

INTERNATIONAL LAW
AND THE SOCIAL QUESTION

ANNE ORFORD

Fifth Annual
T.M.C. Asser Lecture



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The Annual T.M.C. Asser lecture has been established in honour of the Dutch jurist and Nobel Peace Prize Laureate, Tobias Michael Carel Asser (Amsterdam, 28 April 1838 – The Hague, 29 July 1913), and his significant contributions to the development of public and private international law. The Annual Lecture builds on his vision and mission, it invites distinguished international scholars to take inspiration from Asser's idea of cultivating trust and respect through law and legal institutions, and to examine what it could mean in their area of expertise today. It is the T.M.C. Asser Instituut's flagship lecture and its date commemorates the foundation of the Institute in December 1965.

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FOREWORD

International Law and the Social Question: An Alternative Hague Tradition?

With this fifth edition, the Annual T.M.C. Asser Lecture has offered another late-November afternoon of critical thinking on the state of international law, its past, present, and future. In the last five years, we have annually gathered at the premises of the Peace Palace, once built under Tobias Asser's gaze, to listen to a world-leading international law scholar invited to take note of Tobias Asser's ideas and epoch, and to reflect on the role of law in dealing with the challenges and (potentially radical) changes to society in the 21st century.

Tobias Asser and his generation of international lawyers stood at the cradle of traditional international law and institutions. Earlier in 2019, Arthur Eyffinger published the two-volume biography, *T.M.C. Asser (1838-1913): "in Quest of Liberty, Justice, and Peace"*, in which he examines *inter alia* Asser's role in the Four Hague Conferences on Private International Law (1893-1904) and the two Hague Peace Conferences (1899 and 1907), in the creation of the Permanent Court of Arbitration, and in other international law initiatives such as the Peace Palace library and the Hague Academy. Together these have given rise to the so-called 'Hague tradition of international law'.¹ Asser and his colleagues fought for the peaceful settlement of international disputes, disarmament, and international humanitarian law. In the mission statement of this Annual Lecture, however, I have reflected also on the complexity of the legacy of Asser and his generation.² On the one hand, Asser, a Dutch citizen of Jewish descent, was acutely aware of the times and of the crucial value of mutual trust and

¹ A. Eyffinger, *T.M.C. Asser (1838-1913): "In Quest of Liberty, Justice, and Peace"* (Leiden, Boston: Brill Nijhoff, 2019).

² J.E. Nijman, *The Annual T.M.C. Asser Lecture on the Development of International Law: A Mission for Our Time* (2015), hereinafter p 51.

FOREWORD

respect for the health of any society. Hence, the fundamental question underpinning his work: how can law and legal institutions serve the cultivation of mutual trust and respect in society? On the other hand, these late 19th and early 20th century liberal-humanitarian internationalists were interested in ‘extending the mores of an *esprit d’internationalité* within and beyond Europe. ... [they were the] “founders” of the modern international law profession.’³ In their view, ‘jurists should not remain in the scholar’s chamber but were to contribute to social progress.’⁴ But the world order they helped build was also defined by Eurocentrism, colonialism and racial discrimination.

Last year, Martti Koskenniemi examined the populist backlash against internationalism and its institutions as both a ‘problem of knowledge’ and a ‘problem of politics’.⁵ In his view, it is an expression of ‘status anxiety’ on the part of many citizens and a revolt against the prioritization of the cultural values and interests of the global cosmopolitan elite. To further continue the examination of this backlash, we invited Professor Anne Orford to deliver the 2019 Asser lecture.

A SCHOLAR ON THE INTERSECTION OF INTERNATIONAL LAW, HISTORY, AND POLITICS

Anne Orford is Redmond Barry Distinguished Professor, holding the Michael D Kirby Chair of International Law at Melbourne Law School. She is an Australian Laureate Fellow at that same law school, and an elected Fellow of the Academy of the Social Sciences in Australia.

It is not an overstatement to call professor Anne Orford a world-leading critical scholar. She has received many awards and prestigious research grants, and she has held numerous visiting positions around

³ M. Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: CUP 2002), p. 92.

⁴ *Ibid.*, p. 57.

⁵ Martti Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism*, Fourth Annual T.M.C. Asser Lecture, (T.M.C. Asser Press 2019), p. 17

the world, most recently that of Visiting Professor at Harvard Law School. Anne Orford has published excellent monographs, edited volumes and articles, which have truly impacted our discipline. Personally, I very much look forward to the publication of her next book, *International Law and the Politics of History*.⁶

I admire the scope and depth of her thought, the ability to be profoundly critical about international law but also to open up possibilities for change. This is captured well in her online bio:

‘her scholarship combines study of the history, theory, and practice of international law, and an engagement with debates in history, social theory, economics, and philosophy, in order to *grasp the changing role of international law and its relation to social, political, and economic transformations*.’

Hers are important analytical insights about the role of international law in both international and domestic politics, which are valuable to address urgent global and local questions.

For us at the Asser Institute, one of the most urgent of such questions has been about the current populist moment in domestic politics and the distrust of international law and institutions. It involves concerns about the role of international law in the global economy, that is, in the latter’s construction and deregulation in the light of the climate crisis or social injustices. What work is international law doing, and can it do, in the transformation of society?

Her analysis of the populist moment turns around the role of liberal internationalism and international law in pushing for a neoliberal world order and liberal states, while *neglecting ‘the social’* for the last few decades. International lawyers, she argues, have to put ‘the social question’ back on the table.

⁶ Anne Orford, *International Law and the Politics of History* (CUP, forthcoming in 2021).

A COUNTER-FACTUAL HISTORY OF THE HAGUE TRADITION?

Anne Orford starts her lecture by pointing to another historical moment in The Hague. Decades before Tobias Asser co-presided over the Hague Peace conferences, she argues, ‘the tradition of internationalism in the Hague was initiated in 1872, [...] when Karl Marx and Friedrich Engels attended the tumultuous Fifth Congress of the International Working Men’s Association.’⁷ The Congress is mostly famous for the historic break-up between Marx and Bakunin, but this aside it also reminds us of the decades of the Industrial Revolution and of the latter’s impact on the working classes: poverty, child labour, unhealthy working conditions, and lack of representation in political decision-making on economic law and policy.

Reading the lecture, one wonders: What if this congress had come to define Hague internationalism? This is hardly the place for a counter-factual history of the Hague tradition of international law. With this historical anecdote, however, Anne Orford effectively makes us realise how marginal ‘the social question’ has been in the Hague tradition of international law, and also during recent decades.

While pointing to the late 19th and early 20th century roots of liberal internationalism and the concern for social issues and ‘social progress’ with Tobias Asser and his colleagues, Orford discusses how liberal internationalism has been centred on the liberalisation of commerce and trade, and on concomitant dispute settlement mechanisms, such as arbitration, from the beginning.

After situating her lecture against the backdrop of Tobias Asser and his times, Anne Orford provides us in fact with a short yet profound history of twentieth century international law; she demonstrates how international lawyers as liberal internationalists have come to neglect ‘the social question’. The logic and goals of the market have come to dominate international law-making, while the social – and environmental – implications have not been engaged with, whereas those

⁷ Anne Orford, *International Law and the Social Question*, hereinafter p 2.

profoundly affected by harsh global capitalism have not been represented in these economic law-making processes.⁸ The judicialisation and constitutionalisation of international (economic) law of the past thirty years – Orford discusses the WTO and its dispute settlement body, investor-state dispute settlement (or ISDS), and the trade and economic integration agreements (such as NAFTA, TTIP, TTP and CETA) – have pushed for ‘the international rule of law’ when entrenching the liberalisation of the global capitalist economy and the protection of foreign investment. Reading Orford’s lecture, one cannot help asking: *the rule of whose law?*

THE RETURN OF THE SOCIAL QUESTION AS A QUESTION OF
REPRESENTATION

In Orford’s analysis, the current backlash against the international legal order and its institutions is not so much ‘a reactionary cultural-political movement’ fuelled by cultural anxiety about the ‘*loss of status*’,⁹ as Koskeniemi argued in last year’s Asser Lecture. Nor can it be explained by ‘a concept of the masses and of the elite that is largely empty of any substantive content’.¹⁰ Rather, the economic or material causes of the populist backlash should not be underestimated. Pushing the crisis of the elites further, Orford asks ‘whether there is any substance to the argument that international law has facilitated a takeover of democratic or collectivist decision-making processes about economic issues by particular groups.’¹¹

In this lecture, she points to a loss of democratic control over economic (law-making) decisions and a lack of participation in these deci-

⁸ Cf Alessandra Arcuri, ‘International Economic Law and Disintegration: Beware the Schmittean Moment’, *Journal of International Economic Law*, Volume 23, Issue 2, June 2020, Pages 323–345 in which she discusses in Dani Rodrik’s argument on re-empowering the nation-state and his books: Dani Rodrik, *Straight Talk on Trade: Ideas for a Sane World Economy* (Princeton: Princeton University Press, 2018); see also Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy* (New York: W.W. Norton, 2011).

⁹ Hereinafter pp 16 and 17.

¹⁰ Hereinafter p 16.

¹¹ Hereinafter p 21.

sion-making processes by the working class. In short, there may actually ‘be reasonable grounds for the claim that the project of economic integration through law has had an effect on the social question broadly conceived.’¹²

Anne Orford thus gives us her take on the ‘perceived backlash to international law and institutions’ and suggests it ‘offers an opportunity to think again about the ways of relating politics, economics, and the social that have been consolidated through international law and to do so by posing the issue as a question of representation.’¹³

Here, Orford comes to the core of her argument: *the social question is a question of representation* in decision-making processes about economic issues that have significant distributive effects. International lawyers while being members of the global elites play ‘a double role’ as international and state agents. They operate in both the domestic and the international sphere and they move between these spheres to see where for example the liberal internationalist interests of trade, foreign investment, and their respective dispute settlement mechanisms are served best. They participate in political decision-making that has been ‘lift[ed] [...] out of the democratic process.’¹⁴

Here, Orford points to the rather uncritical understanding of the double role of legal professionals; as if no tensions or conflict exist, as if the development of global governance is ‘apolitical’ or ‘neutral’.¹⁵ It is not. Orford thus questions the self-image of international lawyers and professionals that maintains it is possible to employ this ‘double agency’ without betraying one or the other role. Have we as international lawyers and professionals been more interested in developing the international legal order with instruments such as ISDS than in representing the interests of the working and middle class?

¹² Hereinafter p 22.

¹³ Hereinafter p 4.

¹⁴ Hereinafter p 48.

¹⁵ Hereinafter p 33.

In other words, the current ‘backlash against “globalism” has repoliticised the work of international lawyers, particularly in relation to international agreements addressing trade, investment, and economic integration.’¹⁶ Orford shows how the international order that has been constructed by international lawyers and officials insufficiently recognises the interests of middle- and lower-class populations, and, for that matter, of future generations or of the earth system. In the creation of a global market economy in the course of the 20th century, international lawyers have been guided by economists such as Wilhelm Röpke, Friedrich Hayek, and Ludwig Von Mises and their successors, who pushed for liberalisation of the market from (democratic) state control.¹⁷ As a result, today’s international law and institutions stem from a century of free market thinking under the guise of an ‘impartial legalism’ or a ‘neutral’ international rule of law.

‘International lawyers involved in the negotiation and subsequent interpretation of international agreements had made it seem a matter of legal necessity that certain property rights and economic relations were privileged over other rights, relations, values, and interests. The backlash unsettled that sense of necessity more effectively than two decades of critical legal scholarship has been able to do.’¹⁸

The current backlash is about the *kind* of international legal order we have created, and about the role international lawyers as experts have played in it. It doubts the interests and values that have been given prevalence and it impugns the legitimacy of the current system of international adjudication in for example trade and investment disputes. The proposition that the latter system exists ‘independently of ideology, politics, national interests, or substantive visions of the good’ is unsustainable.¹⁹ ‘The privileging of international adjudication over domestic political processes for resolving conflicts between the protection of property rights and competing values of public health, environmental protection, or survival has’, Orford argues, ‘inevitably

¹⁶ Hereinafter p 35.

¹⁷ Hereinafter p 24 *et seq.*

¹⁸ Hereinafter p 35.

¹⁹ Hereinafter p 43.

embroiled judges and arbitrators in serious ideological controversies and political struggles.²⁰ It has evoked a profound anxiety about the loss of democratic control and participation in this control, in particular for those whose insecurity and uncertainty in life have escalated.

FROM EXPERT RULE BACK TO DEMOCRACY AND THE HAGUE
TRADITION

This would not be a signature “Orford lecture” if it did not provide some pointers for change. Orford makes a call to embrace a repolitisation of the role of international lawyers, and also some soul-searching on the part of these international lawyers. Stop suggesting that the work international lawyers and officials are involved in is ‘neutral’; stop denying that the ‘international rule of law’ comes with political choices that give prevalence to some interests and values over others; acknowledge that when an issue is brought into the ambit of international law, (some) democratic control may be lost.

Orford shows it is time ‘to reject the fragmented closed worlds of international law’ and to ensure that competing interests and values of public health, human rights, environmental protection, or planetary survival are included in and weighed throughout economic decision-making. Moreover, and more generally, holistic reasoning in international adjudication and international law- and policymaking should be the default. International legal and political processes inescapably have social implications. They touch on jobs, labour conditions, and life circumstances of working- and middle-class people. International law, Orford argues, has been complicit in the creation of a global economy that has produced ‘surplus population’ and ‘precarity’²¹ in both the Global South and the Global North, even though the latter has generally actively pursued the neoliberal economic

²⁰ Hereinafter p 44.

²¹ Hereinafter pp 1-4. See also on the fall of the middle class and the rise of a new ‘precariat’, Godfried Engbersen, Erik Snel and Monique Kremer (eds), WRR-verkenning 37 *De val van de middenklasse? Het stabiele en kwetsbare midden* (2017), available online: <https://www.wrr.nl/publicaties/verkenningen/2017/07/06/de-val-van-de-middenklasse>

global order.²² The current backlash forces international lawyers to examine how the public can be better represented in decision-making and to move away from strict expert rule. These types of solutions have however yet to be invented at the global level.

Hence, the democratisation of international decision-making, in general, and of economic decision-making, in particular, requires the urgent attention of international lawyers – not in the least because of their ‘double role’.²³ This demands honesty and openness about implied distributive effects: ‘[i]nternational lawyers can reveal the political choices already being made within the law at moments that appear “technical”, and open those political choices up to democratic approaches to the social question.’²⁴

To conclude, then, what does Orford’s analysis mean for such a well-entrenched tradition as the Hague tradition of international law and its (adjudicative) institutions, which are now taking a considerable part of the heat of the global backlash?

In the late 19th century, the social question emerged together with the rise of industrial capitalism and the rapidly growing proletariat. In 1872 in the Lange Lombardstraat in The Hague, Dr Karl Marx called for the ‘rule of labour’ and the ‘domination of the proletariat’ before the First International collapsed and moved to New York, while anarchist Bakunin left the scene with great annoyance over Marx’s authoritarianism. The rest is history, often dark history.

That said, with the social question placed back on the table, no less than as a *pièce de milieu*, the value of solidarity and the spirit of social justice challenge the Hague tradition of international law to engage. I am grateful to Anne Orford for having articulated the contingency of international law, both past and future. Putting back the social question on the table of international lawyers during that late

²² Hereinafter pp 9-10.

²³ Hereinafter p 22.

²⁴ Hereinafter p 49.

ANNE ORFORD

November afternoon in The Hague, she not only held a mirror up to our faces but she also showed us the relevance – the significance even – of the choices that international lawyers make.

PROF DR JANNE E. NIJMAN
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INTERNATIONAL LAW AND THE SOCIAL QUESTION

ANNE ORFORD

During the nineteenth century, many international lawyers, including Tobias Asser, were immersed in debates about the relation of law and political economy. Asser had been born in 1838 into a world ‘in search of new paradigms’, as the American and French Revolutions and the Napoleonic Wars had ‘turned all social switches’.¹ The discussion of the ‘social question’ had become current in that nineteenth century context of widespread social dislocation, unrest, and revolution caused by market liberalization, industrialization, and urbanization. Its political import was driven by the widespread participation of workers and middle-class radicals on the barricades in European capitals, in campaigns for universal suffrage, and in transnational republican movements.² The social question could be posed in a minimal way: who is going to look after the poor and the needy? But it could also be posed in a much more ambitious form: how do we limit the capacity of the market to demand that everything be sacrificed to its logic?³

One set of answers to the social question was provided by political economists and liberal lawyers, who explicitly considered how projects for the liberalization of basic goods or land could address the question of surplus population – that is, how to deal with the populations rendered superfluous, unnecessary, not useful, or dispossessed as a result of market liberalization.⁴ Nineteenth century liberal reformers advocated an expansion (albeit limited) of the franchise, land law

¹ Arthur Eyffinger, *TMC Asser (1838–1913): In Quest of Liberty, Justice, and Peace* (Brill Nijhoff, 2019), 3.

² See generally Gareth Stedman Jones, *Karl Marx: Greatness and Illusion* (Belknap Press, 2016).

³ Alexander Somek, *The Social Question in a Transnational Context*, LSE ‘Europe in Question’ Discussion Paper 39/2011.

⁴ Anne Orford, ‘Food Security, Free Trade, and the Battle for the State’ (2015) 11 *Journal of International Law and International Relations* 1.

reform, free trade policies, the adoption of social legislation, and challenges to the entrenched privilege of the landed aristocracy and company monopolies, in so doing offering a counter to the influence of revolutionary movements upon politicians, intellectuals, peasants, and insurrectionary workers. The ambition was to reform the state so that it would represent a broader range of interests.

Asser ‘positioned himself as a liberal thinker’ and was committed both to the advancement of ‘liberal commercial legislation’ and to ‘social progress and legal co-operation to that end’.⁵ He had been trained both in the law and in ‘the technical intricacies of political economy’ and ‘sought to solve the social riddle from an international perspective’.⁶ Asser saw it as his vocation to study ‘the objectives of the law of commerce within its wider social context’.⁷ With his liberal legal colleagues, he played a central role in making the concept of international arbitration ‘the mantra of the day’ and putting the Hague on the international law map.⁸

Liberal internationalists were, however, in competition with other transnational republican movements during the period between the age of Napoleon and the Franco-Prussian War, including movements created by politically engaged workers and middle-class radicals.⁹ Indeed, the tradition of internationalism in the Hague was initiated in 1872, long before Asser and his colleagues established the Hague as the home of international arbitration, when Karl Marx and Friedrich Engels attended the tumultuous Fifth Congress of the International Working Men’s Association at which the allies of Marx and Engels clashed with the supporters of the Russian anarchist Mikhail Bakunin over the future of the First International.¹⁰ Those more radical transnational movements saw the emancipation of working people as an international project,¹¹ and worked towards goals of mass

⁵ Eyffinger, *TMC Asser*, 332, 335, 425.

⁶ Eyffinger, *TMC Asser*, 3, 5.

⁷ Eyffinger, *TMC Asser*, 418.

⁸ Eyffinger, *TMC Asser*, 4.

⁹ Stedman Jones, *Karl Marx*, 452.

¹⁰ Stedman Jones, *Karl Marx*, 523–531; Eyffinger, *TMC Asser*, 741.

¹¹ Stedman Jones, *Karl Marx*, 465.

suffrage, the limitation of working hours, freedom of association, the social ownership of infrastructure such as railways, and the public ownership of land.

In the last decades of Asser's life, the social state in Europe, the welfare state in the United Kingdom and the United States, communist revolution in Russia (and later China), and anti-colonial movements in Europe's colonies had emerged as varied responses to the demands posed in the language of the social question. The push to expand participation in law-making beyond landed or colonial elites was central to those responses both in Europe and beyond, involving foundational issues about who or what the state would represent and who would decide. In the world that revolutionaries and idealists sought to bring into being, law-making would involve politics broadly conceived as a struggle among groups participating in making the future through collective action. It is that ongoing attempt to expand representation and participation in law-making about economic issues in response to the social question with which I am concerned here.

In this lecture, I am going to suggest that it is timely to put this question back on the international law table in its more ambitious form – that is, as a far-reaching question about the capacity to participate in political decisions about the material limits to the logic and goals of the market. The social question in that form is posed anew by the challenges currently facing the survival of life on the planet under the conditions of globalized capitalism and by the new forms of conflict, scarcity, displacement, and precarity to which those challenges are giving rise. Some international lawyers do, of course, think about such questions. International human rights lawyers think about them, refugee lawyers think about them, environmental lawyers think about them, and labour lawyers think about them. Yet because international lawyers operate in a functionalized and fragmented world, the social question can largely be treated as separate from the world of trade lawyers, investment lawyers, and lawyers working in the areas of security and use of force. Just as political economists in the nineteenth century created a category of social economy to operate outside

political economy as ‘a place to hide *la question sociale*’,¹² international lawyers focused on economic matters have been able to outsource the question of what will happen to those people rendered surplus, insecure, and precarious by the process of removing barriers to trade, guaranteeing the security of investments, and consolidating an international division of labour on a global scale.

Taking up the language of the social question is one way of bringing these legal regimes together within a common frame. Given that international law, for the large part of at least a century, has been increasingly dedicated to a project of economic integration and liberalization, is there some way to talk within international law about the social question to which economic liberalization gives rise that does not reduce it to an issue of humanitarian or security crises? How might we bring the social question back into the world of international trade law, investment law, and economic integration?¹³ In this lecture, I want to suggest that the current moment of perceived backlash to international law and institutions offers an opportunity to think again about the ways of relating politics, economics, and the social that have been consolidated through international law and to do so by posing the issue as a question of representation.

I. THE CRISIS OF LIBERAL INTERNATIONALISM

For most of the twentieth century, international adjudication had played a relatively minor role in the broader international law field.¹⁴

¹² Elizabeth Marie Sage, *A Dubious Science: Political Economy and the Social Question in 19th-Century France* (Peter Lang Publishing, 2009), 4.

¹³ For earlier attempts to bring issues of trade and investment liberalization into relation with issues of displacement, dispossession, security, and the use of force, see Anne Orford, ‘Locating the International: Military and Monetary Interventions after the Cold War’ (1997) 38 *Harvard International Law Journal* 443; Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003); Orford, ‘Food Security, Free Trade, and the Battle for the State’; Anne Orford, ‘NATO, Regionalism, and the Responsibility to Protect’ in Ian Shapiro and Adam Tooze (eds), *Charter of the North Atlantic Treaty Organisation together with Scholarly Commentaries and Essential Historical Documents* (New Haven: Yale University Press, 2018), 302.

¹⁴ The following section draws on Anne Orford, *International Law and the Politics of History* (Cambridge University Press, forthcoming 2021).

Those, like Asser, who advocated a greater role for international courts and tribunals gained little purchase. To the extent that there were international courts and tribunals, their jurisdiction was not mandatory, and states did not generally allow issues that were perceived as central to their national interest to be subjected to binding adjudication. With the ending of the Cold War that began to change. From the beginning of the early 1990s, liberal democracies took advantage of the new geopolitical situation by attempting a systematic process of remaking international law across a wide range of fields. The twin processes of judicialization and constitutionalization began to intensify. Western states and their international lawyers began more successfully to promote certain core principles of human rights, investment protection, and trade liberalization as foundational or constitutional, and a raft of new international courts and tribunals were created.

The 1990s was the most fertile period for this process of judicialization. The emergence of international criminal tribunals was heralded as signalling the emergence of ‘a new world order based on the rule of international law’,¹⁵ with the highpoint being the adoption in 1998 of the Rome Statute establishing the International Criminal Court. The UN Convention on the Law of the Sea (UNCLOS) entered into force in 1994, and the International Tribunal for the Law of the Sea (ITLOS) began to operate in 1997, with commentators hailing the creation of a mandatory dispute settlement mechanism under UNCLOS as ‘one of the most significant developments in dispute settlement in international law, even as important as the entry into force of the United Nations Charter’.¹⁶ Regional human rights courts in Europe and Latin America became far more active and influential.

The most significant developments in terms of international adjudication, however, were in the areas that were central to entrenching a global capitalist economy, through the expanded operation of adju-

¹⁵ Antonio Cassese, ‘On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ (1998) 9 *European Journal of International Law* 2, at 8.

¹⁶ Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press, 2009), 2.

dicatory regimes in the fields of investment and trade. To take one example, the creation in 1996 of the World Trade Organization complete with a compulsory dispute settlement system was seen by many as a high point in that process of judicialization. For the trade regime, the creation of a new dispute settlement body, and in particular of a standing Appellate Body that would hear appeals from first instance Panels, was heralded as the moment in which the ethos of diplomats was replaced by the rule of law. The WTO dispute settlement system was referred to as the ‘jewel in the crown’ of the organization.¹⁷ Scholars argued that ‘the importance of the mere existence of the Appellate Body to a shift in organizational legal culture’ could not be overestimated.¹⁸ The Appellate Body was seen to represent a model of what might be possible in terms of international courts more generally. It was lauded as an approach to mandatory dispute settlement that ‘surpasses’ in ‘effectiveness and sophistication’ anything ‘achieved by other international tribunals, such as the International Court of Justice’.¹⁹ For those who saw international law as contributing to the creation of a liberal international order, ‘WTO admission and participation would set up a kind of tutorial in rule-of-law values’ and might provide the means to push a state ‘not only to change its trade and trade-related practices, but also to reform its domestic government, liberalize its political system, expand the rights and opportunities of women and other disadvantaged groups, and so on’.²⁰

The creation of the WTO at the completion of the Uruguay Round also led to a significant expansion in the range of activities brought within the scope of the international trade regime. The idea that international integration should ensure that trade was not only ‘free’ but

¹⁷ Cosette D Creamer, ‘From the WTO’s Crown Jewel to its Crown of Thorns’ (2019) 113 *AJIL Unbound* 51.

¹⁸ JHH Weiler, ‘The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement’ (2001) 35 *Journal of World Trade* 191, at 199.

¹⁹ See Robert Howse, ‘Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence’ in JHH Weiler (ed) *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade* 35 (Oxford University Press, 2000).

²⁰ Remarks of Lori Fisler Damrosch, ‘Human Rights, Terrorism and Trade’ (2002) 96 *Proceedings of the ASIL Annual Meeting* 128, at 130.

also 'fair' had been argued by trade lawyers during the 1970s and became a rallying cry for the US administration during the Uruguay Round negotiations. The ambition was to address 'the pressures put upon importing economies by a myriad of subtle (and sometimes not so subtle) government aids to exports'.²¹ In the words of trade lawyer John Jackson, while consumers in importing countries may benefit from the cheaper prices of commodities produced with the support of foreign governments, 'the domestic producer feels outraged that while playing by the free enterprise rules he is losing the game to producers not abiding by such rules'.²² The Uruguay Round negotiations resulted in a raft of new trade agreements that took an ambitious approach to disciplining state regulation in the interests of economic liberalization. Those agreements significantly expanded the range of activities brought within the scope of the multilateral trade regime to include trade-related aspects of intellectual property, trade in services, technical barriers to trade (such as rules relating to product labelling), and the harmonization of public health and safety regulations. WTO members were required to sign on to the full range of WTO covered agreements, thus ensuring that the complex bargaining process involved during the Uruguay Round negotiations was reflected in a single undertaking. The overall ambition of the expanded scope of the WTO agreements combined with the establishment of a sophisticated dispute settlement process was to lift trade disputes out of the realm of domestic politics, lobbying, and special interests. The process of dispute settlement through which trade disciplines would be implemented relied upon the symbolic capital of international law, from the location of the WTO overlooking Lake Geneva to the role of distinguished professors and practitioners in its operations.

In addition, perhaps the most effective mechanism through which the international facilitation of economic liberalization took place was through the consolidation of a transnational regime of investment protection. Home states had sought to internationalize the protection of foreign investment and justify the lawfulness of actions to protect

²¹ John H Jackson, 'The Crumbling Institutions of the Liberal Trade System' (1978) 12 *Journal of World Trade* 93, at 95.

²² Jackson, 'The Crumbling Institutions of the Liberal Trade System', 95.

private rights since the nineteenth century.²³ The creation of mixed commissions or tribunals to settle disputes concerning the property rights of aliens was not a new phenomenon,²⁴ and precedents also existed for granting standing to private investors to make claims before such tribunals. However historically those international claims institutions had been the ‘stepchildren of war and rebellion’, and were typically constituted by victorious states or aggrieved neutrals seeking compensation for their nationals.²⁵ States only consented to private actors bringing such claims in relation to ‘past, strictly circumscribed events in the aftermath of war or revolution’,²⁶ such as the capture, confiscation, or destruction of property, or the inability to collect debts during conflict. International claims practice was thus a ‘retributive instrument of international power politics’,²⁷ while also championed by the peace movement as a means of preventing further conflict.²⁸

That situation had begun to change during the era of formal decolonization, when foreign investors and their home states perceived a threat to the security and profitability of investments in newly independent states and sought to introduce greater protections for investments and private property. A key procedural step was the development by the World Bank of a form of international machinery to address disputes between states and investors. The resulting International

²³ See generally Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013).

²⁴ Kathryn Greenman, ‘Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels’ (2018) 31 *Leiden Journal of International Law* 617.

²⁵ David J Bederman, ‘The United Nations Compensation Commission and the Tradition of International Claims Settlement’ (1994) 27 *New York University Journal of International Law and Politics* 1, at 3.

²⁶ Joost Pauwelyn, ‘Rational Design or Accidental Evolution? The Emergence of International Investment Law’ in Zachary Douglas, Joost Pauwelyn, and Jorge E Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014), 11, at 36.

²⁷ Bederman, ‘The United Nations Compensation Commission’, 6.

²⁸ Heather L Bray, ‘Understanding Change: Evolution from International Claims Commissions to Investment Treaty Arbitration’ in Stephan W Schill, Christian J Tams, and Rainer Hofmann (eds), *International Investment Law and History* (Edward Elgar, 2018), 102, at 119.

Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) 1966 established a centre for facilitating the settlement of disputes. Ibrahim Shihata, who served as Senior Vice President and General Counsel of the World Bank and Secretary-General of ISCID, described the ‘depoliticization of investment disputes’ as its goal.²⁹ ICSID’s proponents stressed that its operation would be founded upon state consent, that ICSID tribunals would only have jurisdiction over disputes that parties specifically agreed to submit for arbitration, and that states could carve out disputes they did not want to submit to ICSID.³⁰ However what had seemed like a purely procedural commitment was later interpreted to provide grounds for jurisdiction.³¹ The resulting transnational regime for investment protection was consolidated and expanded during the 1990s with the negotiation of many new BITs and other broad-reaching agreements such as the Energy Charter Treaty and the North American Free Trade Agreement (NAFTA). The result was a significant increase in resort to international adjudication.

There is a growing sense amongst many internationalist policymakers and academics that the liberal form of international legal order that had been consolidated since the end of the Cold War is facing serious challenges.³² Numerous international lawyers have argued that the many high-profile instances of leaving, denouncing, withdrawing, and

²⁹ Ibrahim Shihata, ‘Towards Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA’ (1986) 1 *ICSID Review of Foreign Investment Law Journal* 1; Ibrahim Shihata, ‘Obstacles Facing International Arbitration’ (1986) 4 *International Tax and Business Law* 209, at 210 (stressing that the objective of ISCID was ‘to “depoliticize” the settlement of investment disputes’ and ‘provide a climate of confidence between investors and states to encourage the flow of resources to developing countries’).

³⁰ Antonio R Parra, *The History of ICSID* (Oxford University Press, 2012), 25.

³¹ In the ‘revolutionary’ award of *AAPL v Sri Lanka*, the tribunal found that the article of the UK-Sri Lanka BIT consenting to submit investment disputes to ICSID gave rights to investors to bring direct claims of treaty breach against Sri Lanka even in the absence of a contract between the investor and the government: *AAPL v Sri Lanka*, ICSID/ARB/87/3 (1990). For the characterization of that award as revolutionary, see Pauwelyn, ‘Rational Design or Accidental Evolution?’, 31.

³² The following section draws on Anne Orford, ‘The Sir Elihu Lauterpacht International Law Lecture 2019: The Crisis of Liberal Internationalism and the Future of International Law’ (2020) 28 *Australian Year Book of International Law* 3.

unsigning that have taken place over the past decade signal that something more significant than standard forms of resistance to or critique of specific international legal regimes may be afoot. In part, a sense that the existing international order is under challenge was triggered by the shift in geopolitics caused by the rise and influence of the BRICS, and particularly China, as economic powers, the resurgence of a more assertive Russia, and the corresponding sense of a decline in US hegemony. In addition, the financial, energy, food, asylum, and climate crises of the early twenty-first century and the backlash against multilateralism gave a new urgency to questions about the potential role of international law and institutions in exacerbating those crises. Perhaps most importantly, both factors contributed to a situation in which liberal internationalism came under attack from within those states that had been its most enthusiastic champions. The growing support in the UK and the US for populist movements attacking multilateralism had an unusually direct effect on international politics, culminating in the Brexit referendum vote, ongoing campaigns to limit the influence of the European Convention on Human Rights in the UK, and the election of the Trump administration in the US on a fiercely unilateralist foreign policy platform. The practical result has been that, with surprising rapidity, the architecture of international treaties and tribunals focused on protecting and promoting economic interests consolidated since the end of the Cold War has begun to unravel.

International investment law was the first field in which commentators began to express concerns about a backlash against internationalism, in the context of mounting criticism of the perceived excesses of investor-state dispute settlement (or ISDS) awards.³³ This began with the withdrawal from ICSID by a group of Latin American states (Bolivia, Ecuador, and Venezuela) beginning in 2007, and since then numerous states in Latin America, Asia, Europe, and Africa have announced their intention to terminate some or all of their bilateral investment treaties or BITs. Perhaps more significantly given their role

³³ See Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer, 2010).

as capital exporters, as Western states increasingly became respondents in investor-state proceedings, a growing political resistance to ISDS emerged within Canada, the EU, and now the US, as evidenced by the popular challenge to inclusion of ISDS provisions in the *Transatlantic Trade and Investment Partnership* with the US (now shelved), the *EU–Canada Comprehensive Economic and Trade Agreement*, and in the renegotiated *North American Free Trade Agreement*. In March 2018, the Court of Justice of the EU held in the *Achmea* case that ISDS provisions in BITs between EU Member States were incompatible with EU law,³⁴ and all EU Member States subsequently declared their agreement to terminate their intra-EU BITs.³⁵ In addition, Italy and Russia have withdrawn from or unsigned the *Energy Charter Treaty*, one of the major multilateral agreements under which ISDS proceedings have been brought.³⁶

A similar challenge is evident in the field of trade and economic integration agreements, with the United States initiating a renegotiation of NAFTA and ‘unsigned’ the *Trans-Pacific Partnership Agreement* (‘TPP’),³⁷ and the UK withdrawing from the EU. In addition, many states have bridled at the limitations on freedom of action and regulation that expansive interpretations of WTO disciplines by the Appellate Body have imposed. In particular, both the Obama and Trump administrations have blocked appointments to the Appellate Body in protest at a series of primarily anti-dumping decisions about which the US disagreed, leading to a situation in which the Appellate Body

³⁴ *Slovakia v Achmea BV (Judgment)* (Court of Justice of the European Union, Case No C-284/16, 6 March 2018).

³⁵ European Commission, *Declaration of the Member States of 15 January 2019 on the Legal Consequences of the Achmea Judgment and on Investment Protection* <https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en>.

³⁶ For a discussion of the Russian withdrawal from participation, see Tania Voon and Andrew D Mitchell, ‘Ending International Investment Agreements: Russia’s Withdrawal from Participation in the Energy Charter Treaty’ (2018) 111 *AJIL Unbound* 461.

³⁷ The US ‘unsigned’ the TPP in a letter dated 30 January 2017 sent to New Zealand, as Depository of the TPP, stating their intention not to become a Party to the TPP and that they have no legal obligations arising from their signature: ‘Trans-Pacific Partnership Agreement (TPP)’, *New Zealand Ministry of Foreign Affairs and Trade* (Web Page), available at <https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/>.

ceased functioning in December 2019. US President Donald Trump used his speech at the 74th session of the UN General Assembly to declare that in relation to the WTO, ‘globalism’ had ‘exerted a religious pull over past leaders, causing them to ignore their own national interests. But as far as America is concerned, those days are over’.³⁸ For trade lawyers, the challenge to *NAFTA* and the impasse at the WTO Appellate Body were symptoms of a broader ‘curtailment of key features of the liberal order, primarily international legal adjudication’,³⁹ and signalled ‘the end of an era’.⁴⁰

The apparent backlash against multilateralism has extended beyond economic matters. Despite the relatively limited capacity of human rights tribunals to compel compliance with their decisions,⁴¹ numerous regional human rights courts have experienced a backlash. In the European context, states including Russia and the UK have developed increasingly strained relations with the European Court of Human Rights in response to decisions relating to prisoner rights, violations of rights in the conduct of military actions, and the property rights of oligarchs.⁴² The long history of resistance to judgments of the Inter-American Court of Human Rights has accelerated in recent years,

³⁸ UNGA, Address by Mr Donald Trump, President of the United States of America (Address by President Trump 2019), UN Doc. A/74/PV.3, 24 September 2019. President Trump’s addresses to the General Assembly in 2017 and 2018 had a similar tone. See further UNGA, Address by Mr. Donald Trump, President of the United States of America (Address by President Trump 2017), UN Doc. A/72/PV.3, 19 September 2017; UNGA, Address by Mr Donald Trump, President of the United States of America (Address by President Trump 2018), UN Doc. A/73/PV.6, 25 September 2018.

³⁹ Sergio Puig, ‘The United States–Mexico–Canada Agreement: A Glimpse into the Geoeconomic World Order’ (2019) 113 *AJIL Unbound* 56 (2019).

⁴⁰ Gregory Shaffer, ‘A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations’ (2019) 44 *The Yale Journal of International Law Online* 1, 17.

⁴¹ See, for example, Veronika Fikfak, ‘Changing State Behaviour: Damages before the European Court of Human Rights’ (2018) 29 *European Journal of International Law* 1091, at 1092 (noting that more than half of the judgments rendered by the European Court of Human Rights over the 60 years since its inception remained unenforced).

⁴² Katja S Ziegler, Elizabeth Wicks and Loveday Hodson (eds), *The UK and European Human Rights: A Strained Relationship?* (Hart Publishing, 2015); Lauri Mälksoo and Wolfgang Benedek (eds), *Russia and the European Court of Human Rights: The Strasbourg Effect* (Cambridge University Press, 2018).

with for example Venezuela denouncing the *American Convention* in 2012, constitutional court judgments in the Dominican Republic (in 2014) and Argentina (in 2017) challenging the authority of the Inter-American Court, and in April 2019 Argentina, Brazil, Chile, Colombia, and Paraguay sending a joint letter sent to the Inter-American Commission on Human Rights setting out their interpretation of the jurisdictional and procedural limits to the system's power.⁴³ In the African context, Gambia, Kenya, and Zimbabwe have each sought to restrict the jurisdiction of various sub-regional human rights courts in response to controversial rulings, and in 2018 the African Union Executive Council adopted a decision to curtail the activity of the African Commission on Human and Peoples' Rights.⁴⁴ At the international level, the US withdrew from the UN Human Rights Council in June 2018, claiming that the Council had become a 'protector of human rights abusers', a 'cesspool of political bias', and that it undermined the national interests and sovereignty of the US and its allies.⁴⁵

In the field of international criminal law, Burundi and the Philippines have withdrawn from the International Criminal Court ('ICC'),⁴⁶ Russia and Malaysia joined the United States in withdrawing their signature from the *Rome Statute*,⁴⁷ and the African Union has adopted a coordinated 'Withdrawal Strategy' arguing that the court has

⁴³ The Inter-American situation is discussed in Jorge Contesse, 'Conservative Governments and Latin America's Human Rights Landscape' (2019) 113 *AJIL Unbound* 375.

⁴⁴ Karen J Alter, James T Gathii and Laurence R Helfer, 'Backlash against International Courts in West, East and Southern Africa: Causes and Consequences' (2016) 27 *European Journal of International Law* 293.

⁴⁵ Mike Pompeo and Nikki Haley, 'Remarks on the UN Human Rights Council' (Press Conference, Treaty Room, Washington DC, 19 June 2018), available at <https://www.state.gov/remarks-on-the-un-human-rights-council/>.

⁴⁶ 'Burundi: Withdrawal', C.N.805.2016.TREATIES-XVIII.10 (28 October 2016); 'Philippines: Withdrawal', C.N.138.2018.TREATIES-XVIII.10 (19 March 2018).

⁴⁷ 'Russian Federation: Communication' C.N.886.2016.TREATIES-XVIII.10 (30 November 2016); 'Malaysia: Withdrawal of the Instrument of Accession', C.N.185.2019.TREATIES-XVIII.10 (15 May 2019). For the earlier US notification of its intention not to become a party to the Rome Statute, see 'United States of America: Communication', C.N.434.2002.TREATIES-21 (6 May 2002).

become a political instrument targeting Africans.⁴⁸ The US threatened to retaliate against ICC judges and prosecutors with travel bans, funds seizures, and criminal prosecution if a potential investigation of war crimes and crimes against humanity in Afghanistan were initiated and extended to cover US nationals,⁴⁹ and in April 2019 revoked the US visa of the ICC Chief Prosecutor, Fatou Bensouda.⁵⁰ In addition, the US has also signalled its intention to withdraw from the *Paris Agreement*,⁵¹ the Optional Protocol to the 1961 *Vienna Convention on Diplomatic Relations*, the *Treaty of Amity, Economic Relations, and Consular Rights* with Iran, the *Intermediate-Range Nuclear Forces Treaty* with Russia and even, for a time, the Universal Postal Union.⁵² Other major powers have indicated limits to their acceptance of international adjudication under the UN *Convention on the Law of the Sea*, with the Russian Federation refusing to take part in the *Arctic Sunrise*

⁴⁸ African Union Assembly, *Decision on the International Criminal Court*, Doc EX.CL/1006(XXX), 28th ord sess, 30–31 January 2017.

⁴⁹ John Bolton, 'Protecting American Constitutionalism and Sovereignty from International Threats' (Speech, The Federalist Society, 10 September 2018), available at <https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court>.

⁵⁰ Marlise Simons and Megan Specia, 'US Revokes Visa of ICC Prosecutor Pursuing Afghan War Crimes', *The New York Times* (online, 5 April 2019), available at <https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html>. See also Alex Whiting, 'The ICC's Afghanistan Decision: Bending to U.S. or Focusing Court on Successful Investigations?', *Just Security* (online, 12 April 2019), available at <https://www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations/> (discussing the relation of those US threats to the decision of the ICC Pre-Trial Chamber on 12 April 2019 to reject the Prosecutor's request to open investigation of war crimes and crimes against humanity in Afghanistan).

⁵¹ United States Department of State, 'Communication Regarding Intent to Withdraw from Paris Agreement' (Media Note, 4 August 2017), available at <https://www.state.gov/communication-regarding-intent-to-withdraw-from-paris-agreement/>.

⁵² On 15 October 2018 the US Secretary of State Mike Pompeo announced the US withdrawal from the Universal Postal Union (UPU): CarrieLyn D Guymon (ed), *Digest of United States Practice in International Law 2018* (US State Department) 113–114, available at <https://www.state.gov/wp-content/uploads/2019/10/2018-Digest-Chapter-4.pdf>. In September 2019 the US rescinded its notice of withdrawal, following the decision of the UPU to adopt a proposal on terminal due rates for which the US had been pushing: 'United States Remains in the Universal Postal Union, Rescinding Its Notice of Withdrawal' (2020) 114(1) *American Journal of International Law* 128.

Arbitration initiated by the Netherlands,⁵³ and China refusing to recognize the award in the *South China Sea Arbitration* initiated by the Philippines.⁵⁴

2. PSYCHOLOGIZING THE BACKLASH

Much commentary in the field of international law has interpreted the current situation as something more coherent than a random collection of withdrawals and challenges to a complex and disorganized set of agreements, institutions, and processes. For many international lawyers, those challenges are understood as the result of a resurgence of ‘populism’ and directed at the ‘liberal international order’ or the ‘international rule of law’.⁵⁵ There is a widespread sense that the backlash against liberal internationalism has something to do with a lack of trust in the experts and institutions that produced this agenda.⁵⁶

⁵³ *Arctic Sunrise Arbitration (Netherlands v Russia) (Award on Merits)* (Permanent Court of Arbitration, Case No 2014–02, 14 August 2015). The Russian Federation indicated by a Note Verbale dated 27 February 2014 to the Permanent Court of Arbitration that it refused to take part in the arbitration.

⁵⁴ *South China Sea Arbitration (Philippines v China) (Award)* (Permanent Court of Arbitration, Case No 2013–19, 12 July 2016). For the Chinese government position, see ‘Statement of the Ministry of Foreign Affairs of the People’s Republic of China on the Award of 12 July 2016 of the Arbitral Tribunal in the South China Sea Arbitration Established at the Request of the Republic of the Philippines’ (12 July 2016), available at https://www.fmprc.gov.cn/nanhai/eng/snhwtclwj_1/t1379492.htm.

⁵⁵ See, for example, Chatham House, *Challenges to the Rules-Based International Order* (The Royal Institute of International Affairs, 2015); Eric Posner, *Liberal Internationalism and the Populist Backlash*, University of Chicago, Public Working Paper No. 606 (January 11, 2017); Samuel Moyn, ‘Beyond Liberal Internationalism’ (Winter 2017) *Dissent* 108; Philip Alston, ‘The Populist Challenge to Human Rights’ (2017) 9 *Journal of Human Rights Practice* 1; Richard Haas, *A World in Disarray: American Foreign Policy and the Crisis of the Old Order* (Penguin, 2017); House of Lords Select Committee on International Relations, *UK foreign policy in a shifting world order*, HL Paper 250, December 2018; Constance Duncombe and Tim Dunne, ‘After liberal world order’ (2018) 94 *International Affairs* 1, at 28; G John Ikenberry, ‘The end of liberal international order?’ (2018) 94 *International Affairs* 7; James Crawford, ‘The Current Political Discourse Concerning International Law’ (2018) 81 *Modern Law Review* 1; Francis Fukuyama and Robert Muggah, ‘Populism is poisoning the global liberal order’, *The Globe and Mail*, January 29, 2018.

⁵⁶ Annelise Riles, ‘The Politics of Expertise in Transnational Economic Governance: Breaking the Cycle’ in Benedict Kingsbury, David M Malone, Paul Mertenskötter, Richard B Stewart, Thomas Streinz, and Atshushi Sunami (eds), *Megaregula-*

For numerous scholars of international law and international relations, populists are seen to be ‘rebell[ing] against the globalized liberal world order’ and the ‘cosmopolitan elite.’⁵⁷ In the words of Eric Posner, ‘[a]n upswing in populist sentiment around the world poses the greatest threat to liberal international legal institutions since the Cold War’.⁵⁸ Withdrawal from international agreements and institutions represented ‘revenge against a political elite’,⁵⁹ who had ceased to support the interests or values of those they were supposed to represent.⁶⁰ ‘The backlash’ has been interpreted by international lawyers as ‘a reactionary cultural-political movement’ expressing nostalgia for ‘a time of confidence in one’s status, and the status of one’s values’, which have since ‘been endlessly ridiculed by the global elites and their human rights client groups’.⁶¹

To a degree, such interpretations of a populist backlash to liberal internationalism have seen international lawyers begin to wrestle with issues of representation and to bring social relations back as a relevant category of analysis. Yet in most such accounts, the focus is organized around a concept of the masses and of the elite that is largely empty of any substantive content. The backlash is understood as a reaction against ‘elites’ of all persuasions rather than a political struggle against

tion Contested: Global Economic Ordering after TPP (Oxford University Press, 2019), 103, at 104.

⁵⁷ Craig Calhoun, ‘Brexit is a Mutiny against the Cosmopolitan Elite’ (2016) 33 *New Perspectives Quarterly* 50; Beate Jahn, ‘Liberal Internationalism: Historical Trajectory and Current Prospects’ (2018) 94 *International Affairs* 43, at 48.

⁵⁸ See Posner, *Liberal Internationalism and the Populist Backlash*, 1.

⁵⁹ Martti Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (T.M.C. Asser Press, 2019), 26.

⁶⁰ Posner, *Liberal Internationalism and the Populist Backlash*, 17 (‘the problem was less that a hegemon like the United States seized an excessive share of the gains from international cooperation, than that elites in all countries supported forms of international cooperation that benefited them and harmed the masses or were perceived to harm the masses. This process was accompanied by a great deal of self-serving propaganda that the elites themselves may even have believed, with the members of the Invisible College [of international lawyers] participating as unwitting servants of power’); Michael Anton, ‘The Trump Doctrine: An insider explains the president’s foreign policy’, *Foreign Policy*, April 20, 2019.

⁶¹ Koskenniemi, *International Law and the Far Right*, 16, 25.

substantive material or social processes.⁶² The distrust of international law and institutions is a distrust of those people who represent the nation-state in the international world and are thus able to play a double game, at once agents of the national and of the international. The reaction against such elites is characterized as a pathological psychological mechanism understood in the languages of status and anxiety.

In addition, international lawyers have argued that the backlash is either not motivated by economic concerns or, to the extent that it is, there is no rational relationship between the populist concern with loss of control over economic decisions and the operation of international law. In last year's Asser lecture, for example, Martti Koskenniemi argued that the backlash against international law 'is not about economic deprivation' but is driven by 'a concern over cultural identity and *loss of status*'.⁶³ It should be understood as a reaction 'against the massive cultural transformation that began in the 1960s: civil rights, women's rights, gay rights, minority rights, the environment, the third world... *café latte*... It is about the fact that Western political leaders no longer "respect" the old values but treat them with contempt'.⁶⁴ The resulting rejection of 'internationalism' and 'globalism' is an 'attack on "global elites", refugees, non-governmental and human rights institutions'.⁶⁵ It has been caused by the internationalist ambitions of 'a left' that has 'lost its bearings and left in its wake an increasingly cynical electorate looking for revenge in iconoclastic attacks on political correctness and a reactionary attachment to nationalist nostalgia'.⁶⁶ In that account, 'backlashers do not care for reform' and are not interested in 'the economics and technology that upholds

⁶² For an early critical engagement with the introduction of a 'value-free' concept of the elite in rationalist social theory, see Herbert Marcuse, *A Study on Authority* (trans Joris De Bres) (London: Verso, 2008 [1936]), 106–111. For an attempt in international law to work with Marcuse's insights about the dialectical utility of the empty descriptive categories that have shaped thinking about authority, see Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).

⁶³ Koskenniemi, *International Law and the Far Right*, 24 (emphasis in original).

⁶⁴ Koskenniemi, *International Law and the Far Right*, 25.

⁶⁵ Koskenniemi, *International Law and the Far Right*, 3, 25.

⁶⁶ Koskenniemi, *International Law and the Far Right*, 22.

global inequality'.⁶⁷ Instead they seek only the 'pure negativity' involved in the drama of 'leaving'.⁶⁸

Similarly, Joseph Weiler has dismissed any claim that 'the rising tide of so-called populism' manifested in 'widespread Euroscepticism' is driven by economic factors.⁶⁹ According to Weiler, '[t]hose who believe that the answers can be found entirely in the realm of the material - unemployment or the uneven distribution of the deserts of Globalism - are mistaken'.⁷⁰ The economic explanation for discontent with the project of European integration 'laughably reduces the human person to his or her material needs'.⁷¹ Rather, the disenchantment with 'European values' of democracy, human rights, and the rule of law is driven by the European abandonment of the classical values of patriotism, collective identity, and religion.⁷² Those who respond to the backlash against the EU and against liberal democracy with 'a narrative of employment and growth, and a more equitable distribution of economic deserts ... fail to understand that not on bread alone does man liveth'.⁷³

The insistence that the backlash is not about economic issues and that the sense of a loss of control is pathological appears to be shared by many international lawyers who have sought to respond to this moment of backlash. Even international lawyers who have significant practical experience in investment arbitration do not explore the possibility that those who resist the impact of international trade and investment agreements on their ability to control economic issues may have any basis for their arguments. Those who do consider the detail of trade and investment agreements argue that the backlash against them or the claims of a democratic deficit are misguided and based

⁶⁷ Koskenniemi, *International Law and the Far Right*, 26.

⁶⁸ Koskenniemi, *International Law and the Far Right*, 26.

⁶⁹ JHH Weiler, 'The European Circumstance and the Politics of Meaning: Not on Bread Alone Doth Man Liveth (Deut. 8:3; Mat 4:4)' (2020) 21 *German Law Journal* 96.

⁷⁰ Weiler, 'The European Circumstance and the Politics of Meaning', 96.

⁷¹ Weiler, 'The European Circumstance and the Politics of Meaning', 96.

⁷² Weiler, 'The European Circumstance and the Politics of Meaning', 97-99.

⁷³ Weiler, 'The European Circumstance and the Politics of Meaning', 99.

on ‘nativist policies’ or the opposition to ‘rules-based multilateralism’ by ‘authoritarian “populist regimes”’.⁷⁴ Instead, international lawyers who see themselves as part of a liberal internationalist project have treated the decision to critique or withdraw from international or regional regimes as pathological, in contrast to the decision to join such regimes, which is presented as a legitimate exercise of sovereignty.⁷⁵ The criticism that ‘investment arbitration interferes with the freedom of action of democratically elected governments, restricting sovereignty’ is rejected on the basis that ‘the conclusion of a treaty is itself an exercise of sovereignty’ and that ‘limiting the discretion of domestic actors is what treaties do’.⁷⁶ The signing of such treaties involves ‘a political choice to limit the discretion of current and future political actors ... in exchange for certain benefits’.⁷⁷

International lawyers have argued that it is necessary to ‘be wary of the increasing rhetoric of scepticism towards international law’ and to ‘defend the communitarian values of international law’ against the possibility of ‘a larger-scale retreat into nativism and unilateralism’.⁷⁸ That literature treats existing institutional arrangements collectively as part of progress towards a liberal international order. Critique or challenge of any one regime or institution is presented as an attack on this overall project and met with calls for defending the ‘international rule of law’.⁷⁹ Rather than being seen as a problem, the removal of many issues from state control is seen to represent a step forward, precisely because in this worldview progress is achieved when politics

⁷⁴ Campbell McLachlan, ‘The Assault on International Adjudication and the Limits of Withdrawal’ (2019) 68 *International and Comparative Law Quarterly*, 501–502; E-U Petersmann, ‘How Should WTO Members React to Their WTO Crises?’ (2019) 18 *World Trade Review* 503, at 504.

⁷⁵ McLachlan, ‘The Assault on International Adjudication and the Limits of Withdrawal’, 499.

⁷⁶ Charles N Brower and Sadie Blanchard, ‘From “Dealing in Virtue” to “Profiting from Injustice”’: The Case Against Re-Statification of Investment Dispute Settlement’ (2013) 4 TDM, available at www.transnational-dispute-management.com.

⁷⁷ Brower and Blanchard, ‘From “Dealing in Virtue” to “Profiting from Injustice”’.

⁷⁸ James Crawford, ‘The Current Political Discourse Concerning International Law’ (2018) 81 *Modern Law Review* 1, at 22.

⁷⁹ McLachlan, ‘The Assault on International Adjudication and the Limits of Withdrawal’, 501.

is eliminated from rational decision-making. Withdrawing from a treaty or a legal regime is treated as self-evidently pathological, irrational, related to questions of status or identity, or based on voter misunderstandings of their economic interests. The generally accepted vocabulary for those accounts is that of psychology, whether in the more scientific form of behaviouralist economics or the more pop psychology version inherent in appeals to status ‘anxiety’.⁸⁰

In contrast to that literature, I am interested in directing our attention away from the attempt to diagnose the psychological causes of the backlash. Attempts by international lawyers and international relations scholars to connect the dots between the rise of populism, the backlash against ‘globalism’, and the relation to specific treaties, agreements, institutions, or arbitral decisions often seem more like the conduct of a Rorschach test, in which each commentator reveals their perception of where the ambitions of international law went too far. Given our training, international lawyers can largely only speculate about the psychological profile of those who support backlash politics. Even detailed empirical studies that have explored the sources of opposition to globalization have proved inconclusive about the substantive issues motivating the backlash.⁸¹

Perhaps more significantly for my argument here, even the most ‘objective’ empirical studies of the drivers for backlash politics are still steeped in the language, assumptions, and methods of individualist psychology, directed to measuring individual responses to ‘globalization’ or to policy positions that are assumed to be substitutes for globalization (for example, being pro-trade or pro-immigration). Such studies give no insight into whether there are grounds for concern about the forms of economic decision-making enabled by international agreements,

⁸⁰ For an example of international legal scholarship drawing on behavioural economics that takes as its object voter behaviour and the psychological drivers of ‘protectionism’ in the current trade wars, see Anne van Aaken and Jürgen Kurtz, ‘Beyond Rational Choice: International Trade Law and the Behavioural Political Economy of Protectionism’ (2019) 22 *Journal of International Economic Law* 601.

⁸¹ For an overview, see Megumi Naoi, ‘Survey Experiments in International Political Economy: What We (Don’t) Know About the Backlash Against Globalization’ (2020) 23 *Annual Review of Political Science* 333.

institutions, or networks, or whether the interpretation and enforcement of international law has shifted economic rights and relations between groups. In addition, the tendency in much academic commentary since the 1960s to discuss support for populism through the lens of psychology has been informed by an unease with mass politics. The liberal literature that equated left and right-wing populisms as expressions of a ‘paranoid style’ in politics has had a long-lasting influence.⁸² It introduced the language of status anxiety as a marker for unease with mass politics. That language infuses recent responses to the backlash against liberal internationalism,⁸³ including that of international lawyers.

I want to ask, instead, what international lawyers can add to this story as experts in the technical details of law and their relation to broad ideological arguments about efficiency, democracy, or the rule of law. International lawyers are well placed to consider whether there is any substance to the argument that international law has facilitated a takeover of democratic or collectivist decision-making processes about economic issues by particular groups. We should be able to offer some insights into whether concerns about the relation of globalization to democratic control over economic decisions are indeed irrational given the work that international lawyers have been doing both to facilitate and to critique the project of economic integration through law over the past decades. For example, does the practice or self-understanding of international lawyers lend any support to the argument that liberal internationalists have primarily understood themselves to represent the interests of a transnationally networked class rather than or in addition to the working class of their nation-state? Does studying the negotiation, interpretation, and enforcement of international agreements offer any insights into their effect on the capacity of different groups to participate in making economic decisions? If so, how have international lawyers facilitated or justified that effect? A focus on the

⁸² See particularly Richard Hofstadter, *The Paranoid Style in American Politics and Other Essays* (Vintage, 1967).

⁸³ For a critical account of that liberal response, see Leo P Ribuffo, ‘Donald Trump and the “Paranoid Style” in American (Intellectual) Politics’ in Jervis, Gavin, Rovner, and Labrosse, *Chaos in the Liberal Order*, 343.

practice and arguments of international lawyers can help to assess whether the backlash against international law and institutions has merely been triggered by a paranoid style of politics that bears no relation to the real world of international law or alternatively whether there may be reasonable grounds for the claim that the project of economic integration through law has had an effect on the social question broadly conceived.

3. THE DOUBLE ROLE OF LIBERAL INTERNATIONALISTS

Whether or not those who support the backlash against international law and institutions are expressing status anxiety or a paranoid style of politics, the sense that international lawyers have a complicated relationship to democracy and the wisdom of the masses is borne out by the writings of liberal internationalists over the past century. There is a long tradition of international lawyers and their economic colleagues reflecting upon their roles in ways that reproduce the idea of global elites as double agents, involved in ‘role-splitting’, invisible colleges, and transnational networks.

We might think of the influential conception developed by the French international lawyer and member of the UN International Law Commission, Georges Scelle, who famously developed the concept of *dédoublement fonctionnel* (role splitting) to address this phenomenon.⁸⁴ Scelle and his inter-war generation were trying to account for what they understood to be a system of international law that was beginning to take shape in the absence of any international institutions that could perform legislative, executive, and judicial functions on behalf of the whole community. Scelle developed a theory of international law to explain that individuals could be understood to be acting either on behalf of the international community or as agents of interna-

⁸⁴ See, for example, Georges Scelle, *Précis de droit des gens* (2 volumes, Paris: Sirey, 1932, 1934); Georges Scelle, ‘Règles générales du droit de la paix’ (1933) 46 *Recueil des cours de l’Académie de La Haye*; Georges Scelle, ‘Théorie et pratique de la fonction exécutive en droit international’ (1936) 55 *Recueil des cours de l’Académie de La Haye* 91; Georges Scelle, ‘Quelques réflexions hétérodoxes sur la technique de l’ordre juridique interétatique’ in Hildebraudo Accioly (ed), *Hommage d’une génération de juristes au Président Basdevant* (Pedone, 1960), 473.

tional law.⁸⁵ He argued that while officials, lawyers, and agencies will always have a national status, to the extent that their actions deal with an international matter, they function as international agents.

The sense of a tension between democracy and liberal internationalism was spelt out more clearly in work exploring international approaches to economic integration.⁸⁶ During the 1930s, the challenge that absorbed liberal international lawyers and political economists was how best to confront the perceived ‘disintegration’ of international law and economic order.⁸⁷ For some, the international law and ‘inte-

⁸⁵ Oliver Diggelmann, ‘Georges Scelle (1878–1961)’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012), 1162.

⁸⁶ The following section draws on my earlier work bringing Ordoliberal thinking on law, planning, and the market into relation with projects of remaking the state through three sites: the UN in the early era of decolonization under the leadership of the economist Dag Hammarskjöld, the project of European integration, and the GATT and WTO. For the contested relationship of Ordoliberal and Hayekian thinking to the GATT and WTO, see Orford, ‘Food Security, Free Trade, and the Battle for the State’; Anne Orford, ‘Law, Economics, and the History of Free Trade: A Response’ (2015) 11 *Journal of International Law and International Relations* 155; Anne Orford, ‘Theorizing Free Trade’ in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016), 701. For an analysis of the shifting relationship of Hayek’s thinking on planning and the rule of law to the project of EU integration through law, see Anne Orford, ‘Europe Reconstructed’ (2012) 75 *Modern Law Review* 275. For the relationship of Ordoliberal, Schmittian, and Hayekian thinking about the state and economic order to the processes of managing decolonization at the UN, see Anne Orford, ‘On International Legal Method’ (2014) 1 *London Review of International Law* 166; Anne Orford, ‘Hammarskjöld, Economic Thinking, and the United Nations’ in Henning Melber and Carsten Stahn (eds), *Peace, Diplomacy, Global Justice, and International Agency: Rethinking Human Security and Ethics in the Spirit of Dag Hammarskjöld* (Cambridge: Cambridge University Press, 2014), 156. For the Suez crisis and the economic consequences of decolonization as a spur to the European integration project and to the remaking of the state through the UN, see Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2010), 67–69. The full argument is forthcoming in Anne Orford, *The Battle for the State: Democracy, International Law, and Economics*.

⁸⁷ See Wilhelm Röpke, *International Economic Disintegration* (W Hodge, 1942); W Friedmann, ‘The Disintegration of European Civilisation and the Future of International Law’ (1938) 2 *Modern Law Review* 194; Ludwig von Mises, ‘Economic Problems: The Disintegration of the International Division of Labour’ in Professors of the Graduate Institute of International Studies (eds), *The World Crisis* (Longmans, Green & Co, 1938) 245–274.

grated world system' made possible by European liberalism had already disintegrated by the end of the nineteenth century.⁸⁸ For others the cause of the decline was protectionist responses to World War 1 and the Great Depression.⁸⁹ For still others, the challenge to the social foundations of international law came from the foreign policies of fascist states and, to a lesser extent, Soviet Russia.⁹⁰ Nonetheless by the 1930s, liberal internationalists shared the sense that the disintegration of the international system was a real problem, that it coincided with the end of European liberalism and empire, and that it meant the weakening of international law.⁹¹ Major international law figures such as Karl Strupp and Hersch Lauterpacht wrote treatises and took part in collaborative projects with economists, historians, and sociologists aimed at creating a new liberal order that could ensure peaceful change from an era of imperial states and economies to one of global economic integration.⁹²

An affiliation of liberal lawyers, economists, sociologists, corporate leaders, publishers, and policy-makers, amongst them the legal scholars Franz Böhm and Hans Großmann-Doerth and the economists Alexander Rüstow, Wilhelm Röpke, Alfred Müller-Armack, Lionel Robbins, Friedrich Hayek, Ludwig Von Mises, and Gottfried Haberer, began to express concerns about the collectivism and optimistic approaches to state planning that had begun gaining support. Through events such as the Colloque Walter Lippmann held in Paris in 1938, the creation of think tanks such as the Mont Pèlerin Society in 1947, and the academic networks associated with Freiburg University, the London School of Economics and Political Science, and the Chicago

⁸⁸ Alexander Rüstow, 'Appendix: General Sociological Causes of the Economic Disintegration and Possibilities of Reconstruction' in Röpke, *International Economic Disintegration*, 267–283.

⁸⁹ Röpke, *International Economic Disintegration*.

⁹⁰ Friedmann, 'The Disintegration of European Civilisation'.

⁹¹ On the relation of liberal conditions of economic order to the existence of international law prior to World War 1, see Friedmann, 'The Disintegration of European Civilisation'; Rüstow, 'Appendix', 273–274; Röpke, *International Economic Disintegration*.

⁹² See Karl Strupp, *Legal Machinery for Peaceful Change* (Constable, 1937); Hersch Lauterpacht, 'The Legal Aspect' in CAW Manning (ed), *Peaceful Change: An International Problem* (MacMillan, 1937), 135–165.

School of Economics, this group analysed what they saw as the emerging crisis of liberalism.⁹³ They developed new proposals for constraining collectivism and sought to develop the foundations of a new liberalism, in part through approaching the question of how to create a competitive market economy as one of international order. For these liberal thinkers, liberalism and parliamentary democracy were not necessarily compatible. They believed that democratic states too easily become the prey of organized special interests and unable to act for the collective good. As my earlier work on the genealogy of economic integration made clear, we can trace from Adam Smith through the 1930 Ordoliberals to the early GATT and on to the WTO the contested influence of that tradition of thinking about free trade that uses the language of protection and non-discrimination to create a sense of the appropriate role of the state in creating the conditions for a competitive market economy. International economic integration through law offered one means of freeing the market from special interests, limiting state planning, and enabling competition.

The work of Friedrich Hayek provides an example of the link made between international economic integration and the defeat of state planning.⁹⁴ Hayek sought to prevent what he perceived as the threats to liberty posed not only by communism and fascism, but also by the proposed post-war planned economies of the United Kingdom, the

⁹³ While a handful of legal scholars and economic historians in France, Germany, Italy, and Sweden had been studying the Ordoliberal approach to economic ordering and its relation to the project of European integration since the 1960s, the publication (in 2004 in French and in 2008 in English) of Michel Foucault's 1978–1979 lectures at the Collège de France reignited interest in that body of work: Michel Foucault, *Naissance de la Biopolitique: Cours au Collège de France, 1978–1979* (Éditions de Seuil/Gallimard, 2004); Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–79* (translated by Graham Burchell) (Palgrave Macmillan, 2008). Legal scholars and economic historians have over the past decade developed a significant body of scholarship linking Ordoliberals to contemporary transnational and international economic ordering through law. For a detailed study of that literature, see Anne Orford, *International Law and the Politics of History* (Cambridge University Press, forthcoming 2021).

⁹⁴ See the discussion of Hayek in Orford, 'Europe Reconstructed', 276–277, 279, 285; Orford, 'Food Security, Free Trade, and the Battle for the State', 57–59; Orford, 'Hammarskjöld, Economic Thinking, and the United Nations', 168–171; Orford, 'Theorizing Free Trade', 726–727.

United States, and France.⁹⁵ Planning necessarily involved the ‘deliberate discrimination between particular needs of different people’ and thus ‘the decline of the Rule of Law’.⁹⁶ For Hayek, one means of dismantling planned economies was through a systematic process of interstate economic integration. He argued that the removal of tariffs and other barriers to the movement of goods and capital had important consequences that were frequently overlooked.⁹⁷ In particular, the absence of such ‘economic frontiers’ made it much more difficult to ‘create communities of interest on a regional basis’ and of an ‘intimate character’.⁹⁸ For Hayek, the destruction of any ‘solidarity of interests’ was the most important overlooked consequence of economic integration.⁹⁹ That in turn would limit the capacity of states to develop monetary policy, regulate methods of production, set minimum wages, limit working hours, prohibit child labour, and tax commodities. Hayek saw the removal of ‘economic frontiers’ and consequent dissolution of the sense of community and sympathy created by the nation state as a strategy to attack planning. Because planning or the ‘central direction of economic activity’ presupposed ‘the existence of common ideals and common values’, international economic integration would make planning more difficult to carry out by limiting the extent to which ‘agreement on such a common scale of values can be obtained or enforced’.¹⁰⁰ For Hayek, economic integration through interstate federalism was thus not merely a means of attacking the capacity of the state to discriminate between national and foreign producers, but rather it was a means of attacking the capacity of the state to discriminate—that is, to plan—at all. Hayek concluded that ‘the abrogation of national sovereignties and the creation of an effective international order of law is a necessary complement and the logical consummation of the liberal program’.¹⁰¹

⁹⁵ FA Hayek, *The Road to Serfdom* (University of Chicago Press Chicago 2007 [1944]).

⁹⁶ Hayek, *The Road to Serfdom*, 82.

⁹⁷ FA Hayek, ‘The Economic Conditions of Interstate Federalism (1939)’ in *Individualism and Economic Order* (University of Chicago Press, 1948) 255–272, at 258.

⁹⁸ Hayek, ‘The Economic Conditions of Interstate Federalism’, 257.

⁹⁹ Hayek, ‘The Economic Conditions of Interstate Federalism’, 258.

¹⁰⁰ Hayek, ‘The Economic Conditions of Interstate Federalism’, 264.

¹⁰¹ Hayek, ‘The Economic Conditions of Interstate Federalism’, 269.

The vision of the relation between economic order and international law that emerged during this period is also well illustrated by the work of the economist and sociologist Wilhelm Röpke.¹⁰² In his 1942 book, *International Economic Disintegration*, Röpke argued that ‘the real ultimate cause of the breakdown of international economic life as well as the functional disorders of the liberal economic system is to be found in the far-reaching disturbances, moral and material, caused by the collectivist principle’.¹⁰³ In a similar vein, Röpke’s 1954 lectures at the Hague Academy of International Law took the demise of liberalism and ‘international planning’ as their target. According to Röpke, the ‘international “open society” of the nineteenth century may be regarded . . . as a creation of the “liberal” spirit’, meaning ‘the widest possible separation of the two spheres of government and economy, of sovereignty and economic exploitation, of Imperium and Dominium’.¹⁰⁴ However the ‘international “open society” of the nineteenth century’ had been destroyed by the emergence of an ‘interventionist-collectivist system’ after World War 2. As a result, international law had ‘entered the phase of disintegration’.¹⁰⁵ The answer to the current impasse was not to ‘turn the national system of collectivism, which has shown itself to be the villain in the piece, into an international one’.¹⁰⁶ Rather, the answer was to abolish that ‘excessive sovereignty’ upon which states drew to undertake ‘collectivist economic control’.¹⁰⁷ To the extent there was a role for international law and institutions, it lay in constraining this excessive sovereignty: ‘the alternative to order provided by the government (planning) is certainly not anarchy but another kind of order, provided by the market’.¹⁰⁸

¹⁰² See further the discussion of Röpke in Orford, ‘Food Security, Free Trade, and the Battle for the State’, 50, 56, 59; Orford, ‘Theorizing Free Trade’, 727–728.

¹⁰³ Röpke, *International Economic Disintegration*, 260.

¹⁰⁴ Wilhelm Röpke, ‘Economic Order and International Law’ (1954) 86 *Recueil des Cours* 203, at 223–4 (emphasis removed).

¹⁰⁵ Röpke, ‘Economic Order and International Law’, 226.

¹⁰⁶ Röpke, ‘Economic Order and International Law’, 241.

¹⁰⁷ Röpke, ‘Economic Order and International Law’, 250.

¹⁰⁸ Röpke, ‘Economic Order and International Law’, 248.

The UK economist Lionel Robbins, one of the principal negotiators of the GATT, was another major figure involved in the attempt to bring into being an international institutional architecture that could foster liberalism.¹⁰⁹ Robbins was appointed to a chair at the LSE in 1929, and was a close collaborator with Hayek, responsible for bringing Hayek to the LSE, first in 1931 as a visiting professor and then as a permanent appointment.¹¹⁰ Robbins' 1937 book *Economic Planning and International Order* was an influential contribution to inter-war debates about the future of international order. Robbins argued that the causes of war could be found in the emergence of 'planning', which had become 'the grand panacea of our age'.¹¹¹ Planning here meant 'collective control or supersession of private activities of production and exchange'.¹¹² Robbins examined the significance of planning 'from a specifically international point of view'.¹¹³ He argued that the international consequences of national planning included the diversion of resources from productive uses, destructive attempts by labour to use democracy as a means to determine the conditions of their employment, and war.¹¹⁴ It was necessary to reject socialist or state planning in favour of a liberal model of economic order premised on 'the free market and the institution of private property', and restrained within suitable limits by a framework of institutions.¹¹⁵

The economic thinking of the 1930s and 1940s strongly influenced the innovative approach taken by UN Secretary-General Dag Hammarskjöld to his role as an international civil servant.¹¹⁶ Hammarskjöld's vision of the proper relation of the state to society and the

¹⁰⁹ See further the discussion of Robbins in Orford, 'Food Security, Free Trade, and the Battle for the State', 51, 56; Orford, 'Theorizing Free Trade', 728.

¹¹⁰ Susan Howson, *Lionel Robbins* (Cambridge University Press, 2011), 163–166, 196–241; Hagen Schulz-Forberg, 'Laying the Groundwork: The Semantics of Neoliberalism in the 1930s' in Hagen Schulz-Forberg and Niklas Olsen (eds), *Re-inventing Western Civilization: Transnational Reconstructions of Liberalism in Europe in the Twentieth Century* (Cambridge Scholars Publisher, 2014), 13, at 28.

¹¹¹ Lionel Robbins, *Economic Planning and International Order* (Macmillan, 1937), 3.

¹¹² Robbins, *Economic Planning and International Order*, 13.

¹¹³ Robbins, *Economic Planning and International Order*, 9.

¹¹⁴ Robbins, *Economic Planning and International Order*, 46, 61–2, 72–3, 96.

¹¹⁵ Robbins, *Economic Planning and International Order*, 6, 222, 227.

¹¹⁶ Orford, 'Hammarskjöld, Economic Thinking, and the United Nations', 156.

market was informed by his training as an economist, his experience as a senior Swedish civil servant involved in fiscal and monetary policy, and his role as an international negotiator involved in planning for the reconstruction of Europe after World War 2.¹¹⁷ The positions that Hammarskjöld took on questions relating to the goals of post-war monetary policy, the role of central banks versus parliamentary bodies in economic planning, and the desirability of forms of international monetary cooperation that would constrain government policy-making revealed his distance from the emerging Swedish Social Democratic orthodoxy.¹¹⁸ As a Swedish civil servant, Hammarskjöld stressed the need for the government to be neutral between competing interests, argued that forms of government intervention were needed to create the necessary conditions for a competitive economic order, and considered that economic policy should be entrusted to ‘institutions that, like central banks, are essentially removed from the direct influence of party politics’.¹¹⁹

Hammarskjöld’s economic thinking shaped the model of the state and of international administration that he promoted both in post-war Europe and later in the decolonized world. His starting premise—like that of many liberal economists of his age, but unlike many of his Swedish Social Democratic colleagues—was that the state is grounded upon and legitimized by economic freedom, and that executive

¹¹⁷ Hammarskjöld was the Swedish delegate to the Paris Conference at which the Marshall Plan was negotiated and a key player in shaping the terms of Sweden’s accession to the Bretton Woods Institutions. See further Örjan Appelqvist, ‘Civil servant or politician? Dag Hammarskjöld’s role in Swedish Government Policy in the Forties’ (2005) 3 *Economic Review* 33; Göran Ahlström and Benny Carlson, ‘Hammarskjöld, Sweden and Bretton Woods’ (2005) 3 *Economic Review* 50.

¹¹⁸ Orford, ‘Hammarskjöld, Economic Thinking, and the United Nations’, 157–164. For the broader milieu of Scandinavian economics within which Hammarskjöld’s thinking developed, see Lars Jonung (ed), *The Stockholm School of Economics Revisited* (Cambridge University Press, 1991); Niklas Olsen, ‘A Second-Hand Dealer in Ideas: Christian Gandil and Scandinavian Configurations of European Neoliberalism, 1945–1970’ in Hagen Schulz-Forberg and Niklas Olsen (eds), *Reinventing Western Civilization: Transnational Reconstructions of Liberalism in Europe in the Twentieth Century* (Cambridge Scholars Publisher, 2014), 137.

¹¹⁹ Dag Hammarskjöld, ‘Centralbankerna i nutidens ekonomiska liv’, föredrag vid Svenska Bankföreningens årsmöte 1935, *Skrifter utgivna av Svenska bankföreningen* 61 (1935), cited in Hans Landberg, ‘Time for choosing: Dag Hammarskjöld and the Riksbank in the Thirties’, (2005) 3 *Economic Review* 13, at 25.

rule may be necessary to create the conditions needed to secure that freedom. That commitment to administrative neutrality rather than state planning, and the preference for executive and expert rule over democratic interest-based politics, subsequently shaped Hammarskjöld's vision of the role of the UN in general, and its engagement with decolonization in particular. According to Hammarskjöld, the emergence of institutional institutions such as the UN represented 'an advance beyond traditional "conference diplomacy"' because they introduced 'permanent organs, employing a neutral civil service' that could act for executive purposes on behalf of the international community.¹²⁰ That 'radical innovation in international life' was premised upon the idea that international civil servants or international arbitrators were capable of acting 'on a truly international basis' and carrying out their tasks 'without subservience to a particular national or ideological attitude'.¹²¹ He took the position that members of the Secretariat could not perform their role properly if they are 'under – or consider themselves to be under – two masters in respect of their official functions'.¹²² Hammarskjöld concluded that if 'the experience shows that this radical innovation in international life rests on a false assumption, because "no man can be neutral", then ... a searching re-appraisal would be necessary'.¹²³

Oscar Schachter, who had been Hammarskjöld's legal advisor at the UN, famously argued that the professional community of international lawyers dispersed throughout the world 'constitutes a kind of invisible college dedicated to a common intellectual enterprise'.¹²⁴ Whether engaged in the governmental, intergovernmental, nongovernmental, or scholarly worlds, the members of that college were part of a unified discipline and a shared endeavor. Increased communication and collaboration between members of the invisible college was

¹²⁰ Dag Hammarskjöld, 'The International Civil Servant in Law and in Fact' in Wilder Foote (ed), *The Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld* (The Bodley Head, 1962), 329.

¹²¹ Hammarskjöld, 'The International Civil Servant in Law and in Fact', 346.

¹²² Hammarskjöld, 'The International Civil Servant in Law and in Fact', 342.

¹²³ Hammarskjöld, 'The International Civil Servant in Law and in Fact', 346.

¹²⁴ Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 *Northwestern University School of Law* 217.

desirable because issues in international law require answers that ‘reflect global positions and actions’.¹²⁵ Like Hammar skjöld, Schachter considered that such ‘global positions’ were not only desirable but possible. Schachter concluded that ‘[s]ince the governments of the world are likely to be ambivalent about traditional international law, concern’, giving meaning to ‘the requirements of “*la conscience juridique*” in the evolution of international law was ‘the noblest function of our invisible college’.¹²⁶

Few if any international lawyers would describe themselves or their role in the terms set out by Scelle, Hayek, or even Schachter. Today’s international lawyers prefer more pragmatic accounts of the role they play in seeking to realize global common goods through the design of regimes that recognize the need for carefully calibrated incentives to encourage compliance. Nonetheless, liberal internationalists such as Anne-Marie Slaughter and Harold Koh still portray lawyers located within state bureaucracies as playing dual roles, engaged at once as domestic actors and as participants in transnational legal processes or embedded international networks.

In her influential book *A New World Order*, Anne-Marie Slaughter argues that ‘government networks’ emerged as a ‘key feature of world order in the twenty-first century’.¹²⁷ For Slaughter, rather than continue to imagine ways of creating an international system that could bring unitary states closer together, it made more sense to start thinking about ways in which states had been ‘disaggregated’, with their now functional parts (legislators, regulators, judiciaries) increasingly operating in functionally specialized ‘government networks’.¹²⁸ The emergence of a ‘world of government networks’ was not just an ‘underappreciated’ fact of international life, but also ‘a more effective and potentially just world order’ than either ‘what we have today’ or ‘a world government in which a set of global institutions perched above

¹²⁵ Schachter, ‘The Invisible College of International Lawyers’, 223.

¹²⁶ Schachter, ‘The Invisible College of International Lawyers’, 226.

¹²⁷ Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004), 1.

¹²⁸ Slaughter, *A New World Order*, 5–6.

nation-states enforced global rules'.¹²⁹ A networked world order would be more effective, because management of transnational problems required flexibility and an ability to harmonize and coordinate responses between counterpart officials free of political interference. And a networked world order would be more just, because the decentralized and dispersed nature of the network offered a means of exercising power without a centralized authority.¹³⁰ Slaughter concluded that '(g)lobal governance through government networks is good public policy for the world', as a 'world order self-consciously created out of horizontal and vertical government networks' could 'create a genuine global rule of law without centralized global institutions'.¹³¹

In the more cybernetically-inflected account developed by Harold Koh, lawyers located within state bureaucracies could also be engaged in transnational legal processes. The actors involved in those processes should no longer be understood as operating within a 'strict two-by-two matrix that divided all law into domestic and international', but were rather engaged in the work of uploading and downloading rules of transnational law from one system to the other, with a view to 'advancing an enlightened global system'.¹³² Legal professionals are engaged in a search for the appropriate legal norms from any source that will help them 'play a creative and positive role in building security, reducing disease, poverty, and pollution, and promoting human rights, global governance, and self-governance'.¹³³ Such conceptions of the roles and functions of international lawyers imagine that internationalism can be embedded in the heart of state bureaucracies and institutions, with no clear demarcation between international actors and state actors.¹³⁴

¹²⁹ Slaughter, *A New World Order*, 1, 7.

¹³⁰ Slaughter, *A New World Order*, 30.

¹³¹ Slaughter, *A New World Order*, 261.

¹³² Harold Hongju Koh, 'Is There a "New" New Haven School of International Law?' (2007) 32 *Yale Journal of International Law* 559, at 572.

¹³³ Koh, "'New" New Haven', 573.

¹³⁴ See generally Didier Bigo, 'Sociology of Transnational Guilds' (2016) 10 *International Political Sociology* 398.

A striking feature of the liberal internationalist accounts I have described so far is the lack of any sense of conflict or struggle involved in the double roles they imagine, whether that be struggles between different policy makers within states seeking to strengthen their domestic policy choices by embedding them within international legal regimes, the potential conflicts that might play out between one set of national interests and a competing set of international obligations, or the broader questions about representation that such accounts raise. International lawyers or experts situated in transnational networks are simply presented as participants in an apolitical form of global governance. Some version of the claim that international lawyers and officials could remain neutral or impartial while representing the juridical conscience or the global public good has been central to legitimising the more ambitious roles claimed for international law in the early decades after the Cold War. Lifting decision-making out of domestic politics is not seen as a problem but represented as a step forward, because in this worldview progress is achieved when politics is eliminated.¹³⁵ Increasingly, ‘the appeal of a global rule of law lies in the promise of protection against the pathologies of internal domestic politics’, and thus the very idea of a transnational rule of law ‘suggests a kind of internal depoliticization’.¹³⁶

In a series of highly influential studies, Yves Dezalay and Bryant Garth portrayed the doubled role of transnational lawyers more critically.¹³⁷ In their view, when lawyers develop legal strategies transnationally, they ‘serve as double agents’, at once promoting their own place in domestic hierarchies and asserting the perceived universalism and

¹³⁵ For a critique of arguments along those lines, see Friedrich Kratochwil, ‘Has the “Rule of Law” become a “Rule of Lawyers”?’ in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart, 2009), 171.

¹³⁶ Paul W Kahn, ‘American Exceptionalism, Popular Sovereignty, and the Rule of Law’ in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005), 198.

¹³⁷ Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (The University of Chicago Press, 1996); Yves Dezalay and Bryant Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (The University of Chicago Press, 2002); Yves Dezalay and Bryant Garth, *Asian Legal Revivals: Lawyers in the Shadow of Empire* (The University of Chicago Press, 2010).

autonomy of the transnational legal systems which they champion. A network of international patron-client relations creates symbolic capital for those who both pay their dues nationally and at the same time succeed in creating transnational relations and distancing themselves from the local structures that produced them.¹³⁸ Those lawyers participate in attacking the monopoly of domestic law and promoting the universals of international arbitration.¹³⁹ Cosmopolitan lawyers use their symbolic capital to ‘construct the requisite neutral place for arbitration – or at least a place that appears as such in the relations between different national powers’.¹⁴⁰ Those lawyers are valuable precisely because of ‘their double agency on behalf of their local interests and the interests of international ... arbitration’.¹⁴¹

The sense that international lawyers and institutions are capable of representing something more than mere national interest continues to shape the way that international lawyers have presented the virtues of major multilateral treaties or explained the legitimacy of international judges or arbitrators. Yet the idealized ways in which the role of international lawyers is conceptualized in those accounts underestimated the struggles that would result when those who benefit from and strategize within transnational alliances successfully began to implement or ‘download’ the policies developed in their invisible colleges into enforceable domestic law.

4. REPOLITICIZING THE ROLE OF INTERNATIONAL LAWYERS

The claim that international lawyers and officials could remain neutral and independent when engaged in transnational legal processes was central to legitimising the more ambitious roles claimed for international law in the early decades after the Cold War. Yet the question of

¹³⁸ Dezalay and Garth, *Dealing in Virtue*, 282.

¹³⁹ Dezalay and Garth, *Dealing in Virtue*, 283.

¹⁴⁰ Dezalay and Garth, *Dealing in Virtue*, 283. For the argument that this double agency ‘is intrinsic to the nature of law itself’, and raises questions about ‘the efficacy and implications of the alternatives to those so acting’, see William Alford, ‘Review of Asian Legal Revivals: Lawyers in the Shadow of Empire by Yves Dezalay and Byrant G Garth’ (2013) 63 *The University of Toronto Law Journal* 671, at 675 .

¹⁴¹ Dezalay and Garth, *Dealing in Virtue*, 293.

whether it was really possible for these double agents to represent both the national and the international without betraying one or the other has become an increasingly pressing one in the age of backlash politics. The backlash against 'globalism' has repoliticized the work of international lawyers, particularly in relation to international agreements addressing trade, investment, and economic integration. Transnationalizing the role of lawyers and policy makers began to seem less like a way of lifting our work out of the messy business of politics and into a world of enlightened reason, and more like just another way of engaging in political struggle.¹⁴²

At the same time, the backlash has made clear that while international agreements or decisions may have appeared to lift economic decision-making out of the control of governments or democratic publics, that result was not inevitable but an effect of contestable interpretations of trade and investment agreements. The current moment of backlash thus made visible both the ways in which international agreements had been able to constrain democratic participation in economic decision-making, while also revealing the ways in which the false sense that such constraint was 'locked in' had been produced. International lawyers involved in the negotiation and subsequent interpretation of international agreements had made it seem a matter of legal necessity that certain property rights and economic relations were privileged over other rights, relations, values, and interests. The backlash unsettled that sense of necessity more effectively than two decades of critical legal scholarship has been able to do.

As I noted earlier, since the ending of the Cold War the international adjudication of disputes over trade and investment has come to play an increasingly significant role in justifying the distribution of wealth and the securing of profits on a global scale. The legitimacy of trade and investment dispute settlement relied upon the symbolic capital of international lawyers, with arbitral tribunals located in internationalist cities such as the Hague and Geneva and senior international law professors or ICJ judges taking up roles as investment

¹⁴² David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape the Global Political Economy* (Princeton University Press, 2016).

arbitrators or WTO Appellate Body members.¹⁴³ However the high political, strategic, and financial stakes of the new forms of international adjudication began to place stress on the need to present international law as neutral, impartial, and free of politics.¹⁴⁴ The intensification of the processes of judicialization and constitutionalization in fields such as international trade law and international investment law placed greater weight on the question of whether or not international adjudicators could interpret and apply international law free from bias, ideology, or politics.

The current impasse at the WTO offers a good illustration of that process. In the euphoria amongst international trade lawyers that greeted the creation of the WTO and the successful conclusion of the Uruguay Round more generally, less attention was paid to the shots that had already been fired across the bow of a more assertive or activist 'self-understanding' on the part of Appellate Body members by member states. The attempt to constrain judicial activism was indicated in various provisions of the Dispute Settlement Understanding (DSU) that sought to preserve political control over the interpretation of the complex bargain that had been made by WTO members and stressed that the dispute settlement body must to defer to negotiated rights and obligations. US government trade lawyers also made clear their view of the limited role of the DSU. Writing in 1996 in response to criticisms of the WTO system by 'economic nationalists', for example, Judith Hippler Bello reassured Americans that the WTO rules were not 'binding' in any straightforward sense. According to Bello, a former Deputy General Counsel in the Office of the US Trade Representative, if a dispute settlement ruling was adverse to a member, 'there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement'.¹⁴⁵ While the WTO improved upon the old GATT regime, it 'did not alter the fundamental nature of the negotiated bargain among sovereign member states'. For Bello, a state that is found not to be in compliance with WTO agreements

¹⁴³ Dezalay and Garth, *Dealing in Virtue*.

¹⁴⁴ See further Orford, *International Law and the Politics of History*.

¹⁴⁵ Judith Hippler Bello, 'The WTO Dispute Settlement Understanding: Less is More' (1996) 90 *American Journal of International Law* 416, at 417.

has a choice. The state can choose to bring its law or measure into compliance, maintain the offending measure or omission but provide benefits to restore the balance of negotiated concessions, or decline to make any changes or to provide compensation and open itself up to retaliation. The only 'sacred WTO imperative is to maintain that balance so as to maintain political support for the WTO Agreement among members'.¹⁴⁶ That is the vision of the WTO that the US has continued to assert.

Yet in the intervening decades, institutional factors saw the WTO adjudicative bodies gain increasing autonomy and independence. These factors included the compulsory nature of the dispute settlement process, the relative independence of that process from state control, the existence of a standing Secretariat that provided support to Panelists and Appellate Body members and had its own view of the agreements, and the difficulties of achieving political decisions due to the commitment to consensus decision-making.¹⁴⁷ This independence of the adjudicative bodies was accompanied by the adoption of an increasingly evolutive approach to interpretation. The process of consolidating a particular approach to interpreting WTO agreements became 'a joint enterprise', carried out 'by economists, international lawyers, and rational-choice political scientists', with a particular focus upon informing doctrinal scholarship and institutional design through diagnosing 'substantive problems' and proposing legal solutions.¹⁴⁸ The field of international economic law was one of the first issue areas in which rational choice analysis was applied in that systematic way, with international economic lawyers and trade economists developing a detailed literature on the economically correct way to interpret trade

¹⁴⁶ Bello, 'The WTO Dispute Settlement Understanding', 417.

¹⁴⁷ Andrew Lang, 'The Judicial Sensibility of the WTO Appellate Body' (2017) 27 *European Journal of International Law* 1096.

¹⁴⁸ See Anne van Anken, 'Rational Choice Theory' in Tony Carty (ed), *International Law: Oxford Bibliographies Online* (Oxford, Oxford University Press, 2012), noting the joint projects between lawyers and economists systematically commenting on WTO Appellate Body jurisprudence, such as that initiated by Petros Mavroidis through the American Law Institute in which each decision is analysed by a legal scholar and an international trade economist, as well as the training program financed by the European Union for Law and Economic Analysis in 'Dispute Settlement in Trade: Training in Law and Economics'.

norms.¹⁴⁹ As a result, while a balance between the imperatives of trade liberalization and respect for state sovereignty was expressed in WTO agreements, the adjudicative bodies demonstrated a marked tendency to interpret those agreements in ways that expanded the constraints on states to take measures perceived as trade-distorting and limited the scope for states to take ‘exceptional’ measures aimed at conserving exhaustible natural resources, safeguarding essential products, or implementing measures to protect human and animal health and safety.

The contrast between the situation at the WTO today and the ambitions expressed by liberal internationalists at its creation are striking. Many states have since bridled at the limitations on freedom of action and regulation that subsequent interpretations of WTO disciplines imposed, but the US in particular has undertaken dramatic moves to restore the balance of rights and obligations to which it understood itself to have agreed when it joined the WTO. In particular, the US acted upon those concerns by taking steps to restrain the autonomy of the Appellate Body, in terms that open up questions about the independence and competing loyalties of Appellate Body members. In 2011, the Obama administration blocked the reappointment of US member Jennifer Hillman for a second term on the Appellate Body, indicating that this was because she had not acted sufficiently forcefully to defend US interests and had not been willing to dissent in the trade remedy cases that concerned the US.¹⁵⁰ Critics of that step pointed to its implications for the concept of judicial independence. In 2013, the Obama administration blocked the appointment of James Gathii to a vacant chair on the Appellate Body, and in 2016 blocked the reappointment of the South Korean member Seung Wha Chang for a second term, on the basis that the US objected to his role in a series of decisions with which the US disagreed.¹⁵¹

¹⁴⁹ van Anken, ‘Rational Choice Theory’.

¹⁵⁰ See the discussion in Jennifer Hillman, ‘Independence at the Top of the Triangle: Best Resolution of the Judicial Trilemma?’ (2017) 111 *AJIL Unbound* 364, at 367.

¹⁵¹ Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 23 May 2016, available at https://www.wto.org/english/news_e/news16_e/us_statement_dsbmay16_e.pdf. See also Gregory Shaffer, ‘Will the US Undermine the World Trade Organization?’, *Huffington Post*, 23 May 2016.

Those simmering disagreements with and challenges to the Appellate Body were intensified after the election of President Trump. Opposition to the global economic order and to existing trade deals had been central to President Trump's worldview for decades.¹⁵² During his campaigning and after his election, he continued to declare his opposition to the WTO and to many other trade deals negotiated during the previous decades, telling journalists that the WTO was 'set up for the benefit of everybody but us', that membership had been 'a disaster for this country', and that the agreement establishing the WTO 'was the single worst trade deal ever made'.¹⁵³ The concerns of the Trump administration were subsequently set out in the US 2018 Trade Policy Agenda.¹⁵⁴ The US argued that it saw numerous examples of cases in which the dispute settlement process had diminished the rights and obligations for which it bargained, particularly in cases involving trade remedies in anti-dumping disputes with China. More broadly, the US argued that WTO agreements should be strictly interpreted as contracts rather than as multilateral, law-making treaties, that Panel and Appellate Body rulings apply only to specific disputes and have no precedential value, that the Appellate Body was wrong to consider itself as something akin to a court, with rulings that carry some level of precedential value, and that the Appellate Body was insufficiently accountable to WTO members. The Trump administra-

¹⁵² Charlie Laderman and Brendan Simms, *Donald Trump: The Making of a World View* (London and New York: IB Tauris, 2017), 104–108.

¹⁵³ Ian Schwartz, 'Full Lou Dobbs Interview: Trump Asks What Could Be More Fake Than CBS, NBC, ABC and CNN?', *RealClear Politics*, 25 October 2017 ('The WTO, World Trade Organization, was set up for the benefit for everybody but us ... They have taken advantage of this country like you wouldn't believe. And I say to my people, you tell them, like as an example, we lose the lawsuits, almost all of the lawsuits in the WTO – within the WTO. Because we have fewer judges than other countries. It's set up as you can't win. In other words, the panels are set up so that we don't have majorities. It was set up for the benefit of taking advantage of the United States; Chris Isidore, 'White House Lauded U.S. Record with WTO, Which Trump Now Calls a "Disaster"', *CNN Money*, 2 March 2018; John Micklethwait, Margaret Talev, and Jennifer Jacobs, 'Trump Threatens to Pull U.S. Out of WTO If It Doesn't "Shape Up,"' *Bloomberg*, 30 August 2018, cited in Chad P Brown and Douglas A Irwin, 'What Might a Trump Withdrawal from the World Trade Organization Mean for US Tariffs?', *Peterson Institute for International Economics Policy Brief* 18–23, November 2018, 1.

¹⁵⁴ Office of the USTR, *2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program*, March 2018.

tion subsequently blocked the appointment of any new Appellate Body members, leading to the situation in which the Appellate Body ceased to be able to function after December 2019.¹⁵⁵

The legitimacy of the WTO agreements relied upon the claim that adjudication of trade disputes would be lifted into a neutral and impartial realm. Politics however has re-entered this neutral realm in numerous ways, the most dramatic of which is the impasse at the Appellate Body. For those international lawyers who see that impasse as the symptom of a broader problem, it represents the pushing of decision-making 'towards the realm of national discretion and away from international oversight'. The effect is 'the curtailment of key features of the liberal order, primarily international legal adjudication'.¹⁵⁶ The situation at the WTO represents 'the end of an era', and 'the close of at least the semblance of the rule of law in international trade relations'.¹⁵⁷

The investment regime has been another flashpoint for the backlash against international law. As we saw earlier, importing and exporting capital states entered into a series of agreements from the 1960s onwards in which the goal had seemed clear – encouraging and securing foreign investment through guaranteeing the rights of foreign property owners. Those agreements adopted the standard technique of leaving contested terms in the substantive agreements, such as 'fair and equitable treatment' or 'expropriation', vague and indeterminate. The arrangements were premised upon regimes ensuring that states retained control over which disputes were subject to investor-state settlement through the requirement of consent to jurisdiction. The overall ambition, which worked for elites in both sets of states, was to lift property disputes involving foreign investors out of domestic

¹⁵⁵ Gregory Shaffer, Manfred Elsig, and Mark Pollack, 'The Slow Killing of the World Trade Organization', *Huffington Post*, 11 November 2017; Chad P Brown and Soumaya Keynes, 'Why Trump Shot the Sheriffs: The End of WTO Dispute Settlement 1.0', *Peterson Institute for International Economics Working Paper 20–4*, March 2020.

¹⁵⁶ Sergio Puig, 'The United States-Mexico-Canada Agreement: A Glimpse into the Geoeconomic World Order' (2019) 113 *AJIL Unbound* 56.

¹⁵⁷ Gregory Shaffer, 'A Tragedy in the Making? The Decline of Law and the Return of Power in International Trade Relations' (2019) 44 *Yale Journal of International Law* 1, at 17.

politics. Of course, this did not mean that the resulting arbitrations were apolitical, but that the politicized nature of the underlying disputes could be avoided through claims to impartial and distanced adjudication. And as we have seen, the legitimacy of that adjudication relied upon the broader legitimacy of international law. The investment regime also relied upon the enforcement powers of all states through provisions that enabled awards to be registered and enforced domestically.

From the 1990s onwards, the nature of that regime and, as a result, debates about its legitimacy began to shift. Arbitrators opened up a bigger range of disputes to settlement through expansionist readings of their jurisdiction. Substantive provisions addressing 'fair and equitable treatment' and direct or indirect 'expropriation' were interpreted in ways that favoured the protection of investors against the effects on profits of routine government regulation aimed at public health, environment protection, or consumer safety. Whereas in earlier eras international claims processes had been directed towards loss suffered during conflict, in the era of BITs the focus of arbitral scrutiny became the everyday conduct of government regulation and its impacts on the profits of foreign investors.¹⁵⁸ Although investment arbitration was not supposed to involve any form of 'precedent', arbitrators developed a shared approach to the meaning of core treaty terms across jurisdictions, based on an expansive sense of the relation between treaty terms and emerging principles of customary international law (largely dependent upon interpreting the past practice of major Western states).¹⁵⁹ In addition, the notion of what conduct could be attributed to states to trigger responsibility for failing to protect the

¹⁵⁸ Bray, 'Understanding Change', 104, 118.

¹⁵⁹ For a sense of debates over the role that custom plays as a means for justifying new interpretations of legal obligations in the field of international investment law, see Stephen Schwebel, 'The Influence of Bilateral Investment Treaties on Customary International Law' (2004) 98 *Proceedings of the ASIL Annual Meeting* 27; José E Alvarez, 'A BIT on Custom' (2009) 42 *New York University Journal of International Law and Policy* 17; CL Lim, 'The Worm's View of History and the Twirling Machine' in CL Lim (ed), *Alternative Visions Of The International Law On Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (Cambridge University Press, 2016), 3; Chin Leng Lim, 'The Strange Vitality of Custom in the International Protection of Property, Contracts, and Commerce' in Curtis A Bradley (ed), *Custom's*

property of investors was read broadly. The overall effect was to dis-embed the economic relations between host states, foreign investors, and local communities from the political situation in which investments were made, and to establish international arbitration as the principal mode of resolving any resulting disputes over the scope of property rights.

As the awards paid out by governments to foreign investors began to reflect very impressive returns on investment, people began to express concern about the power placed in the hands of international adjudicators, and more specifically in the hands of the small number of European and North American men who were repeat players in the arbitration scene.¹⁶⁰ The fact that those arbitrators are appointed on a case by case basis, so that they do not have the security of tenure that is typically considered necessary to ensure independence and impartiality, added to the perception of illegitimacy. Activists challenged the expansive constraints and costs placed on states seeking to implement environmental or public health measures and the empowerment of corporate actors in their role as foreign investors to challenge government decision-making.¹⁶¹

In addition, part of the investment law regime's legitimacy crisis flowed from the asymmetrical nature of the system, in which only investors

Future: International Law in a Changing World (Cambridge University Press, 2016), 205.

¹⁶⁰ Jonathan Bonnitcha, Lauge N Skovgaard Poulsen, and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017), 29 (listing the 21 most frequently appointed investment arbitrators, of whom 19 are from Europe and North America and 2 from Latin America); UNCTAD, *World Investment Report 2018* (United Nations, 2019), 95 (listing the 13 most frequently appointed ICSID arbitrators between 1987 and 2017, of whom 12 are from Europe and North America and 1 from Chile).

¹⁶¹ Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory and the Transnational Institute, 2012); Pia Eberhardt, Cecilia Olivet, and Lavinia Steinfert, *One Treaty to Rule Them All: The Ever-Expanding Energy Charter Treaty and the Power it Gives Corporations to Halt the Energy Transition* (Corporate Europe Observatory and the Transnational Institute, 2018); Lora Verheecke, Pia Eberhardt, Cecilia Olivet, and Sam Cossar-Gilbert, *Red Carpet Courts: 10 Stories of How the Rich and Powerful Hijacked Justice* (Friends of the Earth Europe and International, the Transnational Institute and Corporate Europe Observatory, 2019).

could trigger the dispute settlement process while the costs of the resulting arbitration were born by both parties. This meant that the ISDS regime was a one-way street, in which the best outcome for a state sued by an investor would be that the government would be held not to have expropriated the investor's property but still find itself paying millions of dollars to cover the costs of the arbitration.¹⁶² While many states had been willing to gamble on the resulting system, in the hope that their corporations would win against other states often enough to make the overall game worth the ticket, the payoff was less clear for those whose citizens were largely not in the foreign investing class. The net effect of the system was to transfer wealth from states to private actors as the price of regulating in a growing range of areas. The process became increasingly difficult for elites to justify to their citizenry in terms of impartial legalism. In that context, governments were able to use the language of 'sovereignty' and 'backlash' to withdraw from arbitration and retain some control over the terms of the regime.

The subsequent challenge to the legitimacy of the system has not shaken the conviction of many liberal international lawyers that the settlement of wide-ranging trade and investment disputes through international adjudication is a universally agreed upon ideal that exists independently of ideology, politics, national interest, or substantive visions of the good. The call to continue defending those forms of international adjudication has intensified,¹⁶³ despite the signs that they have produced a world order that is not sustainable.

5. DEMOCRACY, REPRESENTATION, AND INTERNATIONAL LAW

For the two decades following the end of the Cold War, the increasingly expansive role of international arbitrators and tribunals was

¹⁶² On the lack of a 'loser pays' principle in the investment regime, see Bonnitza, Skovgaard Poulsen, and Waibel, *The Political Economy of the Investment Treaty*, 28.

¹⁶³ Isabel Hull, 'Anything Can Be Rescinded' (2018) 40 *London Review of Books* 25; Crawford, 'The Current Political Discourse Concerning International Law'; McLachlan, 'The Assault on International Adjudication and the Limits of Withdrawal'.

legitimized through the claim that judicial reason was exercised in service to apolitical external standards developed by transnational experts rather than through making those adjudicators part of a broader political process.¹⁶⁴ The legitimacy of the standards developed in that jurisprudence depended less on the role of consent to their formulation and adoption, and more on formalist claims that the outcomes were reached through rational processes of decision-making or by reference to neutral principles of efficiency or economic growth.¹⁶⁵ The resulting decisions concerning fundamental normative questions about the meaning of property and its relation to other competing values were justified as technically correct interpretations of trade and investment agreements.¹⁶⁶

The question of whether it was really possible for international lawyers, civil servants, or ‘globalists’ to represent both national interests and international interests without betraying one or the other has become an increasingly pressing one in the age of backlash politics. Current populist challenges raising questions about loyalty or representation go to the heart of those claims. The privileging of international adjudication over domestic political processes for resolving conflicts between the protection of property rights and competing values of public health, environmental protection, or survival has inevitably embroiled judges and arbitrators in serious ideological controversies and political struggles. To the extent that property is a relational concept, every decision to privilege the property rights of one group has implications for the rights and interests of other groups. Claims of neutrality, impartiality, and expertise are fragile bases upon which to assert the legitimacy of that form of rule.

¹⁶⁴ Moritz Renner, ‘The Dialectics of Transnational Economic Constitutionalism’ in Christian Joerges and Josef Falke (eds), *Karl Polanyi, Globalisation, and the Potential of Law in Transnational Markets* (Hart Publishing, 2011), 419.

¹⁶⁵ Andrew T Guzman, ‘Against Consent’ (2012) 52 *Virginia Journal of International Law* 747; Laurence R Helfer, ‘Nonconsensual International Lawmaking’ (2008) *University of Illinois Law Review* 71; Nico Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’ (2014) 108 *American Journal of International Law* 1.

¹⁶⁶ Nicolás M Perrone, ‘The Governance of Foreign Investment at a Crossroad: Is an Overlapping Consensus the Way Forward?’ (2015) 15 *Global Jurist* 1, at 17.

Some proponents of liberal legal internationalism have responded to these challenges by becoming more open about the political character of their project. For example, writing in the aftermath of the US election of President Trump, Harold Koh began to present a far more political picture of transnational legal process.¹⁶⁷ He argued that the goal of the liberal international order is to constrain governments (including new US administrations) that do not share the liberal internationalist view of where national interest lies. The postwar alliance system, Koh wrote, is designed to control not only ‘spoilers of’ but also ‘active predators within, the liberal international order’.¹⁶⁸ Global governance regimes allow liberal internationalists to use international law against any ‘wilful president arriving at the White House with a self-proclaimed radical agenda to change how America engages the world’.¹⁶⁹ Exiting multilateral regimes will be difficult, and if attempted, ‘will be challenged by transnational actors committed to the default agenda’.¹⁷⁰ As a result, governments or democratic majorities that want to defeat the ‘default agenda’ will have to ask themselves ‘how critical, really, are these policy changes and institutional exits?’¹⁷¹ During the period when liberal internationalism was unchallenged, Koh had described his vision of ‘transnational legal process’ as if it ‘operated automatically, organically, as a natural result of transnational interactions’.¹⁷² Faced with governments seeking to disrupt the ‘liberal international order’, he began to describe the transnational legal process as a ‘counter-strategy’.¹⁷³

What then is to be done if we accept that making an issue the subject of international law is not a way of lifting it out of politics but rather changing the form of the struggle? While populist challenges to existing international agreements have focused on their anti-democratic

¹⁶⁷ Harold Hongju Koh, ‘The Trump Administration and International Law’ (2017) 56 *Washburn Law Journal* 413, at 415, 467.

¹⁶⁸ Koh, ‘The Trump Administration and International Law’, 468.

¹⁶⁹ Koh, ‘The Trump Administration and International Law’, 419.

¹⁷⁰ Koh, ‘The Trump Administration and International Law’, 466.

¹⁷¹ Koh, ‘The Trump Administration and International Law’, 466.

¹⁷² Craig Martin, ‘Symposium: The Assumptions of Koh’s Transnational Legal Process as Counter-Strategy’, *Opinio Juris Blog*, 26 February 2018.

¹⁷³ Koh, ‘The Trump Administration and International Law’, 413.

effect, the changes in foreign policy initiated to date by right-wing populist governments have not resulted in greater democratic participation in economic decisions or increased political involvement in the determination of the extent and limit of property rights. The politics of regimes such as the Trump administration reflect a split between different groups of oligarchs and corporate executives rather than any real commitment to enfranchising workers or economic democracy.

A first step is to reject the fragmented closed worlds of international law, that ask us to separate trade and investment from the law relating to human rights or environment or collective security. Trade and investment agreements are already agreements that provide a set of answers to the social question – they are already human rights agreements, they are environmental agreements, and they are collective security agreements. Or to put this differently, it is a mistake to think that trade agreements and environmental agreements and human rights agreements deal with different domains or different relations. They deal with shared issues of social relations, rights to property, and how life is to be exposed to the market, but they deal with those issues according to different ways of thinking – that is, economic thinking, environmental thinking, human rights thinking, or security thinking. The key difference between those regimes is that some, such as investment law, have sophisticated mechanisms for enforcement of awards while those lower in the hierarchy, such as human rights or environmental law, do not.

Thinking about these different fields of law together allows us to focus on what the decisions of trade tribunals or investment arbitrators leave to be addressed by other actors or other regimes. Think about investment awards that protect investors against the loss of future profits they potentially might suffer due to pollution mitigation or climate change regulation, or WTO decisions that constrain the capacity of governments to address the risk of harm to human and animal health and safety. In each of those decisions to protect an expansive conception of one set of property rights, the decision is made to sacrifice other interests in life, health, or the environment. What do we assume

is going to happen in relation to those other interests, or those social questions? Who do we think is going to take them up? Who is to be responsible for human health? Who is to be responsible for the environment? And how are the people who are dispossessed, who are protesting their lack of participation in such decisions, to be represented?

A second response to the recognition that international lawyers and diplomats play a role in making decisions that have distributive effects is to insist upon a more open process of treaty-making internationally. As international law increasingly addresses more and more issues that were once the traditional business of national governments, those issues become part of 'a world that has always been characterized by secrecy, on the ground that relations with foreign powers are too subtle and delicate for publicity, and publicity would weaken a government's negotiating hand'.¹⁷⁴ This has serious implications for democracy and representation. We could think here of the heated political debates that accompanied attempts to negotiate the ambitious TPP and the TTIP agreements, and the criticism that those negotiations were conducted in secret, with the texts not made available to the public of contracting states until the very last minute, and with parliamentarians given limited opportunity to shape the negotiations or peruse the final texts, and then only after signing confidentiality agreements.¹⁷⁵ While the secretive nature of such treaty-making processes may increase the ability of negotiators to reach agreement in a timely fashion, it detracts from the legitimacy of the final outcomes. Many trade and investment agreements give international bodies and experts significant control over regulatory decision-making in sensitive areas such as public health and safety, labour standards, social rights, and environmental protection. Those ambitious trade and regional economic integration agreements have been used to set in train a process of regulatory alignment that prioritizes the creation of a fric-

¹⁷⁴ Philip Allott, 'Britain and Europe: Managing Revolution' in Robert McCorquodale and Jean-Pierre Gauci, *British Influences on International Law, 1915–2015* (Brill, 2016), 56, at 63.

¹⁷⁵ See, for example, Joseph Stiglitz, *Tricks of the Trade Deal: Six Big Problems with the Trans-Pacific Partnership*, Roosevelt Institute Policy Briefs, available at: <http://rooseveltinstitute.org/tricks-trade-deal-six-big-problems-trans-pacific-partnership/>.

tionless world for commercial actors over state responsibilities for protecting human life, health, and the environment. Current challenges to international law and global governance offer an opportunity to reconsider the extent to which it is sustainable to lift such significant political decisions out of the democratic process.

In addition, the recognition that vital decisions are now made in transnational networks or through the contracts that constitute global value chains offers new ways to think about when and where decision-making might be made more participatory and embedded in more robust political processes involving negotiation between competing interests and values.¹⁷⁶ For example, lawyers might participate in attempts ‘to democratize this mighty intergovernmental network of bureaucracies’.¹⁷⁷ The influence and power of current governing structures is in part an effect of the ‘ability to expertly define the scope of any potential policies’.¹⁷⁸ Parliaments are then presented with a *fait accompli* or asked to rubber stamp decisions made elsewhere, rather than having the power to co-produce an agenda, the power of legislative initiative, the power to select the executive, or investigative powers.¹⁷⁹ Legal analysis could open up questions about timing in relation to executive action and when in the process of expert decision-making democratic publics are able to participate. Alternatively, we might consider where and how participation can be enabled within the practices of corporate actors or focus on which collectives or groups are empowered by international law to participate in decision-making. For example, in IDSD regimes, one type of collective, the corporation, is empowered to bring a claim against another collective, the state. Investment agreements give procedural rights to certain groups while other groups, such as traditional landowners, local communities, or

¹⁷⁶ On global value chains, see The IGLP Law and Global Production Working Group, ‘The Role of Law in Global Value Chains: A Research Manifesto’ (2016) 4 *London Review of International Law* 57.

¹⁷⁷ Stéphanie Henneette, Thomas Piketty, Guillaume Sacriste, and Antoine Vauchez, ‘Introduction’ in Stéphanie Henneette, Thomas Piketty, Guillaume Sacriste, and Antoine Vauchez (eds), *How to Democratize Europe* (Harvard University Press, 2019), 1, at 3.

¹⁷⁸ Henneette, Piketty, Sacriste, and Vauchez, ‘Introduction’, 3.

¹⁷⁹ Henneette, Piketty, Sacriste, and Vauchez, ‘Introduction’, 4.

trade unions, are not able to participate in those processes. International lawyers can reveal the political choices already being made within the law at moments that appear ‘technical’,¹⁸⁰ and open those political choices up to democratic approaches to the social question.

A final response could be to explore mechanisms for making it less onerous for states to withdraw from treaties, particularly in situations where judicial or arbitral interpretations of treaty terms are perceived to have expanded beyond the initial rights and obligations to which states and publics understood themselves to have committed. While Brexit and the current stand-off at the WTO threaten to be destructive, both events also involve responses to regimes that are widely perceived to have expanded far beyond the initial rights and obligations to which states and their publics understood themselves to be committing. Particularly when agreements have been negotiated in secret, with limited community participation, and include vague and open-ended terms with far-reaching effects, mechanisms for revision or termination need to be more available and less costly. Extensive sunset clauses are particularly common in investment treaties, with some offering protection for third party property rights for up to twenty years after notification of withdrawal. In relation to the Energy Charter Treaty, for example, parties should now be discussing removing or revisiting the 20-year survival clause to that treaty given the context of climate change. Parties are free to agree to a shorter survival period or to its elimination.¹⁸¹ Where agreements have been negotiated in secret and have far-reaching effects on public interests, it is difficult to justify maintaining costly effects of revision or termination.

¹⁸⁰ For related approaches, see Duncan Kennedy, ‘The Political Stakes in “Merely Technical” Issues of Contract Law’ (2001) 19 *European Review of Private Law* 7; Annelise Riles, ‘Collateral Expertise: Legal Knowledge in the Global Financial Markets’ (2010) 51 *Current Anthropology* 795 (‘Attention to the temporal politics of finance requires an analytical approach that does more than uncover the politics of expertise. The promise of such an approach is that it might help us to apprehend already thriving forms of political response to global capitalism’); Nicolás M Perrone, ‘The international investment regime and local populations: are the weakest voices unheard?’ (2016) 7 *Transnational Legal Theory* 383.

¹⁸¹ See Tania Voon, ‘Modernizing the Energy Charter Treaty: What about Termination?’ (2019) 10 *International Treaty News* 4.

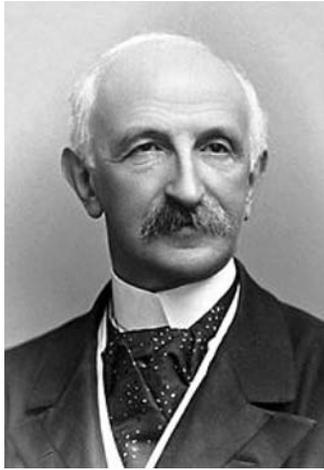
International law offers us a record of the work that has been done to enable the social, economic, and political transformations that have taken place over the past decades. A particular vision of international law triumphed in the late twentieth century. Its displacement poses challenges and opportunities for contemporary critical thinking about the role of law in international politics. Legal systems do not somehow exist in a world beyond politics but instead must be ‘chosen and defended’ politically.¹⁸² There are numerous ways in which this recognition could allow for a more conscious and overt re-embedding of international law-making, adjudication, and enforcement within political processes. What appears utopian in ‘cold’ times when governments are not under pressure to reform institutions and policies might appear realistic – indeed, might just be the only realistic approach – in ‘heated’ times of financial crisis, global pandemics, climate emergency, and populist backlash.¹⁸³

¹⁸² Judith N Shklar, ‘Political Theory and the Rule of Law’ in Stanley Hoffmann (ed), *Political Thought and Political Thinkers* (University of Chicago Press, 1998), 21, at 25.

¹⁸³ S Hennette, T Piketty, G Sacriste, and A Vauchez, ‘Preface to the English Edition’ in Stéphanie Hennette, Thomas Piketty, Guillaume Sacriste, and Antoine Vauchez (eds), *How to Democratize Europe* (Harvard University Press, 2019), xiii, at x.

THE ANNUAL T.M.C. ASSER LECTURE ON THE
DEVELOPMENT OF INTERNATIONAL LAW

A Mission for Our Time



INTRODUCTION

The Annual T.M.C. Asser lecture has been established in honour of the Dutch jurist and Nobel Peace Prize Laureate, Tobias Michael Carel Asser (Amsterdam, 28 April 1838 – The Hague, 29 July 1913), and his significant contributions to the development of public and private international law. It is the T.M.C. Asser Instituut's flagship lecture and its date commemorates the foundation of the Institute in December 1965.

MISSION

Tobias Asser was a man with a vision. A man who kept his finger on the pulse of his time, and who managed to shape the legal develop-

ments during his days.¹ In his Inaugural Address upon the acceptance of his professorship at the University of Amsterdam in 1862, Asser explained that it was his ‘vocation’ to reflect on commercial law and its ‘import’, while ‘taking into consideration the condition of society in [his] century’.² What we learn from his lecture extends beyond the field of commercial law; it shows Asser’s view of the law more generally: ‘law serves primarily to cultivate trust’.³

For its mission statement, the Annual T.M.C. Asser Lecture builds on the vision and mission of the man who has lent it his name. It invites distinguished international lawyers to take inspiration from Asser’s idea of cultivating trust and respect through law and legal institutions, and to examine what it could mean in their area of expertise today.

Current legal scholarship has uncovered the complications of Asser’s mission, and of his internationalist friends and colleagues.⁴ It has pointed to the downside of how the international legal order took shape in spite of the good intentions of these late 19th and early 20th century liberal-humanitarian internationalists. Asser himself was well aware of the dangers of utopian idealism⁵ on the one hand, and the dangers of a nationalistic conservative attitude towards international law on the other. Every age has different needs and pitfalls and hence, sailing between commitment and cynicism,⁶ every age requires a different course.

¹ A Eyffinger, *T.M.C. Asser [1838–1913] Founder of The Hague Tradition* (The Hague: Asser Press, 2011), p. 11.

² The Inaugural Address is included in E.M.H. Hirsch Ballin (ed. and intro.), *A Mission for his Time. Tobias Asser’s Inaugural Address on Commercial Law and Commerce, Amsterdam 1862* (The Hague: Asser Press, 2012), p. 18.

³ *Ibid.*, p. 22.

⁴ See below ‘Tobias Asser in context: One of the ‘Men of 1873’.

⁵ At the Second Hague Peace Conference, Asser himself said ‘you know I am not a Utopian’, Eyffinger, p. 5, n. 45.

⁶ M Koskenniemi, ‘Between Commitment and Cynicism: Outline for a Theory of International Law as Practice’, in *Collection of Essays by Legal Advisors of States, Legal Adviser of International Organizations and Practitioners in the field of International Law* (United Nations, NY, 1999), pp. 495–523; also available online.

Our time, too, is in dire need of reflection. It is marked by the politics of fear, domestically as well as globally. In different ways ‘fear operates directly as a constitutive element of international law and the international ordering and decision-making processes.’⁷ Taking note of Tobias Asser’s legacy in this context, a reorientation of the international order towards an order based on respect and trust urges itself upon us.⁸

Today, with international lawyers perhaps sadder and wiser, it seems more than ever to be an international lawyer’s task to examine – as Asser did in his day – how to respond to ‘the condition of society’. Mutual trust and respect are crucial to the health of any heterogeneous society, whether it is the international society or one of the rapidly growing cities across the globe. A (research) question which Tobias Asser bequeathed to us is ‘how can law serve this aim?’

In spite of well-known complications and dark sides,⁹ in this context the Rule of Law and the principles of human rights are paramount. These may provide direction in our considerations about trust and respect in relation to challenges brought by, for example, globalisation, urbanisation, (global) migration, the atomisation of society, climate change, environmental degradation, the complexity of the traditional North-South divide, the dangers of a renewed international arms race, and the dilemmas of new global actors such as the EU.

Against this backdrop, the Annual T.M.C. Asser Lecture aspires to be a platform for a constructive, critical reflection on the role of law in dealing with the challenges and (potentially radical) changes of the global society of the 21st century.

⁷ D. Joyce & A. Mills, ‘Fear and International Law’, *Cambridge Review of International Affairs*, 19:2 (2006), pp. 309–310.

⁸ A. Carty, ‘New Philosophical Foundations for International Law: From an Order of Fear to One of Respect’, *Cambridge Review of International Affairs*, 19:2 (2006), pp. 311–330; also, J.E. Nijman, ‘Paul Ricoeur and International Law: Beyond ‘The End of the Subject’. Towards a Reconceptualization of International Legal Personality’, *Leiden Journal of International Law*, 20 (2007), pp. 25–64.

⁹ D. Kennedy, *The Dark Sides of Virtue* (Princeton: PUP 2004); also, M. Koskenniemi, *The Gentle Civilizer*, infra note 21, and *The Politics of International Law* (Oxford: Hart 2011).

BACKGROUND

In Asser's time, the cultivation of trust and respect in international relations was indeed an urgent matter. Asser's professional life spans from the second half of 'the long 19th century'¹⁰ up to the eve of the First World War. It was a time of rising nationalism and mounting 'distrust and despair'¹¹ in Europe. The 19th century Eurocentric world order was to collapse only a few years after Asser's death.

In Asser's lifetime America had experienced the Civil War (1861–65) and slavery was abolished after a slow struggle. In Europe, the Crimean War (1853–56) and the Franco-Prussian War (1870–71) brought decades of peace in Europe to an end. With these wars the horrors of industrial warfare began and forever changed the destructive scale and intensity of armed conflict. In Asia, Britain and France forced China, by military means, to open up its markets for opium, on the basis of what they argued to be their sovereign right to free trade, even against the imperial government's desperate attempt to protect its dwindling population from opium addiction. A socialisation into international society and law that was to leave its mark on China's approach to international law well into our time.¹² In the latter days of his career, Asser actively supported the International Opium Conference (1912) to end the opium enslavement of the Chinese people.¹³

With the economic policies of the late 19th century the European empires spurred on the process of modern globalisation in the industrial era. Asser had a keen interest in economics and as the head of a (commercial) law practice for most of his life,¹⁴ he is likely to have been especially sensitive to the process. In his view, transnational trade and commerce were crucial for societies to thrive and develop peace-

¹⁰ Eric Hobsbawm's term for the period 1789–1917.

¹¹ Eyffinger, p. 67.

¹² S. Suzuki, 'China's Perceptions of International Society in the Nineteenth Century: Learning more about Power Politics?', 28 *Asian Perspective* (2004), pp. 115–144.

¹³ Eyffinger, p. 79.

¹⁴ Among his clients, though, were the heirs of King Leopold in the Congo heritance.

fully. In that sense, his perspective on free trade and commerce was utilitarian – in the service of ‘public welfare’.¹⁵ Hence, his stance was not uncritical; transnational trade and commerce facilitated by law and legal institutions were to serve peace and justice, but not to exploit or violate ‘the inalienable rights of a free people’.¹⁶

The urbanisation of 19th century Europe prefigures that of today; it basically put much of the current global city system in place. Asser was outspoken about his love for the ‘distinguished mercantile city’ of Amsterdam: ‘[u]nder any circumstances, wherever my place of domicile, I will forever remain an Amsterdammer!’¹⁷ His love of Amsterdam, however, not only sprung from the city’s tradition of international trade and commerce, but also and even more so from its tradition of openness to strangers and providing a refuge for the expelled. Being a Dutch citizen of Jewish descent, the exclusion and violence brought about by anti-Semitism in European (urban) societies must have been a matter of personal concern for someone so eager to participate in the public sphere. Nationalism, a growing sentiment in Europe, was completely alien to Asser. With his urban cosmopolitan mind-set, his thinking was transnational by nature. His vision of international and personal relations did not hinge upon fear and othering, but rather upon respect and trust.

For Asser, the role of law was vital to the emancipation of the Jewish minorities in Europe, as was the case for any minority. He worked with an integral view of the Rule of Law, to be strengthened as much in the domestic as in the international society. Asser’s dedication to citizens’ rights and the principle of legal equality is visible, for example, in his advocacy of equal voting rights for women.¹⁸

While Asser’s vision of law and legal institutions was all about the ideals of peace, prosperity and justice, he was concrete and prag-

¹⁵ Hirsch Ballin, p. 19.

¹⁶ *Ibid.*, p. 33.

¹⁷ Eyffinger, p. 13.

¹⁸ Hirsch Ballin, p. 13.

matic when aiming to shape developments in private and public international law.

Asser's commitment to international trade and commerce as a means to achieve peace and international solidarity inspired his efforts to deal with 'conflict of laws' and to promote a unification and codification of the rules of private international law. In his view, the demands of international life went beyond economic relations only, and so, being the pragmatic lawyer that he was, Asser presided over the Four Hague Conferences on Private International Law (1893–1904) which managed to produce six conventions ranging from procedural law to family law issues.

While international tensions intensified and an arms race was looming, Asser moved into the realm of public international law – albeit with a good share of realism about state conduct and the pursuit of self-interest. Together with Feodor Martens, Asser stood at the helm of the Hague Peace Conferences (1899 and 1907), which focused on international humanitarian law and the peaceful settlement of disputes. The First Conference resulted in the constitution of a Permanent Court of Arbitration (PCA). Being a prominent arbiter himself, Asser participated in the first case before the PCA. Thanks to Andrew Carnegie, who wanted to ensure a 'wise distribution' of his wealth, the Peace Palace was built and The Hague was thus granted its role of *City of Peace and Justice*.

T.M.C. Asser's mission of peace, liberty and justice defined both his academic and diplomatic work. He intended to listen to 'the voice of the conscience of [his] century' and tirelessly applied his legal genius to develop public and private international law. After decades of neutrality, he would moreover steer the Netherlands back into the diplomatic arena and towards a more prominent international position.

Tobias Asser's legacy is almost too vast for one man. No wonder his role was recognized by the Nobel Prize Committee in 1911. The

Committee portrayed Asser as ‘the Hugo Grotius of his day’.¹⁹ Certainly they both aimed to strengthen the Rule of Law in a global society.²⁰

In contemporary international legal scholarship, Professor T.M.C. Asser was one of the international lawyers Martti Koskenniemi has famously called the ‘Men of 1873’: twenty to thirty European men who were actively engaged in the development of international law and who, thanks to among others Asser and his dear friend Rolin, established the *Institut de Droit International* in 1873.²¹ They were interested in ‘extending the mores of an *esprit d’internationalité* within and beyond Europe. ... [they were the] “founders” of the modern international law profession.’²²

For the men of 1873, international law was to be social and cultural in a deep sense: not as a mere succession of treaties or wars but as part of the political progress of European societies. They each read individual freedoms and the distinction between the private and the public into constructive parts of their law. If they welcomed the increasing interdependence of civilized nations, this was not only to make a point about the basis of the law’s binding force but to see international law as part of the progress of modernity that was leading societies into increasingly rational and humanitarian avenues.²³

Their liberal project was a project of reform, human rights, freedom of trade, and ‘civilization’. In their view, ‘jurists should not remain in the scholar’s chamber but were to contribute to social progress.’²⁴ Koskenniemi further cites Asser to explain the *esprit d’internationalité*:

For Asser, for instance, the tasks of the *jurisconsulte* in the codification of private international law followed “from the necessity to subordinate

¹⁹ See for the Nobel Peace Prize 1911 speech: <http://www.nobelprize.org/nobel_prizes/peace/laureates/1911/press.html>.

²⁰ See Asser’s Address at the Delft Grotius Memorial Ceremony July 4, 1899, p. 41.

²¹ Eyffinger; M. Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: CUP 2002).

²² *Ibid.*, p. 92.

²³ Koskenniemi, pp. 93–94.

²⁴ *Ibid.*, p. 57.

interest to justice – in preparation of general rules for the acceptance of governments to be used in their external relations”²⁵.

BUILDING ON TOBIAS ASSER’S VISION AND MISSION

The institution of this Annual Lecture is inspired by these ‘Men of 1873’ in general and by Asser’s social progressive, ‘principled’ pragmatism, liberalism, and ‘emancipation from legal traditionalism’ in particular.²⁶

Drawing inspiration from the ‘Men of 1873’ is however not without complications. Part of their project was the ‘civilizing mission’, with all its consequences. On the one hand, in the early decades of the 20th century these scholars may have been hopeful about decolonisation and lifting developing countries out of poverty. Asser’s own involvement in attempts to end a most ‘embarrassing chapter of Western history’, the Opium Wars, may also be mentioned. On the other hand, international law as an instrument of civilisation has surely shown its dark sides. Today, more than ever before, we are aware of how internationalism and the Rule of Law have been the handmaidens of (economic, legal) imperialism.²⁷ Scholars have pointed to the ‘double standards’ as ‘an integral part of the ideology of democracy and the rule of law’ so visible in the application of international law even today.²⁸

The rich and somewhat complex heritage of internationalism does not leave room for naïve ideas about international law as an instrument only for the good of liberal-humanitarian reform; if ‘[l]egal internationalism always hovered insecurely between cosmopolitan humanism and imperial apology... [and i]f there is no perspective-

²⁵ Ibid., pp. 57–58.

²⁶ Hirsch Ballin, pp. 12 and 2.

²⁷ E.g. A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: CUP, 2005).

²⁸ A. Carty, ‘The terrors of freedom: the sovereignty of states and the freedom to fear’, in J. Strawson (Ed.) *Law after Ground Zero* (London: Glasshouse Press, 2002), pp. 44–56.

independent meaning to public law institutions and norms, what then becomes of international law's universal, liberating promise?'²⁹

While for some this rhetorical question marks the end-point of possible legal endeavours, the Annual T.M.C. Asser Lecture hopes to be a place for reflecting critically on what lies *beyond* this question. As Koskenniemi points out, '[i]n the absence of an overarching standpoint, legal technique will reveal itself as more evidently political than ever before.'³⁰ And so, since '[i]nternational law's energy and hope lies in its ability to articulate existing transformative commitment in the language of rights and duties and thereby to give voice to those who are otherwise routinely excluded', we ask: What does the *esprit d'internationalité* mean today and what could it mean in and for the future?

JANNE E. NIJMAN

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Academic Director of the T.M.C. Asser Instituut,
The Hague*

²⁹ Koskenniemi, p. 513.

³⁰ *Ibid.*, p. 516.

INTERNATIONAL & EUROPEAN LAW AS A SOURCE OF TRUST IN A HYPER-CONNECTED WORLD

Contours of the Asser Strategic Research Agenda 2016–2020

INTRODUCTION

The T.M.C. Asser Instituut was founded in 1965 as an interuniversity institute for international law in The Hague. Over the past 50 years, the institute has developed into an internationally renowned centre of expertise in the fields of public international law, private international law and European law.

Located in The Hague, the ‘International City of Peace and Justice’, the Asser Institute is the established location where critical and constructive reflection on international and European legal developments takes place. In the vicinity of the many Hague international (legal) institutions, diplomatic missions, and government ministries, the institute exercises strong convening power and attracts legal scholars from around the world to present and test cutting-edge ideas in their respective fields of expertise.

The Asser Institute has a strong tradition in pursuing independent research. The coming years will see the institute build on this research expertise and further strengthen its academic profile whilst fostering its orientation towards fundamental and independent policy-oriented research.

In doing so, the Asser Institute will continue to fulfil the following roles:

- A facilitator for all Dutch Law Schools that wish to collaborate with Asser in research networks and projects and/or in knowledge disseminating activities.

- A vanguard institute for the University of Amsterdam (UvA) in The Hague (for the UvA Law School in general and the Amsterdam Center for International Law (ACIL) in particular).

MISSION

The T.M.C. Asser Instituut aims to further the development of international and European law in such a way that it serves a cultivation of trust and respect in the global, regional, national and local societies in which the law operates.

CONTOURS OF THE ASSER STRATEGIC RESEARCH AGENDA 2016–2020

Pursuant to the institute's mission, the Asser Strategic Research Agenda (ASRA) 'International & European law as a source of trust in a hyper-connected world' aims to examine how law as one of the social institutions can contribute to the construction and cultivation of trust and trusting relations needed for cooperation in this large and hyper-connected world.

It will guide the further development of the institute's research capacity and it will contribute to further strengthening Asser's intellectual identity and its position at the interface of the world of legal academia and legal practice.

In the ASRA, the Asser Institute's research is structured along three research strands and an architrave. The latter deals with more general conceptual questions about trust, trustworthiness, and trust-building effects of international and European law fostering the overarching, more abstract and loosely defined normative framework. The three strands are separate but mutually interlinked:

- Human Dignity and Human Security in International and European Law
- Advancing Public Interests in International and European Law

- Adequate Dispute Settlement and Adjudication in International and European Law

HUMAN DIGNITY AND HUMAN SECURITY IN INTERNATIONAL
AND EUROPEAN LAW

If law cannot provide a sense of human dignity and security, it falls short of the cultivation of trust. Upholding the Rule of Law and a generally high level of human rights protection contributes to the development of trust (and, arguably, vice versa). The research strand Human Dignity and Human Security in International and European Law adopts as its normative framework a human rights approach to contemporary global challenges, inter alia in the field of counter-terrorism, international criminal law, international humanitarian law, international trade, environmental protection, European private international law, and the law of EU external relations. It examines what it means to safeguard human dignity – also in relation to human security – in these areas.

ADVANCING PUBLIC INTERESTS IN INTERNATIONAL
AND EUROPEAN LAW

Both at the European and international level, the dual impact of globalisation and fragmentation has complicated the use of legislation and regulation in safeguarding public interests. Advancing Public Interests in International and European law aims to critically examine how international and European law may further protection of public interests in different areas, ranging from the governance of sports and media in Europe to natural resources, trade, and environmental protection at the international level. Research within this strand will engage with a large set of questions centred on the potential synergies and trade-offs between different public interests and private interests. Possible normative frameworks for reconciling conflicting values are, for example, the principle of proportionality and variants of the constitutional approach.

ADEQUATE DISPUTE SETTLEMENT AND ADJUDICATION
IN INTERNATIONAL AND EUROPEAN LAW

By effectuating the law – and thus upholding the Rule of Law –, courts, tribunals and other dispute settlement mechanisms provide fairness, security, stability and predictability. All of them values conducive to trust. Courts, tribunals and other dispute settlement mechanisms can perform this function adequately only if they, in turn, are perceived as trustworthy in speaking and enforcing the law. The research strand Adequate Dispute Settlement and Adjudication in International and European Law examines the adequacy of dispute settlement and adjudication in various areas, as diverse as foreign investment and transnational civil and commercial disputes, doping and sports more generally, cross-border civil disputes, international crimes, and classic inter-state relations.

LOOKING AHEAD

Over the period of this research agenda, the institute will:

- Conduct high-quality independent research – both fundamental research and policy-oriented research –, in order to contribute to current academic and policy debates within the scope of the aforementioned research strands.
- Increase its research capacity, especially through the promotion and fostering of PhD research in international and European law.
- Deliver research-based, cutting-edge, high-level policy-oriented meetings, (professional) education modules and public events of knowledge dissemination.
- Intensify – in areas where the institute’s research expertise can be brought to bear – its cooperation and engagement in European and international academic networks, as well as in the national, European and international arenas of policy formation and legal practice.

More information about the Asser Institute’s research & activities can be found on the website: www.asser.nl.

THE ANNUAL T.M.C. ASSER LECTURE SERIES

The Annual T.M.C. Asser Lecture is a platform for a critical, multi-disciplinary and constructive reflection on the role of law in the (potentially radically) changing global society of the 21st century, and a high-level event within the context of our research programme '*International & European law as a source of trust in a hyper-connected world*'.

In 2015, Professor Joseph Weiler (President of the European University Institute in Florence, and University Professor at NYU School of Law) delivered the Inaugural Annual T.M.C. Asser Lecture on '*Peace in the Middle East: has International Law failed?*' in which he identified an indeterminacy issue in the legal framework of belligerent occupation that allows for different interpretations. This, according to Weiler, has turned into a political dispute about the facts, for which international law can provide no more than a roadmap.

In 2016, Onora O'Neill, Professor Emeritus of Philosophy at the University of Cambridge and crossbench member of the British House of Lords, spoke about '*Accountable Institutions, Trustworthy Cultures*' and how rules are not enough. The ethics and culture of institutions, international or otherwise, are important for the trustworthiness of these institutions. This is an important argument that still resonates in these days of institutional distrust.¹

In 2017, Saskia Sassen, Robert S. Lynd Professor of Sociology at Columbia University (NY), discussed the relations between globalisation, economic development and global migration in the lecture entitled '*A Third Emergent Migrant Subject Unrecognized in Law: Refugees from "Development"*'. She asked: 'Is there any role for inter-

¹ O. O'Neill, *Accountable Institutions, Trustworthy Cultures* (The Hague, T.M.C. Asser Press 2017).

national law in the prevention of, and protection against, expulsions caused by the accelerating destruction of land and water bodies?’²

In 2018, Martti Koskenniemi, Professor of International Law at the University of Helsinki and Director of the Erik Castrén Institute of International Law and Human Rights, gave the lecture ‘*International Law and the Far Right: Reflections on Law and Cynicism*’ in which he critically reflected on the general state of international law, as well as on its role in the rise of the far right.³

For more information on the Annual Lecture Series, registration and programme, please go to: www.asser.nl/annual-lecture, or contact TMCAsserLecture@asser.nl

² S. Sassen, *A Third Emergent Migrant Subject Unrecognized in Law: Refugees from ‘Development’* (The Hague, T.M.C. Asser Press 2018).

³ M. Koskenniemi, *International Law and the Far Right: Reflections on Law and Cynicism* (The Hague, T.M.C. Asser Press, 2019)

ABOUT THE AUTHOR



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Anne Orford on her lecture *International Law and the Social Question*:

‘While international law has played a central role in creating the conditions for market liberalization on a global scale, many international lawyers have paid less attention to the social question – that is, the question of who is able to participate in political decision-making about economic relations and property rights.

The current moment of perceived backlash to international law and institutions offers an opportunity to think again about the ways of relating politics, economics, and the social that have been consolidated through international law and to do so by posing the issue as a question of representation.

How might international economic law-making and adjudication be re-embedded within political processes? And how can foundational political questions about property, security, survival, and freedom be returned to democratic control?’

