I. INTRODUCTION

Anne Orford\(^1\) begins her ambitious inquiry into the connection between the international legal and economic order regime and food security by explaining its “immediate impetus” was the food price crisis of 2006. Aside from a humanitarian concern provoked by the risk posed by rising and volatile food prices to as many as a billion food-vulnerable people, her project has been stimulated by how the food price crisis has grabbed the attention of international institutions. Most notably, efforts to deal with the issue of food security extend beyond international institutions, like the Food and Agriculture Organization (FAO) that has historically dealt with food security. They include the World Trade Organization (WTO), the international institution mandated to establish and enforce rules for global trade in goods and services. As the global food context has shifted from one of food surpluses and falling commodity prices to one of anticipated food shortages and rising prices, this international attention is almost certain to continue.

The heightened international attention to food prices and food security, as Orford observes, has not been accompanied by a consensus—regarding either the causes or solutions to food insecurity—in the policy community of international institutions, engaged academics, and civil society organizations that has mobilized around food security issues. This policy community, like WTO members, is divided on whether food security solutions require more or less liberalization of world trade. Although they are by no means the only

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issue to do so, differences in how to deal with food insecurity have derailed the progress of the WTO Doha Round since its launch in 2001. A coalition of 33 countries, led by India, has demanded the right to intervene in domestic agricultural commodity markets in order to deal with domestic food insecurity. More specifically, they have sought to gain more leeway for governments to purchase food from low-income producers at administered (above market) prices for the purpose of public stockholding for food security purpose. By late 2014, their efforts had paid off with provisions in the Bali Agreement to allow them to do just that.2

Notwithstanding the 2014 Bali Agreement and whatever evidence it provides of responsiveness on the part of WTO members to the food security concerns of developing countries, Orford is correct to link the food security debate within the WTO to a broader debate about the respective roles of the state and the market in constituting the international economic and legal order. Arguing that WTO free trade agreements contribute to food insecurity, she sees the failure to conclude the Doha Round negotiations as evidence of a challenge to the liberal principles embodied in WTO agreements.3 The solution she offers to both food insecurity, and the “crisis” it has engendered to the international project of market-oriented reform,4 is to recalibrate the market-state relationship in favour of the state. Governments, she argues, need to recapture the capacity to pursue social policy goals like food security.

There is much to praise in Orford’s paper. I am impressed by the long historical sweep of her inquiry into the origins of the current international legal regime for food. I also find admirable her comprehensive approach to defining this regime: that is, as one constituted by international agreements and laws that extend beyond those specific to agriculture, to include, for example, laws with respect to intellectual policy and financial liberalization. Her analyses are timely and relevant, tapping as they do into a widespread perception that the WTO agreements are lopsided when it comes to serving the needs of people in developing countries to the same degree they do

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2 Amidst considerable controversy, the Agreement on Public Stockholding for Food Security Purposes was agreed to as part of the Bali Agreement in December 2013. It was accepted as an interim agreement; a number of WTO members, including some developing countries, worried that the stocks surplus to public stockholding needs could eventually be dumped on world markets. India, which had sought to raise the amount of stockholding allowed as non-trade distorting, refused to sign the Agreement unless it were extended beyond 2017 if a permanent solution on eligible public stockholding volumes was not reached (see Christophe Bellmann, “The Bali Agreement: Implications for Development and the WTO”, online: (2014) 5:2 International Development Policy/Revue international de politique de développement <http://poldev.revues.org/1744>). The Indian Prime Minister agreed to sign the Bali Agreement in November 2014 when he received that assurance from the US President. Notwithstanding this victory for India, Bellmann (Ibid at para 48) observes that most developing countries do not have the financial resources to take advantage of food security stockpiling to stabilize prices.

3 Orford, supra note 1 at 66.

4 Ibid at 65.
those in developed countries. This perception certainly goes a long way to explaining the part developing countries, now better organized than they were during the Uruguay Round negotiations, have played in the failure to conclude the Doha Round negotiations. Her view that securing an appropriate balance between states and markets is necessary also taps into an influential strain in international political economy that argues that international regimes must find avenues to reconcile the tensions between goals of liberalization and domestic social purposes.

Nonetheless, Orford’s central proposition—that the international legal framework for regulating food production, consumption and distribution has contributed to food insecurity—is provocative, not least because of the methodological challenge of substantiating this proposition. Establishing such a causal link between the international food regime and food insecurity is highly difficult, given the very strong likelihood that a combination of several factors—in both the domestic and international arenas—has interacted to contribute to the problem of food insecurity in the global South. How can one weigh and distinguish the contribution to food insecurity caused by the policy priorities of international organizations associated with the Washington Consensus (the World Bank, the IMF) as compared to the trade agreements negotiated and implemented by the WTO? If, as a null hypothesis would suggest, food insecurity is multi-causal, it is probably not possible to answer one of the questions Orford poses for herself, namely “Which rules and institutions enable the current uneven patterns of [food] vulnerability and insecurity?”

Still the difficulty or even impossibility of answering the question she poses should not preclude the effort to know more about how constituent elements (agreements, institutions) of the international food legal order have affected the production, distribution and consumption of food. If we can make some progress in identifying the effects of international agreements and institutions on food governance and food security, relative to those of policies and factors internal to states themselves, we should be able to understand better the reforms needed to mitigate food insecurity in the global South.

My comments here are a modest step toward understanding the constraints of international agreements and the scope for state action in matters directly related to food governance. They are directed to the international trade agreements that figure prominently in Orford’s indictment of the current global food regime as attempting to limit the capacity of governments to intervene in the economy for the benefit of their people. Focusing on agreements with respect to agriculture and trade in agricultural and food products—the Uruguay Round Agreement on Agriculture (URAA) and the WTO Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)—I offer a corrective

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5. Ibid at 15.
6. Ibid at 63.
to her description of the constitutive character of the international food legal regime and its consequences for the ability of governments—at least in developed countries—to pursue social policy goals.

First, I argue that Orford’s characterization of the global trade regime as constituted by principles of liberalism or “free trade” is overdrawn. While free trade principles may well have been aspirational goals on the part of those who sought to bring agriculture more fully within the global trade regime during the Uruguay Round GATT negotiations, the URAA fell well short of the goal of implementing free trade. Moreover, rather than the objective of “embedding liberalism” which Orford claims has been the goal of the WTO, I argue a case can be made that the “embedded liberalism” that characterized the GATT regime was the ideational framework for the WTO trade regime for agriculture and food established in 1995.

Second, I examine the merits of her ancillary argument that governments need to recover the policy space to promote social policy goals (of which food security is one). I agree that such policy space is needed if the international food governance regime is to be accepted as legitimate—but also that policy space to respond to social purposes exists—and has been used by developed country governments, most notably but not exclusively in the European Union. The infiltration of social policy goals—such as environmental and biodiversity protection, food security, and food safety—into EU policies are examples of the continuing practice of governments responding to pressures to embed social values in market relations. Rather than the triumph of liberalism, these measures, like the impasse at Doha, suggest that embedded liberalism continues to do battle with liberalism (or neo-liberalism, as some call its current version). As governments seek ways to embed markets in societal values, the challenge remains of reconciling the universal principles of international regimes with domestic pressures, and doing so in a way that minimizes negative externalities for third parties such as people in developing countries.

II. THE INTERNATIONAL TRADE REGIME: EMBEDDING LIBERALISM OR EMBEDDED LIBERALISM?

Orford describes the international law governing economics and access to resources as “a project of embedding liberalism,” the latter “a project that seeks to transform all states into liberal states, entrench market principles at the heart of government both domestically and internationally, and organise itself around ideas of freedom.” Consistent with the perspective of informed observers of the global trade regime, she demarcates the creation of the World Trade Organization (WTO) in 1995 and the several WTO agreements negotiated during the GATT Uruguay Round of negotiations, as an important watershed in the project of embedding liberalism in international law. The

7. Ibid.
WTO and its agreements certainly expanded the scope of the international trade regime to affect not only cross-border measures but also within-border domestic activities with respect to food production and marketing.

Although experts agree WTO agreements are an important juncture in the global trade regime, including in bringing agriculture within the umbrella of the liberal trade regime to an unprecedented degree, there are many who would dispute Orford’s claim that the “ambition” of the URAA was “to remove any form of ‘support’ for agricultural production.”8 Wolfe,9 for example, argues that the URAA was guided by the idea that agriculture should gradually adjust to liberal principles and that government support should be given in the least trade-distorting manner possible. In his view, the URAA “recognized that interventionist farm policies would continue to exist;” what was needed was to constrain the capacity for domestic intervention to undermine international stability.10 From his perspective, the URAA goal was to extend the principles of embedded liberalism to agriculture. As coined and defined by Ruggie,11 embedded liberalism referred to the post-war GATT compromise in the Bretton Woods system that allowed governments to agree to open their markets while maintaining safeguards (most prominently, social policies) deemed necessary to preserve social stability. This compromise, which set limits on states’ ability to externalize the costs of adjustment to liberalization, had largely exempted agriculture. In constraining governments’ ability to externalize the costs of domestic agricultural measures—by requiring them to be less trade-distorting—the URAA represented an important step toward ideas of embedded liberalism.

While there may be room to dispute whether the goals of a market-oriented system for agriculture were motivated by principles of embedded liberalism (Wolfe12) or liberalism (Orford13), experts concur that the provisions of the URAA fell far short of creating free trade in agriculture and food. Tangermann’s view, that the URA “is not an agreement on free trade, and even less is it an agreement to do away with all agricultural policies,” is widely held.14 The specific commitments to reduce agricultural support and protection in the URAA were limited to what the EU and the US could agree

8 Ibid at 59.
10 Ibid at 134.
12 Wolfe, supra note 9.
13 Orford, supra note 1.
The result was that the URAA left in place agricultural tariffs that were “still on average about five times as high as on manufactured goods” and countries retained considerable scope to support agriculture, especially if their instruments could be justified as non-trade distorting.  

Another WTO agreement, the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement), also represents an effort to limit the trade-distorting effects of domestic measures. Consistent with GATT article XX that it replaced, the SPS Agreement allows governments to implement measures to protect the health and safety of citizens and agricultural sectors from risks arising from additives, contaminants, toxins, or disease-carrying organisms in foods, beverages, or feedstuffs. They must, however, avoid measures that are arbitrary or a disguised restriction to trade, most notably, by demonstrating that these measures are based on scientific principles and evidence, or, alternatively, conform to international standards. Although countries can implement health and safety measures that provide a higher level of risk protection than achieved by international standards, they must provide a risk assessment and scientific evidence to justify their measures. Although the goal of the SPS Agreement is a liberal one of facilitating trade, it is principles of scientific evidence that are the means to this end. And, as compared to the URAA, the SPS Agreement falls short of endorsing principles of embedded liberalism, the European Union failing in its endeavour to have other criteria besides scientific evidence—namely consumer concerns and animal welfare concerns—a basis for food and animal safety regulation.

III. LIBERALISM AND EMBEDDED LIBERALISM?

What has happened in the 20 years since WTO agreements were implemented? Has liberalism, as Orford suggests, triumphed “as a framework for thinking about the proper role of the state in relation to the market,” and so much so that even critics of the current global food economy and its governance denounce agricultural subsidies and treat “state support as a problem per se”?  

There is certainly ample evidence of an enhanced role for the market in the production of food. Governments in industrialised countries have retrenched their intervention in agriculture, cutting back (although not eliminating) their production subsidies and giving more scope to private

18. Orford, supra note 1 at 18.
19. Ibid at 19.
economic actors to regulate the conditions under which agricultural and food products are produced and sold. Domestic markets, including those in developing countries, have been opened up to more competition, and global value chains connect producers and consumers in developing and developed countries to an unprecedented extent. Although the URRAA and the SPS Agreement have certainly played a role in these developments, so too have other WTO agreements that have not received the attention they deserve here. Two such agreements are the Agreement on Trade-Related Aspects of Intellectual Property Rights, whose goals are to protect intellectual property, such as copyright to new plant varieties, and the Agreement on Trade-Related Investment Measures, which prohibits states from discriminating against foreign investors by, for example, local content regulations.

Notwithstanding the advance of market-oriented principles of liberalism, states have been under domestic pressures to find policy space to respond to societal concerns and to do so consistent with principles of embedded liberalism. The European Union (EU) is a compelling example of steps taken in this direction. Over the past 20 plus years, the EU has engaged in reforms to its Common Agricultural Policy that have reoriented state support for agriculture in a direction that is consistent with the principles of embedded liberalism in the URRAA.\(^\text{20}\) Trade-distorting subsidies (that gave incentives to increase production) have largely given way to minimally trade-distorting producer payments. At the same time, and under pressure from civil society groups—that are critical of both producer subsidies and the current global economy—support for European farmers has been made contingent upon farmers farming in a way that advances social policy goals, like biodiversity, environmental protection, and food safety.

The mobilization and influence of consumer, environmental, and other groups around food issues in the European Union has often tested the limits of embedded liberalism, engendering trade challenges by adherents to a liberal/free trade regime for agriculture and food. Two cases serve as good examples. The first is the WTO dispute over the EU prohibition of injecting beef animals with certain hormones (and one that Orford cites disapprovingly as evidence of the elevation of Hayekian principles of free trade and the diminution of the state’s role to regulate food production). The EU ban, which had been put in place in response to consumer pressure, was found by the WTO to be illegal, insofar as the EU had failed to undertake the risk assessment and provide the scientific evidence needed to support it. Rather than remove the ban, the EU agreed to pay concessions to the countries whose producers had been harmed by the ban (a solution that is, admittedly, available only to wealthy WTO members).

A second case is EU policies with respect to the licensing of plants and foods made from genetically modified organisms (GMOs). Under intense pressure from environmental and consumer groups, and several of its member states, the EU suspended its procedures to license GMOs in October 2008. Asked by the US and other GMO-exporting countries to rule on the legality of the EU’s de facto moratorium and suspension of GMO product approvals, the WTO found the EU had acted illegally, contravening the SPS Agreement. The EU moratorium ran counter to the advice of its own scientific committees that the GM products in question were safe.\(^{21}\) Caught between the principles of international law and domestic demands, the EU has now given member states the right to restrict or ban the cultivation of GM crops, even those that have been approved as safe by EU authorities. There are several reasons member states can use to justify their ban/restriction, including objectives of environmental policy, town and country planning, and socio-economic impacts.

Both the hormones and GMO disputes are disputes between developed countries—most notably, the United States and the members of the European Union—regarding the limits of principles of liberalism and embedded liberalism. Yet, in a world of integrated markets, developing countries can get side-swept. Paarlberg,\(^ {22}\) who believes that GMOs are an effective tool to deal with food insecurity, argues that food-poor countries that export to the EU have been harmed by the success of civil society groups in the European Union in stigmatizing GMOs, and restricting the importation of GM food products into the EU.

The food security debate has also clearly been caught in the shifting politics around the governance of food in Europe and elsewhere. Critics of EU policies to promote food-based biofuels have enjoyed considerable success in persuading European governments of the deleterious effects of such policies on land use in the global South. As the demand to produce crops for biofuels increases, they argue, land to produce food is reduced, and pressures rise to convert land unsuitable for food production (for example, tropical forests with high biodiversity). These arguments have succeeded in generating legislative initiatives in the EU to cap mandates for the use of food-based biofuels in the transport sector.

In conclusion, the governance of food in the developed and developing world is intertwined, no less by politics than by existing international agreements. What remains unresolved is the scope for embedded liberalism within the international food governance framework. In directing her attention to just that—the capacity for state action to pursue social purposes—Orford is addressing a highly important question.
