

A History of Food Security and Agriculture in International Trade Law, 1945–2017



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Abstract One common assumption about international trade law is that its main function as a regulatory system is to reduce the occurrence of trade distortions. Another related assumption is that the development of the contemporary regime of international trade, historically, has been driven by one single overarching doctrine, the principle of trade liberalisation. This article seeks to dispute these assumptions by showing that the contemporary regime of international trade is, in fact, the product of interaction involving three closely related but analytically distinct doctrines: the principle of market stabilization, the doctrine of freer trade, and the principle of food security. Proceeding from this starting point, this article aims to map out an alternative way of approaching the history of international trade law, by exploring how the interaction between these three doctrines has influenced the construction of the contemporary international trade regime, how each of them has come to be defined at different moments, and how these definitions have changed and evolved over time. In doing so, it also offers an alternative understanding of the institutional reality of international trade regulation by placing at the centre of the last seven decades of international trade law history the question of agriculture and by including FAO, UNCTAD, and international commodity agreements alongside the GATT and the WTO.

1 Introduction

Food and agriculture have always been central to the question of the World Trade Organization's (WTO) legitimacy. Transnational social movements have been key to this dynamic and have long retained a steady, outside presence in the broader policy debates about the possible reform or ending of the WTO; they have done so in

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part by infusing the terms of the related discussions with various social justice and food security-related concerns.¹ The 2008–09 global food crisis threw these concerns into even higher relief. Having destabilized the lives of millions of people, the food crisis also created a new opening in the global policy arena kick-starting a series of high-profile debates about the WTO's place in agricultural governance and its role in securing adequate access to food to people around the world.²

At the WTO's Ninth Ministerial Conference in Bali, Indonesia, held during 3–7 December 2013, the WTO ministers adopted a set of documents (the Bali Package).³ One of the most significant issues introduced by these documents was the renewed focus on the agricultural trade agenda.⁴ The Bali Ministerial Decision, in particular, marked an important milestone. The Decision reflects the new agreement worked out by the majority of the world's leaders over how WTO member states may now stockpile food for 'food security purposes.'⁵ Before Bali, the WTO Green Box regime allowed member states unlimited spending on food acquisition for public stockholding, for food security purposes, on the condition that the food commodities in question would be purchased at current market prices.⁶ If a government purchased food from the respective producers at above-market prices, regardless of the purpose for which this was done, the WTO Agreement on Agriculture qualified this as a market-distorting intervention, which turned it automatically into contestable action under WTO law.⁷ After Bali, it is politically more difficult to raise legal challenges against developing countries' food-security stockholding programmes where the purchase of the food commodities in question takes place at above-market prices (the so-called 'peace-clause').

The road to this agreement was not an easy one. Of the 10 ministerial decisions included in the package, the United States wanted to focus on a Trade Facilitation Agreement. India, by contrast, insisted on addressing the question of food security and the development of new rules allowing for national stockpiling. For a while, the two sides refused to engage with one another, using their obstinacy as strategic leverage. The breakthrough only came on 13 November 2014, when India finally agreed to move ahead on negotiating a Trade Facilitation Agreement, and the US

²This was exemplified by the public debates in 2009 and 2011 between Olivier De Schutter, in his capacity of Special Rapporteur on Right to Food, and Pascal Lamy, in his capacity of Director of the WTO. For further background and summary, see Fakhri (2015), p. 68.

³WT/MIN(13)/DEC (11 December 2013).

⁴The five agricultural issues identified at Bali were the following: (1) export subsidies and other policies known collectively as export competition; (2) tariff rate quota (TRQ) administration focused on managing persistently under-filled quotas; (3) a temporary peace clause for a developing country's above-market purchases of commodities for food-security stockholding programs; (4) a proposed list of green-box-eligible general services of particular interest to developing countries; and (5) cotton, in response to a proposal from four African members.

⁵WT/MIN(13)/38 - WT/L/913 (11 December 2013). See also WT/L/939 (28 November 2014).

⁶WTO Agreement on Agriculture, Annex II(3).

⁷WTO Agreement on Agriculture, Article 6.

indicated that it was ready to start negotiating allowances for national stockpiling and other related measures to ensure national food security.⁸

The story of the Bali agreement, however, is not just a story about the US and India. Rather, it is a story of a long-fought victory for the G-33 coalition of developing countries,⁹ led by Indonesia, which has long pressed for a greater degree of flexibility in the WTO regime in deciding the terms of global market opening in the field of agricultural trade for developing countries.¹⁰ The G-33 first began meeting as a coalition in the run-up to the 2003 Cancún Ministerial Conference. It includes countries with a sizeable share of smallholder farmers, and it was formed primarily to advance the interests of this import-sensitive farming segment as well as to offset the influence of the Cairns Group¹¹ and the G-20 both of which are dominated by export interests.¹² It bears noting, however, that the introduction of this issue into the WTO policy space preceded the formation of the G-33: the question of public stockholding was first raised in WTO negotiations by the Africa Group in 2002.¹³

Importantly, the ‘peace clause’ mechanism introduced at Bali is intended only to provide a temporary solution, even though, in the words of the Ministerial Decision, it also opens the possibility of developing a more ‘permanent solution’ for the question of public stockholding for food security purposes. The debate over the

⁸https://www.wto.org/english/news_e/news14_e/dgra_13nov14_e.htm. See WT/L/939 (28 November 2014); WT/L/940 (28 November 2014).

⁹For a timeline tracking these ideas in WTO negotiations (2002–2014) see: <http://www.fao.org/3/a-i3867e.pdf>; https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm.

¹⁰The countries in this group are the following: Antigua and Barbuda, Barbados, Belize, Benin, Bolivia, Botswana, Côte d’Ivoire, China, Congo, Cuba, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Korea, Republic of, Madagascar, Mauritius, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Zambia, and Zimbabwe. On the matter of food security, India and China seem to be taking the lead, see Press Trust of India, India, China to Highlight Food Security Issues at WTO Meet (30 July 2015), <http://www.ndtv.com/india-news/india-china-to-highlight-food-security-issues-at-wto-meet-1201891>.

¹¹The Cairns group, led by Australia and sometimes Argentina or Canada, formed in 1986 at the advent of the Uruguay Round. It was primarily a response to the accelerating trade subsidies of the European Union’s Common Agricultural Policy and the United States’ Export Enhancement Program. It is a diverse coalition bringing together 20 developed and developing countries from North and South America, Africa and the Asia-Pacific region. The group accounts for over 25% of the world’s agricultural exports. The countries in this group are the following: Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, the Philippines, South Africa, Thailand, Uruguay, and Vietnam.

¹²The G-20 Coalition is highly heterogeneous group of 23 developing countries led by Brazil and sometimes India with divergent interests. These countries are pressing for ambitious reforms of agriculture in developed countries with some flexibility for developing countries. It formed around the 2003 Cancún Ministerial Conference in response to US and EU proposals. Generally, the group is seeking restrictions in subsidies predominantly used by developed countries. The countries are the following: Argentina, Bolivia, Brazil, Chile, China, Cuba, Ecuador, Egypt, Guatemala, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, Peru, Philippines, South Africa, Tanzania, Thailand, Uruguay, Venezuela, and Zimbabwe.

¹³See https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm.

exact meaning and legal implications of the peace clause, thus, remains extremely important, even if only in the short term.¹⁴ In the medium term, it also seems necessary to address the realignment of the broader negotiation plans.¹⁵ Neither of these points, however, should distract us from the longer view. Over 280 organizations, individuals, and global networks representing a broad range of groups have urged the member states to agree on a permanent solution to the question of food security and public stockholding.¹⁶

In the years after Bali, progress towards a permanent solution remains as modest as ever—but remain politically open. The Nairobi Package in 2015 continued some of the G33's accomplishments in agriculture by maintaining an emphasis on food security and addressing topics such as export subsidies; special safeguard mechanisms for developing countries; and public stockholding for food security purposes.¹⁷ At the Buenos Aires Ministerial conference in 2017 there were some historically novel alliances with the EU trying to situate itself as a global broker. Now that the EU is willing to negotiate, the G33 and the cause for food security still holds strong ground. Right before Buenos Aires, the (export-friendly) Cairns Group and the EU issued a joint statement suggesting that they are working more closely with each other.¹⁸ After Buenos Aires, the EU has also indicated that it was willing to discuss the issue of food security, if India was willing to engage on talks about e-commerce and fish subsidies.¹⁹

It is worth primarily focusing on the Bali Ministerial Decision because it still undergirds all global agricultural negotiations today. This Decision frames the issue as one of balancing: the task for international trade law is to navigate between the need to avoid trade distortions and the need to enable the achievement of food security. In this article, I propose to displace this unhelpful framing by re-examining the history of the corresponding segment of international trade negotiations, in order to develop a new set of legal concepts that goes beyond the vocabulary of trade distortion and that could be used to inform the course of future policy debates and trade law negotiations in a more productive manner.

A popular understanding of trade distortion suggests the scenario where the levels of prices or the volumes of production of a particular commodity deviate from the benchmark at which they are supposed to remain under the conditions of a free, competitive market.²⁰ Based on this view, the main purpose of international trade law is essentially identified as the need to police the boundary between the state and

¹⁴See Haberli (2014), Howse (2014).

¹⁵See Wilkinson et al. (2014), p. 1032, Narlikar and Priyadarshi (2014), p. 1051.

¹⁶See <http://www.twn.my/title2/latestwto/agriculture/ngo.statements/G%2033%20Press%20Release%20-%20Nov%2020/Global%20Sign%20on%20G%2033-En.pdf>.

¹⁷WT/MIN(15)/DEC (19 December 2015).

¹⁸Joint Ministerial Statement On Next Steps in WTO Agriculture Reform by the European Union and Members of the Cairns Group (9 October 2017), http://trade.ec.europa.eu/doclib/docs/2017/october/tradoc_156256.pdf.

¹⁹Kanth (2017); see also https://www.wto.org/english/news_e/news17_e/mc11_13dec17_e.htm.

²⁰WTO (2015), p. 26. See also Anderson (2010), p. 167.

the market in such a way as to eliminate the scope for any trade-distortive activities by the former. The goal, in other words, is to ensure that national laws and policies do not destabilize the normal operation of a free, competitive market. The underlying assumption, thus, seems to be that the ultimate function of international trade law is to give force to some pre-defined concept of a 'normally' functioning free market.

Markets, however, are not an autonomous space, and it is empirically unhelpful to identify a 'normal' condition for any given market. This is to say that what is normal is a matter of sociopolitical debate, and that not all government regulation and policy initiatives are market-distortive. States create markets through laws and institutions that are based on the national policy-makers' and commercial actors' assumptions about what is normal and legitimate.²¹ Ever since the advent of the modern multi-lateral trade regime there have always been debates over what constitutes legitimate government policies that can be considered a necessary precondition for the existence of a stable market environment, and what sort of measures, therefore, would amount to illegitimate state interventions that destabilize markets. From the late nineteenth century onwards, for example, there has been a long-running debate as to whether the payment of subsidies constitutes an unwarranted form of government intervention that affects the formation of international prices in a way that warrants the application of countervailing duties, or whether countervailing duties in themselves represent an undesirable and unpredictable form of government intervention that is worse than subsidies.²²

In this chapter, I examine international trade law as a reflection of how the majority of the world's leaders have come to understand what constitutes a normal global market. I take the view that multilateral institutions, such as the WTO, can be best understood in this context as the principal platforms where the substance of this consensus is negotiated, developed, contested, and re-evaluated. The argument that I put forward here, in other words, denies the possibility that there exists any a priori model of a perfect market, or at least one that would be useful for international trade law purposes. It is impossible to determine a level of pricing that could be considered inherently fair in the sense that it reflects some inherently 'right' equilibrium between global supply and global demand. Market conditions and prices are a product of a very complex, historically determined interaction between government policies, transnational institutions, social movements, as well as specific relations of production that vary from one country to another.

National delegates, political activists, and trade scholars may disagree over how to reform the WTO in relation to the rising food security demands. What most of them seem to agree on, however, is the idea that food security and freer trade policies often tend to find themselves in a direct, tense relationship.²³ Throughout the history of agricultural debates in the GATT, the question of food security has traditionally been

²¹Polanyi (1944). For legal articulations of this position see Paul (1995), p. 29, Desautels-Stein (2012), p. 387.

²²Fakhri (2014b), p. 49, Lang (2014), p. 135.

²³Margulis (2013), p. 53.

framed as a ‘non-trade’ issue. To a large extent, this still remains the case today.²⁴ When governments make arguments that they need to support their farmers out of necessity (to ensure local food security, protect farmers from ecological and financial instability, and preserve rural society), these arguments are typically presented, and treated by other states, as requests for exceptional dispensation from the normal model of market operation.²⁵ To some observers, the WTO’s principal objective has always been limited to liberalizing international trade, and the concept of food security can only constitute a secondary policy factor that would always have to be ‘weighed against the market liberalization objective.’²⁶ In this context, it bears noting a number of far-reaching reform proposals that have been put forward in recent years, all with the aim of ensuring that the demands of international trade liberalization could be reconciled with the needs of food security. Little agreement seems yet to have been achieved as to the content of these reforms.²⁷ Most of the proposed solutions, however, appear to take for granted both the concept of the normal market operation and the idea of ‘trade distortion.’²⁸

In this article, I am going to argue that the modern international trade regime is not, and should not be understood to be, defined by one single overarching value—the idea of trade liberalisation or freer trade—but by an interaction among three closely related but analytically distinct doctrines: market stabilization, freer trade, and food security. In the pages below, I explore how the interaction amongst these three doctrines has influenced the development of the contemporary international trade regime, how each of them has come to be defined at different moments, how these definitions changed and evolved.²⁹ Stepping outside the realm of the WTO, I also propose to look at other international institutions that have served as the key sites and frameworks within the context of which the relevant global actors have negotiated and argued over the meaning and configuration of these doctrines. I find that these three doctrines have long been closely enmeshed with one another, defined one another, and relied on one another for meaning. Historically, one could hardly discuss any one of these doctrines without immediately touching on the other two.

²⁴The preamble of the Agreement on Agriculture states: ‘commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security...’.

²⁵Trebilcock and Pue (2015), p. 233.

²⁶Smith (2012), p. 45 (56). For an example of developing solutions within existing rules see Ewing-Chow et al. (2015), p. 292.

²⁷See Häberli (2010), p. 297, Schoenbaum (2011), p. 593, Howse and Josling (2012), Anania (2013), Fakhri (2015), p. 68.

²⁸See, e.g., Footer (2014), p. 288, Stewart and Bell (2015), p. 113, Desta (2016), p. 67, Häberli (2016), p. 103.

²⁹What I mean by doctrines are systems of principles, rules, and procedures intended to implement the ideas derived from social demands, expert advice, and delegates’ political positions. This approach is heavily influenced by food regime analysis. The literature on this approach is extensive, see most recently Friedmann (2009), McMichael (2009). See also Smythe (2014), p. 471, Orford (2015), p. 1, Cohen (2015), p. 101.

The concept of *market stabilization* describes the idea that it is necessary for governments to manage the economic conditions of production, distribution, and consumption in a way that ensures an efficient use of resources and also improves the given community's welfare. The legal debate over the meaning of market stabilization is, thus, essentially a debate over the meaning of what should be considered a fair and normal commercial practice.³⁰ The doctrine of *freer trade* describes the idea that over time domestic tariffs levels should eventually be reduced so as to promote a more efficient global system of production and distribution. The main point of contestation in the debates about freer trade debates is over what should be considered the most desirable speed and degree of international trade liberalization.³¹ *Food security* is a concept that describes programmes focusing on the creation of institutions that organize the production and distribution of food based on human need. The main questions here are the question of access, availability, and nutrition. More broadly, food security is a matter of governance.³² Against the backdrop of transnational patterns of surplus and scarcity, scholars search amongst the plethora of international institutions to determine which institutions govern food security and how they do so.³³ The stakes of this research are closely linked to the politics of food security: countless actors worldwide argue over which particular institutions should be responsible for which particular communities, their conditions of access, nutrition, etc.

The renewed understanding of international trade law's form and function proposed in this article differs from the traditional understanding not only by the fact that it places the questions of food security and market stabilization right at the centre of the contemporary trade regime but also by the fact that it treats trade liberalization as only one systemic factor amongst others.³⁴ More precisely, in the pages below I examine how the theme of food security was historically defined and redefined within the various GATT committees and negotiation rounds from the mid-1940s onwards.³⁵ In line with a more holistic approach to thinking about international trade law proposed earlier, I also study a number of other international bodies and regimes that have affected the development of agricultural trade in and around GATT, such as the Food and Agricultural Organization (FAO), United Nations Conference on Trade and Development (UNCTAD), and International Commodity Agreements (ICAs). The argument developed in this part of the chapter also builds on an earlier

³⁰Fakhri (2014a), p. 75. Market stabilization is a term that was more popular after 1945. During the time of the League of Nations, the same ideas and debates were in the form of industrial policy (rather than commercial practice), and people employed the term 'rationalization'.

³¹Fakhri (2014a), p. 75.

³²Fakhri (2015), p. 68, Rayfuse and Weisfelt (2012). The term 'food security' is now more contested than ever especially with the prevalence of concepts such the right to food, food justice, and food sovereignty. I leave it open as to whether the concept of food security makes any room for transformative social change, see Holt Giménez and Shattuck (2011), p. 109.

³³Shaw (2007), Margulis (2012), p. 231.

³⁴Since my study is on public stockholding, which is regulated by the AoA, I do not address how the WTO affects agricultural production and food security more broadly through other agreements such as SPS, TBT, CVD, TRIPS, and GATS.

³⁵For an account of food security in GATT negotiating rounds see Margulis (2017), p. 25.

argument exploring the dynamics of market stabilization concepts.³⁶ The general conclusion that emerges at the end of this discussion is that revisiting the postwar history of international trade law in such broad terms can enable us to break out of some of the recent intellectual and policy deadlocks and overcome the language of ‘failure’ in agricultural trade law and policy.³⁷

2 A General History of Agriculture in GATT: The Era of Embedded Liberalism (1945–1982)

2.1 *World Food Board and the International Trade Organization, 1945–1956*

While world leaders, civil servants, and technocrats sought to construct new international institutions such as the International Trade Organizations (ITO) after the Second World War, they still held onto ideas of market stabilization and freer trade prevalent within the League of Nations.³⁸

During the interwar period, James Boyd Orr, a Scottish nutritionist, conducted a study that was the basis for a novel national hunger program. Some officials within the League of Nations were later inspired by Boyd Orr’s work on an international level.³⁹ As the first Director-General of the FAO, Boyd Orr brought food security to the forefront of international law and politics when he published his famous tract, *Proposals for a World Food Board*.⁴⁰ The World Food Board’s purpose would be to rationally organize world food production and distribution in order to meet people’s nutritional needs and eliminate hunger. To Boyd Orr, ‘[t]he trade problem is an essential part of the food and agricultural problem because the market for foodstuffs depends largely on the purchasing power of those engaged in industries other than food production.’⁴¹ According to this perspective, people had to be first properly fed in order to be healthy and markets had to be stabilized so that people were fully employed with good wages, before trade was liberalized.

³⁶Fakhri (2014a).

³⁷In previous work, I suggest that one could even start with the late nineteenth century, see Fakhri (2014a). In that account, however, I end the story in the early 1980s. This is an opportunity to bring my historical account up to the present situation, after Bali.

³⁸Fakhri (2014a), pp. 156–157. The most influential texts were Economic, Financial and Transit Department, *Commercial Policy in the Interwar Period: International Proposals and National Policies*, 1942; Economic, Financial and Transit Department, *Industrialization and Foreign Trade*, 1945.

³⁹Staples (2003), p. 495 (497–498). Boyd Orr would later receive the Nobel Peace Prize.

⁴⁰FAO (1946). ‘Food security’ as a distinct term would not gain prevalence until the 1972 FAO World Food Conference, but its origins can be found in this text.

⁴¹FAO (1946), p. 4.

After the war, agriculturalists around the world used trade policy to stabilize global prices through mechanisms of supply control. Domestically, this was done through marketing boards, and internationally by ICAs.⁴² Thus, Boyd Orr's proposal called for the creation of agricultural ICAs under the FAO's purview. Primary commodity prices were notoriously capricious and stable prices would allow FAO to fund agricultural surpluses, which would then be redirected to countries with food needs.

This in effect competed with the proposal to grant the ITO such power over ICAs. US and British diplomats felt that this conflicted with their trade agenda, insisted that these discussions be held under the ITO, and asked Boyd Orr to withdraw his proposal.⁴³ Boyd Orr refused to comply and argued that the World Food Board would actually increase world trade. Boyd Orr's words capture food security concerns that still resonate with arguments made today:

food, a primary necessity of life, had to be treated differently from other goods like motor cars which were not vital. Food for the world should be considered like a clean and adequate water supply for a town, paid for by the whole community in proportion to income. Mr. [William] Clayton [US Under Secretary of State] wanted food brought under the I.T.O. which regarded trade as an end in itself. I wanted trade in food to be an exception to other forms of trade, being directed to providing an adequate supply for the people.⁴⁴

The World Food Board never took off. And the ITO collapsed to leave the GATT in its wake. The FAO attempted other international food schemes, such as the International Commodity Clearing House (1949) and the World Food Reserve (1954) but to no avail.⁴⁵ Western progressive internationalist were hoping for a FAO that focused on eliminating hunger, but instead found it was subsumed into the trade regime of GATT and ICAs and focused on what they thought was the more conservative agenda of improving living conditions; that is to say that the FAO was swept up into a development agenda.⁴⁶ With that, the doctrine of food security was subordinated within the international trade regime.

Under the ITO plan, international trade in agriculture was never intended to be governed by the GATT. Chapter VI of the ITO Charter addressed agricultural trade by regulating Inter-Governmental Commodity Agreements. The ITO delegates' assumption was that Chapter IV (which became the GATT) would principally be geared towards manufactured products. Thus, GATT Article XX(h) exempts ICAs from GATT rules.

During the Ninth Session of the Contracting Parties, as part of the famous 1954–55 GATT Review Sessions, some governments attempted to reintroduce the Chapter VI regime from the Havana Charter into the GATT. In response, a Working Party on Commodity Problems was established that drafted a Special Agreement on Commodity Arrangements.⁴⁷ The agreement eventually was dropped during the review

⁴²Fakhri (2014a), pp. 170–171. See for e.g. Keynes (1971), p. 112.

⁴³Boyd Orr (1966), pp. 172–173, Wilcox (1949), p. 42.

⁴⁴Boyd Orr (1966), p. 173.

⁴⁵Shaw (2007), pp. 15–57.

⁴⁶Trentmann (2006), p. 13 (32).

⁴⁷L/301 (22 December 1954).

session. Instead, an interpretive note was added to Article XX(h) which purported to address some of the issues raised by the Working Party, and which, in effect, linked Article XX(h) to Chapter VI.⁴⁸

The Working Party found that Article XX(h) in itself did not ‘establish principles for the conclusion of commodity agreements.’⁴⁹ Rather it only provided the terms and conditions through which the GATT may accept ICAs. Thus, in line with the ITO, ICAs still needed to conform to certain principles: ICAs could only be adopted to deal with severe market disruption; their aim would be limited to price stabilization and not price increases; and importing and exporting countries would have equal voting power.⁵⁰ (This position still remains true to this day.)

Another way in which the GATT regime addressed the question of agriculture was through Article XI(2). This provision allowed for quantitative restrictions for the import and export of food and agriculture for the purpose of preventing or relieving ‘critical shortages of foodstuffs.’ If import and export quotas were used to stabilize domestic markets, the provision also established criteria that must be met that would make quotas GATT compliant. Indeed, this reflected the practice of the vast majority of countries’ agricultural policies since quantitative restrictions on a domestic and international scale were the most common mechanism to stabilize agricultural markets.

GATT also indirectly regulated agricultural trade through the loose monitoring of import and export subsidies under Article XVI(1), which only required Contracting States to notify and consult on subsidies. This was in practice a license to allow countries to subsidize. In other words, what was the legal exception for GATT was the rule for various global farm policies at the time. Rich countries like the US and later the EEC could afford domestic systems of farm support and supply control. Whereas developing countries and others that depended on agricultural exports turned to international mechanisms like ICAs. In effect, what was the legal exception for GATT was the rule for various global farm policies at the time.

The most popular way in which countries, especially rich countries, made exceptions within GATT for their agricultural policy was under Article XII which allowed for quantitative restrictions to be temporary employed in order to avoid a fiscal crisis caused by a serious balance of payment deficit. In 1955 (as part of the GATT Review Sessions), this temporary exception became the permanent rule when a very generous waiver was granted to the US⁵¹ and a more conditional ‘Hard Core Waiver’ (as it was called) for the rest of the world.⁵² The result was that the GATT now granted countries permission to impose quantitative restrictions for trade in agriculture.

⁴⁸Note By Secretariat, TRE/W/17 (7 September 1993), para. 16. It does this by referencing ECOSOC Resolution 30 (IV) (28 March 1947). This resolution was passed in response to the pending status of the ITO.

⁴⁹BISD 3S/239.

⁵⁰United Nations Economic and Social Council, Interim Co-ordinating Committee for International Commodity Arrangements, March 28, 1947, Res. 30 (IV).

⁵¹BISD 3S/34-5.

⁵²BISD 3S/39.

To many at the time, these waivers, especially the one granted to the US, ensured that agriculture would not be liberalized through the GATT anytime soon. This trend was further confirmed when the Treaty of Rome established the principles of European Economic Community Common Agriculture Policy, which came into effect in 1962. The waivers became the rule and were in effect until 1994. This trend against liberalization infuriated many at the time.⁵³ This frustration with the US and later the EEC still continues today as manifested by the G-33, G-20, and Cairns Group. The US was seen to be a hypocrite for vehemently advancing a global liberal trade agenda, but insisting on protecting its agricultural sector through subsidies and quotas.

Proponents of food security were exasperated by the decade of postwar trade politics. Orr's vision was for a food board that coordinated 'production and distribution according to principles of universal need.' Instead, food security was defined by food aid policies that in effect offloaded agricultural surplus from developed countries to developing countries.⁵⁴ FAO was therefore in the business of advancing policies primarily driven by the need to dispose surplus instead of creating programs defined by patterns of deficiency.

The US government only appears as a hypocrite if we assume that the US federal government represents a definitive ideological position. In reality, the US government, like all governments, represented different agricultural positions and interests at different times, which was reflected in its position on international trade negotiations. Producers in the Corn Belt were in favor of freer trade policies and against price support. Whereas wheat and cotton growers were against freer trade policies and in favor of price support.⁵⁵ There was also a divide within the US government between the Department of Agriculture and the Department of State.⁵⁶ The Department of Agriculture prioritized market stabilization and supply management while the Department of State was more comfortable with freer trade policies. In fact, in 1945, each department published a very different vision. The Department of State's *Proposals for Expansion of World Trade and Employment* would provide the blueprint for the ITO (and GATT).⁵⁷ The Department of Agriculture's *A Post-War Foreign Trade Program for United States Agriculture* looked to the FAO to lead on the international front and would later support Orr's World Food Board proposal.⁵⁸

⁵³McMahon (2006), p. 3, de Souza Farias (2015), p. 303 (313).

⁵⁴The Marshall Plan turned 'food producing developing countries into importers of American wheat surpluses', Trentmann (2006), p. 13 (34–5).

⁵⁵Winders (2009), pp. 90–92. See also *ibid.*, pp. 110–124.

⁵⁶Matusow (1967), pp. 79–109.

⁵⁷USDS (1945).

⁵⁸United States Department of Agriculture, *A Post-War Foreign Trade Program for United States Agriculture*, 1945.

2.2 *Haberler Report and the Long Development Decade (1957–1972)*

2.2.1 The Haberler Report and Committee II

Developing countries' current demands that the US and EU must reduce their agricultural tariffs and subsidies can find its origins in the 1958 Haberler Report.⁵⁹ The experts who wrote this report were commissioned by the GATT Contracting parties to examine trends in trade with a particular emphasis of examining why so-called less developed countries did not 'develop as rapidly as...industrialized countries.' More specifically, they were asked to focus on the 'excessive short term fluctuations' in primary product prices and the 'resort to agricultural protection.'⁶⁰ Recall, that newly independent countries in Asia and Africa had just convened in Bandung in 1955 and were calling for a new international law that reflected their perspective.⁶¹

The report would not only articulate a particular meaning of development that still resonates today, but it would be establish the groundwork for the current Agreement of Agriculture by identifying certain subsidies as legitimate and illegitimate. The Haberler Report is often celebrated for bringing the issue of development to the fore of the GATT agenda. But this was a particular understanding of development that was informed by a liberal understanding of free trade.⁶²

The report was sympathetic to the plight of developing countries that were at the mercy of fluctuating commodity prices. It gave credence to the 'the feeling of disquiet among primary producing countries that present rules and conventions about commercial policies are relatively unfavorable to them.'⁶³ But it warned that, if possible, protectionist policies should not be used. The report supported stabilization schemes in general but was concerned about the 'real practical difficulties in this field.'⁶⁴

In 1958, many looked to ICAs as the principal means through which agricultural trade would be governed. When the 1956 GATT Special Agreement on Commodity Arrangements was shelved, ICA coordination was left to other institutions such as the Interim Co-ordinating Committee for International Commodity Arrangements (and later taken up by UNCTAD).⁶⁵

Against this ideational and institutional context, the report recommended that developing countries should turn to buffer stocks to stabilize the market (buffer

⁵⁹Haberler et al. (1958). See McMahon, *The WTO Agreement on Agriculture: A Commentary*, 2006, pp. 4–6, Josling/Tangermann/Warley, *Agriculture in the GATT*, 1996, pp. 35–41.

⁶⁰L/77 (5 December 1957), (BISD 6S/18).

⁶¹Eslava et al. (2017).

⁶²Orford (2015), p. 1.

⁶³Haberler et al. (1958), pp. 35–41.11.

⁶⁴Haberler et al. (1958), p. 7.

⁶⁵BISD 5S/87; United Nations General Assembly, Establishment of the United Nations Conference on Trade and Development as an Organ of the General Assembly, December 30, 1964, Res. 1995 (XIX), para. 23(a).

stocks are a scheme when a public body buys a commodity from the market when the price is low, and sells when the price is high). The report focused on domestic stocks and cautiously supported ICAs as long as they continued to abide by the principles established by the ITO and inherited by GATT and ECOSOC.⁶⁶

The Haberler Report not only put development on the GATT agenda, it targeted Western countries' agricultural support programs by characterizing them as protectionist. The report pointed to the fact that the politically easiest way to reduce agricultural protection is by turning all supports into tariffs—this would become Article 4.2 of the Agreement on Agriculture, and one of agreement's most important provisions.

The report was popular with some developing countries at the time and would become a blue print for development plans that would be taken up a decade or so later. In the 1950s before the Haberler Report, developing countries were frustrated with fluctuating commodity prices and their dependence on industrialized countries for manufactured goods. They were also not pleased with the meager economic returns from exporting primary commodity products. Thus, in the 1950s and early 1960s, many developing countries, with some support from the World Bank and International Monetary Fund, turned to import substitution industrialization (ISI) policies.

One major criticism of ISI was that it ignored the potential benefits of using international trade to develop socio-economically. Others criticized the increased inequality that ISI created between traditional rural sectors and emerging urban manufacturing sectors. These criticisms, along with external shocks, such as industrialized countries de-linking from gold and adopting floating currencies, the sudden rise in the price of commodities, and the OPEC-driven oil price spike, changed countries' development policies in the late 1960s and 1970s.

More and more advisors argued that developing countries should stimulate commodity exports while attempting to diversify exports.⁶⁷ Thus, many agriculture exporters in developing countries devised a two-pronged policy. They pushed for stable and fair commodity prices through ICAs and UNCTAD in the short-term. This would allow countries to create take advantage of their comparative advantage in agriculture to bring in capital, which could the state could then direct to industrialize the economy. Developing countries therefore kept an eye to gaining access to developed countries' markets in the long-term through GATT's liberalizing policies.

Thus, in the 1960s and 1970s, developing countries, development institutions such as UNCTAD, and development economists shifted their prescriptions towards more export oriented development policies, which engendered liberal international trade policies with domestic industrialization and diversification.⁶⁸

⁶⁶Haberler et al. (1958), pp. 72–79. This allayed fears that ICAs would be used to raise prices to the benefit of exporters.

⁶⁷Fakhri (2014a), pp. 178–179.

⁶⁸Fakhri (2014a), p. 179. This new development theory manifested through a variety of different policies. The main idea behind the export promotion policy was that a stable, global, and liberal agricultural market would provide developing countries with the requisite amount of revenue

The Haberler Report took for granted that there was a commonly held understanding of what constituted illegitimate agricultural protectionism and how to measure it.⁶⁹ But GATT delegates from contracting states and other international institutions had very different understandings and it would not be easy to establish a coherent policy of liberal trade and agricultural support. The GATT Contracting Parties created several committees to follow-up on the recommendations of the Haberler Report.

Committee II was created in order to gather and study, with the FAO, data ‘regarding the use of by contracting parties of non-tariff measures of the protection of agriculture or in support of incomes of agricultural producers.’⁷⁰ There were vehement debates over the meaning what was to be measured, how it was to be measured, what was necessary support and what was ‘protectionism’, and what exceptions were necessary (such as national security or social policy).⁷¹

Indeed, the arguments in favor of agricultural support were the same then as they are today: (1) to support farm income in order for it to be comparable to other sectors; and (2) to act as a bulwark against fluctuating prices.⁷² One can also see the foundations for the modern Agreement on Agriculture in the work of Committee II. The committee found what they called structural or long-term improvements to be uncontroversial—this would become the Green Box of allowable subsidies. The more contentious issue would be ‘direct method’ of support; the thinking of the time was that while these methods stabilize the market prices, the committee had to distinguish between which methods significantly reduced imports and which created an increase in export availability⁷³—a question answered by the Agreement on Agriculture’s Amber and Green Boxes.

they needed to invest in more remunerative sectors like industrial production. This plan, however, depended on active cooperation from the principal agricultural importers, namely the US and EECs, especially in what concerned the reduction of their domestic agricultural support and lowering of their agricultural tariffs.

⁶⁹ ‘The most satisfactory measure of the degree of agricultural protectionism in such [complicated support] schemes would be a comparison between the total return actually received by the domestic farmer for his production and the return which would correspond to the ruling world price.’ Haberler et al. (1958), p. 9.

⁷⁰ GATT, ‘Expansion of International Trade: Decision of 17 November 1958 and Appointment of Committees’ L/939 (27 November 1958), p. 2.

⁷¹ See, e.g., GATT, ‘First Report of Committee II on Expansion of Trade’ Com.II/5 (16 March 1959), p. 2; ‘Measuring the Degree of Agricultural Protection: Note By the Delegation of the United States’ Com.II/16 (23 September 1959); GATT, ‘Measuring the Degree of Agricultural Protection: Note By the Delegation of the United States’ Com.II/16 (23 September 1959).

⁷² GATT, ‘Second Report of Committee II’, Spec (60)99/Rev. 1 (13 May 1960), p. 3; https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm (Under ‘What is Distortion’): Fakhri (2014a), p.179.

⁷³ GATT, ‘Second Report of Committee II’, Spec (60)99/Rev. 1 (13 May 1960), p. 6.

2.2.2 The Kennedy Round and Committee on Agriculture

The Haberler Report was also concerned about the forthcoming European common agricultural policy (CAP) even though at the time no specific information was yet available.⁷⁴ The CAP regulations and basic decisions were enacted on 4 April 1962 and the details were circulated to GATT Contracting Parties the next month.⁷⁵ By this point, the Dillon Round (1960–62) was coming to a close.

Exactly two weeks after the Dillon Round ended, the CAP came into force on 30 July 1962.⁷⁶ Soon after, the CAP was debated in the regular GATT sessions, and pointedly challenged in Committee II meetings.⁷⁷ Developing and developed countries from all over the world were pushing against the EEC plan to heavily subsidize domestic agricultural production and impose high tariffs. The Indonesian and Indian delegates reflected the opinion of many developing countries and in effect called the EEC a hypocrite for claiming to want developing countries to increase their trade but making it virtually impossible by closing off one of the largest markets for agricultural exports.⁷⁸

The biggest test for the EEC was yet to come for it was at the GATT Kennedy Round (1964–67) where the world negotiated and debated over the details of what the CAP would look like. In the lead up to the Kennedy Round, the Contracting Parties created a Committee on Agriculture. At the outset, this specialized sub-committee was given the unprecedented task to negotiate non-tariff barriers to agricultural trade.⁷⁹ Agriculture was a key issue at the Kennedy Round since the EEC CAP's was at stake. The broader context for the Committee was to ensure that agricultural agreements were fairly 'balanced' with the industrial sector so that 'all participating countries' (read: those countries that depended on agricultural exports) could benefit from GATT.⁸⁰

Domestic US agricultural policy was the quintessential farm support system and so the US could not take as strong a principled position against the EEC, as developing countries had. The reason that the US strongly opposed the EEC CAP was because it excluded the importation of US agricultural products (in the form of food aid).⁸¹

The Committee on Agriculture members could never agree on the scope of their mandate. Argentina, Australia, Canada, Denmark, New Zealand, the UK, the US, and India took the position that they should negotiate across the board reductions in

⁷⁴Haberler et al. (1958), p. 11.

⁷⁵L/1771 (24 May 1962); EEC Council: Regulation No 25.

⁷⁶Instrument No 80 (16 July 1962); EEC Regulation No 49 of the Council (29 June 1962).

⁷⁷GATT, *Trends in Agricultural Trade: Report of Committee II on Consultations with the European Economic Community* (1962) [which can also be found as L/1910 (13 November 1962)].

⁷⁸L/1902 (9 November 1962); SR.2016 (15 November 1962). The EEC statement that Contracting Parties were responding to is L/1887 (31 October 1962).

⁷⁹TN.64/WSpec(63)301 (18 November 1963).

⁸⁰TN.64/WSpec(63)301 (18 November 1963).

⁸¹Friedmann (1982), p. S248 (S260–S271), Winders (2009), pp. 146–153.

tariff and non-tariff agricultural support.⁸² Whereas the EEC sought to legitimize its new system of agricultural support, under CAP, with minimal restrictions.⁸³ In the end, the developing countries, the US, and GATT secretariat were disappointed that the negotiations failed to generate new agricultural policies during the negotiations.⁸⁴ But to the EEC the Kennedy Round was a success because inaction and the ongoing Hard Core Waiver essentially legitimized the CAP.⁸⁵

In other regards, the Kennedy Round was a success for developing countries and made some progress on agriculture—but not in terms of liberalization. In 1965, developing countries successfully introduced a new section known as Part IV: Trade and Development. They coalesced in UNCTAD (created in 1964) to define their unified position on trade and development, and exercised their majority power in GATT.

Not only did Part IV carve out some exceptional space for developing countries within the GATT, but it also expanded what little room the GATT allowed for ICAs. The newly enacted Article XXXVI(1) noted that many less-developed countries depended on the export of primary products (which included agriculture). Thus, it called for more favorable market access and ‘in particular measures designed to attain stable, equitable and remunerative prices’. The article was explicit in its logic: if developed countries liberalized their agricultural market thereby granting developing countries more market access, and if ICAs stabilized commodity markets—then developing countries could expand their trade, increase their export earnings, and use these new resources for economic development and diversification. Developing countries wanted a liberal trade regime for ‘processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.’⁸⁶

In fact, the Kennedy Round provided the foundations for two important ICAs. The first was a great success for developing countries. In 1961, under the auspices of GATT itself, a Short-Term Arrangement Regarding International Trade in Cotton Textiles was agreed as an exception to the GATT rules. The arrangement permitted the negotiation of quota restrictions affecting the exports of cotton-producing countries. In 1962 the ‘Short-term’ Arrangement became the ‘Long-term’ Arrangement when it was renewed in 1967 and lasted until 1974; that was when the Multifibre Arrangement entered into force (which lasted until 2004).⁸⁷

The second was a 1967 GATT Memorandum of Agreement that was negotiated during the Kennedy Round. It provided the basic elements of a world grains arrangement amongst U.S., Canada, Australia, Argentina and the EEC. Later that year in

⁸²Spec (63) 301 (18 November 1963); TN.64/23/Rev.1 (4 May 1964).

⁸³TN.64/AGR/2 (11 March 1964); TN.64/23/Rev.1 (4 May 1964).

⁸⁴GATT/994 (30 June 1967); ‘Agriculture Within World Trade: Address by Eric Wyndham White’ INT(67)212 (11 September 1967).

⁸⁵TN.64/AGR/2 (11 March 1964). For an excellent analysis from the perspective of EEC politics see Meunier (2005), pp. 74–101. For negotiation history McKenzie (2010), p. 229.

⁸⁶Article XXXVI(5).

⁸⁷https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm.

Rome, at the International Wheat Conference this became the 1967 International Wheat Arrangement (aka International Grains Arrangement).⁸⁸ What is remarkable about this treaty was that it was made up of a Wheat Trade Convention and (the first ever) Food Aid Convention.⁸⁹ Because of the latter, many considered it also a benefit for developing countries especially since it addressed issues related to distinguishing food aid from dumping.⁹⁰

As such, the 1967 International Wheat Arrangement was a rare configuration of three dynamics: liberal trade institutions, market stabilization schemes, and food security policies. Even though during Orr's call for interlacing food security and trade was initially excluded from GATT, it still resonated (and resonates) within the trade regime. In 1954 FAO developed a set of principles to address situations where surplus disposal in the form of aid could act as an export subsidy and displace commercial imports and discourage local production in recipient countries.⁹¹ The FAO principles were incorporated into the 1967 International Wheat Arrangement and 1994 Agreement on Agriculture (Art. 10(4)(b)).

In sum—from a freer trade perspective the Kennedy Round was a failure because it did not lead to the liberalization of agricultural trade. But from the perspective of agricultural support and market stabilization policies that were popular at the time, the Kennedy Round was a great success. The EEC saved its new regional system and proved to the world and itself for the first time that it could successfully negotiate as a single unit.⁹² The US's farm program supported both free trade agriculturalists and farm support agriculturalists. And everyone was happy with the new wheat agreement which purported to stabilize the market and feed the hungry in developing countries. Cotton growers in developed and developing countries were happy to have a commodity agreement that lasted longer than most other ICAs.⁹³ Moreover, national governments, especially those of developing countries, could now count on ICAs as a legitimate means to regulate trade more than ever before.⁹⁴

The key agricultural trade question during this era was: Should food surplus be used to feed the hungry or improve the economic lives of the poor?⁹⁵ FAO at the time, under the leadership B.S. Sen (1956–67), decisively made food a development

⁸⁸Commonwealth Economic Committee, *Grain Crops: A Review*, Issue 12 (1967), pp. 139–143; Commonwealth Economic Committee, *Grain Crops: A Review*, Issue 13 (1969), p. 160, O'Connor (1982), p. 225.

⁸⁹The 2012 Food Assistance Convention is the latest iteration of the 1967 food aid treaty.

⁹⁰Davies and Woodward (2014), p. 376.

⁹¹FAO (1954). This was after an unsuccessful attempt by Australia to pass a new provision within GATT to address the non-commercial disposal of agricultural surplus (BISD 5S/87).

⁹²Meunier (2005), pp. 74–101.

⁹³In fact, today, cotton remains one of the few commodities singled out as its own agenda item for the Doha Development Round and was part of the Bali Package.

⁹⁴Popular studies on international economic law at the time made significant provision for the study of ICAs, see Jackson (1969), pp. 717–740, van Meerhaeghe (1971), pp. 124–166.

⁹⁵Rietkerk (2016), p. 788.

issue.⁹⁶ Sen, an eminent Indian diplomat, placed an emphasis on coordinating global surplus and inequality, transforming subsistence agriculture into a market economy, and increasing productivity (much like was accomplished in the 1967 International Wheat Arrangement).⁹⁷ To Sen, establishing national food reserves through international co-ordination was a high priority; these reserves would buffer against supply fluctuations caused by ecological conditions, and stabilize prices to balance between increasing productivity and addressing sharp increases in cost of living.⁹⁸ While trade did not play a central role in Sen's campaign (his focus was more on aid), he argued against Third World policies of self-sufficiency popular at the time and called for stable and coordinated expansion of agricultural trade.⁹⁹ This in effect aligned food security with trade policies at the time.

2.3 Crisis After Crisis and the Renegotiation of the Global Food Regime (1972–1986)

Going into the Tokyo Round (1973–79), there was a concerted push by several countries, especially the US, for international trade law to treat agriculture like any other sector. The post-Kennedy Round Agriculture Committee had accomplished very little and many came to Tokyo with a view that the world agricultural market was (as famously described) in 'disarray'.¹⁰⁰ The main problem, according to this perspective, was that farm support policies in rich, industrialized countries supported rich landowners who are able to produce more and therefore receive more support. The problem was that it encouraged surplus production by farmers at the expense of taxpayers and consumers. Moreover, such policies insulated domestic markets from world prices and so when surplus commodities were dumped onto the world market, this depressed and destabilized world prices.

At first, most delegates at international trade negotiations focused most of their energy on liberalizing, and less on stabilizing, markets. But the Tokyo Round was quickly enfolded into broader issues of global food security.¹⁰¹ The so-called disarray was nothing compared to the World Food Crisis of 1972–75. World grain prices skyrocketed devastating the lives of millions of people. The global era of a food and trade politics based on surplus management was over. Today, many are looking to the

⁹⁶Sen's prize work was the Freedom From Hunger Campaign (1960–70) and the 1963 World Food Congress. See Singer (1962), p. 69.

⁹⁷Shaw (2007), pp. 77–84.

⁹⁸FAO (1962), p. 25.

⁹⁹FAO (1962), p. 41.

¹⁰⁰Johnson (1973). Johnson's tract reflected a rising movement within US agricultural toward more policies linked more to market prices instead of price supports and production control. In 1973, President Richard Nixon attempted to phase out price supports all together. Even though he was unsuccessful the Agriculture and Consumer Protection Act introduced more market-oriented system of support. See Winders (2009), pp. 82–83.

¹⁰¹Josling et al. (1996), pp. 74–75, 87.

1970s to compare and contrast with the aftermath of our own 2007–08 and 2010–20 food crisis.¹⁰²

Ecologically, El Niño and a significant global temperature drop made the weather so unstable that some experts wondered whether the climate itself was changing.¹⁰³ Later in 1974, flooding in Bangladesh, and drought in India, Ethiopia, and the Sahel region¹⁰⁴ brought famine to the lives of millions.

The problem was not that there was too little food and too many people. Amartya Sen famously recast the issue of famine as a matter of political economy, distribution, and government decision-making.¹⁰⁵ For example, the Bangladesh famine was caused by the Bangladeshi reliance of food imports, the global rise in grain prices, and—most crucially—the US decision to cease food aid and trade to Bangladesh because of Bangladesh's jute trade with Cuba.¹⁰⁶ Therefore it is not surprising that debates over the international food regime during that time redefined global governance (or the 'world order' in the parlance of the time). Key, and now classic, texts reflecting upon this famine redefined understandings of right to food,¹⁰⁷ global power,¹⁰⁸ and development.¹⁰⁹

The crisis was triggered when the Soviet Union purchased 30 million metric tons of grain to compensate for production shortfalls and feed its people. This amounted to three quarters of all grain on the world market.¹¹⁰ As part of détente politics of the time, the US agreed to sell a significant amount of its wheat (known as the 1972–73 Soviet-US grain deals). The US had little to export thereafter since they government had just incentivized farmers to cut wheat production. All this caused prices to quickly rise. By this point, the economic provisions under the 1967 Wheat Trade Convention were suspended and the successor 1971 Wheat Trade Convention included none, leaving global leaders no international mechanism to at least attempt to stabilize the price of wheat.

While the climate and agricultural yields improved in 1973, that same year the price of oil rocketed, making all transport more expensive, thereby raising fertilizer

¹⁰²Horton (2009), p. 29, Díaz-Bonilla (2010), p. 49, Headey and Fan (2010).

¹⁰³TIME, 'The World Food Crisis', Vol. 104 Issue 20, p. 94 (11 November 1974): 'Harsh winters, droughts or typhoons cut output in the Soviet Union, Argentina, Australia, the Philippines and India. Off the coast of Peru, a change in ocean currents and overfishing decimated the anchovy catch, a major source of protein for animal feed. In Southeast Asia and parts of Africa, the peanut crop—providing mainly animal feed and cooking oil—fell far below normal. All told, the world's food output dropped for the first time in 20 years, down 33 million tons, from 1,200 million tons.'

¹⁰⁴The Sahel covers parts of Senegal, Mauritania, Mali, Burkina Faso, Algeria, Niger, Nigeria, Chad, Sudan, and Eritrea.

¹⁰⁵Sen (1981).

¹⁰⁶Sen (1981), pp. 135–136.

¹⁰⁷Alston and Tomaševski (1984).

¹⁰⁸George (1976).

¹⁰⁹Sen (1981).

¹¹⁰Friedmann (1993), p. 29 (40).

and food costs.¹¹¹ All this was going on while the embedded liberal global compact was unravelling.¹¹² For example, to many people's surprise, Nixon ended dollar convertibility to gold in 1971 and essentially ended the Bretton Woods system. By 1973, most major world economies had allowed their currencies to float freely against the dollar. It was a 'rocky transition' characterized by plummeting stock prices, bank failures and inflation.¹¹³

It is during this era of unstable market conditions that food security and freer trade were at the forefront of international negotiations. A World Food Conference was convened in 1974 and held in Rome, where 'food security' was officially defined for the first time and promulgated onto the international agenda.¹¹⁴ The resolutions can be grouped into five areas of emphasis:¹¹⁵

1. Increasing food production in developing countries within a broader development framework—this included integrating approximately 100 million subsistence farmers into the world economy;
2. Developing programs to improve consumption and nutrition patterns and ensuring adequate food availability to people in developing countries, especially vulnerable groups;
3. Strengthening world food security better information systems, international stock-holding policies, and a food aid system;
4. Creating new institutions—what arose were the International Fund for Agricultural Development (which still operates today), the Consultative Group for Food Policy and Investment, and the World Food Council¹¹⁶; and
5. Promoting international trade.

While the conceptualization of food security was innovative, the final consensus at the conference over stock-holding policies and international trade was nothing new and reflected the existing trade policies of UNCTAD and GATT.¹¹⁷

¹¹¹The common account of the 1973 oil shock is that Arab oil-producing countries imposed an embargo through OPEC in order to punish the countries like the United States and Netherlands for their support of Israel in the Yom Kippur/October war against Egypt. But recent scholarship suggests that the price of oil may have been more effected by other factors such as: the financial instability created by the end of the Breton words system, the global rise of primary commodity prices, nationalizations and spreading fear of natural resource exhaustion, US oil production peaks, and the rise of environmental concerns. See Garavini (2011), p. 473.

¹¹²Ruggie (1982), p. 379.

¹¹³Stephey (2008).

¹¹⁴UN (1975), Aziz (1975).

¹¹⁵Hathaway (1975), Shaw (2007), pp. 115–154, Gerlach (2015), p. 929.

¹¹⁶The conference was a blow to FAO. It was not granted the authority to lead on any of the proposals and was relegated to the margins by proposals for new food institutions. This reflected the little confidence that the global policy-making community had in FAO's ability to address questions on a global scale and the Soviet aversion to FAO which the USSR thought to be a Western stronghold. Developing countries had proposed the conference be held under the auspices of UNCTAD. See Weiss and Jordan (1976), p. 104.

¹¹⁷Universal Declaration on the Eradication of Hunger and Malnutrition, para. 11: 'All States should strive to the utmost to readjust, where appropriate, their agricultural policies to give priority to food

Some delegates at the World Food Conference preferred to leave trade discussions to the ongoing Tokyo Round.¹¹⁸ Six months after the World Food Conference in May, negotiators at the Tokyo Round took up the call to address the world grain problem that had generated the food crisis. Talks at the International Wheat Council (later renamed the International Grains Council) had gone nowhere in February.¹¹⁹

An ‘Agriculture’ group was created for the Tokyo Round, and a Sub-Committee on Grains was assembled. But views were too disparate and in the end no agreement was concluded. The EEC wanted an arrangement that improved the exchange of information, prioritized stabilization (which in effect protected CAP), and addressed developing countries needs primarily through food aid.¹²⁰ The US, on the other hand, wanted to prioritize trade liberalization. The US partially blamed the food crisis on the fact that they had to halt wheat production on 40 million acres of land in 1971–72 (equalling 60% of the total world reserve) because they did not have access to foreign markets for their surplus.¹²¹ Importing and exporting developing countries alike took the broad perspective and did not want this to be another missed opportunity like the World Food Conference and International Wheat Council: to them, trade liberalization (both tariff and non-tariff barriers) had to be discussed alongside matters of market stabilization and food security.¹²²

On the market stabilization front, the Tokyo Round was not very successful since the two ICAs that were finalized—on bovine meat and dairy products—only had nominal stabilizing mechanisms.¹²³ To many commentators today, the bigger failure was that no progress was made on liberalizing trade in agriculture. But the real failure of the Tokyo Round, measured in the political terms of the time, was the inability to conclude a grain agreement that employed principles of market stabilization and trade liberalization to serve food security needs.

UNCTAD had been invited to the Tokyo Round Sub-Group negotiations on grain. In fact, developing countries during the World Food Conference were not keen on talking about trade in Rome and preferred to leave it to UNCTAD.¹²⁴ By now, the

production, recognizing in this connection the interrelationship between the world food problem and international trade. In the determination of attitudes towards farm support programmes for domestic food production, developed countries should take into account, as far as possible, the interest of the food-exporting developing countries, in order to avoid detrimental effect on their exports. Moreover, all countries should co-operate to devise effective steps to deal with the problem of stabilizing world markets and promoting equitable and remunerative prices, where appropriate through international arrangements, to improve access to markets through reduction or elimination of tariff and non-tariff barriers on the products of interest to the developing countries, to substantially increase the export earnings of these countries, to contribute to the diversification of their exports, and apply to them, in the multilateral trade negotiations, the principles as agreed upon in the Tokyo Declaration, including the concept of non-reciprocity and more favourable treatment.’

¹¹⁸UN (1975), p. 36.

¹¹⁹Shaw (2007), pp. 155–158.

¹²⁰MTN/GR/W/1 (27 May 1975).

¹²¹MTN/GR/W/1 (28 May 1975).

¹²²MTN/GR/1 (10 June 1975); MTN/GR/W/3 (24 June 1975).

¹²³BISD 26S/84; BISD 26/91 (1980).

¹²⁴Shaw (2007), p. 125.

Third World was mobilizing through UNCTAD and passed a General Assembly resolution calling for the establishment of a New International Economic Order (NIEO).¹²⁵ The regulation of primary commodities was the first thing on the list of the NIEO Programme of Action.¹²⁶

Whereas the World Food Conference prioritized and defined food security and left market stability and trade liberalization unclear; and the GATT Tokyo Round split over whether market stabilization or trade liberalization would best serve food security demands; NIEO prioritized market stabilization, emphasized that food security is linked to market stabilization and development, and treated trade liberalization as a secondary (but necessary) issue.

Representatives from Third World countries, however, disagreed over how best to implement these new doctrines of market stabilization. They were divided over whether power should be delegated to national governments and ICAs or more centralized to UNCTAD. In 1976, under the leadership of Gamani Corea, an economist and high-ranking civil servant from Sri Lanka, UNCTAD led the effort to operationalize the NIEO call. This included creating the Integrated Programme for Commodities and, later in 1980, the Common Fund for Commodities. Until this point, ICAs were negotiated on a commodity-by-commodity basis by essentially independent bodies, with no clear common objective. The Integrated Programme for Commodities was the first time that one international organization, since the ITO, attempted to bring all ICAs within a single institution, directed by a single fund.

Different ICAs employed diverse forms for market regulation, all of which included the international regulation of commodity prices, through both international and domestic institutions. UNCTAD, however, proposed to hold, control, and finance international commodities and originally placed very little emphasis on ICAs. This did not sit too easily with national governments. Commodity producers, especially Latin American countries, expressed anxiety in regard to the Common Fund, because they feared that they would lose decision-making power over certain products, such as setting maximum and minimum prices, to a forum where countries without an interest in those products would participate. What is also telling is that major commodity producers, such as Brazil, Malaysia, Ivory Coast, Chile, and Colombia, did not lead in creating the Integrated Programme.¹²⁷

Just when the world was recovering from the World Food Crisis, it was hit by the global commodity crisis in 1978 when prices collapsed across the board and would not recover until 1986.¹²⁸ Moreover, a second oil shock hit the world in 1978–80.

¹²⁵United Nations General Assembly, Declaration for the Establishment of a New International Economic Order, May 1, 1974, Res. 3201 (S-VII); United Nations General Assembly, Programme for Action on the Establishment of a New International Economic Order, May 1, 1974, Res. 3202 (S-VI).

¹²⁶United Nations General Assembly, Declaration for the Establishment of a New International Economic Order, May 1, 1974, Res. 3201 (S-VII); United Nations General Assembly, Programme for Action on the Establishment of a New International Economic Order, May 1, 1974, Res. 3202 (S-VI).

¹²⁷Fakhri (2014a), p. 204.

¹²⁸Maizels (1992), Corea (1992), pp. 153–158.

The 1970s was the era of the second development decade and Third World countries pursued large development projects that emphasized industrialization. But Third World countries had to borrow money to fund their industrialization projects; this was because most of these countries depended on exporting primary commodities that did not bring in a lot of capital into local economies. The price spike of the first oil shock generated large amounts of extra money for oil-exporting countries, which they deposited into Western banks. The banks then loaned much of this money to developing countries for development projects. However, when commodity prices collapsed in 1979 dragging everyone into recession, developing countries were no longer able to repay their debts.

This ushered in a new ideological and financial era which would later be called the Washington Consensus or neoliberalism. The Third World debt crisis was most acutely felt in non-oil producing Latin American countries. Countries that were unable to pay their debts, turned to the IMF who provided money for loans and unpaid debts. In return, the IMF forced developing countries to make structural adjustment reforms that undid subsidies, reduced tariffs, and promoted the market as the principal social institution.

Up until now, embedded liberalism was sustaining critiques from the left by NIEO and from the right by neoliberalism. But with the commodity crisis and global recession by 1981–82, everything changed, the left and centre bottomed out leaving neoliberalism in its wake.

The institutional corollary was that UNCTAD and ICAs were outdone by the GATT. Starting around 1979, UNCTAD started looking for a ‘different analytical base.’¹²⁹ Soon after, UNCTAD went through a ‘crisis, retreat, and reinvention’. By the mid-1980s, as the Uruguay Round began, UNCTAD and many developing country leaders decided that their countries should direct most of their trade law and policy energy into the GATT.¹³⁰

Even those from the North and South who had not given up entirely on ICAs as an idea, started to look to the GATT, rather than UNCTAD, as the institutional milieu for ICAs. There was also a shift from discussing ICAs in terms of debating appropriate economic mechanisms regulating prices, to suggesting that international commodity organizations should focus on administrative functions, such as research, consultation, and international cooperation—which is the status of most ICAs today.

Throughout their postwar history, ICAs reflected an embedded liberal consensus. By 1980, many people were losing confidence in their ability to stabilize commodity prices. Many young international lawyers fought to keep ICAs alive as a vibrant institutional project.¹³¹ But by the mid-1990s, experts would pronounce ICAs to be dead.¹³²

¹²⁹Weiss (2005), p. 198.

¹³⁰Taylor and Smith (2007), pp. 67–90, UNCTAD (2004), pp. 5–10.

¹³¹Kennedy (1977), p. 232, Khan (1982), Sands (1986), p. 386, Chimni (1987).

¹³²Fakhri (2014a), pp. 200–205.

3 The Advent of the WTO and Corporate Food Regime (1982–1994)

By the late 1970s, it had become clear that the farm support programmes operated by the US government could no longer be plausibly regarded as solely being aimed at helping family farms. Instead, the respective farm bills subsidized the rise of multinational agribusiness. Within the US, grain traders were granted significant export subsidies which supported production for the purpose of export. This was lucrative for large, corporate US grain producers who used this subsidy to expand their business and acquire more farmland, thereby increasing the amount of support they received in subsidies.¹³³ When Third World countries liberalized their economies as per IMF demands, these large companies stood to gain even more since they were well poised to take advantage of this new market access, ushering in today's 'corporate food regime'.¹³⁴ At the World Food Conference, some national delegates anticipated this trend and raised concerns that multinational corporations had too much power as buyers of developing country products, and sellers of necessary inputs.¹³⁵

By the early 1980s, it was becoming difficult to find any institutional space in which to generate ideas that were not neoliberal. UNCTAD had been caught up in the global turn to markets. In 1978, Edouard Saouma, a Lebanese agronomist and high ranking civil servant, became the Director-General of FAO. While he employed neoliberal discourse to some degree, he nevertheless spent his 18-year tenure dedicated to and supported by Third World countries. Saouma did this by increasing decision-making autonomy for local and regional FAO offices while also expanding FAO's mandate to include a focus on food production, stability of food supplies, and access to food by the poor; he was rewarded by having to stave off challenges to his job and leadership by developed countries.¹³⁶

Within GATT, the Consultative Group of 18 led some discussions regarding agriculture in 1981–82.¹³⁷ But the main energy that would establish the principles behind the new global food regime originated from the OECD. In 1982, the OECD developed a new mandate to investigate the link between domestic policies and agricultural trade (the Ministerial Trade Mandate). This mandate pushed the OECD away from its old role as a place to provide descriptive work, and towards producing analytical work that measured how domestic policies affected trade. Thus, the new mandate focused on treating agriculture like all other goods, significantly reducing all agricultural support, and developing 'market-oriented policies'. The OECD's methodology was refined in 1983–85, and reports that arose from this mandate were published in

¹³³Winders (2009), pp. 157–158.

¹³⁴McMichael (2005), p. 265.

¹³⁵UN (1975), p. 36. See also U.N. Commission on Transnational Corporations, *Transnational Corporations: Issues Involved in the Formulation of a Code of Conduct*, U.N. Doc. E/C.10/1976/117 (1976).

¹³⁶Shaw (2007), p. xii, 235–258, Jarosz (2009), p. 37 (50–52).

¹³⁷See for e.g. CG.18/W/58 (16 September 1981); CG.18/W/59/Rev.1 (20 January 1982); CG.18/W/68 (8 April 1982).

1987 shortly after the Uruguay Round was launched in 1986.¹³⁸ Much like developing countries had successfully used UNCTAD to coalesce together and develop new ideas that were run through GATT, developed countries did the same with the OECD in the 1980s.

The commodity crisis rallied the Contracting Parties at the 1982 Ministerial Meeting in Geneva. Going in, some commentators knew that agriculture was a central issue especially for the US. There was a farm crisis in the US because farmers produced bumper crops but commodity prices were too low and farmers' incomes, adjusted for inflation, were the lowest since the Great Depression.¹³⁹ The Ministers declared that the multilateral trading system, and its 'legal foundation' the GATT, was 'seriously endangered' because of the 'severely depressed levels of production and trade.'¹⁴⁰ The seeds of the WTO were sown during this crisis and at the Ministerial.

Even though the conference stalled on agriculture, the work programme provided the foundation to the Uruguay Round.¹⁴¹ From this point on agricultural negotiations at the GATT were now only defined in terms of freer trade. Whereas in the past, a stable market was the precursor to a liberal trade regime, now a liberal trade regime was assumed to exemplify a stable market. The Ministerial Declaration used new language that would define the agricultural trade agenda till now. Ministers undertook to: 'bring agriculture more fully into the multilateral trading system' by improving the 'effectiveness of GATT rules'; to improve market access; and discipline against export subsidies.¹⁴² In other words, the desire was to create a freer global market and the assumption was that it could only be established by more and more powerful law.¹⁴³

The Punta del Este Declaration kicked-off the Uruguay Round of negotiations on 20 September 1986.¹⁴⁴ Building from the work of the OECD and GATT Committee on Trade in Agriculture, the agricultural agenda was framed entirely in terms of freer trade. Farm support in all its forms was potentially threatened. Freer trade was expected to bring more market 'discipline and predictability'. The three points that trade delegates agreed upon were that:

- (1) market access would be improved by reducing import barriers;
- (2) the market would be stabilized by 'increasing discipline' on all direct and indirect subsidies; and
- (3) a very novel topic for trade was introduced—sanitary and phytosanitary regulations were to be treated as potential barriers to trade.

¹³⁸Moyer (1993), p. 95.

¹³⁹Echols (1982), p. 109.

¹⁴⁰GATT/1328 (29 November 1982).

¹⁴¹https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm.

¹⁴²GATT/1328 (29 November 1982).

¹⁴³A global commitment to freer trade in agriculture did not solve problems of the time. But the tense meeting of the newly formed Committee on Trade in Agriculture clarified all the different positions at play within this particular commitment to freer trade. See Josling et al. (1996), pp. 111–132.

¹⁴⁴MIN. DEC (20/09/1986).

This last point was the only place the any engagement with food security by any definition was addressed. But now food safety regulations were in a sense illegal under trade unless it met certain WTO requirements and was somehow justified.

Uruguay negotiations were famous for the breadth of give-and-take. The recent recounting of the chief US negotiator captures the spirit:

Japan was willing to open up its rice market in part because it could see long-term benefits in global protection of intellectual property. India accepted the intellectual property agreement—which literally produced riots in some parts of the country over fears that it would inhibit agricultural seed improvements—in part because the United States was opening its textile market. The United States, in turn, opened its textile market in part because American domestic agricultural interests, which benefited from the new trade agreement, could outvote the Southern textile operators that would lose the benefit of textile import quotas. And so on.¹⁴⁵

Agricultural negotiations, as always, were contentious and threatened the entire negotiating round. And it would be challenged through food security terms.

In 1991, Arthur Dunkel, the Director-General of the GATT at the time and Swiss expert in trade in agriculture, put forward a comprehensive draft that would act as the basis for what was to become the WTO. The so-called Dunkel Draft proposed to liberalize agricultural trade and did so through legally binding tariff rates reductions and constraints on subsidies.¹⁴⁶

The Dunkel Draft represented a controversial moment that redefined and sharpened trade interests, especially around agriculture. For fifty years, developing countries navigated between the US's propensity for freer trade and the EEC's desire to stabilize the market. And ever since the peace clauses of 1955, the US and EEC were strong trade opponents in the agricultural sector. But through the Dunkel Draft, and later the Blair House Agreement, they worked out their differences.¹⁴⁷ The Dunkel Draft and later the Agreement on Agriculture reflected US and EEC compromises while still preserving the respective government's farm support policies (through the Green Box).¹⁴⁸

Scholars and government officials from the developing world in 1989–90 expressed concerns about the relationship between trade liberalisation and food security that powerfully resonate to this day:

Would agricultural policy reform require the removal of national policies perceived by their users to enhance food security? Would policy reform make it more difficult to acquire food at reasonable prices from the global market? Would a reformed agricultural policy system be less responsive to global food needs?¹⁴⁹

The Dunkel Draft, and later the Agreement on Agriculture, addressed food security concerns by recognizing food security as a legitimate non-trade issue. Moreover

¹⁴⁵Schmidt (2015).

¹⁴⁶Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, MTN/TNC/W/FA (20 December 1991).

¹⁴⁷Ingersent et al. (1993).

¹⁴⁸Josling et al. (1996), pp. 35–41, 157–74, Moyer (1993), p. 95.

¹⁴⁹Ballenger and Mabbs-Zeno (1992), p. 264.

it expanded the provision of food aid to developing countries. But this was (and remains) a dated understanding of food security. The consensus amongst policy-makers at the World Bank, IMF, and developing countries at the time was that these countries were harmed by food aid practices because they artificially depressed market prices and trapped countries into a system of dependence.¹⁵⁰ But the Agreement on Agriculture did not reflect this position since developing countries were politically weaker than they were in the 1970s because they could not overcome their differences when it came to trade in agriculture.¹⁵¹

With the Dunkel Draft, there was much talk and excitement by free traders at the time at the prospect of bringing both developing countries and agriculture 'into the multilateral trading system.'¹⁵² Indeed, the draft not only proposed an agreement on agriculture but expanded and disaggregated agriculture across the trade institution through what would become TRIPS, SPS, TBT, and GATS.

But this talk was misleading. Developing countries had, either through IMF structural adjustment programs (as mentioned) or unilaterally with the aid of World Bank programs, already implemented a 'small revolution' and had liberalized their agricultural sectors. By the late 1980s, they were export-oriented and did little to protect (i.e. support) domestic agricultural production.¹⁵³

The draft was extremely controversial within almost all member states. US agricultural policy officials under the Reagan administration had unsuccessfully tried to reform domestic agricultural support policies in the direction of greater market-orientation and were planning to use the Uruguay Round to leverage the domestic changes they wanted.¹⁵⁴ Canadian officials struggled since Canada had a strong system of domestic supply management still in place but Canadian grain producers were in favor of a liberal trade regime.¹⁵⁵ Farmers in India had varying opinions and the draft was fought over in India on the streets and in the pages of some highly-regarded journals such as the *Economic and Political Weekly*.¹⁵⁶ The main argument was that the draft did not adequately grant developing countries market access.¹⁵⁷ To some, what concessions developing countries may get on the market access front would be lost because TRIPS would stifle domestic innovation and farmer autonomy.¹⁵⁸ Farmers, especially Karnataka Rajya Ryota Sangha (Karnataka State Farmers' Association), rallied and garnered international attention. The protest against TRIPS was

¹⁵⁰DeRosa (1992), p. 755 (759).

¹⁵¹Hopkins (1993), p. 143.

¹⁵²See for e.g. Ricupero (1998), Yeutter (1998).

¹⁵³Gunasekara et al. (1989), p. 238 (249), Dean (1995), p. 173.

¹⁵⁴Paarlberg (1989), p. 39 (41).

¹⁵⁵Canada Library of Parliament Research Branch, *GATT, the Dunkel Report and Canadian Agricultural Policies* (Library of Parliament, Research Branch, 1995).

¹⁵⁶Thomas et al. (1994), p. A42.

¹⁵⁷Islam (1991), p. 2107, Gulati and Sharma (1992), p. A106, Patel (1992), p. 99. See also Featherstone (2008), pp. 153–154.

¹⁵⁸Dasgupta (1993), p. 855, Rao (1993), p. 1791, Sahai (1993), p. 958.

part of their larger concerns with the increased number of transnational corporations' and their rising control over seeds.¹⁵⁹ Others in India, including the Shetkari Sanghatana farmers' organization, were confident that the Dunkel Draft disciplines against subsidies would grant Third World farmers more market access, allow them to benefit from corporate innovations, and not hinder their ability to save seeds.¹⁶⁰

For all the talk about trade liberalization during the Uruguay Round, the Agreement on Agriculture still sought to balance the consideration of market stabilization and allow some scope for the idea of farm support. The provision, however, was rather limited in scope: the Blue Box essentially permits only those farm support measures that count as non-trade distorting. This, in effect, limits the use of farm support policies only to those tools that are usually exclusive to rich countries. Thus, the Agreement on Agriculture deploys freer trade doctrine to allow developed countries to further subsidize their farms. As many predicted, this in effect supported transnational corporations and institutionalized the trend that had begun in the late 1970s.¹⁶¹ As a result, developing countries were left not only without an improved market access but also without the ability to make use of those mechanisms, such as quantitative restrictions, that would otherwise be much more readily accessible to them.

When the Uruguay Round was concluded, the WTO was born straight into a legitimacy crisis.¹⁶² Even though the international trade community and the world leaders driving the negotiations process seemed to have arrived at some kind of policy consensus, the levels of public misapprehension about the newly established institution around the world remained considerable and never really abated since. Today, with the constant talk of trade crisis, one cannot even claim there exists a stable consensus among the trade community and the world leaders.

4 Conclusion

Ever since the 1991 Dunkel Draft, the three main issues at the heart of agricultural trade negotiations have remained substantially the same: export subsidies (aka export competition); tariffs and tariff-quotas (aka market access); and farm subsidies (aka domestic support).¹⁶³ In some way, the Agreement on Agriculture in this context may be considered a partial success story; it allows for a certain form of farm support—albeit only for agribusiness—while also maintaining the presence of all three fundamental principles of international trade law: trade liberalisation, market stability, and food security. The Agreement's Green Box allows an unlimited spending on

¹⁵⁹Nanjundaswamy (1993), p. 1334.

¹⁶⁰Tarkunde (1994), p. 2378, Shiva (1993), p. 555.

¹⁶¹McMichael (1993), p. 198.

¹⁶²Fakhri (2011), p. 64.

¹⁶³Throughout these talks there has also always been discussions over defining nontrade concerns and providing special and differential treatment for developing countries.

food acquisition by member governments for public stockholding for food security purposes on the condition that the food is purchased at current market prices.¹⁶⁴ Developing countries are granted a higher degree of flexibility since the provision provides them a wider latitude in requiring only that the prices in question remain 'reasonable', while also permitting the introduction of food security programmes to address the needs of the urban and rural poor.¹⁶⁵ At the same time, if a government decides to start buying commodities from the respective food producers at above-market prices, the Agreement on Agriculture will consider this to be a market distorting activity since it would incentivize the farmers to increase production.¹⁶⁶ In other words, food security considerations under the Agreement on Agriculture are still constrained by the logic of fair market pricing.

Bali, however, creates more space in trade law for food security concerns by restricting the scope for WTO legal challenges against the developing countries' above-market purchases of commodities for food-security stockholding programs. This may very well be an opportunity to set a new intellectual and legal agenda for the international trade regime in a way that strengthens food security's international institutional power. In this regard, we may be now entering a 'constitutional moment'—not unlike that of 1945, 1955–56, 1972, and 1982—in which the relationship between the three fundamental doctrines may come to be reconfigured and rethought once again. Looking at things through this lens, with the broader and deeper history of international trade law in mind,¹⁶⁷ let me then conclude my discussion by outlining three sets of considerations that I think need to be taken into account to make the best use of this new constitutional moment.

First, the language of international trade law and policy should be expanded. This means that every trade liberalisation policy debate should start opening some space for a debate about food security and market stability. Too many international trade scholars and practitioners still treat the concept of food security as contravening the letter and spirit of the WTO law. Historically and doctrinally, the promotion of food security has formed a legitimate exception to the main principles of the GATT, not a derogation from them. Bali recalibrates the project of international trade law and significantly strengthens the position that food security schemes occupy within it. Future debates about these issues should focus on working out the details of this relationship. The same applies to the principle of market stabilisation. The key questions confronting international trade law and policy today are: what constitutes a reasonable market price? what government policies and schemes can be considered market distortions? what degree of distortion is problematic? Within the context of

¹⁶⁴'Public Stockholding for Food Security Purposes,' Annex II, Paragraph 3, Agreement on.

¹⁶⁵Annex II, Paragraph 3, Fn 5, Agreement on Agriculture.

¹⁶⁶Article 6, Agreement on Agriculture. As a result above-market public stockholding gets calculated as a Contracting Member's total aggregate measurement of support (AMS). The Agreement on Agriculture reflects Contracting States commitment to reduce domestic support that falls within AMS calculations. This means that if a government purchases foodstuffs at a price that exceeds a certain threshold of fair market price, then the doctrine of freer trade is triggered, which demands a gradual but inevitable reduction of support.

¹⁶⁷See also Clapp (2015).

the contemporary WTO, it is imperative that the negotiations covering these questions start to include the views not only of the traditional trade and policy community but also the representatives of the various transnational social movements.

Second, the WTO should no longer be viewed or automatically treated as the main institutional setting when it comes to the regulation of international trade in the field of agriculture.¹⁶⁸ Because of its setup and design, the WTO regime traditionally prioritizes the logic of trade liberalisation, provides some limited provision for considerations of market stability, and essentially excludes all questions of food security. By comparison, in contexts such as the FAO or the UNCTAD these ideas and principles occupy a far more prominent place. By opening up our understanding of the international trade regime, we can expand the range of our policy imagination. In the long run, this may involve the revival of ICAs but in a novel way that directly address matters of food security.¹⁶⁹ Or it may lead to the creation of entirely new institutional structures altogether.¹⁷⁰ My sense is that, with a richer appreciation of the range of available institutional options, we can engage in far more productive debates over the appropriate institutional function and design of international trade.¹⁷¹

Third, international trade law and policy should support domestic farm programmes that aim to help poor food producers. Approximately 70% of the nearly one billion people who chronically suffer from starvation are small-hold farmers and agricultural workers.¹⁷² Any permanent solution to the problem of world hunger entails securing the food producers' own access to food. As indicated by Bali, to achieve this kind of objective requires among other things the introduction of government programmes that purchase foodstuffs from producers at a fair market value or higher. The adoption of this sort of approach will of course change the price of the respective commodities in ways that will impact the patterns of global trade. And yet rather than taking this fact as an excuse to avoid this sort of conversation, international trade law should welcome the opportunity to revise its policy structure and substantive principles. Instead of continuing to insist that the sole governing principle of international trade law is freer trade, the time has come for us to start addressing the role and place of the other two fundamental doctrines.

With all this in mind, we should no longer focus on ameliorating freer trade's food security implications. We should instead ameliorate food security's trade implications. This would be an international trade law whose aim is to address the social

¹⁶⁸I leave discussions of regional trade agreements aside for now. For further background on this subject, see, however, Ewing-Chow et al. (2015), p. 292.

¹⁶⁹There is some evidence that there was some (albeit unclear) political will to this idea since in the draft Doha Round Modalities of December 2008 ICAs were put forward a way to stabilize agricultural export prices. TN/AG/W/4/Rev.4 (6 December 2008), paras. 95–102, https://www.wto.org/english/tratop_e/agric_e/agchairtxt_dec08_a_e.pdf.

¹⁷⁰See, e.g., the International Assessment of Agricultural Knowledge, Science and Technology for Development was an intergovernmental process (2005–2007), under the co-sponsorship of the FAO, GEF, UNDP, UNEP, UNESCO, the World Bank, and WHO.

¹⁷¹It may be that we must reconsider now how food has become an international issue. For further development of this argument, see Orford (2015).

¹⁷²UNCTAD (2013), p. 11.

and commercial instability that domestic stock programs (or whatever other food security schemes may be devised) may cause. Maybe then the future trade law and policy communities will be able to focus on establishing a global interface for different types of agricultural support for the poor and hungry food producers, that will still facilitate trade and provide a stable international market.

Today, 85% of all food in the world is produced by the farming households that consume it or exchange locally; only 15% of food is traded across international borders.¹⁷³ The purpose of international trade could be to work within this trend rather than against it. Then a majority of the surplus would be sold locally at a remunerative price and the minority would be traded internationally. In agronomic terms, this would mean a trade regime that supports practices where the majority of food is grown for the purpose of immediate consumption or preservation.

Trade law and policy could then focus on ensuring food security. If we understand the doctrine of freer trade to mean any policy that encourages a fair, efficient, and dynamic flow of goods, it may then operate as an exception; in times of great need, trade law would strive to ensure that states immediately do away with barriers to trade as quickly as possible so that food can efficiently flow from any producer in the world to those who are hungry in a way that may still be commercially viable for the producer and not disrupt local markets. It would also make it harder for governments to impose policies that cause famine as was the case during the 1972–74 World Food Crisis. Such a trade law would also provide some protection to people—like in Bangladesh in the 1970s—so that they would not have to pay the physical cost of international trade negotiations. If Amartya Sen is right that hunger is a political question of distribution and not abundance, this demands a new type of jurisprudence in which a ‘barrier to trade’ is defined as any government instrument that slows down the global distribution of food to where people need it or that causes social disruption, hunger, starvation, or famine.

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¹⁷³Wise (2014).

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