general objection which may be made to all the different expedients of the mercantile system; the objection of forcing some part of the industry of the country into a channel less advantageous than that in which it would run of its own accord.”¹¹²

Smith’s advocacy of a “liberal system” of trade was directed to two problems: first, the inability of the legislator to know how best to harness private interests to the common good, and second, the tendency of economic policy-making to be influenced by the “mean rapacity” and “monopolising spirit of merchants and manufacturers.”¹¹³ He considered the latter problem to be an urgent one, commenting that the monopoly that manufacturers had obtained had “so much increased the number of some particular tribes of them that, like an overgrown standing army, they have become formidable to the government, and upon many occasions intimidate the legislature.”¹¹⁴ In order to avoid being directed “by the clamorous importunity of partial interests,” the legislature should avoid introducing new forms of economic regulation except in situations of “most urgent necessity.”¹¹⁵

Smith opposed colonial rule for the same reason that he opposed mercantilism more generally—because it was conducted for the benefit of the “rich and powerful” at the expense of “the poor and the indigent.”¹¹⁶ Colonial trade was enabled through government by unrepresentative assemblies under intimidation by powerful companies that had gained power and thus influence through commercial monopolies. The merchants who carried on colonial trade had become the principal advisors to the government on the regulation of that trade, with the result that the interests of the merchants were “more considered than those of either the colonies or the mother country.”¹¹⁷ Those companies were often granted formal monopolies over trade with particular colonies, and even companies that did not have a monopoly in law could nonetheless enjoy exclusive trade in fact due to the competitive advantages

¹¹⁰ David Williams, “Adam Smith and colonialism” (2014) 10J Intl Political Theory 283; Donald Winch, “Science and the Legislator: Adam Smith and After” (1983) 93 Economic J 501.

¹¹¹ Smith, *supra* note 109 at 5.

¹¹² *Ibid* at 94.

¹¹³ *Ibid* at 72, 118.

¹¹⁴ *Ibid* at 48.

¹¹⁵ *Ibid* at 49, 119.

¹¹⁶ *Ibid* at 229.

¹¹⁷ *Ibid* at 165.

they gained through incorporation as joint stock companies with limited risk to the capital of those involved.¹¹⁸

In addition, Smith argued that trading companies could be “considered as the sovereigns of the countries which they have conquered.”¹¹⁹ Yet “a company of merchants are, it seems, incapable of considering themselves as sovereigns, even after they have become such.”¹²⁰ In most countries the revenue of the sovereign was drawn from the annual produce of the land and the people. As a result, the sovereign had an interest in increasing that annual produce as much as possible. Trading companies however did not consider it in their interests to increase the profitability of the colony as a whole. Rather, those companies “by a strange absurdity” regarded “the character of the sovereign as but an appendix to that of the merchant.”¹²¹ Their ambition was to profit by buying produce as cheaply as possible in the colonies and selling it at a higher price in Europe. In order to do so, they tried to keep all possible competitors from the colonial market, and thus keep the price of colonial products low. The result was to “make government subservient to the interest of monopoly” and “stunt the natural growth” of the produce of the country.¹²² The result was in turn bad for Britain. Colonies were left with barely sufficient produce to answer the demands of their people, and did not have sufficient revenue to fund their own protection. The British people were left to fund the protection of the colonies and of colonial trade without any revenue base on which to draw. Thus for Smith the negative effects of colonialism were illustrative of the broader problem with mercantilist government regulation in general—“though it may increase the revenue of a particular order of men in Great Britain, it diminishes instead of increasing that of the great body of the people.”¹²³ Free trade for Smith was the solution to the problem of unrepresentative government in the interests of wealthy elites.

However whether Smith’s solution was in the best interests of colonial subjects or the “poor and indigent” of Britain is another question, as the implications of his arguments concerning free trade in subsistence foodstuffs illustrate. Smith was rare amongst political economists in his willingness to advocate liberal approaches to trade even during times of scarcity. This was an important topic in late eighteenth century Britain. Food was a political flashpoint during this period of rapid transformation in the relations between landlords and tenants, forced enclosures of common lands, consolidation of larger holdings across England, clearances of rural land in Ireland, and

¹¹⁸ *Ibid* at 333, 343.

¹¹⁹ *Ibid* at 221-22.

¹²⁰ *Ibid* at 222.

¹²¹ *Ibid* at 222.

¹²² *Ibid* at 222-23.

¹²³ *Ibid* at 201.

growing commercial and military rivalry with France.¹²⁴ Food riots were a common form of direct action that represented the assertion by labouring people of traditional rights and customs, and a different sense of legitimacy to that imposed by the landed classes. As EP Thompson famously argued, the “conflict between the countryside and the town,” or between traditionalism and the new political economy, “was mediated by the price of bread.”¹²⁵ Food riots and the “risings of the poor” punctuated the “great age of agricultural improvement” throughout the eighteenth century.¹²⁶ Riots were a form of market disruption that sought to set the price of subsistence foodstuffs at a popular rather than market-driven level.

Few legislators or philosophers before Smith were willing to advocate complete freedom of trade during such periods of high food prices and hunger, fearing that if “rulers were to deny their own duties and functions in protecting the poor in time of dearth, then they might devalue the legitimacy of their rule.”¹²⁷ Many European states continued to control the trade in food throughout the eighteenth century, treating provisions as quite distinct from other commodities. For example, English law created the offences of engrossing (buying up corn or other foodstuffs wholesale in order to create a monopoly in it), forestalling (buying before goods reached a stall in an open market), and regrating (buying corn or other foodstuffs in a market and selling it again in the same market), regulated the operation of food markets (such as by allowing only townspeople to buy grain, flour, or meal during the first hour after the market opened, after which dealers were allowed in), supervised the weights and measures used by farmers, set annual statutory prices for corn, and fixed the size and price of loaves of bread and the profit to be made by bakers according to the institution of the Assize of Bread.¹²⁸

Smith challenged what he described as the “ancient policy of Europe” and the restrictions it placed on agriculture, “the great trade of the country.”¹²⁹ In his famous “Digression concerning the Corn Trade and Corn Laws” in Book IV of *The Wealth of Nations*, Smith argued that those ancient policies should

¹²⁴ On this period generally, see Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 2001, 1st published 1944).

¹²⁵ Thompson, *supra* note 41 at 189.

¹²⁶ *Ibid*; Lars Edgren, “Livsmedelsprotesterna i Malmö 1799” (2014: 1-2) *Arbetshistoria* 8; George Rudé, *The Crowd in History: A Study of Popular Disturbances in France and England, 1730-1848* (London: Serif, 2005, 1st published 1964).

¹²⁷ Thompson, *supra* note 41 at 270.

¹²⁸ *Ibid* at 193-94, 270, 282. On engrossing, forestalling, and regrating, see William Blackstone, *Commentaries on the Laws of England: Book the Fourth* (Oxford: Clarendon Press, 1769) at 158; JS Girdler, *Observations on the Pernicious Consequences of Forestalling, Regrating, and Ingrossing, with a List of the Statutes etc Which have been adopted for the Punishment of those Offences* (London: H Baldwin and Son, 1800). On the Assize of Bread, see Sidney and Beatrice Webb, “The Assize of Bread” (1904) *XIV Economic J* 196; Alan SC Ross, “The Assize of Bread” (1956) *9 Economic History Rev* 332.

¹²⁹ Smith, *supra* note 109 at 107.

be replaced by unrestrained freedom of trade in subsistence foodstuffs, even during times of poor harvest and high food prices. Government intervention during times of dearth or scarcity would not only be of no benefit, but could in fact be the cause of famine. If the government sought to “remedy the inconveniences of a dearth” by ordering corn dealers to sell their corn at what the government considered to be a reasonable price, this would only aggravate distress, either because a famine would be caused at the beginning of the season when dealers refused to bring their corn to market under such unfavourable conditions, or because a famine would be produced by the end of the season as a result of people being encouraged by cheap prices to consume grain too fast.¹³⁰ Thus the “unlimited, unrestrained freedom of the corn trade” was the “only effectual preventative of the miseries of a famine” and “the best palliative of the inconveniences of a dearth.”¹³¹

According to Smith, free trade in corn should be protected both for reasons of public good and private right. In terms of public good, Smith argued that the interest of the corn merchant in setting the proper price for grain made him study the market as carefully as possible. As a result, “no other person can have the same interest, or the same knowledge, or the same abilities to do it so exactly as he” and so “this most important operation of commerce ought to be entrusted entirely to him” and the trade in corn “left entirely free.”¹³² In terms of private right, Smith argued that to prevent “the farmer from sending his goods at all times to the best market is evidently to sacrifice the ordinary laws of justice to an idea of public utility, to a sort of reason of state; an act of legislative authority which ought to be exercised only, which can be pardoned only in cases of most urgent necessity.”¹³³ As that quote suggests, Smith did envisage that at times of “most urgent necessity,” government intervention might be justified, but otherwise expressed a steadfast commitment to free trade in food even in cases of famine. Smith’s arguments would be taken up to justify not only limited governmental intervention during episodes of scarcity in England, Ireland, and India, but also continued exports of foodstuffs out of areas suffering from famine.¹³⁴

¹³⁰ *Ibid* at 106.

¹³¹ *Ibid*.

¹³² *Ibid* at 113.

¹³³ *Ibid* at 119.

¹³⁴ In the broader project I explore the influence of Smith’s free trade advocacy beyond Britain and its colonies. Suffice to say here that *The Wealth of Nations* was widely translated, and influenced political economists and policy-makers in Germany, Sweden, Italy, Denmark, Portugal, Spain, Russia, and later China and Japan. However its central message underwent a transformation when it was taken up in continental Europe and America, with economists invoking Smith to support arguments for government intervention and limitations on free trade. See further Magnusson, *supra* note 105 at 92-151; Cheng-Chung Lai, *Adam Smith Across Nations: Translations and Receptions of the Wealth of Nations* (Oxford: Oxford University Press, 2000).

2. *Malthus and the principle of population*

The idea that hunger was an inevitable result of the laws of nature was the theme of another influential text of the age, Thomas Malthus' *An Essay on the Principle of Population*.¹³⁵ The contribution of Malthus to the development of political economy was to focus attention on the government of the poor and dispossessed in England and the colonies, and the relation of that government to the question of scarcity. Malthus sought to counter the effect that revolutionary thought was having upon politicians, intellectuals, and insurrectionary peasants in England and Ireland. He challenged the "speculations" of radicals such as William Godwin and Nicolas de Condorcet, who considered that poverty, deprivation, and inequality could be alleviated by the perfection of human institutions. According to Malthus, natural laws governing the relation between population and subsistence, rather than human institutions, were the cause of poverty, suffering, and famine. As population grew faster than the productive capacity of the earth, it was the "unchecked" growth of population rather than any social, political or economic arrangements that produced "the difficulty of subsistence."¹³⁶ The limits to food security were natural, in the sense that natural laws were an expression of God's divine plan.

According to Malthus, "[n]o fancied equality, no agrarian regulations in their utmost extent," could remove the pressure of population growth upon food supply.¹³⁷ Malthus attacked attempts to ameliorate hunger and poverty, such as the English Poor Law that had since Elizabethan times mandated parish relief for the English poor, on the basis that such measures tended "to create the poor which they maintain."¹³⁸ His *Essay* offered "an anti-Jacobin defence of property rights embedded in the religious world-view and theological framework of eighteenth century Anglican Christianity."¹³⁹ By presenting the principle of population as a fixed law of nature, Malthus was able to defend the human institutions of property and government that shaped access to and use of land.

Malthus' approach to government was informed by, and in turn informed, an evangelical vision of political economy that was central in shaping social and political thought in nineteenth century Britain.¹⁴⁰ That vision was premised upon the idea that Providence acts through general laws and that man should not intervene in the operation of those laws. God's providence was responsible for everything that happens in this world, understood as an arena of moral

¹³⁵ Malthus, *supra* note 36.

¹³⁶ *Ibid* at 13.

¹³⁷ *Ibid* at 14.

¹³⁸ *Ibid* at xv.

¹³⁹ AMC Waterman, *Revolution, Economics and Religion: Christian Political Economy 1798-1833* (Cambridge: Cambridge University Press, 1991) at 7 [Waterman].

¹⁴⁰ *Ibid* at 3.

trial.¹⁴¹ Suffering was part of God's order, and would lead to contrition, reformation, redemption, and eventually grace. In its dominant "moderate" form, the middle class piety represented by respectable groups such as the Clapham Sect had a major influence on thinking about domestic, colonial, and foreign policy, with figures such as the evangelical clergyman Charles Simeon influencing a generation of undergraduates during his ministry at Cambridge, the Scottish theologian and political economist Thomas Chalmers shaping the reform of poor relief in Scotland, and civil servants such as the lawyer James Stephen and Charles Trevelyan developing the direction of British policy in India and Ireland. Unlike more extreme evangelicals such as Edward Irving or Henry Drummond, moderates believed that God did not miraculously intervene in earthly affairs to demonstrate special judgments. Rather, having instituted the laws of nature, God took a *laissez-faire* approach to the material world and did not interfere with the operation of the mechanism he had set in train. Thus the operation of the natural laws of the market was predictable—just as the constancy of nature allowed the natural philosopher to be confident about the conduct of chemical experiments, so the constancy of the moral laws governing human behaviour could give "confidence in the management of human nature."¹⁴²

This sense of the operation of Providence profoundly shaped the approach taken by English elites to questions of government. Moderate evangelicals wanted to ensure that society operated as closely as possible to nature by repealing any laws considered to interfere with the unfolding of God's plan for the redemption of mankind. References to British faith in the "sacred laws of political economy" or "the Gospel of Free Trade" are thus not mere figures of speech.¹⁴³ Human intervention with the natural laws of the economy would only obstruct the perfection of individual morality. Most evangelists in this moderate, natural law school "were confident that *laissez-faire* policies would reveal a providential order," and moreover, that the order so revealed "would be a *just* one."¹⁴⁴ The moral charge attached to attacks on government intervention in the market derives from this evangelical foundation to Christian political economy.¹⁴⁵ As I argue below, that mode of thought shaped British approaches to the government of the state internally, the conduct of colonial administration, and the direction of foreign policy, supplying the ideological underpinning for a liberal-conservative reaction to the forces behind the

¹⁴¹ Boyd Hilton, *The Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought, 1785–1865* (Oxford: Clarendon Press, 1986) at 8 [Hilton].

¹⁴² Thomas Chalmers, *Institutes of Theology* (Edinburgh: 1847–49), viii, 337, discussed *ibid* at 14.

¹⁴³ Hilton, *supra* note 141 at 6.

¹⁴⁴ *Ibid* at 94.

¹⁴⁵ That moral charge is still evident in attacks on the distorting effects of government intervention by contemporary free traders. For an articulation of the moral foundations of the neoliberal rejection of many forms of state intervention in the market, see Raymond Plant, *The Neo-liberal State* (Oxford: Oxford University Press, 2010).

French Revolution and English Jacobinism and for governmental responses to poverty and famine in Britain and its colonies.¹⁴⁶

3. *The Corn Laws and the making of the free trade state*

By the mid-nineteenth century the political campaign for free trade had become one of the clearest articulations of English middle-class Providentialism. For its proponents—and by the middle of the nineteenth century there were many free trade proponents in England and its colonies—free trade offered a principle for shaping domestic government, colonial administration, and foreign relations. Perhaps the most celebrated use of free trade as a tool of political campaigning in the nineteenth century was in debates over repeal of the Corn Laws. The Corn Laws were part of the wider mercantilist system of protectionist measures that had shaped English trade relations with Europe and with English colonies since the seventeenth century. These measures included the Navigation Acts that restricted the use of foreign ships in trade between Britain and its colonies, widespread use of tariffs and import prohibitions, preferences for colonial products such as sugar, timber, and coffee, and the East India Company monopoly. All came under attack in the first decades of the nineteenth century, as advocates of free trade began to gain influence both within England and within the colonies.¹⁴⁷

The approach taken by free trade campaigners such as the cotton manufacturers Richard Cobden and John Bright illustrate the broad scope of the free trade principle during this period.¹⁴⁸ Cobden and Bright were influential in establishing the Anti-Corn Law League in 1836 to pressure members of parliament to repeal the Corn Laws. The League largely represented industrialists and manufacturers based in the North of England whose profits depended upon free trade and who resented the ways in which Parliament both represented and privileged the landed interest. The League's targets were the laws reintroducing protective tariffs on grain imports after the end of the Napoleonic wars, in an attempt to prevent a slump in grain prices following the resumption of continental trade. Those laws were widely perceived and resented as a means of preserving aristocratic land-owning privileges at the expense of both the labouring poor who suffered from food shortages and high food prices, and the manufacturing class whose ability to export their products depended on healthy import trades generating sterling. While a focus upon the actions of the Anti-Corn Law League can describe

¹⁴⁶ Waterman, *supra* note 139 at 257.

¹⁴⁷ See generally Anthony Howe, *Free Trade and Liberal England, 1846-1946* (Oxford: Oxford University Press, 1997); PJ Cain and AG Hopkins, "Gentlemanly Capitalism and British Expansion Overseas I: The Old Colonial System, 1688-1850" (1986) 2nd series, 39 *Economic History Rev* 501.

¹⁴⁸ Cheryl Schonhardt-Bailey, *From the Corn Laws to Free Trade: Interests, Ideas, and Institutions in Historical Perspective* (Cambridge: The MIT Press, 2006).

“the engine or the force that drove repeal to the doors of Parliament,” it does not explain why a largely Conservative government representing landholders voted for repeal of the laws, or why the Anti-Corn Law League gained such broad support from the British public.¹⁴⁹ To understand those developments, it is necessary to consider the role played by the appeal to free trade in nationalising and generalising the League’s interests.

The eventual swing in Parliament in support of repeal of the Corn Laws in 1846 was driven by a combination of growing ideological and theological sentiment against unnecessary state intervention in the market, a pragmatic sense even amongst those who largely represented the landed interest that without some concessions to giving up aristocratic privileges England could well go the way of revolutionary France, and a cosmopolitan and expansionist sense of trade and industry as a vehicle for growth and progress. Many of these interests were articulated in the support of “free trade.” For Cobden, the free trade principle represented a broad commitment to replacing the existing fiscal-military state with minimal government. Cobden and other like-minded reformers opposed government action that improperly interfered with the laws of the market both in the conduct of external relations and internal government, so that war expenditure, colonial acquisition, intervention, and import tariffs were denounced as infringements of free trade alongside food taxes, the alienation of estates, restrictive land laws, factory legislation, and monopolies.¹⁵⁰ Free trade broadly defined was directed to creating the conditions in which the market could operate without intervention, and was as much a debate about the government of property, commerce, industry, finance, and the need for democratic reform in England as it was about import tariffs. Cobden saw in the free trade principle “that which shall act on the moral world as the principle of gravitation in the universe, drawing men together.”¹⁵¹ In one of his many speeches campaigning in favour of free trade, Cobden professed his belief “that the speculative philosopher of a thousand years hence will date the greatest revolution that ever happened in the world’s history from the triumph of the principle which we have met here to advocate.”¹⁵²

The powerful influence of theological sentiments on the free trade debate is illustrated by Prime Minister Robert Peel’s speech to the House of Commons invoking the Irish potato famine that had begun the previous

¹⁴⁹ *Ibid* at 24-5.

¹⁵⁰ Richard Cobden, “Speech at Rochdale, 23 November, 1864” in John Bright and J. E. Thorold Rogers, eds, *Speeches on Questions of Public Policy by Richard Cobden, M.P. Volume II* (3rd edition) (London: T. Fisher Unwin, 1908) at 493; Francis W Hirst, ed, *Free Trade and Other Fundamental Doctrines of the Manchester School* (London: Harper, 1903) at xii.

¹⁵¹ Richard Cobden, “Free Trade, Manchester, 15 January 1846,” in John Bright and J E Thorold Rogers, eds, *Speeches on Questions of Public Policy by Richard Cobden, M.P. Volume I* (3rd edition) (London: T Fisher Unwin, 1908) at 181, 187.

¹⁵² *Ibid*.

year and urging Members to repeal the Corn Laws on 16 February 1846.¹⁵³ Privately Peel acknowledged that the repeal of the Corn Laws was unlikely to do anything to improve the Irish situation, and historians have criticised the expediency of Peel's appeal to the Irish crisis to justify the repeal of the Corn Laws.¹⁵⁴ Nonetheless he publicly invoked the famine, along with an account of the dispensations of Providence, in his speech to the House of Commons. Having recounted many "alarming accounts from Ireland," Peel urged Parliament to remove "every impediment to the free circulation of the Creator's bounty."¹⁵⁵ Peel did not claim that the repeal of the Corn Laws would immediately end distress in Ireland or prevent its recurrence in the future. He did, however, suggest that by repealing the Corn Laws and bringing the foreign and domestic commercial policy of England into conformity with the principles of free trade, parliamentarians could ensure that any future distress would not be the result of the laws of man but rather a manifestation of the just purpose of Providence.

When you are again exhorting a suffering people to fortitude under their privations, when you are telling them, 'These are the chastenings of an all-wise and merciful Providence, sent for some inscrutable but just and beneficent purpose—it may be, to humble our pride, or to punish our unfaithfulness, or to impress us with the sense of our own nothingness and dependence on His mercy;' when you are thus addressing your suffering fellow subjects, and encouraging them to bear without repining the dispensations of Providence, may God grant that by your decision of this night you may have laid in store for yourselves the consolation of reflecting that such calamities are, in truth, the dispensations of Providence—that they have not been caused, they have not been aggravated by laws of man restricting, in the hour of scarcity, the supply of food!¹⁵⁶

As a result in large part of the successful campaign to repeal the Corn Laws, free trade shifted from being "an essential component of the evangelical world-view" to becoming one of the most commonly held values uniting manufacturing and working class reformists in England.¹⁵⁷ By the mid-nineteenth century, many of the core aspects of economic governance that had troubled Adam Smith had been abandoned in England, with the Corn Laws and many other protectionist forms of regulation repealed, the East India

¹⁵³ *Hansard's Parliamentary Debates*, Third Series, Volume 83, 1004 [16 February 1846].

¹⁵⁴ Christine Kinealy, "Peel, rotten potatoes and Providence: the repeal of the Corn Laws and the Irish Famine" in Andrew Marrison, ed, *Free Trade and its Reception 1815-1960: Volume One Freedom and Trade* (London: Routledge, 1998) at 50 [Marrison].

¹⁵⁵ *Hansard's Parliamentary Debates*, Third Series, Volume 83, 1043 [16 February 1846].

¹⁵⁶ *Ibid.*

¹⁵⁷ AC Howe, "Free Trade and the City of London, c. 1820-1870" (1992) 77 *History* 391 at 409; Anthony Howe, "Free trade and the Victorians" in Marrison, *supra* note 154 at 164.

Company monopolies in India and China abolished, the discretionary powers of the Bank of England curtailed, and the “fiscal-military state” beginning its slow transformation towards the minimal state championed by free traders and political economists.¹⁵⁸

Yet while advocates of free trade such as Adam Smith and Richard Cobden were committed to the dismantling of existing colonial relations, they also ushered in what was to become a new free trade imperialism.¹⁵⁹ The old mercantilist system of colonial relations was dismantled over the nineteenth century, yet this did not represent the end of empire, if empire is understood to involve structured systems of exploitation. In place of the “old colonial system” was erected a new system of free trade, premised upon an international division of labour and access to the resources of the colonies.¹⁶⁰ In that context, the “issue of starvation” would remain the “ultimate test” of the Victorian commitment to free trade and the principles of political economy.¹⁶¹ It was a test that colonial administrators would pass with flying colours in Ireland and India.

4. *Free trade, famine relief, and colonial administration*

Free trade was the language in which the English governing classes debated the wisdom of government intervention to provide relief to the hungry, whether they be the poor in England or the victims of famine in Ireland and India. The principle of free trade and the science of political economy profoundly shaped the approach of English officials to the administration of Ireland and India more generally.¹⁶² This was in part due to the ongoing influence of Malthus. Malthus’ essays and teaching about the causes of hunger and poverty were influential in reshaping the system of poor relief in England, and his appointment to the Chair of Political Economy at the East India College in 1805 ensured that his ideas would have an influence upon the conduct of colonial administration, first in Ireland and later in India.¹⁶³ Colonial administrators trained by Malthus developed programmes

¹⁵⁸ Boyd Hilton, *A Mad, Bad, and Dangerous People? England 1783-1846* (Oxford: Clarendon, 2006) at 543.

¹⁵⁹ Bernard Semmel, *The Rise of Free Trade Imperialism: Classical Political Economy, the Empire of Free Trade and Imperialism 1750-1850* (Cambridge: Cambridge University Press, 1970) at 3.

¹⁶⁰ On the “old colonial system,” see R L Schuyler, *The Fall of the Old Colonial System: A Study in British Free Trade, 1770-1870* (New York: Oxford University Press, 1945).

¹⁶¹ Douglas Hay, “The State and the Market: Lord Kenyon and Mr Waddington” (1999) 162 *Past and Present* 101 at 159.

¹⁶² Peter Gray, *Famine, Land and Politics: British Government and Irish Society 1843-50* (Dublin: Irish Academic Press, 1999); Thomas A Boylan and Timothy P Foley, *Political Economy and Colonial Ireland: The Propagation and Ideological Function of Economic Discourse in the Nineteenth Century* (London and New York: Routledge, 1992).

¹⁶³ Patricia James, *Population Malthus: His Life and Times* (London and New York: Routledge, 1979).

for responding to famine that focused either upon controlling population numbers or upon increasing the productivity of the earth, without questioning the practices of land clearances, enclosures, consolidation of large holdings by absentee landlords, and free trade that were then shaping access to and use of resources throughout the British Empire.¹⁶⁴ The dangerousness of government intervention in the market was impressed upon generations of civil servants taught at the East India College, where political economy was included in the curriculum from the inception of the College in 1805. Even after the abolition of the College in 1855, political economy continued to be a compulsory subject in Indian Civil Service examinations until 1892.¹⁶⁵

The characterisation of the Irish famine of 1845-52 as a Malthusian crisis shaped the approach to famine relief taken by the British government. During what would become a seven-year period of mass starvation and emigration, the population of Ireland declined by over 20 per cent, with approximately one million people dying and more than one million people emigrating. The response of the British government was overtly aimed at reshaping Ireland into a commercial society, enabling the clearances and consolidation of farming land, encouraging English and Scottish investment, and addressing the problem of "surplus population" through promoting emigration to other colonies. Administrators were keenly aware of the dangers of rural unrest and the threat of revolution, and both famine relief and emigration were seen as potential vehicles for preventing uprisings.

The role played by Malthus' student Charles Trevelyan in overseeing famine relief was central to the approach that the British government adopted. Trevelyan had been a student of Malthus while at the East India Company College, and during the late 1820s and 1830s had served with the East India Company Civil Service in Bengal and the British Colonial Government in Calcutta. From 1840 to 1859 he was assistant secretary to Her Majesty's Treasury, and in that role administered the famine relief works in Ireland from 1845 to 1847. For Trevelyan, writing in 1848, the Irish famine was a "great intervention of Providence," and history would trace to it "the commencement of a salutary revolution in the habits of a nation long singularly unfortunate, and will acknowledge that on this, as on many other occasions, Supreme Wisdom has educed permanent good out of transient evil."¹⁶⁶ Trevelyan and his fellow officials interpreted the Irish famine as a symptom of the overpopulation of Ireland by surplus rural labourers,¹⁶⁷ rather than an indictment of a British colonial system that continued to ship large quantities of grain, beef, and pork to England even at the height of the famine. The evangelical commitment to

¹⁶⁴ Ross, *supra* note 54.

¹⁶⁵ Kate Currie, "British Colonial Policy and Famines: Some Effects and Implications of 'Free Trade' in the Bombay, Bengal and Madras Presidencies, 1860-1900" (1991) 14 *South Asia* 43.

¹⁶⁶ CE Trevelyan, *The Irish Crisis* (London: Longman, Brown, Green, and Longmans, 1848) at 1, 8.

¹⁶⁷ *Ibid.*

allowing God's plan to unfold through the unrestricted operation of natural laws shaped the approach taken by British officials both to the short-term provision of famine relief and to longer-term structural reform.

An example of the official British commitment to free trade as a basis for longer-term structural reform is provided by the report of the liberal agriculturalist James Caird, published in 1850 after he toured Ireland in the latter stages of the famine.¹⁶⁸ Caird was an English farmer and small landowner, who by the 1840s had emerged as a leading advocate of free trade in food, agricultural reform, and liberal responses to famine relief. He played a major role in pushing for an investment-oriented approach to "scientific agriculture" in Britain and the empire, through his tireless support for "high farming" (improved or intensive farming dependent on investment), his interventions supporting Peel's vision for the transformation of the Irish economy in the late stage of the 1845 famine, and his role as a member of the Indian famine commission that was established in the wake of the southern and western Indian famines of 1876–79.¹⁶⁹

Caird's report on Ireland, entitled *The Plantation Scheme; or, the West of Ireland as a field for investment*, argued that a "new foundation" had to be laid in Ireland "for building up hereafter a nation which shall be strong in the vigour of its own self-supporting power, the right arm of England, instead of its bane and disgrace."¹⁷⁰ Caird spelt out the conditions that were necessary if the West of Ireland was to be transformed into a "field of investment."¹⁷¹ Caird advised that there was much "fine fertile land" in the West of Ireland, which represented extremely good value for English and Scottish investors. However he stressed that for investment to be encouraged, the government had to remove undue impediments to the transfer of land, lower the rates of poor relief that landowners were liable to pay, and encourage emigration. Caird described in detail the starving people he saw in the union houses and the prisons, many of whom "bore the marks of pinching want" and were largely serving time for "petty thefts," such as "stealing a hen," "stealing turnips," and "rooting potatoes."¹⁷² He proposed that schemes to attract investors should be united with schemes enabling the emigration of the poor. The authorities should be allowed to send able-bodied persons who applied for relief to the colonies, if

¹⁶⁸ James Caird, *The Plantation Scheme; or, the West of Ireland as a field for investment* (Edinburgh: W Blackwood & Sons, 1850).

¹⁶⁹ Peter Gray, "Famine and Land in Ireland and India, 1845-1880: James Caird and the Political Economy of Hunger" (2006) 49 *Historical J* 193. On the idea of "high farming" and its significance in Victorian Britain, see PJ Perry, "High Farming in Victorian Britain: Prospect and Retrospect" (1981) *Agricultural History* 156.

¹⁷⁰ Caird, *supra* note 168 at 134.

¹⁷¹ *Ibid* at 1.

¹⁷² *Ibid* at 27.

they were otherwise clearly ascertained to be “redundant, as compared with the requirements of the land.”¹⁷³ According to Caird:

The way thus being opened for the influx of capital, and its secure investment in the land, and the safety of the redundant population being also provided for, measures should be taken to guard against the undue increase of population, and the possible recurrence of a second calamity.¹⁷⁴

Caird’s report also made clear that agricultural productivity in general remained very high during the potato famine. The problem was not a lack of sufficient food being produced in Ireland, but rather that the Irish people were not entitled to the food being produced. For example, Caird praised Lord Lucan for the successes of his “superior style of husbandry.” While Lord Lucan had been “much blamed for dispossessing the people who formerly held the land,” Caird argued that “when the amount of employment he is now giving, and the superior style of husbandry practised on his farms, are taken into account, it may be doubted whether the former possessors could earn as much by the miserable cultivation of their own lands as they now do in the capacity of hired labourers.”¹⁷⁵ As evidence, Caird noted that the annual produce from Lord Lucan’s 10,000 acres in that season of famine included 1000 acres of white crop, between 400 and 500 acres of green crop, a stock of 800 cattle, and 600 sheep.¹⁷⁶ Caird did not draw from this the possibility that the acres occupied by English aristocrats, or their cattle and sheep, should have been used to feed the people they had dispossessed, particularly in the context of severe famine. Rather, Caird considered that “[l]andlords generally, even those of the highest class in the empire, might do well to take a lesson from the example of Lord Lucan.”¹⁷⁷ Caird concluded his report on a note of “hope,” which nonetheless reveals the violence that was needed to maintain order in a state of rural distress:

Having thus brought to a close my observations on the state of the West of Ireland, I cannot conclude without expressing an earnest hope that a happier understanding between all classes in that country, based on a juster perception, and a more conscientious fulfilment of their respective duties, may soon form a moral power, stronger for the future preservation of order than the 50,000 armed men whose presence is now found necessary to maintain it.¹⁷⁸

The influence of political economy on thinking about the relation between famine and free trade was also evident in official responses to serial famines

¹⁷³ *Ibid* at 138.

¹⁷⁴ *Ibid* at 139.

¹⁷⁵ *Ibid* at 23.

¹⁷⁶ *Ibid* at 23.

¹⁷⁷ *Ibid* at 24.

¹⁷⁸ *Ibid* at 181.

in India under British rule. Colonial administrators in India were some of the earliest officials to take up the principles of Adam Smith and Thomas Malthus as the basis for policy-making.¹⁷⁹ In part this was because of their training at the East India College, and in part this was because many of the influential early administrators of newly conquered parts of British India in the early nineteenth century were Scottish, including Sir John Malcolm, Mountstuart Elphinstone, and Sir Thomas Munro.¹⁸⁰ They brought Scottish Enlightenment conceptions about forms of government, law, theology, and political economy to the problem of governing India. As administrators they self-consciously sought to act as Adam Smith's ideal legislators, building a science of government upon the principles of political economy.¹⁸¹

The centrality of the free trade concept to British colonial administration in India is illustrated in the reports of the famine commissions that were established from the mid-nineteenth century onwards in an attempt to develop a generally applicable "famine policy." While India had long been vulnerable to droughts and famines, Indian rulers had responded to famines with ad hoc responses driven by a combination of humanitarian and religious motivations. The number of people dying during famines became a political problem for British administrators, one that was felt more strongly after the Indian Mutiny of 1857.

The first British inquiry into famine in British India was set up in 1861, four years after the Mutiny. Its task was to investigate the Famine of 1860-61 in the North-West Provinces and Rajputana. The inquiry, conducted by Colonel R Baird Smith, was asked to report on the causes and intensity of the famine, the economic facts it disclosed, and "the remedial measures which it may be expedient to adopt in view to the prevention or essential mitigation of the effects of the occurrence of future seasons of drought."¹⁸² Baird Smith's report stressed the centrality of the principle of free trade in determining the appropriate response to famine. His study of earlier examples of famines in India showed that when governments had attempted to interfere with the principle of free trade, they had made the situation worse. According to Baird Smith, "up to a time very recent indeed, the calamities due to natural causes received some of their worst aggravations from the blunders of well-meaning men." These included "[v]iolent interferences with the course of trade," such as "persecutions of the traders; fixed maximum selling prices for the grain; constituting the Government the great grain dealer of the country,

¹⁷⁹ Srinivasa Ambirajan, "Political economy and Indian famines" (1971) 1 *South Asia* 20 at 21.

¹⁸⁰ Martha McLaren, *British India and British Scotland, 1780-1830: Career Building, Empire Building, and a Scottish School of Thought on Indian Governance* (Akron: University of Akron Press, 2001).

¹⁸¹ Jack Harrington, *Sir John Malcolm and the Creation of British India* (London: Palgrave Macmillan, 2010).

¹⁸² *The Special Commissioner's Final Report on the Famine of 1860-61*, 14 August 1861 (Calcutta: Englishman Office, 1861), Section II, 9.

and endeavouring to fulfil this impossible function through a mechanism equally impossible."¹⁸³

Baird Smith saw the introduction of such measures as evidence of "an entire absence of recognition of the truth, that the order of nature, if it occasionally produces dire sufferings, does also provide generally the most effective means for their mitigation."¹⁸⁴ He nonetheless considered that earlier administrators could not have been expected to act in a more enlightened fashion, because they had not yet had the chance to read *The Wealth of Nations*.

As it is scarcely yet recognised universally among ourselves, however, that in the natural laws of trade left to their free action, or if helped only by the removal of obstructions, one of the best and surest aids against Famines is to be found, the strange devices spoken of in these ancient records ... are not much to be wondered at. They were on the level of the knowledge of the times, and as the latest of the older series of great Famines, that namely of 1783, followed only by a few years, the first dawn of the revolution of thought on such questions produced ultimately by the publication of Adam Smith's 'Wealth of Nations' in 1776, it could scarcely have been expected that those who had to meet it ... should do so on principles far in advance of contemporary opinion and experience.¹⁸⁵

That commitment to allowing the "natural laws of trade" to operate freely is also spelt out in the 1880 Report of the Commission of Inquiry on Indian Famines. The Commission was appointed by the Secretary of State for India to provide a comprehensive study of famines in British India and the principles that should determine governmental responses to famine in future.¹⁸⁶ The report meticulously worked through the responses to famines under British rule in India, noting when "the principle of non-interference with trade" was followed and when it was abandoned. The report revealed that complying with the principle of free trade often led to "excess" deaths of a million or more people per famine, but also took care to record that situations in which the government interfered with private trade often led to reserves of grain left in government storehouses that had to be "disposed of at a loss."¹⁸⁷ It concluded that the principle of non-interference with trade should ground British administration of famine relief going forward. Its authors recommended that "the true principle for the Government to adopt as its general rule of conduct in this matter is to leave the business of the supply and distribution of food to private trade, taking care that every possible facility is given for its free action,

^{183.} *Ibid.*

^{184.} *Ibid.*

^{185.} *Ibid.*

^{186.} *Report of the Indian Famine Commission, Part I, "Famine Relief,"* 7 July 1880.

^{187.} *Ibid* at 10, 16.

and that all obstacles material or fiscal are, as far as practicable, removed.”¹⁸⁸ The report dismissed Government attempts to prevent famines from occurring through means such as supplying grain during times of scarcity, or storing grains in the period between famines so as to be prepared for times of distress.

The repeated and continued attempts to alleviate the difficulty of securing the food supply of the people by direct State interference, which have been made in our own country and elsewhere, have always ended in failure, and the safety of the population and their freedom from extreme fluctuations of the price of bread were only assured from the time when all such efforts were abandoned.¹⁸⁹

The free trade philosophy of the political economists had lasting effects on principles of colonial administration, and contributed to the consolidation of imperial economic systems over the course of the nineteenth century and the early decades of the twentieth. Those systems succeeded in ending famine in much of Europe, producing sufficient food to feed the workers of the continent’s rapidly industrialising cities, and ridding the countryside of the surplus peasant labour produced by the enclosures. Yet catastrophic famines never ceased to plague European colonies.¹⁹⁰ As Mike Davis has argued, the issue is “not simply that tens of millions of rural people died appallingly,” but that they did so while British administrators quoting Smithian dogma “allowed huge grain exports to England in the midst of starvation.”¹⁹¹

IV. FREE TRADE IN CONTEXT: FOOD SECURITY AND THE SOCIAL STATE

Today’s multilateral and regional trade agreements are justified according to an “invented tradition” of free trade. The history of free trade is remembered as a battle against protectionism and militant economic nationalism, in which commercial diplomacy is equated with liberal government, cosmopolitanism, and a more peaceful world. Yet the negotiated outcomes embodied in the WTO agreements and in a growing number of major regional trade agreements bear a complicated relationship to the history that advocates of free trade invoke. While there is much more to say about the historical role played by free trade in shaping access to food globally,¹⁹² even the brief fragment of that history

¹⁸⁸ *Ibid* at 49.

¹⁸⁹ *Ibid* at 53.

¹⁹⁰ James Vernon, *Hunger: A Modern History* (Cambridge and London: The Belknap Press, 2007) at 4.

¹⁹¹ Mike Davis, *Late Victorian Holocausts: El Niño Famines and the Making of the Third World* (London: Verso, 2002) at 9, 11.

¹⁹² For an insightful new history of the development of international trade law through a focus on the regulation of trade in sugar, see Michael Fakhri, *Sugar and the Making of International Trade Law* (Cambridge: Cambridge University Press, 2014).

offered here can help to illuminate the contemporary role played by the appeal to free trade in constituting the relationship of people to food and in making certain entitlements to food appear legitimate. Here I will draw out some of the ways in which contemporary trade law draws on but also departs from the nineteenth century free trade project. It is important to note that economic history *is* theory, and how we narrate that history already does a great deal of work in setting up the lessons we will take away about the inevitability and desirability of economic liberalism.¹⁹³

1. *The rise of commercial diplomacy*

Unlike today's free traders, nineteenth century free trade purists were reluctant to negotiate detailed free trade agreements. They saw such negotiations as providing the opportunity for merchants and manufacturers to lobby governments and shape domestic policy. In Britain, "commercial diplomacy" was largely viewed with hostility by free traders, and British liberal ideology supported an open market to all goods and unilateral liberalisation of trade barriers. Cobden briefly flirted with the need for trade diplomacy during the 1860s, one result of which was his role in shaping the Cobden-Chevalier treaty negotiated with France, but more dogmatic free traders criticised the negotiation of such treaties as "an abandonment of pure, unilateral free trade principles" and "a retrograde policy of 'exclusive dealing and bargaining'."¹⁹⁴

Perhaps as a result of that idealist commitment to unilateral liberalisation, and despite the tendency today to present the period before World War 1 in rosy terms, most trade was not "free" during the late nineteenth and early twentieth centuries. Today trade lawyers often recount the history of that period as if the world wars and depression of the early twentieth century interrupted a worldwide liberalisation of trade, labour, and commerce.¹⁹⁵ Yet many European states maintained high tariff regimes and protectionist policies throughout the nineteenth century, and to the extent they liberalised tariffs it was as a result of bilateral trade agreements.¹⁹⁶ The large proportion of the world's population who inhabited European colonies were excluded from liberal trade relations. Trade in goods produced in the colonies still primarily moved according to patterns of imperial preference and monopoly, shaped by colonial business interests and investors who acquired land, managed plantations and mines, made use of slave or indentured labour, and built

¹⁹³ For two scholars with quite different political agendas making the point that economic history is theory, see Jairus Banaji, *Theory as History: Essays on Modes of Production and Exploitation* (Chicago: Haymarket Books, 2010); PT Bauer, "Economic History as Theory" (1971) 38 *Economica* 163.

¹⁹⁴ Martin Daunton, *Wealth and Welfare: An Economic and Social History of Britain 1851-1951* (Oxford: Oxford University Press, 2007) at 204.

¹⁹⁵ See, for example, Douglas A Irwin, Petros C Mavroidis and Alan O Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008) at 5-7 [Irwin, Mavroidis and Sykes].

¹⁹⁶ Daunton, *supra* note 194; Gustav Cohn, "Free Trade and Protection" (1904) 14 *Economic J* 188.

railways and ports to integrate imperial assets into European commercial networks. Nonetheless by the late nineteenth century the network of bilateral agreements between European states had led to the creation of a low-tariff zone throughout much of Europe, and there was a higher degree of international integration between wealthier nations prior to World War 1 than afterwards.

That comparatively liberal period came to an end with the outbreak of World War 1. The free trade concept suffered a blow when governments responded to the financial crisis of the 1920s with tariff barriers and other protectionist policies designed to stop the spread of economic depression. During the inter-war period, international commercial diplomacy began to occupy a far more significant place in foreign policy-making, even for states like Britain that had been strong advocates of a unilateral free trade agenda. The challenge that absorbed liberal international lawyers, political economists, and international historians was how best to confront the perceived “disintegration” of international law and economic order.¹⁹⁷ For some, the international law and “integrated world system” made possible by European liberalism had already disintegrated by the end of the nineteenth century.¹⁹⁸ For others the cause of the decline was protectionist responses to World War 1 and the Great Depression.¹⁹⁹ For still others, the challenge to the social foundations of international law was caused by the foreign policies of fascist states and, to a lesser extent, Soviet Russia.²⁰⁰ Nonetheless by the 1930s, liberal internationalists shared the sense that the disintegration of the international system was a real problem, that it coincided with the end of European liberalism, and that it meant the weakening of international law.²⁰¹

The turn to commercial diplomacy in response during the inter-war period was largely driven by the United States. Cordell Hull, Secretary of State from 1933 to 1944 in the administration of President Franklin Roosevelt, was the driving force in repositioning US foreign policy toward trade liberalisation during the 1930s and in shaping planning for post-war reconstruction during the 1940s. Under his leadership the United States negotiated trade agreements with 22 countries during the 1930s, many of them in Latin America. The

¹⁹⁷ For the language of “disintegration,” see Wilhelm Röpke, *International Economic Disintegration* (London: William Hodge and Company, 1942) [Röpke]; Wolfgang Friedmann, “The Disintegration of European Civilisation and the Future of International Law: Some Observations on the Social Foundations of Law” (1938) 2 Mod L Rev 194 [Friedmann]; Ludwig von Mises, “Economic Problems: The Disintegration of the International Division of Labour” in The Professors of the Graduate Institute of International Studies, *The World Crisis* (London and New York: Longmans, Green, 1938) at 245.

¹⁹⁸ Alexander Rüstow, “Appendix: General Sociological Causes of the Economic Disintegration and the Possibilities of Reconstruction” in Röpke, *supra* note 197 at 267.

¹⁹⁹ Röpke, *supra* note 197.

²⁰⁰ Friedmann, *supra* note 197.

²⁰¹ For the relation of liberal conditions of economic order to the existence of international law prior to World War 1, see Rüstow, “Appendix,” 273-4; Röpke, *supra* note 197; Friedmann, *supra* note 197 at 194-95.

provisions of those agreements formed the basis for much of the General Agreement on Tariffs and Trade (GATT) of 1947.²⁰² The United States took advantage of the United Kingdom's need for financial assistance during World War 2 to require as a condition for the Lend Lease aid program that the United Kingdom would negotiate a reduction in imperial preferences and an agreement on principles for a liberal international commercial policy and free trade regime.²⁰³ Pursuant to those negotiations, as stated in the Atlantic Charter issued by President Roosevelt and Prime Minister Winston Churchill in 1941, the two countries would "endeavour, with due respect for their existing obligations, to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world."²⁰⁴ A small number of "internationally minded civil servants and economists" had "enormous influence" over this process, amongst them the liberal economists Harry Hawkins and Clair Wilcox from the US State Department, and Lionel Robbins and James Meade from the Economic Section of the British War Cabinet Secretariat.²⁰⁵ They were able to overcome the opposition to trade liberalisation from the US Departments of Agriculture, Labor, and Commerce, and the British Treasury, the Ministry of Supply, the Ministry of Agriculture, the Ministry of Food, and the Board of Trade.²⁰⁶ With the successful completion of the Anglo-American negotiations in 1945, the State Department moved to sponsor an international conference to negotiate a multilateral convention that would result in the GATT. Thus embedded within the GATT was a particular American vision of a new international economic order premised upon free trade.

2. *Economic liberalisation and agricultural exceptionalism*

The place of agriculture within that new economic order was highly controversial. States sought to insulate agriculture from market liberalisation principles and to treat agriculture differently from other sectors for a number of reasons. The collapse of commodity prices during the Depression of the 1930s had led states to introduce protection for farm incomes. The protection of agriculture and the maintenance of both a satisfactory level of income for farmers and a satisfactory level of food for growing urban populations had become core government policy across Europe and North America by the end of World War 2. The protection of agriculture was a particularly sensitive political question in Europe. During the nineteenth century Europe had been transformed from a continent in which income derived mainly from agriculture to one in which income was derived mainly from industry. Over that period,

²⁰² Irwin, Mavroidis and Sykes, *supra* note 195 at 12.

²⁰³ *Ibid* at 12-43.

²⁰⁴ *Ibid* at 17.

²⁰⁵ *Ibid* at 23-27.

²⁰⁶ See Susan Howson, *Lionel Robbins* (Cambridge: Cambridge University Press, 2011) at 424-61.

farm incomes had not increased as fast as incomes in the industrial and service sectors. This was partly because technical innovation increased productivity more rapidly in industry than in agriculture, and partly because adjustments to land-holdings and to labour could not be made as rapidly in agriculture as in industry.

During the inter-war period the wide disparity in rates of income growth between the agricultural and industrial sectors led to political instability across Europe and to widespread discontent in rural areas. The political mobilisation, violence and rhetoric exalting agriculture as the bedrock of the nation that emerged during this period played a major role in bringing fascist regimes to power, with authoritarian movements drawing support from the agricultural sector across Austria, Hungary and Germany. It was clear that rural impoverishment had been a cause of fascist support.²⁰⁷ Under such conditions, and in the context of a worldwide economic depression that further lowered prices for agricultural commodities, "it was hard for democratic governments to find a satisfactory response to these dangers."²⁰⁸ In addition, given the centrality of landholding arrangements to the social foundations of most countries, any changes in the "managerial systems" of agriculture were complex political decisions. The response during the 1930s was for governments to introduce protectionist measures and to regulate commodity markets, through total control over food production in the case of Nazi Germany through to the creation of marketing boards in other countries. In addition, the strategic lessons of World War 2 seemed to suggest that states should not allow themselves to become overly dependent on foreign food supplies.²⁰⁹ In the aftermath of the war with European states still facing food shortages, representatives of agricultural groups were in a powerful position to argue for more systematic responses to agricultural protection by governments.

This was the situation facing European states during the negotiation of the GATT and the subsequent negotiation to create a European common market. Even in Europe, where states shared common problems relating to agriculture, it proved extremely difficult to reach consensus on a European framework for agricultural trade. While some kind of European or international framework appeared necessary to protect both food and farmers, "any international solution appeared to require more sacrifices than the beneficiaries of national agricultural policies were prepared to make."²¹⁰ The agreement in 1957 that the signatories to the Treaty of Rome would agree on a Common Agricultural

²⁰⁷ Milward, *supra* note 79 at 224-6.

²⁰⁸ *Ibid* at 227.

²⁰⁹ Lizzie Collingham, *The Taste of War: World War II and the Battle for Food* (New York: Penguin, 2012).

²¹⁰ Milward, *supra* note 79 at 224.

Policy was central to the political compromise that led to the creation of peace in Europe.

In relation to the GATT regime as well as to the European Community, agriculture remained the exception for trade liberalisation until the 1980s. Parties to the GATT were not willing to treat agricultural products in the same way as other products.²¹¹ States were permitted to subsidise agricultural products for export under Article XVI:3, and at the insistence of the United States were also permitted to apply import quotas on agricultural products where necessary to enforce measures to limit domestic production. Much agricultural trade was exempted from other GATT principles as the result of country-specific waivers or other derogations. For example, in 1953 the United States requested and was granted an open-ended waiver permitting it to maintain import quotas as part of US domestic agricultural support programmes. The Working Party set up in 1956 to examine the compatibility of the Treaty of Rome establishing the European Economic Community with the GATT expressed concern about the potentially restrictive effects of the Common Agricultural Policy, yet reached no firm conclusions on its conformity with GATT obligations.²¹²

While the domestic agricultural production of powerful states or groups such as the United States and the European Community were insulated from trade liberalisation during the decades after the GATT came into existence, the agricultural sectors of countries in the global South were opened up to free trade from the 1980s. By the early 1990s, more than 90 developing and post-socialist economies were subject to structural adjustment programs as a result of conditions imposed on access to World Bank and International Monetary Fund resources. The aim of structural adjustment programs was to limit government intervention in the market and remove tariff and other barriers to trade. That process led to the reversal of land reform policies, cuts in farm subsidies and price supports, the expansion of crops for export, and the removal of tariffs or import quotas on agricultural products. The result was the devastation of peasant and small-scale family farming in much of the global South.²¹³

The creation of the WTO at the completion of the Uruguay Round of GATT negotiations in 1995 saw an intensification of that process and a significant expansion in the range of activities brought within the scope of the international trade regime. The use of commercial diplomacy to further the goal of liberalising agricultural trade received a major institutional boost with those developments. The Uruguay Round outcomes marked a shift in the international regulation of trade in agricultural products, as well as rules

²¹¹ Joseph A McMahon and Melaku Geboye Desta, "The Agreement on Agriculture: setting the scene" in Joseph A McMahon and Melaku Geboye Desta, eds, *Research Handbook on the WTO Agriculture Agreement* (Cheltenham: Edward Elgar, 2012) at 1 [McMahon and Desta].

²¹² Joseph A McMahon, *The WTO Agreement on Agriculture: A Commentary* (Oxford: Oxford University Press, 2006) at 2-5.

²¹³ Bello, *supra* note 2 at 30-1.

relating to their production and safety. Large global agricultural corporations, transnational food retailers, large industrial farmers, and agrochemical companies were both drivers and beneficiaries of these negotiations.

The Uruguay Round saw the negotiation of the Agreement on Agriculture (AoA), which brought the agricultural sector within GATT disciplines for the first time. The aim of the AoA is in some ways modest. As set out in the preamble, the AoA is the result of a decision by Members “to establish a basis for initiating a process of reform of trade in agriculture,” with the “long-term objective ... to establish a fair and market-oriented agricultural trading system.” That long-term objective is itself “to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets.” The overall approach in the AoA is thus designed to create liberalised markets in agricultural products through addressing what the text describes as “market distortions” in the agricultural sector. The specific form of trade distortion that the AoA is designed to address is the artificial (that is, caused by something other than market actors) *depression* of the price of agricultural commodities through either state “support” or state “protection.”

It was recognised in the AoA that the liberalisation of agricultural production might cause exceptional problems, either in the transition period to a liberalised market or during periods of disruption. While the AoA aims at removing various forms of “price support mechanisms,” trade negotiators also recognised that removal of support could cause price rises and problems for food supply. That is made clear in the language of the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, that was adopted alongside the AoA as part of the Final Act establishing the WTO. In a prescient statement, the Decision notes that:

Ministers recognize that during the reform programme leading to greater liberalisation of trade in agriculture least-developed and net food-importing developing countries may experience negative effects in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs.

In other words, negotiators recognised that food prices may rise as a consequence of the removal of support mechanisms in domestic agricultural policies and countries may find it difficult to maintain food supply as a result, given the implication that price support mechanisms kept the cost of agricultural products artificially low.²¹⁴ Nonetheless the underlying premise

²¹⁴ Fiona Smith, “Food security and international agricultural trade regulation: old problems, new perspectives” in McMahon and Desta, *supra* note 211 at 52.

of the liberal market approach embedded in the AoA is that the removal of state support for and protection of agricultural production is the best way to achieve food security in the longer term.

In addition, the WTO negotiations resulted in a raft of new trade agreements that took an ambitious approach to remaking the state in the interests of the market. The Uruguay Round outcomes significantly expanded the range of activities brought within the scope of the multilateral trade regime to include trade-related aspects of intellectual property,²¹⁵ trade in services²¹⁶ and the harmonization of public health and safety regulations,²¹⁷ and greatly increased the enforcement powers of the regime through the establishment of a sophisticated dispute settlement process.²¹⁸ The GATT had addressed some barriers to trade other than border measures, such as charges imposed internally and taxes that were imposed in a discriminatory fashion internally and effectively functioned as tariffs. However, this move away from a focus on “border” measures onto domestic regulations was intensified with creation of the WTO. A number of the agreements no longer only limit regulations that discriminate between foreign and domestic producers, or between different foreign producers. Rather, they constrain the capacity of states to regulate commercial activity more generally. The result, as I spell out in the next section, is that WTO agreements use the language of protection to challenge many forms of state intervention in the operation of agricultural markets, from regulating food safety and animal welfare through to environmental protection and product labelling.

3. *Free trade, economic integration, and the social state*

As Part III showed, the free trade concept has always been part of broader attempts to remake the state in the interests of particular groups and their political visions. In the late eighteenth and early nineteenth century the form of the state being attacked was the fiscal-military state, and the problem to be addressed was the use of trade barriers to protect the landed interest or corporate monopolies. Today’s free traders challenge the social state, and twentieth-century forms of health, environmental, and labour regulation that they see as interfering with market freedoms.²¹⁹ The ambition of economic

²¹⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr 15, 1994 [TRIPS].

²¹⁶ General Agreement on Trade in Services, Apr 15, 1994 [GATS].

²¹⁷ Agreement on Sanitary and Phytosanitary Measures, Apr 15, 1994 [SPS Agreement].

²¹⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr 15, 1994.

²¹⁹ The concept of the social state or *L’État social* draws on a French tradition that refers to a form of the state that not only provides social security but also guarantees public utilities, workers’ rights, and collective participation in economic ordering more generally. The term seems to capture something closer to the Nordic state than does the English concept of “welfare state.” The French concept of “*L’État providence*” is closer to the meaning of welfare state as used in English. See further Alain Supiot, *Grandeur et misère de l’État social* (Paris: Collège de France/Fayard, 2013).

integration through international agreements is to influence the approach that all governments take to regulation and planning.

The vision behind this approach to economic integration was clearly articulated during the era in which new trade agreements and international institutions were emerging. By the end of World War 2, many competing proposals for creating a new international legal order were already on the international negotiating table. One approach in particular that began to emerge during that period has since come to dominate international negotiations and radically shape the role of the state. During the 1930s, an affiliation of liberal economists, lawyers, corporate leaders, publishers, and policy-makers, amongst them the legal scholars Franz Böhm and Hans Großmann-Doerth and the liberal economists Alexander Rüstow, Wilhelm Röpke, Alfred Müller-Armack, Lionel Robbins, Friedrich Hayek, Ludvig Von Mises, and Gottfried Haberler, began to express concerns about the collectivism and optimistic approach to state planning that had gained support during World War 2.²²⁰

Through events such as the Colloque Walter Lippmann held in Paris in 1938, the creation of think tanks such as the Mont Pèlerin Society in 1947, and the academic networks associated with Freiburg University, the London School of Economics and Political Science, and the Chicago School of Economics, this group developed new proposals for constraining collectivism and state planning.²²¹ They analysed what they saw as the emerging crisis of capitalist economy and sought to develop the foundations of a new liberalism, in part through approaching the question of how to create a competitive market economy as a question of constitutional order.²²² For these liberal thinkers, liberalism and parliamentary democracy were not necessarily compatible. They believed that democratic states too easily become the prey of organised special interests and unable to act for the collective good. International economic integration offered one means of freeing the market from special interests and enabling competition.²²³

²²⁰ Röpke, *supra* note 197; Samuel Gregg, *Wilhelm Röpke's Political Economy* (Cheltenham: Edward Elgar Publishing, 2010) at 149; Lionel Robbins, *Economic Planning and International Order* (London: MacMillan and Co, 1937).

²²¹ See Serge Audier, *Le colloque Lippmann: Aux origines du 'néo-libéralisme'* (Paris: BDL editions, 2012); Robert Van Horn, Philip Mirowski, and Thomas A Stapleford, eds, *Building Chicago Economics* (Cambridge: Cambridge University Press, 2011); Philip Mirowski and Dieter Plehwe, eds, *The Road from Mount Pèlerin: The Making of the Neoliberal Thought Collective* (Cambridge: Harvard University Press, 2009) [Mirowski and Plehwe]; Keith Tribe, *Strategies of Economic Order: German Economic Discourse 1750-1950* (Cambridge: Cambridge University Press, 1995).

²²² Viktor J Vanberg, "The Freiburg School: Walter Eucken and Ordoliberalism," *Freiburg Discussion Papers on Constitutional Economics*, No. 04/11 (2004).

²²³ See further Anne Orford, "Hammar skjöld, Economic Thinking, and the United Nations" in Henning Melber and Carsten Stahn, eds, *Peace, Diplomacy, Global Justice, and International Agency: Rethinking Human Security and Ethics in the Spirit of Dag Hammar skjöld* (Cambridge: Cambridge University Press, 2014) at 156.

The work of Friedrich Hayek provides an example of the link made between international economic integration and the defeat of state planning. Hayek sought to prevent what he perceived as the threats to liberty posed not only by communism and fascism, but also by the proposed post-war planned economies of the United Kingdom, the United States, and France.²²⁴ For Hayek, state planning was opposed to the rule of law. He argued that a clear distinction could be drawn between “the creation of a permanent framework of laws within which the productive activity is guided by individual decisions, and the direction of economic activity by a central authority.”²²⁵ If a government was to act in accordance with the rule of law, it should leave it to individuals to decide the ends for which available resources were to be used. Any rules that the government introduced must not assist particular people more than others.²²⁶ Planning, in contrast, necessarily involved the “deliberate discrimination between particular needs of different people” and thus “the decline of the Rule of Law.”²²⁷

For Hayek, one means of dismantling planned economies was through a systematic process of interstate economic integration. Hayek argued that the removal of tariff walls and other barriers to the movement of goods and capital had “certain important consequences which are frequently overlooked.”²²⁸ In particular, the absence of such “economic frontiers” made it much more difficult to “create communities of interest on a regional basis” and of an “intimate character.”²²⁹ For Hayek, the destruction of any “solidarity of interests” was the most important overlooked consequence of economic integration.²³⁰

That there will always be communities of interest which will be similarly affected by a particular event or a particular measure is unavoidable. But it is clearly in the interest of unity of the larger whole that these groupings should not be permanent and, more particularly, that the various communities of interest should overlap territorially and never become lastingly identified with the inhabitants of a particular region.²³¹

The absence of economic frontiers would make it more difficult for states to identify national economic and political interests. That in turn would limit the capacity of states to develop monetary policy, regulate methods of

²²⁴ Friedrich A Hayek, *The Road to Serfdom* (Chicago: The University of Chicago Press, 2007) (first published 1944) [Hayek].

²²⁵ *Ibid* at 76.

²²⁶ *Ibid* at 76-7.

²²⁷ *Ibid* at 82.

²²⁸ Friedrich A Hayek, “The Economic Conditions of Interstate Federalism” (1939) *V New Commonwealth Quarterly* 131, reprinted in Friedrich A Hayek, *Individualism and Economic Order* (Chicago: The University of Chicago Press, 1948) 255 at 258.

²²⁹ *Ibid* at 257.

²³⁰ *Ibid* at 258.

²³¹ *Ibid*.

production, set minimum wages, limit working hours, prohibit child labour, tax commodities, and so on.²³² Hayek also considered it unlikely that “restrictive or protective” forms of government regulation would be taken over by the newly created interstate government.²³³ People would be much less willing to make sacrifices or pay more for goods in order to help producers in other states—as a result, there would be no support for restrictive or protective measures aimed at helping other group of producers or workers within an internationalised market.²³⁴ Thus removing “economic frontiers” and dissolving the sense of community and sympathy created by the nation state was specifically conceived of by Hayek as an instrument to attack planning. Because planning or the “central direction of economic activity” presupposed “the existence of common ideals and common values,” international economic integration could make planning much more difficult to carry out by limiting the extent to which “agreement on such a common scale of values can be obtained or enforced.”²³⁵

Economic integration was therefore not envisaged by Hayek merely as a means of attacking the capacity of the state to discriminate between national producers and foreign producers, but rather it was envisaged from the beginning as a means of attacking the capacity of the state to discriminate—that is, to plan—at all. Inherent in Hayek’s argument for economic federation was the goal of limiting legislation in many fields and making it more difficult for groups to reach agreement on what forms of economic regulation were appropriate. The effect would be to limit “the pursuit of independent policies by member-states of a federation.”²³⁶ For Hayek, the removal of tariff walls and barriers to movement was thus useful not because it could lead to increased trade but because it had other overlooked consequences.

The absence of tariff walls and the free movements of men and capital between the states of the federation has certain important consequences which are frequently overlooked. They limit to a great extent the scope of the economic policy of the individual states.²³⁷

After World War 2, Hayek and his colleagues intensified their critique of socialism and state planning. Hayek called for “a new liberal program which appeals to the imagination,” and makes “the building of a free society once more an intellectual adventure, a deed of courage.”²³⁸ For Hayek, the problem

²³² *Ibid* at 258-9.

²³³ *Ibid* at 261.

²³⁴ *Ibid* at 263.

²³⁵ *Ibid* at 264.

²³⁶ John Gillingham, *European Integration, 1950-2003: Superstate or New Market Economy?* (Cambridge: Cambridge University Press, 2003) at 10.

²³⁷ Hayek, *supra* note 224 at 258.

²³⁸ Friedrich A Hayek, “The Intellectuals and Socialism” (1948-49) 16 *U Chicago L Rev* 417 at 432.

was the “lack” of a “liberal Utopia.” “Free trade or the freedom of opportunity are ideals which still may arouse the imaginations of large numbers”²³⁹ To take a second example, Wilhelm Röpke opposed the “economic nationalist or socialist policies followed by most post-colonial developing nations,” arguing that this was often “a result of their governments following the prescriptions of economics such as Gunnar Myrdal ... who advocated welfare states, nationalization and inflationary investment policies in their own countries.”²⁴⁰ Röpke’s 1954 lectures at the Hague Academy of International Law took “international planning” as their target, arguing that the “international ‘open society’ of the nineteenth century” had been destroyed by the emergence of an “interventionist-collectivist system” after World War 2 and that as a result, international law had “entered the phase of disintegration.”²⁴¹

During the 1970s and 1980s, free trade advocates sought to expand the GATT regime to address this “disintegration.” The target of free trade advocates became the collectivist approach to state planning, social legislation, and commercial policy broadly conceived. In particular, free traders developed an ambitious approach aimed at finding ways to address “the pressures put upon importing economies by a myriad of subtle (and sometimes not so subtle) government aids to exports,”²⁴² or in other words, to find ways to counter the policies of states that provided support to industry and agriculture. In the words of trade lawyer John Jackson, while consumers in importing countries may benefit from the cheaper prices of commodities produced with the support of foreign governments, “the domestic producer feels outraged that while playing by the free enterprise rules he is losing the game to producers not abiding by such rules.”²⁴³

The idea that international integration should ensure that trade was not only “free” but also “fair” became a central feature of WTO agreements. Those agreements are concerned with broad issues about the limits of state intervention in the operation of the market. As a result, WTO agreements should properly be thought of as governance agreements rather than trade agreements. For example, the ambition of the AoA is to remove any form of “support” for agricultural production. The idea that governments should protect their populations by guaranteeing the supply of food is dismissed by today’s free traders just as it was dismissed by nineteenth century free traders. Indeed many contemporary debates have an eerie resonance with those relating to the conduct of Irish and Indian famine policy during the nineteenth century. So for example scholars have argued that the combination

²³⁹ *Ibid.*

²⁴⁰ Gregg, *supra* note 220 at 149, 182-3, 291.

²⁴¹ Wilhelm Röpke, “Economic Order and International Law” (1954) 86 *Recueil des Cours* 203 at 226.

²⁴² John H Jackson, “The Crumbling Institutions of the Liberal Trade System” (1978) 12 *J World Trade* 93 at 95.

²⁴³ *Ibid.*

of obligations under the GATT and the AoA should be interpreted to limit the capacity of states to restrict the export of grains and other foodstuffs from their territory.²⁴⁴ Similarly, the current Doha round of trade negotiations is replaying debates from nineteenth century Indian famine reports about whether Indian administrators should be permitted to stockpile grain as a food security measure. Negotiators have struggled to overcome the impasse caused by the firm stance taken by the Indian government on the question of stockpiling food reserves, and the objections of the United States to such policies.²⁴⁵

Many other WTO agreements limit the capacity of states to regulate industrial food production, animal welfare, hormonal and chemical additives, labelling, transportation, and the environmental impact of production processes. For example, the provisions of the SPS Agreement have been the basis of a challenge to measures regulating industrial beef production. Many health professionals, animal welfare activists, labour organisers, consumer advocates, and environmentalists have expressed concerns about factory-style industrial meat production. Amongst other criticisms, they have pointed to the reliance of industrialised meat farming upon hormones and antibiotics to promote growth and prevent disease in crowded and insanitary conditions, and the effects of that reliance on the health and welfare of animals, workers, consumers, rural communities, and the general public.²⁴⁶ Yet in a landmark 1998 ruling, the WTO Appellate Body held that EC regulations limiting the use of hormones in beef production were in violation of obligations under the SPS Agreement.²⁴⁷ The ruling made clear that Members may be in breach of the SPS Agreement even if the health and safety measures they adopt have no discriminatory effect and apply on a non-discriminatory basis. In this interpretation, the SPS Agreement does not only prevent states from regulating in ways that discriminate against foreign producers. It also embodies the Hayekian position that health and safety regulations interfere with the operation of the market and cannot be maintained unless the state seeking to protect its population from a technology or additive involved in production can prove scientifically that there is a demonstrable risk to human or animal health and safety and that no less trade-distorting method is

²⁴⁴ Howse and Josling, *supra* note 3.

²⁴⁵ Eugenio Diaz-Bonilla, *On Food Security Stocks, Peace Clauses, Permanent Solutions After Bali*, IFPRI Discussion Paper, November 2014.

²⁴⁶ Shefali Sharma, "The Price of China's Meat And Dairy Industries" (28 January 2014), *IATP Blog*, online: < <http://www.iatp.org/blog/201401/the-price-of-china%E2%80%99s-meat-and-dairy-industries>>; John Hopkins Center for a Liveable Future, *Industrial Animal Food Production in America*, Fall 2013; Daniel Imhoff, *The CAFO Reader: The Tragedy of Industrial Animal Factories* (Berkeley and Los Angeles: Watershed Media, 2010); Pew Commission on Industrial Farm Animal Production, *Putting Meat on the Table: Industrial Farm Animal Production in America*, 2009.

²⁴⁷ EC—Measures Concerning Meat and Meat Products (Hormones), WT/SD26/AB/R (16 January 1998).

available to address that risk.²⁴⁸ Similarly, the provisions of the Agreement on Technical Barriers to Trade have been relied upon successfully to challenge US consumer protection legislation requiring the labelling of meat and poultry products with information indicating where the livestock was born, raised, and slaughtered.²⁴⁹ While similar country of origin labelling applies in the US to other foods, multinational meat companies had strongly resisted country of origin labelling for meat products, and encouraged Canada and Mexico to challenge that legislation at the WTO.²⁵⁰

As these examples show, free trade agreements work to limit the capacity of states either to support farmers directly or to encourage the development of sustainable forms of agricultural production. Resistance to those effects of trade agreements is growing, not only on the part of peasants and small-scale family farmers who have been displaced in order to make room for large-scale agribusiness farming operations, but also on the part of consumers, development workers, health professionals, family farmers, and environmentalists who are “disconcerted by the mixture of corporate greed, social insensitivity, and reckless science” that has accompanied the advance of market-oriented agrarian reform and are working to create alternatives.²⁵¹

4. *Free trade and the Trojan horse of development*

To the extent that the WTO literature recognises that trade liberalisation in agriculture may cause problems for access to food or for North-South relations, it treats those problems as caused by the social state and government support for agriculture. This approach to thinking about the relationship between agricultural protection in the North and the economic situation in the South dates back to the Haberler report of 1958.²⁵² This report is often discussed as the moment when “development” enters the GATT trade agenda. Andrew Lang, for example, presents the Haberler report as a “turning point” for the GATT regime’s response to the “development challenge,” when growing “agricultural protectionism” in the industrialized world “prompted developing countries to make their voices heard more effectively within the GATT.”²⁵³

²⁴⁸ Anne Orford, “Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice (2005) 18 *Leiden J Intl L* 179.

²⁴⁹ United States—Certain Country Of Origin Labelling (COOL) Requirements, WT/DS384/AB/R WT/DS386/AB/R (29 June 2012).

²⁵⁰ Ben Lilliston, “Farmers, Ranchers and Consumers Lose on WTO COOL Ruling” (20 October 2014), *IATP Blog*, online: <http://www.iatp.org/blog/201410/farmers-ranchers-and-consumers-lose-on-wto-cool-ruling>.

²⁵¹ Jennifer Clapp, *Food* (Cambridge: Polity Press, 2012) at 158-83; Bello, *supra* note 2 at 36; Harriet Friedmann and Amber McNair, “Whose Rules Rule? Contested Projects to Certify ‘Local Production for Distant Consumers’” (2008) 8 *J Agrarian Change* 408.

²⁵² G Haberler, R de Oliveira Campos, JE Meade, and J Tinbergen, *Trends in International Trade: A report by a panel of experts* (Geneva: GATT, 1958).

²⁵³ Lang, *supra* note 90 at 45.

Yet the Haberler report can better be understood as part of a major attempt to reconfigure relations between the state, finance, and labour played out through debates about development economics and the place of free trade in development. The 1950s saw the beginning of a struggle between advocates of state-driven modernisation models with a focus on planning, import substitution, and social reform, the consolidation of the liberal attack on state planning described above, and an emergent world system theory that offered more radical critiques of the unequal integration of independent states into the global economy and their continued exploitation by foreign corporations and investors.²⁵⁴

The Haberler report played an important part in that struggle. Three of the report's authors were committed liberal economists. Gottfried Haberler was an Austrian economist and member of the Mont Pèlerin society, closely connected to Ludwig von Mises and Hayek.²⁵⁵ Roberto de Oliveira Campos was a Brazilian economist, diplomat, bank president, and cabinet minister, described in his New York Times obituary as an "apostle of free trade."²⁵⁶ He was on the Brazilian delegation to the conferences that created the International Monetary Fund, the World Bank, and the GATT, and was a supporter of the right-wing dictatorship that came to power after the military coup that ousted President João Goulart in 1964. Campos served as Minister for Planning in the first three years of the dictatorship, and was subsequently appointed as the military government's envoy to the UK. James Meade was one of the initial negotiators of the Anglo-American loans agreement and a close colleague of Robbins at the LSE.

Their report reflected the position developed by influential liberal economists who were concerned that the problems facing Third World countries combined with the tendency to look to state planning in response would lead to another Keynesian revolution.²⁵⁷ In the view of these liberal thinkers, the postcolonial state threatened to become a vehicle for land reform, redistribution, industrialisation, and economic growth either through import-replacement industrialisation or command economies. They opposed the vision for the postcolonial state aimed at new social settlements involving the establishment of labour rights, redistribution, education, and land reform.

The vision of development through trade liberalisation was presented in the Haberler report and other Mont Pèlerin influenced literature in conscious opposition to those redistributive approaches. The liberal developmental

²⁵⁴ Karin Fischer, "The Influence of Neoliberals in Chile before, during, and after Pinochet" [Fischer] in Mirowski and Plehwe, *supra* note 221 at 305, 311.

²⁵⁵ *Ibid* at 357-9.

²⁵⁶ Larry Rohter, "Roberto Campos, 84, Apostle For the Free Market in Brazil", *New York Times* (21 October 2001), online: <<http://www.nytimes.com/2001/10/12/world/roberto-campos-84-apostle-for-the-free-market-in-brazil.html>>.

²⁵⁷ Dieter Plehwe, "The Origins of the Neoliberal Economic Development Discourse" in Mirowski and Plehwe, *supra* note 221 at 238.

strategy was premised on building export-oriented mining and industrial agriculture rather than manufacturing industries in developing states, with a focus on attracting funding from foreign investors. As an approach, it was developed in connection with authoritarian governments and elites in Mexico, Chile, South Africa, and Brazil as a means of retaining the support of propertied classes and the United States while not creating political opportunities for parties and unions associated with the industrial working class.²⁵⁸ Thus rather than treating the 1958 Haberler report as the moment when a Third World challenge was posed to the free trade project, the report should instead be understood as reflecting the outcome of intense discussion in neoliberal circles about the form that the postcolonial state should take.

Since that time, liberals have encouraged the view that state support for agriculture, falling food prices, and food surpluses are a problem. From a perspective that focuses on producing enough food to “feed the world,” low food prices and surplus production might be seen as a good thing. For example, understanding the world as a planned economy rather than a free market could make it be possible to contemplate global food surpluses as a shared resource available for redistribution.²⁵⁹ From a “free trade” perspective, however, those outcomes represent market distortions that have to be remedied by reducing the amount of available food and attacking “artificially” cheap food prices.

5. *Monopolies and corporate power*

Finally, the concern with the power of companies and their relation to the state articulated by Adam Smith has today disappeared from the free trade project. The nineteenth century free trade project was connected with campaigns to enfranchise the manufacturing and working classes, and tackle the entrenched privilege of the landed aristocracy and company monopolies. The ambition was to reform the state so that it would represent a broader range of interests. In contrast, modern free trade agreements are negotiated in secret, as if they were private contracts. The terms of those negotiations are not made available to the public, and democratic parliaments have limited opportunities to intervene in negotiations. Corporate leaders, however, have played a major role in shaping the conduct of trade negotiations and working with governments to enforce trade agreements.²⁶⁰ Indeed the central role of corporations in the negotiation of free trade agreements, and their innovative proposals for redescribing many forms of state action as “foreign barriers to

²⁵⁸ Raewyn Connell and Nour Dados, “Where in the world does neoliberalism come from?” (2014) 43 *Theory and Society* 117 at 122; Juan Gabriel Valdés, *Pinochet’s Economists: The Chicago School in Chile* (Cambridge: Cambridge University Press, 1995); Fischer, *supra* note 254 at 305.

²⁵⁹ See Gunnar Myrdal, *Beyond the Welfare State: Economic Planning and its International Implications* (New Haven and London: Yale University Press, 1960).

²⁶⁰ John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

trade,” are examples of the kinds of relationships between government and merchants about which Smith was so scathing.²⁶¹

The agenda that is being furthered by free trade agreements entrenches a relationship between states and transnational corporations that favours those corporations over local peoples and communities. Such agreements attempt to limit the capacity of governments to intervene in the economy for the benefit of their people while expanding the protection of investors.²⁶² This has had a significant impact on the capacity of governments to intervene to shape how food is produced and according to what standards. The effect, as Smith might have predicted, is the consolidation of global monopolies by a small number of giant agribusiness corporations, for example in the grain and meat industries. In addition, free trade agreements increasingly represent the interests of specific monopolists—precisely the kind of relationship that made unilateral free traders of the nineteenth century suspicious about commercial diplomacy. This can be seen today in attempts to include in trade agreements provisions that constrain the ability of states to enact local origin and other labelling requirements, food safety regulations, and environmental protection measures. The lack of any international competition law combined with an enabling approach to corporate activity produces extraordinary concentrations of power in global supply chains, a result that would have been of concern to Smith, for whom corporate obstruction of the free operation of the market was a problem. The result is particularly serious for food systems in which the concentration of a small number of major agribusinesses as middle men in global food supply chains has a strong effect on both the low prices paid to producers and the high prices paid by consumers.²⁶³

V. CONCLUSION—THE CRISIS OF THE FREE TRADE STATE

This article has suggested that agrarian reform, the championing of “free trade,” and the battle for the state have been closely related projects over the past two hundred years. Since the emergence of international law in the nineteenth century, international lawyers have been deeply involved in a conversation with political economists and free trade ideologues about the proper limits to state power in relation to the market. The project of state reconstruction to enable the market to operate without restraint has been entrenched quite consciously through transnational economic integration,

²⁶¹ For a discussion of this process in the context of the Trans-Pacific Partnership negotiations, see Ben Lilliston, *Big Meat Swallows the Trans-Pacific Partnership*, Institute for Agriculture and Trade Policy, November 2014.

²⁶² Orford, “Locating the International,” *supra* note 25.

²⁶³ S Ryan Isakson, “Food and Finance: The Financial Transformation of Agro-Food Supply Chains” (2014) 41:5 *J Peasant Studies* 749; Jennifer Clapp, “Financialization, Distance and Global Food Politics” (2014) 41:5 *J Peasant Studies* 797; Sophia Murphy, David Burch & Jennifer Clapp, *Cereal Secrets: The World’s Largest Grain Traders and Global Agriculture*, *Oxfam Research Reports*, August 2012.

both through the European integration project and through the negotiation of multilateral free trade agreements.²⁶⁴

In many ways, the sense of the free trade project as involving a battle for the state is lost as we move into the WTO era. The language of non-discrimination and the removal of “barriers to trade,” hides the relation of trade law to remaking the state. Lawyers have adopted the ideologically-loaded and morally charged language of protection to describe state attempts to regulate free trade as that language has become the stuff of relevant WTO treaties. The negotiation of those treaties has thus been an extremely effective means of embedding a particular way of thinking into international relations and legal practice. The successful negotiation of the WTO agreements during the 1980s and 1990s is a high point of success for a particular version of the free trade side of this battle. Even within the world of “free trade,” the WTO agreements represent an extreme version of a political position concerning the proper role of the state in relation to the market.

There is today a strong tendency to ignore or reject the potential for the state to play a more productive role in the constitution of just food systems.²⁶⁵ This is in part due to the ways in which that potential has systematically been disabled and shut down by international law over the past decades. The representation of the potentialities of law and the state has been limited, so that law is increasingly equated with the protection of property rights, punishment, and the creation of space for economic freedom, while the privileged image of the state is that of the free trade state. I am attempting through this project to produce a broader sense of the way international law has constituted and justified that limited role for the state in the current system, as well as the range of roles that law played in the past and could still play to make another world possible. What has been lost from conventional disciplinary histories is the sense that other forms of the state have existed and still exist, and that other forms of international integration have been imagined and attempted. Those other possibilities have been lost in part through the participation of international lawyers in making the current vision of law and the state mandated through trade and investment agreements seem routine and unremarkable, and as if it were no big thing that more and more political decision-making is moved outside the capacity of organised democratic processes.

The adoption of market-oriented agrarian reform, population control, and market liberalisation as international projects has worked to prevent redistribution and to control impoverished rural populations in the decolonised world. This current internationalist project of state reform in the name of free

²⁶⁴ See Anne Orford, “Europe Reconstructed” (2012) 75 Mod L Rev 275.

²⁶⁵ On the tendency for critical analysis of food systems to ignore the potential role of the state, see Harry G West, “Ethical Food Systems: Between Suspicion and Hope” in Yuson Jung, Jakob A Klein, and Melissa L Caldwell, eds, *Ethical Eating in the Postsocialist and Socialist World* (Berkeley: University of California Press, 2014) at 215.

trade and development, with its focus on growth, market-oriented agrarian reform, and population control, is now in crisis. Indeed, already in the 1960s many left-leaning internationalists had begun to express concern about the direction in which the UN and other international organisations had begun to take rural development. To take just one example, in his last magnum opus, *Asian Drama*, published in 1968, the great Stockholm school economist Gunnar Myrdal argued that the central problem faced by development policy-makers in Asia was not overpopulation, as received wisdom had it, but “the underutilisation of rural labour.”²⁶⁶ A better solution to this was “to devise means for agriculture to become more labour-intensive, to transform it in a way which would enable it to absorb and sustain the seeming surplus of rural labour.”²⁶⁷ Instead what states in Asia were forced to adopt was the Green Revolution and an increasingly active campaign for birth control.

We are today seeing the crisis of that particular project of state reconstruction, both within Europe and within many of its former colonies, particularly in Africa, the Middle East and South-East Asia. The challenges of food security, the associated mass movement of peoples, civil wars, riots, and political volatility throughout Africa and the Middle East can be seen as symptoms of the failure of a particular state form premised upon market-oriented agrarian reform, economic liberalisation, authoritarian government, and counter-revolutionary population control. Similarly, as the impasse over the current agricultural negotiations as part of the Doha Round has revealed, the political view of the role of the state embodied in WTO agreements is coming under increasing challenge. At stake are core questions about the obligations of states to protect the welfare of their own populations, the forms of political action needed to preserve democracy in the face of rural distress and dispossession, and the means available to societies seeking to preserve traditional or communal relationships to land. The core WTO Agreements as currently interpreted offer a historically contested answer to those important questions of law and politics.

In light of that history, it is useful to think again about some of the ways in which the debate about food security is now being approached internationally. Typical is a declaration made by a coalition of agricultural economists who called in 2010 for an ambitious reform of the Common Agricultural Policy.²⁶⁸ The declaration proposed that a future CAP should phase out support for farmers, claiming that the “alleviation of rural poverty should be a function of social and not agricultural policy,” that “sustainable land use should become the key objective of the CAP” and that in general “well-functioning markets rather than state intervention are the best way to attain a demand-oriented, innovative and competitive farm sector.” The EU should abolish export

²⁶⁶ Gunnar Myrdal, *Asian Drama* (New York: Pantheon, 1968) at 1153.

²⁶⁷ Ross, *supra* note 54 at 160.

²⁶⁸ Declaration by Agricultural Economists, *supra* note 50.

subsidies and “promote global food security through an open trading system, support for agricultural productivity in developing countries, climate change mitigation and the preservation of its own sustainable production capacity.”

As I noted above, the idea that Europe should abandon its support for agriculture, that industrialised subsidies for farmers are the cause of food insecurity, and that agricultural policy is not social policy, is now becoming something of a mantra even amongst progressive critics. There is little consideration of the possibility that what is needed is precisely *more* social policy in the form of agricultural policy—a recognition that how land and food is organised goes to the heart of every polity. In my view, this is not the time to demand that the European countryside begin to be managed in the same way that the countryside of Asia, Africa and Latin America has been, but rather this is a moment to revisit the alternatives to the management of agriculture and rural life that might yet be available.

The aim of this article, and the broader project on which it draws, is to offer a new history of the free trade project undertaken through international law as one aimed centrally at restructuring the state. The current concern with access to food and land that registers in the debate about food insecurity can be understood as a symptom of a broader problem. That broader problem is the crisis of the free trade state and the global market economy constituted by international law over the past two centuries. Famine and hunger haunt the commitment to political economy and free trade. That is no accident. The free trade debate over the Corn Laws in England, the economic response to famine in Ireland and India, the debate over the Common Agricultural Policy in Europe, and the riots and political instability that accompanied rising food prices in over thirty countries between 2006 and 2008 are all markers of something that liberal economic ordering cannot (yet) fully manage and control. What is at stake in debates over food security and free trade is a battle for the state—who or what will the state represent in the twenty-first century, and who will decide?