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SYMPOSIUM ON INTERNATIONAL ECONOMIC LAW AND ITS OTHERS

HUMAN RIGHTS PRINCIPLES FOR TRADE

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Most trade scholars treat agriculture as a commodity, and in a sense, agriculture workers and their technological replacements as commodities as well. From a food sovereignty perspective, however, agriculture is part of a food system and what is at stake in trade law is people's way of life. Peasants' and Indigenous peoples' (and workers') resistance against the World Trade Organization (WTO) has been an existential struggle.[1] Most trade law scholars, with notable exceptions, have ignored social movements' demands, including their call to end the WTO.[2] By in effect disregarding the costs and violence of the existing trade system against food producers, trade scholarship makes social movements' language and political demands less cognizable in international law. In this essay, I provide some context and language that may encourage trade law scholars to engage with the food sovereignty movement. I first explain what is at stake in trade law for the food sovereignty movements. I then briefly describe the underlying three pillars supporting the Agreement on Agriculture, and highlight the limits of trade law. I conclude by offering three principles—dignity, self-sufficiency, and solidarity—that could open trade law to wider perspectives. These principles blur the line between trade and the right to food in order to ensure that neither one is dominant nor an "other."

The international food sovereignty movement was born in protest against the WTO, and, as described by Tomaso Ferrando and Elizabeth Mpofu in this symposium, it has been the most sustained force against trade law.[3] It is not surprising that the food sovereignty movement has been such a powerful force against existing trade agreements since food has always been central to global trade regimes.[4] One reason most trade scholars have ignored social movements may be because movements have articulated their claims in the language of social justice and human rights and not in the language of trade law. While trade law today may be incapable of addressing

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[1] Unions are not part of the food sovereignty movement. But the food sovereignty movement works in solidarity with the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (a federation of unions) at the global level through right to food discourse.

[2] *But see* Robert Wai, *Countering, Branding, Dealing: Using Economic and Social Rights in and Around the International Trade Regime*, 14 Eur. J. Int'l L. 35 (2003); James Thuo Gathii, *Food Sovereignty for Poor Countries in the Global Trading System*, 57 Loyola L. Rev. 509 (2011); Carmen G. Gonzalez, *International Economic Law and the Right to Food*, *in* Rethinking Food Systems: Structural Challenges, New Strategies and the Law 165 (Nadia C. S. Lambek, et al. eds., 2014); B. S. Chimni, *Anti-Imperialism: Then and Now*, *in* Bandung, Global History, and International Law 35 (Luis Eslava, Michael Fakhri & Vasuki Nesiah eds., 2017); Ntina Tzouvala, *A False Promise? Regulating Land-Grabbing and the Post-Colonial State*, 32 Leiden J. Int'l L. 235 (2019).

[3] *See* Tomaso Ferrando & Elizabeth Mpofu, *Peasants as "Cosmopolitan Insurgents,"* 116 AJIL Unbound 96 (2022).

[4] Michael Fakhri, Sugar and the Making of International Trade Law (2014).

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human rights claims, the right to food obliges states to take trade into account and "ensure an equitable distribution of world food supplies in relation to need."[5]

I propose three principles to trade scholars so that they have a language that enables a commitment to transform the global trade regime on more equitable terms and is more intelligible to the food sovereignty movement. I do not think the food sovereignty movement necessarily wants to actively participate in the trade regime as it stands now. Moreover, the food sovereignty movement is not against trade, it is against free trade agreements that undo people's longstanding relationships with each other, the land, and waterways. I therefore offer these principles to encourage clearer substantive debates over international trade's institutional structure. If Ferrando and Mpofu invite international economic jurists to take food sovereignty seriously, this essay provides an account of trade that does just that.

The proposed principles for trade that respond to the food sovereignty movement are succinctly presented here. I outline the principles in more detail in my report to the General Assembly along with a proposal for how the Agreement on Agriculture may be wound down and replaced with international food agreements.[6]

The Stakes of Trade Law

Since at least 1999, trade law scholarship has mostly framed the stakes of trade law as a matter of preserving or enhancing the WTO's legitimacy.[7] This framing is usually combined with an assumption that trade policy's purpose is to generate economic growth or development.

Starting in the 1990s, however, peasants and other small-scale food producers around the world were already fed up with international economic institutions, disappointed with their national governments, and cynical when it came to development discourse. For fifty years, most national governments across the Third World were preoccupied with development. Regardless of their particular understanding of development, very few governments and advisors were committed to supporting food producers in a way that allowed them to continue their way of life. Many developing countries looked to industry as an alternative to agriculture or looked to industrialize agriculture. International trade institutions like the United Nations Conference on Trade and Development (UNCTAD) and international commodity agreements supported trade in agriculture by trying to stabilize global prices, but this was a means to generate capital that enabled a shift to manufacturing. National governments' ultimate plan was to disinvest from the agricultural sector and create a cheap work base for the manufacturing sector.[8]

Even though rural communities were under attack through these development plans, they still played an influential role in national politics since most developing countries still relied on agriculture. At different times during the 1960s and 1970s, in places like Mexico, Ecuador, and Indonesia, national peasant movements mobilized to push against their respective governments' industrialization agendas. The nature of these movements changed in the 1980s and 1990s with the advent of neoliberalism. With the demise of international commodity agreements, a diminishing role of UNCTAD, and the shifting of international agricultural trade policy to the General Agreement

[5] International Covenant on Economic, Social and Cultural Rights, Art. 11(2)(b), Dec. 16, 1966, 993 UNTS 3.

[6] General Assembly, The Right to Food in the Context of International Trade Law and Policy, UN Doc. A/75/219 (July 22, 2020). *See also* General Assembly, The Right to Food and Food Systems, UN Doc. A/76/237 (July 27, 2021). For critical engagement, see *La Via Campesina Backs the UN Special Rapporteur's Observation that WTO Policies Have Marginalised People's Human Rights Concerns*, La Vía Campesina (Oct. 8, 2020); Miho Shirotori, *Towards a New Trade Agenda for the Right to Food*, UNCTAD Policy Brief No. 83 (Mar. 2021).

[7] Michael Fakhri, *Reconstruing WTO Legitimacy Debates*, 2 Notre Dame J. Int'l & Comp. L. 64 (2011). For a recent example, see Joost Pauwelyn, *WTO Panels Without an Appellate Body: Can Rules-Based Dispute Settlement Survive Post December 2019 Under the Status Quo?*, Int'l Econ. L. & Pol'y Blog (May 22, 2019). *But see* Harlan Grant Cohen, *What Is International Trade Law For?*, 113 AJIL 326 (2019).

[8] Fakhri, *supra* note 4, at 177–79.

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on Tariffs and Trade (and later the WTO), developing countries no longer had a strong international institutional structure to support national agriculture. In other words, even if Third World governments wanted to support rural communities, by the 1980s they had fewer international institutional mechanisms to which to turn.[9]

Peasants, other small-scale food producers, and Indigenous peoples around the world (especially in Latin America) began to organize themselves into transnational movements committed to opposing international economic institutions, like NAFTA and the World Bank. By May 1993, the movement became global when *La Vía Campesina* was formed in Mons, Belgium.[10] Today, it is about more than *La Vía Campesina*, with food sovereignty movements encompassing different networks of networks, such as the International Planning Committee for Food Sovereignty and the People's Coalition for Food Sovereignty. These networks of networks bring millions of people from all over the world together to debate through differences and find common ground, develop shared concepts, mount international campaigns, and decide on how (or whether) to tactically engage with international law and institutions. So, while the WTO remains in a permanent legitimacy crisis, food sovereignty as a series of movements and a discourse continues to expand and change. Food sovereignty's normative and social dynamism can be seen when you look at the changes from *La Vía Campesina*'s inaugural *Mons Declaration*[11] to the broader food sovereignty movement's *Nyéléni Declaration*[12] to the UN Declaration on the Rights of Peasants and Other People Working in Rural Areas.[13] What is always at the heart of food sovereignty is the question of power: who controls food systems? This question is raised because of the concern that pervasive food insecurity is caused by the increasing rate of corporate power and commodification in food systems. The question also comes alongside demands to transfer more power into the hands of the people who actually make our food.

The Limits of the Agreement on Agriculture

The consensus shared by both champions and critics of the WTO alike has been that in practice the Agreement on Agriculture has neither created a liberal global market nor has it benefited poorer countries, whose economies depend on the agricultural sector. It has instead protected powerful countries and allowed those governments to use public agricultural funds to subsidize large transnational corporations.[14]

Since 1982, in the days of GATT, and continued under the WTO Agreement on Agriculture, agricultural trade negotiations have been focused on three pillars: (1) improving market access by banning quantitative restrictions, converting behind-the-border policies into tariffs and gradually reducing all agricultural tariffs; (2) gradually reducing export subsidies to zero; and (3) limiting the scope of permissible domestic support.[15]

"Tariffication" under the first pillar was completed with the advent of the WTO in 1994. And on the second pillar, at the WTO Ministerial Conference in Nairobi in 2015, Members agreed for the first time to abolish export subsidies. The third pillar remains unresolved. The European Union and the United States, among others, have never committed to limiting their domestic support. Even though the Agreement on Agriculture included mechanisms to encourage European governments and the United States to reduce their subsidies, in practice the

[9] Michael Fakhri, *A History of Food Security and Agriculture in International Trade Law, 1945–2017*, *in* New Voices and New Perspectives in International Economic Law 55 (John D. Haskell & Akbar Rasulov eds., 2020).

[10] Annette Aurélie Desmarais, *The Vía Campesina: Consolidating an International Peasant and Farm Movement*, 29 J. Peasant Studies 91 (2002).

[11] La Vía Campesina, *Mons Declaration* (May 16, 1993).

[12] Forum for Food Sovereignty, *Declaration of Nyéléni* (Feb. 27, 2007).

[13] GA Res. 73/165, UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (Jan. 21, 2019).

[14] Christian Häberli, *Agricultural Trade: How Bad Is the WTO for Development?*, *in* Eur. Y.B. Int'l Econ. L. 2016 103 (Marc Bungenberg, et al. eds., 2016); Fakhri, *supra* note 9.

[15] GATT Press Release, Ministers at GATT Session Adopt Declaration, GATT/1328 (Nov. 29, 1982).

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Agreement was flexible in a way that has mostly supported countries with industrialized agricultural sectors and significant import rates like the European Union and the United States. These governments have used international institutions to legitimize their systems that subsidize corporations, flood developing country markets, and incentivize ecologically hazardous practices.

While halting rich countries' harmful system of subsidies is a priority, a global commitment to limit the scope of permissible domestic support is too narrow a focus. We should be asking instead: what domestic support is necessary for a flourishing food system? From both a food sovereignty and trade policy perspective, however, there is still no language or institutional trade framework that allows people to discuss and debate this broader question. This is because there is no singular position within the food sovereignty movement in relation to national governments and national food policies; the food sovereignty movement covers a wide range of national and regional contexts, and different governments have varying relationships with social movements. There is also a lack of language and institutional discussion because in trade policy many consider the Agreement on Agriculture to be outdated, but, as evidenced by the stalled Doha Development Round, still cannot agree what warrants a good subsidy versus a bad subsidy.[16]

Human Rights Principles for Trade: Dignity, Self-Sufficiency, and Solidarity

Until new institutional space is found for food trade policy, lawyers and social movements can continue to find ways to advance the prescriptive human rights agenda for trade. I therefore propose three principles—dignity, self-sufficiency, and solidarity—that can provide the trade law community the language it needs to engage with the food sovereignty movement in critical discussion and debate. These principles do not stem from the food sovereignty movement, but they come from my own understanding of how food sovereignty includes a focus on people's relationships with each other and the ecosystem.

Dignity is at the core of international human rights law and can also be found in numerous national constitutions and legislation. Even when an individual is overcome by formidable forces and cannot exercise their inalienable rights, they retain control over their inherent dignity as the final backstop against oppression.

The trade system is usually measured on a national scale in terms of balance of trade/balance of payment, or on a global scale in terms of volume. The underlying value informing these metrics is that more trade is a good thing. Inherent within this perspective is that the more people trade and the more goods they consume, the more the economy grows; everything becomes a commodity whose value is based on being bought and sold. Trade in foodstuffs is measured no differently than trade in any item. Through this system, people and states are valued by how much they can economically produce and exchange on a global scale.

If the food and agriculture trade system started, instead, with the premise that food is inherently tied to dignity, and should be judged in such terms, the function and purpose of trade changes. Under the current trade system, because economic growth is the underlying value, individuals interact with each other primarily as sellers and buyers in their everyday exchanges. However, if dignity replaces the value of economic growth, people's social and cultural relationships envelop everyday exchanges and interactions. When people exchange goods and services with dignity, they meet each other in the spirit of exchanging as friends, neighbors, or kin, drawing from practices based on hospitality and conviviality. More trade does not necessarily lead to a better life; the point is that trade policy has to be inherently and explicitly part of communities' and states' negotiated policies on migration, resource sharing, knowledge exchange, and political relations.

"Self-sufficiency" has been a taboo word in trade and associated with autarchy. If we have learned anything from the COVID-19 pandemic, it is that each individual self relies on the care work of others and our relationship with

[16] Alan Wolff, Qu Dongyu & Michael Fakhri, *Agricultural Trade and Food System Transformation*, WTO (Dec. 2, 2020).

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the ecosystem. In a human rights context, self-sufficiency is a relational principle: to be self-sufficient is to also coexist with others, human or otherwise. The notion of self is collective and not individualistic, nationalistic, or aiming for autarchy. Among nations, and within nations, self-sufficiency is about community and its symbiotic place in relation to world food and ecological systems.

In all those different relations, self-sufficiency emphasizes autonomy, harmony, coexistence, and respect. It is about defining oneself by choosing who are one's neighbors, with whom one wants to maintain longstanding, good relations so that one can take care of each other through stable and fair-trading relationships. In other words, it is not that trade is bad or good, the point is that international and intercommunal relationships need to take priority over cross-border trade.

Finally, an economy built on solidarity relies on organizations governed by principles of horizontal cooperation and coordination, not profit and ceaseless growth. It is through ideas of solidarity that we can enhance cooperative forms instead of corporations.

The idea of solidarity economics draws directly from the practices of millions of people all over the world, who have organized their power through entities such as mutual benefit societies, trusts, and cooperatives. For example, the government in Ghana in the early 2000s shaped markets in a way that empowered small farmers by creating participatory programs, such as farmer field schools and cooperatives. One result was an increase in agricultural cooperatives by 251 percent over the course of only six years. Similarly, Brazil assisted agricultural collectives by mandating public schools to purchase a substantial percentage of the food for school meals from the solidarity economy sector.[17] Indeed, the food sovereignty movement still does not have a unified position on solidarity economics considering the movement's complex relationship with the state.

The underlying purpose is to create markets that operate to meet human needs instead of pursuing profit for its own sake. It is about organizing commerce through democratically governed enterprises and softening the boundaries between the economic sphere and the realms of care, leisure, and culture. In this respect, the solidarity economy differs both from private enterprise, which prioritizes profit, and from state intervention, which is often bureaucratic, remote, and exclusionary. Rather, the solidarity economy shifts the focus away from understanding the economy primarily as a tension between individuals and governments/markets and states and more as a negotiation between social movements and governments.

Conclusion

Since the early 1980s, many assumed that trade policy's purpose was to continuously increase the flow of trade by removing barriers to trade—i.e., free trade. With principles of dignity, self-sufficiency, and solidarity in hand, and in the right institutional space, social movements and governments can transform trade policy in food so that trade can instead ensure that the right to food is fulfilled and everyone has access to a good, healthy meal.

[17] The Right to Food in the Context of International Trade Law and Policy, *supra* note 6, para. 82.

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