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From Agriculture to Food Security: Embedded Liberalism and Stories of Regulatory Change

Fiona Smith¹

“Once there was a boy who was told by his master to catch a hare. He went to the woods and looked around...at that very moment he saw a hare running along at full speed. As he watched in astonishment, the hare ran smack into the tree and knocked itself unconscious. All he had to do was pick up the hare. For the rest of his life the boy waited behind the same tree in the hope that more hares would do the same thing.”²

There are two stories about why the rules governing international agricultural trade change.

The first is a conventional story. The second is a more complex analysis- the embedded liberalism story.

The first, the conventional story, is a simple story of regulatory change. In essence, international agricultural trade rules become unfit for purpose over time because they are drafted in different eras, during different economic circumstances and are designed to overcome different political challenges.³ This story teaches us that, to ‘work,’ rules must be changed-updated-to regulate the contemporary challenges of modern international agricultural trade, like food security or climate change, for example.⁴

The second story is more nuanced, and though not told in the context of international agricultural trade regulation, when applied to that field, it gives a deeper account of why the rules change. In this story, international agricultural trade rules are created because powerful states want to achieve two things: a multilateral solution to the global problems of

¹ Professor of International Economic Law, University of Warwick. I want to thank Gillian Moon, Lisa Toohey, Frank Garcia, Garry Watt, Michael Cardwell and John McEldowney for comments on earlier drafts of this article. Any errors remain my own.

² Adeline Yen Mah, *Watching the Tree*, (Broadway Books, 2001), 6.

³ T J Schoenbaum, “Fashioning a New Regime for Agricultural Trade: New Issues and the Global Food Crisis”, *Journal of International Economic Law* 14(3) (2011), 593.

⁴ C Haberli, “Food Security and WTO Rules,” in B. Karapinar & C. Haberli (eds), *Food Crises and the WTO*, (Cambridge University Press, 2010), 297.

agricultural trade and the freedom to pursue their own important domestic social goals.⁵ The fragile balance between these two contradictory goals-multilateralism and domestic autonomy- is embedded into the rules. This is the story of ‘embedded liberalism’ as told by John Ruggie in his seminal 1982 article.⁶

Ruggie’s story teaches us that regulatory change happens when *both* the power shifts away from the state that was dominant at the time the rules were drafted (the ‘hegemon’) *and* the underlying social purpose embedded in the rules no longer reflects the new geopolitical power balance between states and social context in which those rules must operate. Existing rules remain effective when there is a simple power shift among states, but are no longer effective when this power shift is accompanied too by a shift in the “legitimate social purpose;” when these two coincide, regulatory change is inevitable.⁷

John Ruggie’s theory of embedded liberalism is seminal because he shows how a familiar story of the emergence of international economic rules, their interpretation and the reasons why those rules change could be told in a new way to shed light on a different aspect of the complex economic, social and political interactions between states. For me, Ruggie’s work is important because he shows history is contingent: that is, his work shows that how we interpret historical “fact” and what lessons we claim to learn from the past is dependent on what moments in history we look at among the myriad of possible moments. We choose those historical moments because we want to understand something about our present.⁸

Ruggie’s seminal contribution to international relations scholarship is that he showed that there are always more perspectives from which those historical moments can be viewed;

⁵ Ruggie: “International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order” *International Organization*, 36(2) Spring (1982) 379, 382.

⁶ Ruggie *ibid.*

⁷ Ruggie, *ibid.*, 382.

⁸ Ruggie does not make a claim for a new way of reading history in his article. Rather his discussion rejects the dominant theory of power relations between states-hegemonic stability theory-in favour of a social theory that focuses on what determines the content of the international economic order: Ruggie *ibid.*, 382. For a clear discussion on Ruggie’s theory and its limitations, see A Lang, *World Trade Law After Neoliberalism: re-Imagining the Global Economic Order*, (Oxford University Press, 2011), particularly 176 to177.

more moments in history to explore and more ways of understanding our present by looking at the past. From 1982, Ruggie's work allowed scholars to tell different stories about what drives regulatory change in international economic law and teach new lessons how we might learn from the past to help resolve the problems of the present.⁹ It is his insight into historical analysis from John Ruggie's work that I explore in this article with reference to international agricultural trade.

I argue below that seeing history as a 'warehouse' to be explored, rather than a fixed set of facts with predetermined meanings, allows new stories to emerge about why international agricultural trade rules change.¹⁰ By telling new stories, our understanding deepens. By looking at the past, we may better explain the place and function of law in the ever-changing economic, social and political relations between states in the face of global challenges.¹¹

In an article of this length, I cannot present an exhaustive treatment of the history of international agricultural trade regulation together with the complex political, social, economic and legal dynamics influencing regulatory change.¹² Instead, I present an edited account sufficient to show that telling the story of the same past events from another perspective teaches us to attribute different significance to the role of those events in driving regulatory change.

The discussion is in three parts. First, the conventional story why international agricultural trade rules change is told. It begins with the Havana Charter rules designed to stabilise agricultural commodity trade after the devastation of World War II. It moves on to consider the problems of the GATT, the strong regulatory framework of the World Trade

⁹ Many scholars have been inspired by Ruggie's approach: see contributions to this volume & Lang *ibid*, and in the context of food security, A Orford, "Food Security, Free Trade and the Battle for the State," *Journal of International Law and International Relations*, (2015) 11(2), 1

¹⁰ M Oakeshott, "The activity of being an historian," in M Oakeshott, *Rationalism in Politics* (Liberty Fund, 1991), 151, 157.

¹¹ For an excellent example of a new story in agricultural trade regulation see Orford above n9.

¹² On the history of international agricultural trade regulation see M. Desta, *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture* (Kluwer 2002); on the history of food security, see Orford *ibid*; and on the evolution of international economic law generally see Lang above n8.

Organisation's Agreement on Agriculture (Agriculture Agreement) and the pressures on the current rules which may result in regulatory change. Second, the story is told from the perspective of embedded liberalism. This shows that when the story of international agricultural trade regulation is told in a different way, but drawing on the same moments, new lessons about why rules change appear. Finally, in the conclusion, I speculate which stories have yet to be told and what lessons those stories may teach us about regulatory change in international agricultural trade.

A CONVENTIONAL STORY

The conventional story takes (and supplies) the orthodox perspective on why international agricultural trade rules change. This story, or at least some parts of it, is found in reports issued by the key multilateral organisations, like the OECD, the World Bank, UNCTAD as well as the GATT and the WTO.¹³ It is the story that underpins critiques of trade rules made by eminent academic economists and lawyers¹⁴; and it is the story that underpins the ethos of large non-governmental organisations like OXFAM, and the more disparate international peasant movement when they lobby for removal of the existing rules in favour of rules that “work.”¹⁵

History shows that international agricultural trade is notoriously difficult to regulate.¹⁶ Farming practices can be beneficial to the environment and to rural communities, so some developed states in particular encourage such practices through their domestic farm policies. By cultivating the land, farmers maintain attractive landscapes which attract tourists to rural areas thereby generating important revenue for local communities. Farmers contribute to

¹³ G. Haberler et al, *Trends in International Trade: a report by a panel of experts*, (General Agreement on Tariffs and Trade, 1958) (“Haberler Report”).

¹⁴ The literature is vast, but see Desta above n12; Schoenbaum above n3.

¹⁵ For example: OXFAM “GROW” campaign: www.oxfam.org/en/campaigns/grow. *La Via Campesina*: the 2007 Joint Nyéléni Declaration following the Food Sovereignty World Assembly in Mali, West Africa para 3: www.nyeleni.org/spip.php?article290.

¹⁶ Haberler Report above n13.

biodiversity preservation too when they farm in ways that are beneficial to the climate and the environment. It is agriculture's 'multifunctionality' - its ability to generate benefits to communities, the climate and the environment at the same time as the inherent economic value of the agricultural products-that makes the balance between open trade and appropriate intervention in the market ('lawful protected trade') difficult to achieve in international trade regulation.¹⁷ This is because some states encourage their farmers to adopt such beneficial practices through import barriers and targeted domestic support policies¹⁸ that distort trade when they are linked to export or the production of specific agricultural products.¹⁹ The ITO, the GATT and the WTO rules each capture this balance between open trade and lawful protected trade in different ways.

In the conventional story, regulatory change happens when the existing rules cannot maintain that balance, either because states implement "protectionist" agricultural policies that undermine trade and agricultural production in other, sometimes weaker less developed states, despite the existence of the regulation,²⁰ or because the rules do not provide sufficient flexibility to enable states to pursue important policy objectives in their domestic agricultural policies.²¹ Although, as will become apparent below, the conventional story is less able to

¹⁷ I use the term "lawful protected trade" to include states' use of non-tariff barriers (eg subsidies, labelling and licensing) to achieve legitimate goals in their domestic agricultural policies. On multifunctionality see OECD, *Multifunctionality: Towards an Analytical Framework*, (2001), 13 on the definition of multifunctionality: OECD, *Multifunctionality in Agriculture: Evaluating the Degree of Jointness, Policy Implications*, (2008) exploring how "jointness" occurs and how it might be measured & OECD, *Multifunctionality: The Policy Implications*, (2003) exploring which are the best policies to promote positive commodity outputs in agriculture.

¹⁸ Subsidies for "public goods." L Madureira, J Lima Santos, A Ferreira *et al.*, *Feasibility Study on the Valuation of Public Goods and Externalities in EU Agriculture* (JRC Scientific and Policy Reports, European Commission, 2013) 14

¹⁹ Haberler Report above n13; D Hathaway, "Agriculture and the GATT: Rewriting the Rules" *Policy Issues in International Economics*, 20, (Institute for International Economics, 1987).

²⁰ T Josling, "Agricultural Trade Policy: Completing the Reform," *Policy Analyses in International Economics* 53 (Institute for International Economics, 1998).

²¹ See M N Cardwell and F Smith, "Renegotiation of the WTO Agreement on Agriculture: Accommodating the New Big Issues," *International and Comparative Law Quarterly*, 62(4) (2013), 865.

account for why there is so little progress towards regulatory change in the Doha Development Round of multilateral trade talks.²²

ITO to the GATT

The Havana Charter establishing the ITO created a ‘new’ international code governing commercial behaviour in Chapter 4, the General Agreement on Tariffs and Trade (GATT).

The GATT was to be read together with more detailed rules on inter-governmental commodity agreements, restrictive business practices and hidden barriers to trade.²³ The ITO would govern all these rules in a pioneering move where sovereign states ceded autonomy over their trade policy to the new international organisation.²⁴ States were to obtain mutual benefits from more open trade underpinned by the regulatory structure, with the principle of non-discrimination- contained in GATT’s most favoured nation (MFN) and national treatment clauses at its heart.²⁵

Chapter 6 of the ITO recognised that international trade in agricultural commodities caused “special difficulties” to farmers and consumers because such products had a tendency towards “persistent disequilibrium between production and consumption, the accumulation of burdensome stocks and pronounced fluctuations in prices.”²⁶ The ITO therefore allowed states to intervene to stabilise commodity prices under certain circumstances to protect their farmers from the effects of volatile market prices.

As Article 57 ITO pragmatically put it, state intervention in the market under those circumstances was justified because “...adjustments between production and consumption cannot be effected by market forces alone as rapidly as circumstances allow.” These inter-

²² Talks in agriculture started in 1997, but the Doha Round was launched in 2001: WTO, “Ministerial Declaration,” WT/MIN(01)/DEC/1, (November 20, 2001).

²³ For example, see M Fakhri, *Sugar and the Making of International Trade Law* (Cambridge University Press, 2014).

²⁴ C H Alexandrowicz, *International Economic Organizations*, (Stevens & Sons Ltd, 1952) 164 to 165.

²⁵ Article I and III GATT.

²⁶ Article 55 Havana Charter for an International Trade Organization (“Havana Charter”), 1948, www.wto.org/english/docs_e/legal_e/havana_e/pdf.

governmental commodity agreements could take a simple form, but equally if circumstances required it, imports and exports could be reduced, prices affected and production methods changed. These agreements were to be monitored by a separate Council, by the ITO and United Nations Food and Agriculture Organisation (FAO) to determine whether they remained effective, with the view that the agreements be terminated after five years at the latest.²⁷ It provided a highly flexible and sophisticated legal solution to an immediate political and economic problem.²⁸

US' Congress failure to ratify the Havana Charter ensured the ITO did not come into existence.²⁹ Its rules allowing states to intervene and protect their farmers during periods of commodity price volatility did not come into effect therefore. As Lang notes, after the failure of the ITO, the rules governing agricultural trade in the GATT were more focused on opening trade, particularly reducing industrial tariffs, with the consequence that many domestic agricultural policies were unregulated.³⁰

GATT allowed states to limit exports of agricultural products on a temporary basis if they declared a food shortage.³¹ Import restrictions were permitted when necessary to help “secure” specific domestic policy objectives in agriculture, especially if a country had a surplus and restricted imports until the surplus ran out.³² Article XVI:4 GATT prohibited export subsidies in states' trade policies. In contrast, under Article XVI:3 GATT states were encouraged only to “*avoid the use of subsidies on the export of primary products.*”³³

Violation of Article XVI:3 was found when the complaining state demonstrated the export subsidy was “applied in a manner which results in that contracting party having a *more than*

²⁷ Article 64 Havana Charter *ibid.*

²⁸ Article 59 and 62 Havana Charter *ibid.*, and discussion by Alexandrowicz above n24 167 to 168.

²⁹ For example, J H Jackson, *World Trade and the Law of GATT*, (Bobbs Merrill, 1969) Ch 27.

³⁰ Lang above n8, 28.

³¹ Article XI:2(c)(i) GATT.

³² Article XI:2(c)(iii) GATT.

³³ My emphasis.

equitable share of world trade.”³⁴ A test that was only proven once successfully in GATT dispute settlement proceedings in the *French Wheat Flour* dispute, even though a dispute with similar facts between the United States and the European Economic Communities came before a GATT dispute panel in 1983.³⁵

Domestic subsidies paid to farmers were not prohibited under the GATT, although countervailing duties could be imposed on imports to offset the effects of a domestic subsidy on the importing country’s farmers.³⁶ Farmers in the United States and those in the European Economic Communities received domestic subsidies to cover all or some of their production costs and export subsidies to insulate any exported produce from low world prices.³⁷ Consequently, these farmers increased production in response to the domestic subsidy, knowing that if they produced too much at a time of low global commodity prices, they could still sell their goods at the low price because that sale was subsidised through export subsidies, thereby making up the difference between farmers’ (rising) costs of production and the price farmers received on the sale of their goods on the market. Because farmers always had a market for their goods, they continued to produce: the excess flooded on to world markets priced at, or sometimes below, the market price.³⁸

Limited regulation of international agricultural trade in the GATT was accompanied by ineffective surveillance of states’ implementation of those rules. Disputes concerning agriculture became an increasingly prominent feature of GATT dispute settlement particularly between 1960-1989.³⁹ As Hudec notes in his study of GATT dispute settlement,

³⁴ Article XVI:3 GATT.

³⁵ GATT Panel Report, *French Assistance to Exports of Wheat and Wheat Flour*, BISD 7S/46 (GATT, 1958) para 15; GATT Panel Report, *EEC- Subsidies on Export of Wheat Flour*, GATT Doc. SCM/42 (GATT, 1983) (unadopted).

³⁶ Article XVI:1 GATT; but note the different interpretation of this point when considered from the view of embedded liberalism below *infra*.

³⁷ See generally Hathaway above n19.

³⁸ These policies had devastating effects on developing and least-developed countries’ attempts to export their production see B Gardener, *European Agriculture: Policies, Production and Trade*, (Routledge, 1996), 15 to 62.

³⁹ R E Hudec, *Enforcing International Trade Law” The Evolution of the Modern GATT Legal System*, (Butterworth, 1993), 327.

agriculture featured in 89 of the 207 recorded GATT complaints, with many remaining unresolved until the end of the Uruguay Round of multilateral trade talks establishing the WTO ended.⁴⁰

The failure of the ITO encouraged the United States and the European Economic Communities to pursue unilateral policies to protect their farmers under the protection of a waiver (United States) and exemption (European Economic Communities) from the already limited rules of the GATT.⁴¹ GATT's ineffective dispute settlement system and weak surveillance of the European Economic Communities' agricultural policy, the CAP, compounded the problem. Governance of international agricultural trade became bifurcated between states who were subject to the limited rules and those who were not. Developing and least-developed countries were particularly badly affected by the protectionist domestic agricultural policies of developed countries.⁴² By the start of the Uruguay Round, the lack of effective regulation in international agricultural trade either in the rules, or through surveillance and formal dispute settlement meant regulatory change became inevitable.

The WTO

Unlike the GATT, the WTO regulates agricultural trade through legally binding agreements and non-binding decisions and states' obligations are enforced through legally binding dispute settlement proceedings.⁴³ The Agriculture Agreement coupled with the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Countries primarily govern trade in agricultural products

⁴⁰ Hudec *ibid*, 327.

⁴¹ GATT, *Waiver Granted to the United States in Connection with Import Restrictions Imposed under Section 22 Agricultural Adjustment Act (of 1933) as amended* BISD3S/32. The Act allowed the United States to impose tariffs, import restrictions and export subsidies to protect American farmers from commodity price volatility. Supervision of the EEC's CAP in the GATT: GATT, *Trade in Agricultural Products*, BISD6S/76 (1957), 81 and Section C.

⁴² A detailed discussion of the effects on these countries is outside the scope of this discussion, but see R E Hudec, *Developing Countries in the GATT Legal System*, (Trade Policy Research Centre, 1987).

⁴³ Understanding on the Rules and Procedures Governing the Settlement of Disputes (the Dispute Settlement Understanding).

and some other aspects of states' domestic agricultural policies.⁴⁴ Other WTO agreements and decisions also have an impact on agriculture, notably, the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement), the Agreement on Subsidies and Countervailing Measures (Subsidies Agreement), the Agreement on Import Licensing Procedures, the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) and the Decision on Measures in Favour of Developing Countries.

As the primary source of international agricultural trade regulation, the Preamble to the Agriculture Agreement makes it clear that domestic agricultural policies will be regulated for the first time together with agricultural import tariffs. The new rules are designed to start unravelling the protectionism of the GATT era by substituting GATT's liberal rules for "strengthened and more operationally effective ...rules and disciplines" thereby creating a "fair and market-oriented agricultural trading system."⁴⁵ The Agreement on Agriculture rules cover import tariffs, domestic and export subsidies, respectively referred to in the Agreement as "market access",⁴⁶ "domestic support"⁴⁷ and "export competition."⁴⁸

Article 4.2 prohibits the creation of new non-tariff barriers on agricultural imports. All non-tariff barriers existing prior to the WTO rules, like, for example, the European Economic Communities' variable import levy that insulated European farmers from cheaper agricultural imports, had to be converted into tariffs through a process called "tariffication."⁴⁹ Tariff rate quotas were introduced to create import opportunities when converted tariffs were so high that they operated as de facto import prohibitions.⁵⁰ All agricultural developed countries'

⁴⁴ For a detailed discussion see: J A McMahon, *The WTO Agreement on Agriculture*, (Oxford University Press, 2006).

⁴⁵ Preamble Agriculture Agreement, para 2.

⁴⁶ Part III and Annex 5 Agriculture Agreement.

⁴⁷ Part IV and Annexes 2, 3 and 4 Agriculture Agreement.

⁴⁸ Part V Agriculture Agreement.

⁴⁹ GATT, *Modalities for the Establishment of Specific Binding Commitments under the Reform Programme*, MTN.GNG/MA/W/24, December 20 (GATT, 1993), Annex 3.

⁵⁰ Modalities document *ibid*, paras 5, 6 and 7.

tariffs (including those created through ‘tariffication’) were to be reduced by an overall average of 36% over six years (1995-2001), subject to a minimum reduction of 15% for each tariff line.⁵¹ After the reduction, whatever tariff levels remained act as a ceiling, above which import tariffs cannot be imposed, unless the member is raising tariffs in response to an unexpected import surge or a drop in the imported products’ price.⁵² This maximum tariff rate and any commitments to provide tariff rate quotas form part of a member’s Schedule of Commitments annexed to the Agreement on Agriculture and are legally binding.⁵³

Agricultural subsidies are also not prohibited by the WTO, but members did commit to progressively reduce them. For domestic subsidies, members were required to calculate the total value of their domestic production subsidies (from a 1986-1988 base year) and, in the case of developed countries, reduce that value by 20% over 6 years (1995-2001).⁵⁴ The value of production subsidies left at the end of this reduction period is the maximum level of production subsidies the WTO member is permitted under the WTO rules.⁵⁵ This level of production subsidies is contained in the WTO member’s Schedule of Commitments and is legally binding.⁵⁶ These permitted production subsidies are known as the Amber Box. In technical terms, the ‘amber box’ is also known as a member’s “Final Bound Aggregate Measurement of Support” that is, the “maximum allowable level of domestic support the Member could give to its domestic agricultural producers at the end of the implementation period.”⁵⁷

Some domestic subsidies paid over to farmers were exempt from reduction commitments and so members can use them to target domestic policy objectives like, for example, certain food

⁵¹ Ibid, para 5.

⁵² Note not all WTO members are eligible to use the ‘special safeguard’ measure in Article 5 Agriculture Agreement.

⁵³ Note there are variable implementation commitments for developing and least-developed countries: Article 15 and 16 Agriculture Agreement.

⁵⁴ Modalities Agreement above n49, para 8.

⁵⁵ Ibid.

⁵⁶ Article 3:2 Agriculture Agreement.

⁵⁷ Article 1(h)(i) and 1(h)(ii) Agriculture Agreement.

security and protection of the environment, without limit.⁵⁸ Domestic subsidies that come within the scope of Annex 2 of the Agreement on Agriculture (the Green Box) fall completely outside the scope of the domestic subsidy reduction commitments.⁵⁹ For a measure to be exempt from reduction commitments under the Green Box, the measure must have ‘no or at most minimal, trade-distorting effects or effects on production’ and be “provided through a publicly-funded government programme (including revenue foregone) not involving transfers from consumers.”⁶⁰

Unlike the GATT rules which, by their absence, allowed states extensive freedom to determine how to use trade measures to achieve important domestic policy objectives, the WTO rules constrain this freedom. The Agriculture Agreement distinguishes between subsidies tailored to implement specific environmental and development programmes that are an important part of states’ domestic agricultural policies and the ‘wrong’ type of subsidy that distorts trade because it results in excess production above the levels of demand. GATT’s weak rules allowed states to dump excess production on international markets either in the form of inappropriate food aid, or as cheap food thereby protecting developed country farmers at the expense of developing and least-developed farmers.⁶¹ In contrast, the WTO rules make it clear that domestic subsidies must “not have the effect of providing price support.” The measure must also comply with the policy-specific criteria set out in paragraphs 2 to 13 Annex 2 Agriculture Agreement. Paragraphs 2 to 13 cover various subsidies, for example, subsidies paid over for many payments made under environmental programmes, emergency safety nets, structural adjustment programmes, as well as

⁵⁸ I.e. subsidies that fall into the Blue Box in Article 6.5 Agriculture Agreement or Green Box in Annex Agriculture Agreement.

⁵⁹ Article 6:1 Agriculture Agreement.

⁶⁰ Annex 2:1(a) and (b) Agriculture Agreement.

⁶¹ Haberler Report above n13.

“decoupled income support.”⁶² The WTO rules also required developed countries’ export subsidies to be reduced by 36% in terms of value and 21% in terms of the volume of production subsidized.⁶³ No export subsidies can be used by members unless they conform to the terms of the Agriculture Agreement.⁶⁴

The WTO’s supervision of the Agriculture Agreement’s rules through the WTO Committee on Agriculture and the dispute settlement system is more effective than the GATT’s. Strict interpretation of, for example, the United States and the (by then renamed) European Communities’ domestic and export subsidy commitments in dispute settlement proceedings by the WTO Appellate Body reduced states’ flexibility to use targeted domestic subsidies to meet domestic policy objectives. The bright line between an export subsidy and a domestic subsidy was eliminated—a subsidy could violate both rules.⁶⁵ Export credits fell within the rules, even though the wording of Article 10.2 Agriculture Agreement suggested that rules on export credits would be brought in only after further discussions among WTO members.⁶⁶ The Appellate Body also set out guidelines so states could determine when food safety and food standards, foods labelled with their country of origin and measures designed to promote ethical production methods are unlawful barriers to trade rather than lawful protected trade.⁶⁷

Beyond the WTO: pressures for regulatory change

⁶² Subsidies that fall within de minimis levels set out in Article 6.4 Agriculture Agreement are also exempt from reduction commitments.

⁶³ Calculated from a 1986 to 1990 base: Modalities Agreement above n49, para 11 and Article 9 Agriculture Agreement.

⁶⁴ Article 8 Agriculture Agreement and Modalities Agreement, *ibid*, para 12.

⁶⁵ Appellate Body Report, *European Communities-Export Subsidies on Sugar*, WT/DS265/AB/R, (April 28, 2005), paras 251 to 283.

⁶⁶ Appellate Body Report, *United States-Subsidies on Upland Cotton*, WT/DS267/AB/R, (March 3, 2005), para para 609; see also Appellate Body Report, Article 21.5DSU Reference, WT/DS267/AB/RW (June 2, 2008).

⁶⁷ See for example, Appellate Body Report, *European Communities-Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, (January 16, 1998); *United States-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, (May 16, 2012); *United States-Certain Country of Origin Labelling Requirements*, WT/DS384/AB/R, (June 29, 2012).

Despite the WTO's comprehensive rules, there is further pressure for regulatory change because the rules no longer address the contemporary problems of international agricultural trade.⁶⁸ There are multiple pressures, but two main problems can be highlighted.

First, multinational corporations like, for example, Walmart, Coca-Cola and Glencore, trade in agriculture and food across state boundaries through extensive and complex agri-food global value chains.⁶⁹ For example, Coca-Cola is now one of the largest sugar purchasers in the world, purchasing approximately 8% of all sugar produced for industrial purposes from multiple countries.⁷⁰ In these complex chains, trade in distinct agricultural goods and services is replaced by "trade in tasks" as every discrete stage of production and processing is spread among many farmers and food and fuel processors scattered throughout the world, rather than being confined to a single state.⁷¹

The WTO rules were intended to start cutting the protectionist barriers to agricultural trade of the GATT era. Consequently, they are aligned to traditional trade measures, like import barriers and subsidies, that states use in their agricultural policies to achieve specific policy objectives. Such rules are designed to operate within state jurisdictional boundaries by reducing barriers to trade, while allowing states to use trade measures to achieve non-trade objectives, like food security and preservation of the environment. They are increasingly irrelevant in a global market place without borders when what is at stake is extracting the

⁶⁸ Cardwell and Smith, above n21.

⁶⁹ F Smith, "Natural Resources and Global Value Chains: What Role for the World Trade Organization?" *International Journal of Law in Context*, 11(2), (2015), 132.

⁷⁰ Euromonitor International (2013) www.euromonitor.com cited in R M Locke and S L Coslovsky, "Parallel Paths to Enforcement: Private Compliance, Public Regulation, Labour Standards in the Brazilian Sugar Sector," *Watson Institute for International Studies at Brown University Working Paper No. 2013-01*, (2013), 6.

⁷¹ OECD, WTO, UNCTAD, *Implications of Global Value Chains for Trade, Investment and Development and Jobs*, (2013), Prepared for the G-20 Leaders Summit, Russia, July 20, 2013, www.stats.oecd.org/Index.aspx?DataSetCode=TIVA_OECD_WTO.

“value-added” at each stage of production, irrespective of where that value is located and whether that value comes from the addition of goods or services, or a combination of both.⁷²

Second, wealth and prosperity for developing and least-developed countries generated through agricultural trade remains elusive.⁷³ Some countries could rely on trade in agricultural products to bring in income for investment in infrastructure and to help fund social programmes like, for example, education and the provision of food for their poor and vulnerable citizens. However, uncertainty remains whether policies like, for example, India’s public stockholding of food under its National Food Security Act 2013, fit within the Green Box exemption in the Agriculture Agreement.⁷⁴

Some developing countries and least-developed countries’ farmers too cannot compete when, for example, important agricultural exporters like the United States and the European Union heavily subsidise their farmers’ crops and livestock production so there is a glut on world markets; or where countries ‘dump’ their excess agricultural production on developing country markets under the guise of ‘food aid’ which only serves to drive down the price developing country farmers can obtain for their produce.⁷⁵

States, like India, raise concerns that the Appellate Body’s rigid interpretation of states’ obligations in the Agriculture Agreement, may mean they cannot meet the needs of their citizens and still comply with their obligations in the WTO but that the rules allow too much flexibility for some states like the United States, who rely on subsidies to protect their

⁷² Smith, above n69. Note that the WTO rules’ focus on jurisdictional boundaries means it is difficult for states to use them to resolve other cross-border problems like climate change: M Joshi, “Are Eco-Labels Consistent with World Trade Agreements?,” 38(1) *Journal of World Trade* 69, (2004) 74.

⁷³ M D Ingo and L A Winters, *Agriculture and the New Trade Agenda*, (Cambridge University Press, 2004).

⁷⁴ Note there are fears that India’s food security programme may not conform to the Green Box: J Burke, “India approves grain bill to subsidize grain for the poor,” *The Guardian*, www.theguardian.com/world/2013/aug/27/india-food-bill-grain-poor, (August 27, 2013)

⁷⁵ Note that subsidies under the Green Box are not thought to subsidise production as such, but their large scale means farmers become less risk averse in the knowledge they receive some income support. Haberli above n4. Note the suggestion by Pakistan that India’s food security programme may lead to excess production dumped on international markets: WTO, “Farm Produce Stockholding worries members who fear impact on trade and incomes,” (September 26, 2013), www.wto.org/english/news_e/news13_e/agcom_26sep13_e.htm#stockholding.

farmers. This imbalance between states' policy objectives and the flexibility of the current rules means that regulatory change is inevitable to realign this imbalance.

EMBEDDED LIBERALISM: A COMPLEX STORY OF REGULATORY CHANGE

Embedded liberalism is a reimagining of the conventional story why the rules of international agricultural trade change. Like the conventional story, it tells how the rules emerge in the post-war economy, how they become ineffective over time, how the comprehensive rules on agricultural trade in the WTO then come into being and how pressure for change to those rules occurs.

For Ruggie, "...to say anything sensible about the content of international economic orders and about the regimes that serve them, it is necessary to look at how power and legitimate social purpose become fused to project political authority into the international system."⁷⁶

Told from this perspective, the story begins in the 1940s during talks of post-war reconstruction. Europe devastated by war needed to build up agricultural production and its non-existent infrastructure.⁷⁷ By contrast, the United States relatively untouched domestically by the effects of the war and with domestic agricultural production boosted by Roosevelt's 'New Deal,' needed to export its excess agricultural production.⁷⁸ The United States wanted any restrictions to its export ambitions removed. But more importantly, the United States believed international trade rules in general could guarantee peace: if every country traded and became dependent on each other for essential goods, then there was little incentive for states to enter into conflicts, or for any small disagreements to escalate.

This innovative "free trade" ethos of the post-war international agricultural trade regime had been foreshadowed to some extent by several factors. First, Cordell Hull, the United States

⁷⁶ Ruggie, above n5, 382.

⁷⁷ OECD, "Agricultural Policies in Europe and North America, 1st report of the Ministerial Committee for Agriculture and Food," (1956), 313 to 316.

⁷⁸ G Curzon, *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and its impact on national commercial policies and techniques*, (Michael Joseph, 1965), 168.

Secretary of State responsible for shaping the United States' peacetime foreign policy during Second World War.⁷⁹ He genuinely believed allowing trade restrictions on natural resources undermined efforts to maintain peace.⁸⁰ The early stages of talks between the United States and the United Kingdom (the other key international player during this inter-war period) on how best to maintain international peace post-World War II were heavily influenced by this "free trade" philosophy. Even the subsequent United States' proposals for the new ITO, were premised on the fundamental assumption that balanced world economic growth and a higher standard of living could be achieved only against a background of open trade, or when only "normal market forces" governed states' trading activities.⁸¹

Second, during World War II, the United States and Great Britain dominated global politics as the other emerging superpower, the Soviet Union, turned away from international co-operation to consolidate its power in Eastern Europe and address domestic concerns about rural poverty.⁸²

Britain's dominance arose from its historic expansionist ambitions into India, the Caribbean and some parts of Africa.⁸³ Free trade, even in agriculture, lay at the heart of British trade policy after the repeal of the Corn Laws in 1846, and not surprisingly, this ambition to open international markets for British agriculture influenced talks on the shape of post-war peace between the Britain and the United States held in the mid-1940s.⁸⁴ By the time of the negotiations of the Havana Charter establishing the ITO, the British Empire started to fragment and fall away, and with it, Britain's strong influence of global trade. This decline

⁷⁹ Curzon *ibid*, 144.

⁸⁰ *Ibid*, 144.

⁸¹ Alexandrowicz, above n24, 162.

⁸² S Lovell, *The Shadow of War: Russia and the USSR, 1941 to the present*, (Blackwell, 2010), Ch1.

⁸³ The Corn Laws were designed to protect British agriculture through a system of prohibitively high tariffs. Their adverse effects on trade were controversial however see: S Fairlie, "The Corn Laws and British Wheat Production 1829-1876," *Economic History Review*, 22,1, (1969) 88, 89; Curzon, above n78, 145.

⁸⁴ *Ibid*.

coincided with United States' rise with the consequence that the power to control international agricultural trade regulation shifted away from Britain to the United States.⁸⁵

ITO to the GATT

During the negotiations of the ITO, the United States' negotiating position was still based on Britain's free trade ethos. It shared Britain's preference for removing tariffs and other barriers to trade in agriculture driven, in part at least, by its need to export the excess production generated by Roosevelt's 'New Deal' for agriculture that had been implemented in response to the Great Depression of the 1930s.⁸⁶ Although the ITO Charter purported to create "conditions of stability and well-being which are necessary for peaceful and friendly relations among nations" this objective was to be achieved by reducing tariffs and other barriers to trade in order to open up international markets to all goods.⁸⁷

In other words, liberalized trade was the rules' ultimate objective despite the shift in power to the United States because both Britain and the United States believed domestic prosperity and international peace flowed from open global markets for agricultural products.⁸⁸ Given the domination of Britain and then the United States over international trade during this period, it is not surprising that any attempt by countries to block trade in agricultural products to protect their farmers using trade measures, like for example, import restrictions or high tariffs, was considered unacceptable.⁸⁹

The new rules of the ITO Charter controlled only those aspects of agricultural policy that the United States saw as problematic in *other* countries' domestic policies, and its lack of interest in other aspects of agricultural policy, that it regarded as unimportant. For example, as a net agricultural exporter, the United States pushed for lower tariff and non-tariff barriers, like

⁸⁵ On the history of key commodity agreements in agriculture and the rise of the United States: see Orford, above n9.

⁸⁶ See generally Hathaway above n19.

⁸⁷ Para 1 Preamble Charter International Trade Organisation.

⁸⁸ D Gale Johnson, *World Agriculture in Disarray*, (Macmillan, 1973), 12 to 13.

⁸⁹ *Ibid*, 12.

quotas, to open international (mainly European) markets for its excess production.⁹⁰ The ITO rules governing commodities and the ITO's commercial chapter, the GATT, focused, unsurprisingly, on lowering import tariffs and import quotas on agricultural products with limited exceptions provided by the GATT for emergencies, for example, domestic food shortages and balance of payments problems.⁹¹

By contrast, export subsidies allowed farmers to export their goods at market prices even when prices fell below domestic production costs. Export subsidies had the potential to both harm and help United States' farmers: cheap, heavily subsidised imported goods could harm United States' farmers when their farmers' costs of production exceeded those of any imported goods because imported goods were cheaper than those produced by United States' farmers. But, equally, United States' farmers could sell their products cheaply on international markets when they themselves received export subsidies during periods of high production costs and low world prices. As there was little competition to United States' agricultural exports immediately post-war, the United States was less concerned about the harmful effects of other states' export subsidies to its farmers during the ITO negotiations.⁹² As the GATT was the commercial chapter of the ITO, it is not surprising to see that its rules mirror this ambivalence. GATT only required countries to enter discussions with others potentially affected prior to imposing the proposed export subsidy.⁹³

Post-war demand for agricultural products incentivised farmers to increase their production: mechanization required increased fertilizer use and all these costs were offset by the United States providing domestic subsidies to its farmers.⁹⁴ Demand for imported agricultural products was high especially in Europe during this period, so any policies that facilitated increased production were acceptable and in some instances positively encouraged. It is not

⁹⁰ Curzon, above n78, 168.

⁹¹ OECD, *Agricultural Policies in Europe and North America* above n77, 313 to 316.

⁹² Curzon, above n78, 167.

⁹³ Article XVI:1 GATT.

⁹⁴ Johnson, above n88, 19.

surprising that the GATT rules too reflect this general acceptance of domestic subsidies.⁹⁵

Any unexpected problems caused by domestic policies on specific agricultural products were to be addressed by creating international commodity agreements concluded under the auspices of the ITO. Discussions could take place among affected countries and semi-formalised decisions for action were the appropriate solution, rather than GATT's formal rules and dispute settlement proceedings.⁹⁶

Despite the pro-United States' orientation of the ITO's rules, US Congress refused to ratify the Havana Charter creating the ITO, fearing the effect of foreign competition on their farmers. The ITO did not come into existence therefore, although the GATT continued, albeit in a temporary form.⁹⁷

GATT to the WTO

Between the decline of the ITO and the creation of the WTO in 1995, GATT's weak control over domestic agricultural policies facilitated the rise of new agricultural exporters, like the European Economic Community, (later the European Union,) to challenge the power of the United States to control the shape of international agricultural trade regulation. This challenge was coupled with a subtle shift in what was regarded as unacceptable domestic agricultural trade policies. Open markets for agricultural products were replaced gradually by a growing acceptance of protectionism: high tariffs, non-tariff import restrictions, together with heavy use of domestic and import subsidies designed to insulate European and United States' farmers from cheaper imported agricultural products became common.⁹⁸

For example, the permissive GATT rules on agricultural products enabled the creation of complex domestic agricultural policies like that of the then European Economic

⁹⁵ Article XVI:1 and XVI:3 GATT.

⁹⁶ Article 57 ITO.

⁹⁷ Jackson, *World Trade and the Law of GATT*, above n29, Ch2.

⁹⁸ Josling, above n20, 49.

Community's Common Agricultural Policy (CAP).⁹⁹ The CAP's notorious variable import levy, permitted by both uncertain interpretations of the scope of GATT rules on the creation of regional agreements (Article XXIV GATT) and the use of non-tariff barriers (Article XI GATT), protected European farmers from cheaper agricultural imports by raising or lowering customs duties on imported agricultural products dependent on the prevailing world price.¹⁰⁰ CAP's common organisation of markets for specific agricultural products also allowed European farmers to benefit from domestic subsidies if they, for example, grew certain crops or produced milk.¹⁰¹ Any excess production was then offloaded onto world markets at cheap prices, with any shortfall between the costs of production and the product's sale price met by export subsidies.¹⁰² This increasing volume of cheaper agricultural products from European farmers threatened the United States' continued dominance of international agricultural trade, and as a consequence it sought a waiver for its domestic agricultural policy from the already limited GATT obligations on agricultural imports.¹⁰³

The story of GATT's increasing impotence, the growing disquiet especially among developing countries over the effect of European and United States' protectionist agricultural policies and the difficult negotiations in the Uruguay Round of multilateral trade talks leading to the creation of the World Trade Organisation (WTO) is well known and told by eminent scholars, so it is not my intention to rehearse it here.¹⁰⁴ Rather I want to highlight key points in the embedded liberalism story of decline and evolution in international trade regulation that culminates in the World Trade Organisation (WTO) Agreement on Agriculture.

Power to dominate international agricultural trade shifts away from the United States to a multiplicity of actors, including the European Economic Communities, which, through the

⁹⁹ B L Pierson, "American Agricultural Exports and the EEC's Common Agricultural Policy," *Wisconsin International Law Journal*, 1 (1982), 133.

¹⁰⁰ J A McMahon, *Law of the Common Agricultural Policy*, (Longman, 2000), 98 to 99.

¹⁰¹ *Ibid*, 98 and 99.

¹⁰² *Ibid*, 98 and 99.

¹⁰³ Johnson above n88, 17 to 19.

¹⁰⁴ See generally, J A McMahon, *The WTO Agreement on Agriculture* above n44.

CAP, increased the levels of protection available for its farmers from cheaper imports. It became increasingly difficult for the United States to gain access to key European markets. Free trading nations like Australia and New Zealand pushed for more open agricultural markets, a view shared by developing countries who were net-agricultural exporters trying to gain access to European and United States' markets as a way of generating income to develop their economic infrastructure.¹⁰⁵ This plethora of states arguing that free trade in agriculture automatically leads to positive effects for development, food security and other "legitimate social purposes" means GATT's loose regulation of domestic policies is seen as facilitating protectionism, rather than as a legitimate way for states to pursue non-trade objectives. More formal regulation of what is an appropriate non-tariff barrier-one that does not "protect" domestic markets from international trade-is actively pursued by these states in the Uruguay Round and then driven through by an 'eleventh hour' agreement at Blair House in 1993 between the dominant actors of the Uruguay Round, the United States and the European Communities.¹⁰⁶

The WTO and pressure for regulatory change

Following the conclusion of the Uruguay Round in 1993, the balance between open trade and lawfully protected trade is contained in the comprehensive rules on agriculture.¹⁰⁷ Unlike the GATT which left states' domestic agricultural policies mostly unregulated, the WTO imposed greater control: the Agriculture Agreement defined and then limited legitimate import barriers and set quantitative limits on domestic and export subsidies for the first time. The rules, not states, determined whether a domestic or export subsidy was legitimate in the WTO. Lawful domestic subsidies were either production subsidies imposed within agreed limits, or subsidies that had "no or at most minimal trade distorting effects, or effects on

¹⁰⁵ Josling, above n20, 8.

¹⁰⁶ T P Stewart, *The GATT: A Negotiating History 1989-1992*, (Kluwer, 1993).

¹⁰⁷ Stewart *ibid*.

production.”¹⁰⁸ Export subsidies could only be imposed in accordance with the rules and only within legally binding limits.¹⁰⁹

The comprehensive rules were accompanied too by a more sophisticated system of monitoring compliance in the Committee on Agriculture and the dispute settlement system, which included a right to appeal on matters of legal interpretation to a standing Appellate Body for the first time.¹¹⁰ GATT’s flexible, diplomatic style of dispute settlement allowed states to rely on a combination of legal interpretation of the rules and a recourse to informal discussions on the rules’ meaning conducted in rounds of trade negotiations, was rejected by the WTO Appellate Body.

Notably in the *EC-Sugar* dispute, the European Communities (as it then was) tried to argue that a footnote covering an aspect of its development policy set out in its Schedule of Commitments should be interpreted to give it an additional component to its export subsidy commitments in the Agriculture Agreement.¹¹¹ It argued, the meaning of the footnote was “well known” to the other states negotiating the rules on agriculture in the Uruguay Round and, as such, the meaning attributed to the footnote by states in those negotiations should take precedence over any other interpretation put forward in the dispute.¹¹²

The Appellate Body rejected this informal, politically driven interpretation of the footnote’s scope, in favour of a legal interpretation based on the footnote’s “ordinary meaning” in accordance with the rules on treaty interpretation in the Vienna Convention on the Law of Treaties.¹¹³ It stated: “...we are not persuaded by these arguments, which rely on the presumed knowledge of other Members of the World Trade Organization (the "WTO") on the

¹⁰⁸ Annex 2:1 Agreement on Agriculture. On the Amber and Green Boxes see discussion above *infra*.

¹⁰⁹ Articles 8, 9 and 10 Agriculture Agreement above *infra*.

¹¹⁰ Articles 17 and 18 Agriculture Agreement (Committee on Agriculture); Article 19 Agriculture Agreement (dispute settlement); generally see I Van Damme, *Treaty Interpretation by the WTO Appellate Body*, (Oxford University press, 2009).

¹¹¹ *EC-Sugar* above n65, para 171.

¹¹² *Ibid*, para 176.

¹¹³ 1155 UNTS 331, (Vienna, May, 23 1969); *International Legal Materials* 8, (1969), 679.

export subsidy practices of the European Communities with respect to ACP/India sugar.”¹¹⁴

Likewise, interpretations by the Appellate Body of the comprehensive rules on non-tariffs barriers, like food safety and quality standards provided further boundaries on states’ autonomy.¹¹⁵

This increasing restriction on states’ flexible use of trade measures to achieve domestic policy objectives limited protectionism, but became increasingly difficult to implement. The Committee on Agriculture reported that over 85% of all notifications of farm subsidy levels under the Agriculture Agreement were either late, or missing completely.¹¹⁶ States were finding the lack of flexibility in the rules and in their interpretation constrained their ability to pursue key policy objectives like food security.¹¹⁷ Concerns were raised by some developing countries, led by India, that these constraints undermined their ability to pursue an appropriate food security strategy whereby they stockpiled food to feed to their rural poor.¹¹⁸ India argued that without a scheme that could both support its poor farmers (who were themselves undernourished) and its people, it could not address its citizens’ right to food. In a preemptive response to the possible illegality of its public stockholding scheme, India led a campaign during the multilateral trade talks on the reform of the WTO rules prior to the 2013 Ministerial Meeting at Bali, Indonesia.¹¹⁹ In an important shift in power relations away from the domination of the US-European Communities seen in previous negotiating round, India, heading a coalition of developing countries, argued for a permanent change in the rules. It argued that public stockholding programmes of food should be permitted at administered prices, rather than at market prices as currently permitted in the Green Box.

¹¹⁴ *EC-Sugar* above n65, para 180.

¹¹⁵ eg Appellate Body Report, *European Communities- Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, (January 16, 1998), interpreting the SPS Agreement.

¹¹⁶ Bridges, “Farm subsidy data gaps hampering progress in WTO talks, Chair says,” (May 13, 2016).

¹¹⁷ China and India have not notified farm subsidy levels since 2010: Bridges, “Uncertainty over WTO Negotiating Chair Overshadows Farm Trade Talks,” (March 30, 2017).

¹¹⁸ A Matthews, *Food Security and WTO Domestic Support Disciplines Post-Bali*, (ICTSD, June 2014), No53, 2.

¹¹⁹ The Ninth Ministerial Conference of the WTO, 3 to 9 December 2013: <https://mc9.wto.org>

India stated that such a change was important and “non-negotiable” in the light of growing concerns of developing countries’ domestic food needs and potential supply problems caused by the impact of climate change.¹²⁰

After intensive negotiations, the WTO members negotiated the Ministerial Decision on Public Stockholding for Food Security Purposes effectively imposing a time-limited moratorium (or ‘peace clause’) on dispute settlement actions on the legitimacy of such schemes in WTO dispute settlement proceedings subject to certain limitations, with a promise that further negotiations on a permanent solution would take place subsequently.¹²¹ Despite expectations that this would resolve the matter at least temporarily, India declared its unhappiness with the negotiated “peace clause” and informed WTO members that it could not support the adoption of another critical new agreement from Bali, the Trade Facilitation Agreement,¹²² until it found permanent movement on the food security issue.¹²³ The Trade Facilitation Agreement arguably was the most important outcome of the December 2013 Ministerial Meeting, ironically because it is projected to increase income from trade to developing nations in particular, by reducing overall trade costs and thereby increasing global income by over \$40billion.¹²⁴

Although India later reconsidered its opposition to the Trade Facilitation Agreement in favour of negotiating a permanent change to the WTO rules, pressure to reevaluate the existing rules’ effectiveness and to accommodate more flexible opportunities for states to use

¹²⁰ Bridges, “Daily Update,” (December 7, 2014.)

¹²¹ WTO, *Public Stockholding for Food Security Purposes: Ministerial Decision of 7 December 2013*, WT/MIN(13)38, WT/L/913, December 11, 2013.

¹²² WTO, *Agreement on Trade Facilitation: 7 December 2013*, WT/MIN(13)38, WT/L/911, December 11, 2013.

¹²³ WTO, “WTO Members Weigh Options as India Pushes Food Security Link on Trade Facilitation Deal,” (July 24, 2014).

¹²⁴ OECD, *The WTO Trade Facilitation Agreement-Potential Impact on Trade Costs*, (2014), 2 drawing on OECD, *Trade Facilitation Indicators: The Potential Impact of Trade Facilitation on Developing Country Trade*, (2013) OECD Trade Policy Papers No.144.

domestic subsidies for food security purposes are on the agenda for the Buenos Aires Ministerial Meeting in December 2017.¹²⁵

CONCLUSION: STORIES YET TO BE TOLD

International agricultural trade regulation has undergone a series of changes between the 1940s and 2017. From the ITO's abortive rules on inter-governmental commodity agreements, to the GATT's minimal interference in states' domestic agricultural policies, to the WTO's extensive rules that constrain states' autonomy, the reasons why the rules change are varied and complicated.

The conventional story tells us that the rules change from the ITO to the GATT and to the WTO because GATT's rules could no longer contain protectionism in domestic agricultural policies, a situation that could not be corrected by the GATT's inadequate dispute settlement system; that the WTO's comprehensive system of rules and successful dispute settlement system constrains protectionism, but then lacks the flexibility to address contemporary challenges, like food security and trade without borders along global value chains. In this story, in the light of these new regulatory challenges, it is not surprising that members are reviewing the possibility of using domestic support in more innovative ways to support their food security policies.¹²⁶

Yet when this story is told from a different perspective-that of John Ruggie's theory of embedded liberalism-new insights into why regulatory change happens in international agricultural trade are revealed. The early rules of the ITO and then the GATT reflect the interests of the United States, the dominant actor in the immediate post-war period, but this dominance is gradually eroded as other actors become more significant, like the European Economic Communities. The GATT's limited control over states' domestic subsidies and

¹²⁵ WTO, "Farm Produce Stockholding worries members who fear impact on trade and incomes," above n75.

¹²⁶ WTO, "Farm negotiators welcome proposals to curb subsidies and open agricultural markets," (November, 16 and 17, 2016), www.wto.org/english/news_e/news16_e/agri_16nov16_e.htm.

other non-tariff barriers like food standards, allowed states to use these trade measures to pursue legitimate social objectives in their domestic agricultural policies. The rise in protectionism together with pressure from other liberal free traders, like Australia and New Zealand, leads to another change in the rules, this time to the WTO. Regulatory change is inevitable as multinationals become the dominant actors and states demand more autonomy than permitted under the WTO rules to pursue important policy objectives.

There is another element of Ruggie's contribution to scholarship that is more important, but often overlooked in my view, and that is his insight that in retelling an accepted historical account in a different way, he could articulate different reasons why rules change and when this might happen in the future. Ruggie's seminal 1982 article teaches us that there are other, as yet, undiscovered stories in the past that are there to be told and new lessons to learn. I provide an abridged account of two possible new stories below.

First, how is the "farmer" portrayed throughout the history of international agricultural trade regulation and how is this change reflected in the rules? After the Second World War, farmers are simply general providers of food and raw materials in the post-war recovery.¹²⁷ Whereas by the mid-GATT period, the farmer becomes a more nuanced figure. It is in this period that the "developed country farmer" and the "developing country farmer" emerge.¹²⁸ The developed country farmer is more protected by states' domestic agricultural policies from the volatility of world markets. From their privileged position, the developed country farmer harms other, more vulnerable developing country farmers, who are left to cope unprotected by their states in the face of the perceived "selfish" activities of the developed country farmer.

By the late twentieth century, the developed country farmer provides positive benefits to the rural community by providing employment and the environment through their husbandry of

¹²⁷ OECD, "Agricultural Policies in Europe and North America," above n77 313-316.

¹²⁸ Hudec, *Developing Countries in the GATT*, above n42.

the land.¹²⁹ The picture changes again by the twenty-first century and the farmer becomes an ever more fragmented figure, with some, like the global peasant movement- *La Via Campesina*- claiming only certain farmers-the “peasant farmers”- hold the key to achieving global food security and combatting climate change. In contrast, “industrial farmers” only hinder this important work. Unlike their twentieth century counterparts, these industrial farmers are no longer confined to developed countries, but are instead identifiable by the way they farm, irrespective of where that might be in the world.¹³⁰

A story about why international agricultural trade regulation changes that does not consider the changing place of the farmer in regulation can only be partial. This is because as the identity of the farmer changes, so too does our perception of what constitutes a legitimate domestic farm policy and our perception of where the line is between a legitimate and illegitimate interference with state sovereignty in agricultural trade regulation.

Second, how does our understanding of what “agriculture” is change over time? In the 1940s, agriculture is connected to the production of commodities like corn, cotton, rice and sugar exported from production-rich countries like the United States to alleviate chronic commodity shortages in war torn Europe. Whilst it is true that some commodities require special treatment through commodity agreements, the main concern is to address any unexpected seasonal volatility through short-term negotiated solutions, rather than any long-term special treatment for these products.¹³¹

During the GATT period, commodities, like cotton, become associated with specific countries, like Benin and Burkina Faso, who rely on money generated from the production and exports to fund development projects.¹³² Developed country subsidy programmes tied to

¹²⁹ See generally T Cooper, K Hart and D Baldock, *Provision of Public Goods through Agriculture in the European Union* (Institute for European Environmental Policy, 2009).

¹³⁰ See generally M Edelman, “Food Sovereignty: forgotten genealogies and future regulatory challenges” *Journal of Peasant Studies*, 41(6), (2014), 959.

¹³¹ Curzon, above n78, 167.

¹³² Josling above n20, 8.

these specific commodities, like those of the United States,' allow a distinction between "good" agricultural policies-those that do not harm the potential export income a developing and least developed country can achieve from the commodity it produces-and "bad policies"-those that do harm that potential income. By the WTO, "agriculture" shifts beyond commodities in their raw or semi-processed state to fully processed products like ethanol and hemp.¹³³ Only for the meaning of "agriculture" to fragment further in the early twenty-first century towards a division between "agricultural production destined for industrial use", like biofuel, and "agriculture production for food." With the steep decline in the oil price in 2015, agriculture is increasingly synonymous with food.¹³⁴

Ruggie's lasting contribution to lawyers and political scholars exploring the economic and social relationships between states in the global economic order is that he shows us that in reaching back into the past to understand why, for example, international agricultural trade regulation changes, we should question that past. We should not accept the past as a true and factual account of the politics of the time, the trade negotiators' concerns and the way law was then working (or not). Instead, Ruggie reminds us that we must not forget that it is simply one enquiry into what happened- one way of understanding the very complex world that existed at the time.¹³⁵ He shows us that if we accept one historical account as true without challenging our thinking, we make suggestions for changes to the rules based on this "known" and "accepted" past without understanding that we filter the past through our concerns in the present: we use twenty-first century thinking as a lens through which to examine the past. We bring our twenty-first century expectations of the way we expect the law to work now to the critique of what was wrong with the rules when they were originally crafted. We risk treating the historical past as a set of facts, rather than a series of stories

¹³³ Annex 1 Agriculture Agreement.

¹³⁴ OECD/FAO, "Agricultural Outlook 2014," (2014), Ch 2, 'Feeding India.'

¹³⁵ M Oakeshott, *On History*, (Liberty Fund, 1993). 1, 1 to 2.

contingent on our perception of the “real” relationship between the politics, economics and legal systems existing at the time.

Ruggie’s story of embedded liberalism shows us that history is contingent and that there are always new stories to tell and new lessons to learn.