
FOOD AS A MATTER OF GLOBAL GOVERNANCE

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I. THE DE SCHUTTER-LAMY DEBATES

One of the most important questions today is whether the World Trade Organization (WTO) works against or supports food security. Olivier De Schutter, during his tenure as the UN Special Rapporteur on the Right to Food, engaged in this question with the then-Director-General of the WTO, Pascal Lamy. They debated each other in very frank terms in 2009¹ and 2011.²

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¹ Olivier De Schutter, Mission to the World Trade Organization, UN doc. A/HRC/10/005/Add.2; Olivier De Schutter, Background document prepared by the UN Special Rapporteur on the Right to Food on his mission to the World Trade Organization, presented to the Human Rights Council in March 2009, online: <<http://www.srfood.org/images/stories/pdf/otherdocuments/9-srtrfreportmissionwto-1-09.pdf>>; World Trade Organization, *Table ronde: La libéralisation du commerce et l'OMC : aide ou entrave au droit à l'alimentation? (11 May 2009)*, online video: <http://www.youtube.com/watch?v=tLy2Erg3R_k>, online transcript : <www.wto.org/french/forums_f/debates_f/debate14_transcript_f.doc>.

² Olivier De Schutter, "The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System" (November 2011), online: <http://www.srfood.org/images/stories/pdf/otherdocuments/20111116_briefing_note_05_en.pdf>; Pascal Lamy, "Rebuttal Letter to De Schutter" (14 December 2011), online: <http://www.wto.org/english/news_e/news11_e/agcom_14dec11_e.htm>; Olivier De Schutter, "WTO defending an outdated vision of food security—UN food expert responds

De Schutter framed hunger as an issue that brings small farmers into alliance with the landless, urban poor, and those whose livelihood and welfare depend on fishing and hunting. To him, the key problem was that food prices are too high for consumers and yet too low for small farmers to make a living. Lamy also took the issue of food security, poverty, and hunger very seriously. But he framed the issue as a tension mostly between urban poor consumers versus rural farmers. The question to Lamy was how to ensure existing free trade law and policies continued to operate in order to ensure that food is produced and distributed efficiently; to him, this would reduce food prices and improve poor and hungry people's access to food. The debate has influenced ongoing discussions amongst academics,³ civil society organizations,⁴ and agriculturalists.⁵

De Schutter and Lamy agreed that their debate was not only about food security and trade rules as such, but also about the WTO's role as a global governance institution.⁶ Thus, their debate exemplified twenty years of disagreements over the function and purpose of the WTO.⁷ De Schutter employed constitutional terms—he understood the right to food as a value that competes with free trade; he argued that the right to food is higher on the global hierarchy of values and thus trade law must comply with the right to food. Lamy characterized the WTO as an economic institution whose principal

to Pascal Lamy" (16 December 2011), online: <http://www.srfood.org/images/stories/pdf/press_releases/20111216_wtoriposte_en.pdf>.

³ See for e.g. Matias E. Margulis, "The World Trade Organization and Food Security After the Global Food Crisis" in Daniel Drache and Lesley A. Jacobs, eds., *Linking Global Trade and Human Rights: New Policy Space in Hard Economic Times* (New York: Cambridge University Press, 2014) at 236; Elizabeth Smythe, "Food is Different: Globalization, Trade Regimes and Local Food Movements" in David Deese, ed., *Handbook of the International Political Economy of Trade* (Cheltenham: Edward Elgar, 2014) 471; Alan Matthews, "Trade Rules Food Security and the Multilateral Negotiations" (2014) 41 *European Review of Agricultural Economics* 511; Robert Howse and Tim Josling, *Agricultural Export Restrictions and International Trade Law: A Way Forward* (Washington DC: International Food & Agricultural Trade Policy Council Position Paper, September 2012).

⁴ See for e.g. Ziad Abdel Samad, "Arab Trade Deals Benefit Investors, but Hurt Farmers," *AI Monitor*. February 8, 2013, online: <<http://www.al-monitor.com/pulse/business/2012/04/agricultural-market-liberalizati.html#>>.

⁵ See for e.g. Fédération de producteurs de lait du Québec, "Annual Report 2009" at 5, online: <<http://lait.org/fichiers/RapportAnnuel/rapportIndex.php?folder=FPLQ-2009>>; Fédération des producteurs d'oeufs, "La gestion de l'offre, un système pertinent et bénéfique au Canada," online: <<http://oeuf.ca/actualites/gestion-loffre-systeme-toujours-pertinent-benefique-au-canada/>>.

⁶ See also Pascal Lamy, "Global Governance: From Theory to Practice" (2012) 15 *J Intl Econ L* 721.

⁷ Michael Fakhri, "Reconstruing WTO Legitimacy Debates" (2011) 2 *Notre Dame J of Intl & Comp L* 64.

purpose is to enforce principles of free trade and defend a presumed boundary between state and market (using the language of “trade distortion”).

Both De Schutter and Lamy agreed that the WTO constrains state power. De Schutter argued that WTO rules are too rigid and ambiguous. Trade law, therefore, restrained states’ ability (especially poorer ones) from designing and deploying new domestic policies aimed at ensuring food security. Lamy, on the other hand, argued that the boon of trade law was that it disciplined states against intervening into the market. But he interpreted trade law to be flexible enough to grant states the necessary space to devise food security policies. Instead of a hierarchy of values, Lamy’s legal thinking was in terms of norms and exceptions. Free trade is the necessary ideal. Any food security policies that do not adhere to free trade norms, such as stockpiling, may be carved out within the terms of WTO law as temporary exceptions.

In this short comment, I do not engage with the substance of this debate. Rather, I examine how the debate was argued. As such, I first explore what global governance means. I then insert Anne Orford’s study of food security and international trade into the De Schutter and Lamy debate. Orford’s work highlights how a broad, historical global governance perspective may augment the study of food security. I conclude by outlining the limits of a global governance perspective and briefly consider how trade law might also be understood in terms of growing and eating, and making and exchanging.

II. GLOBAL GOVERNANCE

Scholars, policy researchers, and policy makers first coined the term “global governance” in the early 1990s. In the beginning, it was mostly developed by international relations scholars in the United States. The term now has its own life and multiple meanings in a number of disciplines. “Global governance” arose from an appreciation that states were not the only entities that determined how the world was organized and governed. In fact, many at the time assumed that states’ ability to govern on any scale was waning (or argued that it should be restricted). Global governance built upon an image of a world that was deeply interconnected, where the actions in one particular part of the world affected other distant parts. It was also an image that did not have clear nodes of authority. As such, global governance was developed as a way to examine how decisions and power were diffuse and dispersed across a plethora of institutions.

In sum, a global governance perspective looks for how power is exercised through a range of mechanisms that do not fall within any well-defined hierarchies of command.⁸ Rosenau provides a broad and dynamic definition of the concept. To him, a global governance perspective is a way to examine

⁸ Thomas G. Weiss, *Global Governance: Why? What? Whither?* (Cambridge: Polity Press, 2013) at 8-44.

the “systems of rule at all levels of human activity—from the family to the international organization—in which the pursuit of the goals through the exercise of control has transnational repercussions.”⁹

The perennial debate in global governance has been over this perspective’s purview. In other words, how do we determine or identify what counts as a global governance mechanism?¹⁰ Regardless, a global governance perspective often focuses on institutions and institutional actors. This is because institutions are historical repositories of norms, rules, and conventions. They provide the intellectual and social stability necessary to maintain, move, and change ideas through time.

Scholars commonly treat an institution as an “autonomous sphere of authority” or self-contained system.¹¹ Thus, in food security, we may determine how each institution defines and evaluates food security in its own way.¹² As Orford notes, while human rights lawyers will treat the issue as a question of rights, trade lawyers will treat it as a matter of market access, and humanitarian actors focus on famines. The list continues: national security specialists treat food insecurity as a matter of political instability, environmentalists prioritize conservation, and refugee lawyers deal with mass migration that is the result of famine and rural impoverishment.¹³

The politics of this proliferation of institutions becomes a contest over which institutions wins the authority and jurisdiction over global problems.¹⁴ There are debates as to whether to imagine this proliferation as a problem of constitutional hierarchy, administrative coordination, or as a pluralist jumbled interaction of self-contained systems and values.¹⁵ Scholars also argue over what counts as an institution and which institutions are worth studying. Nonetheless, almost any global governance perspective assumes that intergovernmental organizations are an influential (and to some, the most important) aspect of how the world is ruled.¹⁶

⁹ James N. Rosenau, “Governance in the Twenty-first Century” (1995) 1 *Global Governance* 13 at 13.

¹⁰ Lawrence S. Finkelstein, “What is Global Governance?” (1995) 1 *Global Governance* 367; Weiss, *supra* note 8.

¹¹ Gunther Teubner, ed, *Global Law Without a State* (Aldershot: Dartmouth, 1997); Klaus Dingwerth and Philipp Pattberg, “Global Governance as a Perspective on World Politics” (2006) 12 *Global Governance* 185 at 197.

¹² Fiona Smith, “Food Security and International Agricultural Trade: Old Problems, New Perspectives” in Joseph A McMahon and Melaku Geboye Desta, eds., *Research Handbook on International Agricultural Trade Regulation* (Cheltenham, UK: Edward Elgar, 2012) 45.

¹³ Anne Orford, “Food Security, Free Trade, and the Battle for the State” (2015) 11:2 *J Intl L & Intl Rel* 1 at 23.

¹⁴ *Ibid.*

¹⁵ Fakhri, *supra* note 7 at 71-72.

¹⁶ John G. Ruggie, “International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order” (1982) 36 *Intl Organization* 379; Rosenau, *supra* note 9 at 18-20;

Orford's forthcoming project investigates how food security has become a matter of global governance. She asks, "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?"¹⁷ Her concern is that it has become more difficult for scholars and politicians to frame food security as national issue since it is no longer popular to focus on "how a state can protect the welfare of its population."¹⁸

While much of global governance scholarship focuses on all the different non-state entities which control global issues, I interpret Orford's focus on the state as still within the boundaries of a global governance perspective. Evaluating the world in terms of global governance is inherently a multi-scalar project since it provides researchers a means to study any institution that has global effect. As such, when Orford suggests that that we need to better appreciate the role of the state, this can be interpreted as a methodological argument for a global governance perspective that is more accurate.

Today we have a better sense that states still play an important role in global governance. But we still know very little about what is their role. We cannot assume that there is a uniform understanding of state power since all states operate differently especially in varied contexts. The idea of the state itself is not a monolithic institution and is in fact made up of plural, multi-scalar normative orders.¹⁹

Implied in Orford's discussion is a question as to whether the proliferation of international institutions is a good thing. Legal scholars have judged the expansive power and authority of international institutions through different notions of imperialism, constitutionalism, administrative law, and functionalism.²⁰ Orford measures global governance institutions against notions of democratic accountability. In that regard, she finds international institutions lacking and suggests that states have a better claim to legitimacy.²¹

Finkelstein, *supra* note 9; Weiss, *supra* note 7; Ranesh Thakur, Brian Job, Mónica Serrano, and Diana Tussie, "The Next Phase in the Consolidation and Expansion of *Global Governance*" (2014) 20 *Global Governance* 1.

¹⁷ Orford, *supra* note 11 at 10.

¹⁸ *Ibid.*

¹⁹ William Twining, "Normative and Legal Pluralism: A Global Perspective" (2010) 20 *Duke J Comp & Int'l L* 473.

²⁰ B.S. Chimni, "International Institutions Today: An Imperial Global State in the Making" (2004) 15 *Eur J Int'l L* 1; (2004); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, "The Emergence of Global Administrative Law" (2004-2005) 68 *Law & Contemp Probs* 15; Jan Klabbers, "Two Concepts of International Organizations" (2005) 2 *Int'l Org L Rev* 277.

²¹ Orford, *supra* note 11 at 9-10. This aligns with discussions of legitimacy, see for eg. Jean-Marc Coicaud and Veijo Heiskanen, eds., *The Legitimacy of International Organizations* (Tokyo: United Nations University Press, 2001); Hilary Charlesworth and Jean-Marc Coicaud, eds., *Fault Lines of International Legitimacy* (Cambridge University Press, 2010); Christopher A. Thomas, "The

She implies that state-centered politics captures a wider range of interests than international institutions—it may be that state-centered politics is a more democratic debate over the global common good. Her fear is that with the proliferation of international institutions and “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.”²²

III. WHAT ORFORD’S PERSPECTIVE BRINGS TO THE DE SCHUTTER—LAMY DEBATE

The advantage of treating food security as a matter of global governance is that, in alignment with Amartya Sen’s work, problems of hunger, starvation, and famine, are not simply a technical matter of producing more food. Rather, resolving food insecurity is about determining how the political and legal system distributes food in a particular pattern.²³ De Schutter, Lamy, and Orford would all agree that the current global food regime is distributed according to whoever has most purchasing power and not according to who needs it the most. The unified question is therefore, “Which rules and institutions enable the current uneven patterns of vulnerability?”²⁴ And more specifically, “What is the WTO’s role in contributing to global patterns of hunger and (even if it is not) should it be changed to ameliorate the problem?”

In the food security debate, Lamy used the language of trade distortion. To him and many others, any government policy that interferes with trade is problematic because it raises the price of food. This language implies that there is a commonly understood ideal global market that establishes a “natural price” and states should not interfere with this domain by enacting regulations. Thus, the global price becomes the uncontested condition against which food policies should be made. Within this framework, it is then perfectly logical for Lamy to frame food security as a domestic issue which national governments should address through laws and policies that regulate private property, water access, infrastructure, transportation, and credit markets.²⁵

Uses and Abuses of Legitimacy in International Law” (2014) 34 Oxford J Leg Stud 1. This is also similar to claims that states need to play a more profound role in the governance of their own territories in order to address global climate change, Mary Christina Wood, *Nature’s Trust: Environmental Law for a New Ecological Age* (Cambridge: Cambridge University Press, 2013).

²² Orford, *supra* note 13 at 19.

²³ Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Oxford University Press, 1981).

²⁴ Orford, *supra* note 13 at 15.

²⁵ WTO online debate *supra* note 1, and Lamy, *supra* note 2. See also “The global food crisis: What is the role of trade?” WTO (uploaded on Aug 6, 2009), online: <<https://www.youtube.com/watch?v=sKS9ltKywv4>>.

Even if this were true, Lamy did not open the discussion to examine how the WTO affects or interacts with these domestic legal regimes. Indeed, De Schutter and Orford also suggest that domestic policies are the most effective in combatting issues of hunger, but consider the WTO as part of the problem. Thus, they have a sense of the line between the domestic and international that is more dynamic than Lamy.

Nonetheless, while De Schutter starts from the position that a global problem warrants a global solution, and Lamy would draw a distinguishing line between the operation of domestic and international institutions, Orford would interrogate the very existence of the debate between De Schutter and Lamy and ask: What political, institutional, and ideational conditions allowed for that debate to happen in the first place? What is the respective and particular account of authority that provides legitimacy for both De Schutter and Lamy to speak and debate? How is it that human rights and trade institutions were able to fight over jurisdiction over food security?

Orford's perspective also raises the broader question: What made food security a global issue in the first place? It cannot be only because of the global food crisis of 2007-08 when prices of food around the world dramatically increased at the same time and created all sorts of instability in rich and poor nations alike. There is also likely a story of climate change at play. But in my reading of Orford, I think the critical question to ask is, what do we mean exactly by "global markets"? We have a sense of their effects and how they distribute power. We still, however, do not entirely understand which institutions matter and how they relate to each other in order to create global food markets.

For a number of different reasons, international jurists and policy-makers have historically treated food as an international issue. For example, during the time of the League of Nations, agriculture was treated as an international issue because European politicians and diplomats were frustrated that former and existing colonies that used to supply Europe with primary commodities had economically surpassed Europe; they wanted to ensure the steady supply of raw materials from the colonies in an effort to reconstruct Europe.²⁶

Another example is after World War II, when governments and academics policy framed food and agriculture in terms of economic development. Food security became an international issue through a development rationality.²⁷ Throughout the International Trade Organization negotiations, countries divided themselves between "developed" and "underdeveloped" countries. Those countries whose economies depended on exported foodstuffs and raw materials coalesced together as "underdeveloped countries." These countries (primarily led by Australia, India, and Latin American states) insisted that

²⁶ Michael Fakhri, *Sugar and the Making of International Trade Law* (Cambridge: Cambridge University Press, 2014) at 81-83; 93-94.

²⁷ Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011).

their infant industrial capacity needed to be protected in order to develop. Underdeveloped countries considered international trade to be inextricable from development issues. They wanted higher returns on their primary commodities in order to invest in industrializing their economies and no longer depend on commodity exports. Developed states were wary of placing food and agriculture within the mandate of an international institution since they feared that international commodity agreements, the most popular institution governing international agricultural trade, would raise prices and reduce their access to raw materials.²⁸

IV. THE LIMITS OF GLOBAL GOVERNANCE

Some scholars are frustrated with the term “global governance” because it does not always provide a clear guide to what matters—if everything is interconnected and everything in the world affects everything else, then it is difficult to determine which action does not have a global effect. Everything becomes the proverbial butterfly fluttering its wings and creating storms. Another concern is whether global governance is yet another perspective that presents itself as a comprehensive account of knowledge.

However, definitional ambiguity and a totalizing scope are not necessarily problems because global governance’s analytical benefits depend on a person’s particular agenda and what the term is being deployed against. A global perspective is an excellent antidote against the assumption that the state is empirically and normatively the most important political and legal form. Adopting a global perspective also provides one way to imagine, interpret, and judge an entire world. Thus, it can be used in an effort to rule the world. But, it also allows one to trace the patterns of the uneven distribution wealth and knowledge across the entire landscape of human topography.

The rules governing food and agriculture have been operating on a global scale for centuries. Understanding food regimes is key to understanding how different people were involved in the construction and development of a world capitalist economy.²⁹ Food and agriculture were the defining issues that led to the invention and proliferation of multilateral trade institutions.³⁰ And prominent lawyers, political economists, colonial and international civil servants, and politicians have always had a preoccupation with famine.

But, and staying with the map metaphor, a global sensibility does not provide a clear way of to measure scale. How ubiquitous must a phenomenon be in order for it to be global? How do we determine what is an appropriate

²⁸ Fakhri, *supra* note 26 at 150-155.

²⁹ Harriett Friedmann, “The Political Economy of Food: The Rise and Fall of the Postwar International Food Order” (1982) *Am J Sociology* 248; Harriett Friedmann and Philip McMichael, “Agriculture and the State System: The Rise and Fall of National Agricultures, 1870 to the Present” (1989) 29 *Sociologia Ruralis* 93.

³⁰ Fakhri, *supra* note 26.

or significant global effect? Nor is global governance a useful heuristic to understand borders (even if only to point to the porous and diffuse aspects of those borders); this is better accomplished by a comparative, transnational, or international perspective.

Broadly, global governance may be understood as a project that maps “the modes of global power” and identifies “the channels and levers of influence.”³¹ Another explanation is that “governance comprises the means used to influence behavior, the production of resources, and the distribution of resources.”³² International law is an obvious and important aspect of global governance; but there are a number of techniques in which one can think about law in global terms.³³

Undoubtedly, finding and describing how global power operates at different scales and through different private and public mechanisms will make it easier for people to address global problems.³⁴ But in order to generate redistributive change, the key question is: will the study of global governance also change who wields the levers of power? Maybe. The first and fastest consumers (and creators) of global governance knowledge will be those that already have access to the power to rule—the so-called experts. These experts include people who are human rights activists, soldiers, lawyers, journalists, businesspeople, librarians, politicians, researchers, bureaucrats, diplomats, arbitrators, judges, or civil society organizers. Indeed, much of global governance scholarship focuses on the levers that these governors already wield in the form of law, force, media, money, and education. In other words, global governance scholarship often benefits the existing global governors.

³¹ David Kennedy, “The Mystery of Global Governance” (2008) 34 Ohio NUL Rev 827 at 828.

³² Kevin E. Davis, Benedict Kingsbury, and Sally Engle Merry, “Indicators as a Technology of Global Governance” (2012) 46 Law & Soc’y Rev 71 at 78.

³³ For e.g. see the following: Legal pluralism—Boaventura De Sousa Santos, *Toward A New Common Sense: Law, Science And Politics In The Paradigmatic Transition*, 2nd ed (London: Butterworths LexisNexis, 2002); William Twining, *General Jurisprudence: Understanding Law From a Global Perspective* (Cambridge: Cambridge University Press, 2009). Comparative law—Duncan Kennedy, “Three Globalizations of Law and Legal Thought: 1850-2000” in David Trubek and Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006) 95. Transnational law—Günther Handl, Joachim Zekoll and Peer Zumbansen, ed, *Beyond Territoriality. Transnational Legal Authority in an Age of Globalization* (Leiden: Brill, 2012); Gregory Shafer, “How the WTO Shapes Regulatory Governance” (2014) Regulation & Governance (forthcoming). Conflict of laws—Karen Knop, Ralf Michaels and Annelise Riles, “From Multiculturalism to Technique: Feminism, Culture and the Conflict of Laws Style” (2012) 64 Stan L Rev 589. Social Movements—Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

³⁴ For e.g. John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000); Dan Danielsen, “Corporate power and global order” in Anne Orford, ed, *International Law and its Others* (Cambridge: Cambridge University Press, 2006) 85; Salo Coslovsky and Richard Locke (2013) “Parallel paths to enforcement: Private compliance, public regulation, and labor standards in the Brazilian sugar sector” 41 Politics & Society 497.

This same scholarship can also create knowledge that helps the governed. By identifying places where decisions are being made, this scholarship may be used by the governed to identify hidden or distant places where decisions are made that profoundly affect their lives. Thus, global governance scholarship may also be used to create or destabilize sites of contestation for the benefit of the governed. This knowledge is usually generated from stories about and studies of advocacy or resistance.³⁵ This knowledge, however, often takes more time to travel amongst the governed. Moreover, as patterns of power and knowledge change, so do the levers of power. It is often the governors who can adapt more quickly and first learn how to wield the ever-changing mechanisms.

To be sure, these are not static sociological labels because sometimes we are governors and sometimes we are the governed. Our individual roles depend on the web of relations around us and how we navigate or escape that web. Here is an example of how the WTO defines the terms of global governance. Member State X is unhappy with Member State Y's laws and policies; State Y in effect subsidizes a particular domestic industry; State X does not subsidize its respective domestic industry (or at least to the same degree) and does not want to have (or cannot afford) to subsidize its domestic industry in order for it to stay competitive with State Y's industry. If State X allows its own industry to implode from the pressures of global competition, a politically significant number of people will find themselves somewhere between disrupted, dislocated, and destitute. State X would likely have to devote a very large amount of resources to respond to this social eruption. In a sense, State Y's domestic laws and policies are affecting the global flow of goods and State X's domestic law and local industry. State X, however, does not want to be governed by State Y's laws. State X may subsidize its own industry in order to remain globally competitive. But this makes State X vulnerable to a complaint by almost any WTO Member State and not just from State Y. State X may unilaterally impose a countervailing duty; State Y may challenge this measure before the WTO dispute settlement body (DSB), thereby using the WTO to push back against State X. Or State X may seek authorization from the DSB to impose a countermeasure. An Appellate Body decision (or unappealed Panel decision) in favour of State X, would grant State X the means to legally neutralize any future complaints. In all scenarios, it is the WTO that determines what are legitimate mechanisms of global governance—subsidy, countermeasure, or countervailing duty—or at least decisions are being made under the shadow of WTO law. This means that decisions made through WTO law set the terms of which state is governing and which is being governed in a particular situation.

³⁵ Rajagopal, *supra* note 33.

V. PUSHING TRADE LAW TOWARDS QUESTIONS OF GROWING AND EATING

Up until today, trade law has provided an effective means through which people debate over and define what counts as a legitimate border and what borders should be removed; it is one way that we delineate differences between domestic and international markets, states and markets, and between states and international institutions. Trade law is a rich field because it is a mix of commercial and public international law. Moreover, at times it is ambiguous about distinctions between notions public and private spheres of action, which gives it a broad scope. Its limitation, however, is that it often makes it more difficult to understand social relations.

What makes trade law dynamic is that it is not merely a language created and spoken by experts. Over the last century, trade law and policy has been vehemently debated in popular media and through social movements. Thus, to try and widen understandings of international trade law may provide a number of different people with more decision-making options since it is a not just a question of elite or technocratic politics.

Based on that, I wonder what trade law would be like if the debates were not framed in terms of governance. Anyone may use global governance as a heuristic to see the world with certain analytical sharpness. It is a way in which we use to define and view the world as a set of interactions dependent on authority and control. But every heuristic has its limits. No relationship— at any scale—is only about governing, submitting, and resisting. Life is queerer and broader than that. In our daily interactions, we do more than command and coerce, compromise and submit, and subvert. A very big part of life is also about making and exchanging.

Orford is quite right to point out that “the international rules and institutions dealing with the question of material access to food can tell us about the nature of global governance in the world today.”³⁶ In fact, I have employed this perspective in my own work. But, focusing on food and agriculture also provides an immense amount of insight into how we organize ourselves around the making and exchanging of things.

Of course, the line is blurry between determining which phenomena are governing processes of production and distribution and which are the actual processes themselves. The distinction is not an always self-explanatory or an objective question. Often it is a matter of the researcher’s emphasis and focus. But I want to outline several ways in which thinking in terms of making and exchanging may augment or at times differ from a governance perspective. My purpose is not to critique governance as such, but rather to understand its contours in order to better appreciate its strengths and weaknesses as an analytical tool. I want to also add to the repertoire of ways in which, along with

³⁶ Orford, *supra* note 13 at 15.

Orford, we can explore “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.”³⁷

If we frame phenomena in terms of making and exchanging, this conditions how we understand our subjects. It also determines which practices are worth studying. Rather than only using categories of governor/governed, I recommend we also explore people’s roles as producers, makers, recyclers, and refurbishers. To understand modes of exchange we should understand people as sharers, gifters, harvesters, and foragers. Everyone also distributes resources in their capacity as lovers, friends, spouses, and caretakers; or in more commercial terms as transporters, exchangers, sellers, and hoarders. And when people receive or take things they are consumers, buyers, and gluttons; or even destroyers and thieves.

This may affect (or reflect) how actors understand themselves. To some scholars, the critical project of global governance scholarship is to provide professional experts, who imagine themselves as technocrats, a way to instead appreciate themselves as governors whose decisions have global implications.³⁸ By treating actors in terms of makers, growers, and exchangers it raises a different moral and ethical sensibility. It frames social life as not only about a personal responsibility to other people, but it also about a person’s relationship to her own work and ecosystem.³⁹

Concepts of creation, skill, resources, and completion become relevant which characterizes questions of work in terms of: What is a job well done? How does one determine when to stop a certain task or practice and start another? In agriculture, these determinations result from a mix of personal skill, access to technology, and seasonal patterns. It is therefore not surprising that historically, domestic and international agricultural commodity legislation has been provisional. This means that every several years national deluges renegotiate the framework of how states and international institutions distribute risk and support amongst farmers.

Another difference between the two perspectives is that a project focusing on governance traces power in a particular way. It looks for notions of power *over* things and people—so this focuses on concepts like dominion, authority, and the like. Whereas, especially in the practices surrounding eating, there are

³⁷ Orford, *supra* note 13 at 2.

³⁸ David Kennedy, “Challenging Expert Rule: The Politics of Global Governance” (2005) 27 *Sydney L Rev* 1; Kevin Davis, Angelina Fisher, Benedict Kingsbury, and Sally Engle Merry, eds., *Governance by Indicators: Global Power through Classification and Rankings* (Oxford: Oxford University Press, 2012).

³⁹ See for e.g. Richard Sennett, *The Craftsman* (New Haven: Yale University Press, 2008); Wendell Berry, “Solving for Pattern” in *The Gift of Good Land: Further Essays Cultural & Agricultural* (Berkeley: Counterpoint, 2009) 134.

also very complicated patterns of power *to make* things.⁴⁰ Thus, it may be that patterns of global power are different if we start an analysis with the people who physically grow, gather, or make food as the principal actors. We would then have to treat the doctrines derived from (and that condition) their practice as the fundamental rules of food production. Gender is immediately brought to the forefront of political discussion since the majority of growers of food and makers of meals in the world are women. Thus, through this perspective it is not difficult to argue that women already wield a great amount of power when they navigate through the global food regime. As such, they produce much of the doctrines of how we eat and are also the main sharers of this knowledge. The political agenda becomes a matter of organizing this power rather than empowering women.⁴¹ Then, along this line, global food policy technocrats (craftspeople in their own right) and the reports and laws they produce become a secondary concern in the hierarchies of power and knowledge.

Food and agriculture provide an accessible way to tell a story of making and exchanging because almost anyone can imagine decisions involved in growing and eating. It is also not difficult to situate all those roles and relationships within several different global contexts. As an example, I focus on my own garden.⁴² If my garden is successful enough, I may reduce the amount of fruits and vegetables that I purchase from the supermarket and farmers' market. This would move my money away from the various local, regional, and international markets. I would redirect my money towards the suppliers of what I need for my garden. My personal skill, wealth, and commitment will determine the success of my garden. The number and nature of people also tending to the garden could be described as a community of exchange around this particular practice. The global ecosystem, economy, and climate would significantly affect the well-being of the garden and the concomitant exchange-community's well-being and spending habits. The more fruits and vegetables that grow in my garden, the more the garden is able to redirect my money either to other markets or reduce my spending. And the better my bounty, the more I can share with friends and family. Or maybe people who worked in the garden jointly decide to make exchange and distribution decisions through deliberation and consensus. I may even sell some surplus

⁴⁰. The subtleties and implications of these distinctions are best articulated in Ursula K. Le Guin, *The Tombs of Atuan* (New York: Simon Pulse, 2012 [1971]).

⁴¹. For example, in a FAO report the gender problems are treated as a gap between women and men, where the issue is characterized as the fact "that women lack the resources and opportunities they need to make the most productive use of their time." Food and Agricultural Organization, *The State of Food and Agriculture 2010-2011 – Women In Agriculture: Closing The Gender Gap For Development* (Rome: Food and Agricultural Organization, 2011) at 3.

⁴². Of course, a garden is a bastion of legal categories and controversies. This can be a garden on land that I own, rent, or share. Or it may be something I cultivate on land in which ownership is disputed or was appropriated to displace communities dependent on hunting and gathering practices.

informally or through a local market. Also, the hungrier the people are in my community (or the larger the number of hungry people), the more likely I am to donate what I grew to a food bank or that someone would take produce from the garden without asking.

I want to be clear that I am not arguing that agriculture is a primary commodity and therefore determines the speed and size of an economy; any sector at any given moment may be structuring a particular economy.⁴³ Nor is this an exercise in agrarian romanticism. I do, however, want to focus on what makes food and agriculture unique.

It may be useful to think of agriculture as our most deliberate, sustained, and productive engagement with the biosphere. In that sense, it is the front line of how we live. It involves cultivating new life and is driven by a dynamic of resilience and growth. Broadly, our relationship with each aspect of the ecosystem has its own terms. It is the result of a plethora of interactions: individual human decisions, multispecies social relationships, and global ecological connections.

We may then start mapping global law differently if we assume that law is embedded in different parts of the ecosystem. So for example, while the biosphere moves in circles between death and life, the hydrosphere creates a dynamic of flow. Indeed, the direction and distribution of water flow is one of life's most powerful determinants. Drawing water is a matter of using a resource that cannot be destroyed or created on a significant scale. Historically, many communities are built around a system of securing access to the flow or, if they move, they follow the flow. Another example is our relationship with minerals and fossil fuels. When we extract from the geosphere, we are using a finite and nonrenewable resource. But unlike water, this extraction generates a dynamic of destruction. So instead of primarily tracking patterns authority and legitimacy (as commonly done in global governance approaches), we may trace how law grows, flows, and destroys.

I suggest that we continue to situate debates about international trade within discussions about growing, harvesting, and eating.⁴⁴ That perspective's starting point is the fact that approximately 70 per cent of the nearly one billion people who chronically suffer from starvation are small-hold farmers and agricultural workers.⁴⁵ Marx provides an account of how under capitalism a worker is forced to sell his labour and does not have access to the very things

⁴³ My thanks to Robert Wai for this point.

⁴⁴ De Schutter did something similar with the right to food. In his official reports, De Schutter stays within contemporary human rights discourse and focuses on the individual's relation to the state and transnational corporations. But, he also used his position to reframe the right to food as an agricultural practice, namely agroecology — UN Special Rapporteur on the right to food, Report of the Special Rapporteur on the right to food (December 17, 2010), Human Rights Council, A/HRC/16/49.

⁴⁵ UNCTAD, *Trade and Environment Review 2013: Wake Up Before It Is Too Late* (UNCTAD: Geneva, 2013) at 11, cited by Orford, *supra* note 13 at 16.

he produces; as a result, the worker is alienated from himself and others, which Marx treats as a social problem. The fact that farmers and food workers are hungry or starving, however, is an absurd problem. We currently have a food regime that benefits those who hold the most land and money, and have access to corporate and state power.⁴⁶ The most effective way to overcome this absurdity is by creating a food regime that makes it easier for those who grow and harvest food to be the first to have enough to eat. This approach may focus on the levers of power immediately available to those who grow, raise, and harvest. Ideally, the world's hungriest food producers should therefore drive how this should be done.⁴⁷

One way the small-scale growers and harvesters may ensure that they have enough to eat is to increase their purchasing power by selling their surplus. Today, 85 per cent of food is produced by the farming households that consume it or exchange locally; only 15 per cent of food is traded across borders.⁴⁸ A common response is to encourage those farmers to rely less on householding (where food is grown for the purpose of immediate consumption or preservation) and integrate more into larger and international markets.⁴⁹

But it may be worth exploring a new type of trade regime. Trade law's renewed function could be to find and provide the right mix of stability and flexibility to support householding (not replace it with export receipts) by making it easy for farming households to supplement or diversify their income with international trade when they need it. For those that already depend on exporting agricultural goods for their livelihood and welfare, trade law's other purpose would be to provide the stability necessary for trade to happen in a remunerative and competitive market. Thus, the emphasis would be on designing the markets we want instead of demarcating some theoretical line between state and market. Maybe the problem with prices that are too high for the hungry and too low for the agricultural poor demands that we better understand how international trade law fits within agricultural value chains.⁵⁰ To be sure, negotiating global consensus over what are the institutional

⁴⁶ Philip McMichael, "Global Development and the Corporate Food Regime" in Frederick Buttel and Philip McMichael, eds., *New Directions in the Sociology of Global Development: Research in Rural Sociology and Development*, vol. 11 (Amsterdam: Elsevier, 2005) at 269.

⁴⁷ Nonetheless, those who already have a large amount of power may also use this knowledge to maintain the distributive status quo.

⁴⁸ Timothy A Wise, 'Feeding the World: The Ultimate First-World Conceit', Triple Crisis Blog, 7 October 2014, 1, quoted in Orford, *supra* note 13 at 10.

⁴⁹ Food and Agriculture Organization, *The State of Food and Agriculture 2014: Innovation in Family Farming* (Rome: Food and Agriculture Organization, 2014) at 21-23.

⁵⁰ Doris Fuchs et al., "Food Security in the Era of Retail Governance" in Rosemary Rayfuse and Nicole Wiesfelt, eds., *The Challenge of Food Security: International Policy and Regulatory Frameworks* (Edward Elgar: Cheltenham, UK, 2012) 275; Diwakar Dixit, "Agriculture Value Chains and Food Security" (2014) 48 *J World Trade* 967; Jennifer Clapp, "Distant Agricultural Landscapes" (2015) 10 *Sustainability Science* 305.

preconditions necessary for a particular market to operate is no easy task. But that has been modern trade law's role since its inception.⁵¹

If we therefore understand international trade as a complementary, not principal, means of distributing food, it becomes easier to relate international trade to domestic food-making and householding in socio-legal and economic terms. In fact, a great deal of general production and distributive activity happens through other institutions and collective relations.⁵² With this in mind, trading and householding can be studied in relation to other distributive practices such as sharing, stealing, donating, and gifting.

As I mentioned, there is a great benefit in naming and framing certain technical or economic practices as matters of governance. When Orford notes that "WTO agreements should properly be thought of as governance agreements rather than trade agreements,"⁵³ she is opening up the WTO to political and social scrutiny. She also quite rightly treats debates over free trade as disagreements over the relationship between the state and market.⁵⁴ She ends with the question of who should get to decide matters of food production and distribution, and control institutions of global governance. While Orford does not answer the question outright, she has framed the problem in a particular way that makes it possible to add an understanding of trade law in terms of growing, harvesting, and eating. Thus, by treating trade law as both a question of governance and food, the hungry of the world may be better positioned to provisionally understand and organize themselves as rulers of the world.

⁵¹. Fakhri, *supra* note 26.

⁵². Kerry Rittich and Janet E. Halley, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism" (2010) 58 *Am J Comp L* 753.

⁵³. Orford, *supra* note 13 at 59.

⁵⁴. Orford, *supra* note 13 at 32.