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Critical Law and Development

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> *The idea of development stands like a ruin in the intellectual landscape. Delusion and disappointment, failures and crime have been the steady companions of development and they tell a common story: it did not work.*[1]

Introduction: the "development crisis"

It is not uncommon to hear the international development project being referred to in terms of crisis. Strangely, however, the use of the word crisis in this context often seems to be somewhat non-urgent. After all, if the development project really is in crisis then it is a crisis that has been in course since at least the end of the Second World War. A very good case could even be made for the proposition that this crisis significantly predates the post-war decolonization process and, in fact, dates back to the colonial period. In 1922 Lord Lugard, a prominent colonial administrator, articulated the so-called "dual mandate" according to which colonialism was justified as part of the universal historical mission of the imperial powers, which were under two moral duties:[2] "to bring the blessings of Western civilisation to the inhabitants of the tropics and to activate neglected resources in 'backward' countries for the benefit of the world economy".[3] As this chapter will argue, with some modifications, these two principles continue to be central to the development project, which has not only failed to address its own crisis, but has also failed abysmally to address the crisis faced by a significant portion of the inhabitants of the planet.

Failing to understand the urgency of the development crisis somehow reflects the failure of the whole project. As if it does not matter: *that* millions of people have been deprived of their social, cultural, political, economic and legal autonomy, not to mention the most basic of life's necessities; *that* after the

[1] Wolfgang Sachs, "Introduction" in Wolfgang Sachs (ed.), *The Development Dictionary: A Guide to Knowledge as Power* (Zed Books 2009).
[2] Lord Frederick J D Lugard, *The Dual Mandate in British Tropical Africa* (Frank Cass & Co, 1922)
[3] Jürgen Osterhammel, "Colonialist Ideology" in *Colonialism: A Theoretical Overview* (trans. Shelley L Frisch) (Markus Winer, 1997), 109-110.

succession of endless ideas, emerging from some strange coalition of theory and institutional politics, about what development might mean, or should be, we seem to have made no appreciable gains in achieving it in practice or even being quite sure what it is; *that* since the Washington Consensus, even that most arbitrary and unsatisfactory mode of measuring so-called development, by economic growth, has shown that the gap between developed and developing economies has on average grown for the first time since the end of the Second World War.[4] Despite the plethora of international, intergovernmental and governmental bodies specifically dedicated to the development project, despite the focussed attention to the question from nearly every other international and intergovernmental institution, despite an industry of non-governmental organizations and civil society organizations working tirelessly, despite the combined efforts of the world's social, political, legal and economic elite gathered together annually at Davos under the auspices of the World Economic Forum,[5] in other words despite the endless resources of all types poured into the development project, achieving – or imposing – development has proved remarkably elusive. Consequently, millions of people continue to live in material conditions that are unacceptable by any standard of decency.

On the other hand, as crises go this has been a rather successful one for the West.[6] The failure of the development process has allowed the Western world to maintain most of its historic geo-political and material advantages, while at the same time leveraging the consequent weakness of the so-called developing world in order to find new ways of extracting resources and capital on advantageous terms. Understood this way, one might argue that the real crisis is that the enormous apparatus of the international development project is the very reason that a significant part of the planet continues to live in unacceptable material conditions. The role of law in this apparatus, both as a means of exporting Western norms and as a means of extracting resources on advantageous terms, is central. The pivotal issue here turns on the process by which the globalization of Western law, in the form of international law, has mediated the connection between colonialism and capitalism in the post-World War Two period.

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[4] Julio Faundez, "International economic law and development: before and after neo-liberalism" in Julio Faundez and Celine Tan (eds), *International Economic Law, Globalization and Developing Countries* (Edward Elgar, 2010), 25. On the inevitability of this, see Giovanni Arrighi, Beverley J Silver and Benjamin D Brewer, "Industrial Convergence, Globalization and the Persistence of the North-South Divide" (2003) 38 *Studies in Comparative Economic Development* 3.

[5] See https://www.weforum.org/, accessed 27 December 2017.

[6] While accepting that broad descriptions such as the West, the Global North/South are unable to capture the complexity of the global geo-politics, this chapter uses the expression the West to describe that group of states currently regarded as being developed. There is an approximate identity between the group in question and the 35 states comprising the membership of the Organization for Economic Coordination and Development (OECD), see http://www.oecd.org/g20/g20-members.htm, accessed 27 December 2017.

International Law and the Post-Colonial Capitalist System

1. Division between the political and the economic

The current international legal order, which has emerged since the end of the Second World War, embraces a kind of schism between international economic law and public international law.[7] The United Nations organizations, which form the framework for what is referred to here as public international law, arose from the Dumbarton Oaks negotiations. The institutions of international economic law emerged from the Bretton Woods negotiations, which drew up the charters of the International Monetary Fund (IMF), the International Fund for Reconstruction and Development (which became the World Bank), and the International Trade Organization. From the beginning, the mandates of these two systems of international law were distinct. The Dumbarton Oaks institutions were to manage the international political order while the Bretton Woods institutions were to manage international economic relations. Thus, the Dumbarton Oaks institutions have taken charge of what have been described as "state-making and war-making" functions.[8] In addition to this, the system of public international law that has been built up around the Dumbarton Oaks institutions has purported to establish international standards in areas such as the protection of human rights and of the environment.

This bifurcation of international law along the lines of the putative division between the political and the economic appears to be rooted in the origins of the Westphalia System. The principle that quarrels between sovereigns did not implicate non-combatant civilians was built into the Peace of Westphalia of 1648.[9] As a consequence, the treaties that built upon the Settlement of Westphalia abolished trade barriers and sought to protect the rights of private enterprises to trade across state borders, even during times of war or other political turmoil. Arrighi remarks that "[t]his reorganization of political space in the interest of capital accumulation marks the birth not just of the modern inter-state system, but also of capitalism as world system".[10]

Arrighi is far from being the only prominent commentator to have noticed that this division between the political and the economic is critical to the modern

[7] Sundhya Pahuja, "Trading Spaces: Locating Sites for Challenge within International Trade Law" (2000) 14 *Australian Feminist Law Journal* 38; Fiona Macmillan, "International Economic Law and Public International Law: Strangers in the Night" (2004) 6 *International Trade Law and Regulation* 115.
[8] Giovanni Arrighi, *The Long Twentieth Century: Money, Power & the Origins of Our Times* (Verso 2002), 275.
[9] Arrighi, n 8 above, 43.
[10] Note 8 above, 44.

system of global capitalism.[11] This observation is fundamental to Hirschman's argument that amongst eighteenth century European political philosophers, making particular reference to Montesquieu and Sir James Steuart, the division between the political and the economic was essential to controlling the power of despotic rulers in the pre-democratic period. The essential point here is that, at least in the pre-democratic period this division was a political question in the sense that the power of the economic system was regarded as a constraint on the operation of the political system. In the nineteenth century, however, when Western politics had developed its own forms of democratic restraint, the economic system was liberated from its role in politics. However, instead of democratic politics taking up the role of constraining the power of the economic system, under the influence of the neoclassical economists and the political economists that founded the Austrian School the global capitalist system was liberated from much in the way of political restraint and so effectively de-politicized.[12] Bearing in mind that the system of international law that was remade at the end of the Second World War reflects the systemic division between the political and the economic, the de-politicization of the idea of the economic is crucial to understanding both the role of international economic law in relation to global capitalism and the place of the development project within the global capitalist system. With this point in mind, this chapter now turns to a closer engagement with the system of international economic law inaugurated at Bretton Woods.

2. The Bretton Woods System

The surviving Bretton Woods institutions are the IMF and the World Bank. Despite being the progeny of Franklin D Roosevelt's "one-worldism", the International Trade Organization never came into existence. Its death knell was the intense opposition that it engendered in the United States,[13] although the political and business interests ranged against it were not confined to those

[11] See also, eg, Karl Polanyi, *the Great Transformation: The Political and Economic Origins of our Time* (first published 1944, Beacon Press, 2000); Albert O Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (New Jersey, Princeton University Press, 1977, reprinted 1997); Samir Amin, *Capitalism in the Age of Globalization* (London & New York, Zed Books, 1998); John Gray, *False Dawn: The Delusions of Global Capitalism* (New York, New Press, 1998); Ellen Meiksens Wood, *Empire of Capital* (Verso 2003).

[12] Dimitris Milonakis and Ben Fine, *From Political Economy to Economics: Method, the social and the historical in the evolution of economic theory* (Routledge 2009); Fiona Macmillan, "The World Trade Organization and the Turbulent Legacy of International Economic Law-making in the Long Twentieth Century" in Faundez and Tan (eds), n 4 above; Benjamin Selwyn, *The Global Development Crisis* (Polity 2014), ch 5.

[13] See Arrighi, n 8 above, 276-7; Graham Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round & Globalism – A Critique* (Zed Books 2001), 26-8.

emanating from the US.[14] However, it metamorphosed into the 1947 version of the General Agreement on Trade and Tariffs (GATT) and was, accordingly, a precursor to the World Trade Organization (WTO). Together the IMF, the World Bank and the World Trade Organization make up what has been described as the "unholy trinity"[15] of international economic law institutions. Each of these institutions has had, explicitly or implicitly, a significant role of the development project. This is perhaps most obvious in the role of the World Bank, which has a specific mandate with respect to development. Since the collapse of the fixed exchange rate system and the loss of its central function, the IMF has increasingly turned its attention to the question of development. Nowadays many of the explicit development strategies and policies are jointly operated by the IMF and the World Bank, and it can be no surprise that many of the most famous development disasters can claim a similar heritage.[16]

The role of the WTO is somewhat different as it has no specific mandate in relation to development, apart from a rather vague reference in the preamble to its constitutional agreement that refer to its role in the promotion of "sustainable development", which presumably grounds the provisions in the WTO covered agreements on "special and differential treatment" (SDT) for developing countries.[17] However, its role in the development debacle is more extensive than its constituent documents might lead one to believe. To understand this it is useful to make a brief reference to its antecedents, the failed International Trade Organization and the General Agreement on Trade and Tariffs (GATT). Both the rejection of the International Trade Organization in the post-war period, and the subsequent arrival of the WTO fifty years later, are part of a continuous process driven by the needs of capital accumulation. After the Second World War the introduction of a system of multilateral free trade was postponed in favour of the GATT's framework for the negotiation, on either a multilateral or bilateral basis, of the reduction of restrictions on international trade in goods. This is entirely consistent with the fact that the US embrace of free trade has always been largely rhetorical. Using the GATT, the US government was able to control the process of trade liberalization in ways that benefited US interests by internalizing international trade within the vertically integrated structures of multinational corporations. In this way, post-war international markets were reconstructed through the engine of foreign direct investment (FDI) rather than through "free trade". This is the beginning of the process which, as Arrighi notes, means that by the 1970s transnational corporations "had developed into a

[14] See Dunkley, n 13 above, 26-8.
[15] Richard Peet, *Unholy Trinity: The IMF, World Bank and the WTO* (Zed Books 2003).
[16] See, eg, B. Rajagopal, *International Law From Below: Development, Social Movements, and Third World Resistance* Cambridge (CUP 2003), ch 5; Celine Tan (2008) "Mandating Rights and Limiting Mission Creep: Holding the World Bank and the International Monetary Fund Accountable for Human Rights Violations" (2008) 2 *Human Rights and International Legal Discourse* 79.
[17] See Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime: The Failure and Promise of the WTO's Development Mission* (Hart 2010).

world-scale system of production, exchange and accumulation, which was subject to no state authority and had the power to subject to its own 'laws' each and every member of the inter-state system".[18] So transnational capital neither needed nor wanted "free trade" in post-war period. The need for a selective free trade regime comes later in the US period of dominance and, as is argued below, is directly connected the process of capital accumulation and the generation of interstate competition for mobile capital.

3. Fragmentation and de-politicization

In the present context there are two important consequences of the split between the political and the economic in the international law system. One of these, the de-politicization of international economic law, has already been mentioned but is worth some further attention. This is particularly so since the other important – if somewhat obvious – consequence, fragmentation of regulation, operates in tandem with de-politicization. The two are mutually supportive. The international law principles governing human rights, labour rights and development are, along with the protection of the environment, particularly affected by the fragmentation of regulation. Arguably different concepts of human rights, for example, operate in the two parts of the system.[19] Maybe even worse, labour rights seem to have completely disappeared from the international economic law system. And specifically in relation to development, the dedicated instrumentalities are all part of the United Nations system, but the real action (or damage) is taking place in the international economic law system.

This fragmentation and de-politicization has enabled the imposition of conditions attached to lending by the World Bank and the IMF (the Bretton Woods institutions) in their role as lenders (often of last resort) to states. Structural adjustment using loan conditionality has become one of the famous ways in which these institutions put pressure on developing countries (and other countries in need of emergency finance) to change their laws and institutions.[20] Distressing cases of the damage caused by this type of loan conditionality abound.[21] Conditionality has also crept into the aid agenda where it has been

[18] Arrighi, n 8 above, 74.
[19] Pahuja, n 7 above.
[20] See, eg, Faundez, n 4 above; Peet, n 15 above, ch 4; Celine Tan, *Governance Through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Routledge 2011).
[21] See, eg, Michel Chossudovsky, "India under IMF Rule" (1993) 28 *Economic and Political Weekly* 385; Rajagopal, n 16 above.

used in relation to debt relief initiatives.[22] The conditional lending practices of the Bretton Woods institutions have changed their form over time, but the substance remains largely the same. Not only do these forms of conditionality require the Westernization of the law and institutions of the recipient states, they also reflect the tenets of the Washington Consensus and so are driven by ideas like reduction of the public sector, low taxation, privatization of public services, limitation – or even elimination – of labour standards, liberalization of inward FDI, and austerity. However, even within this strait-jacket there is considerable room for variation and manoeuvre with respect to the type of conditionality imposed. Interesting work has been done on so-called rule of law conditionality that shows that the idea of "the rule of law" in Bretton Woods rule of law conditionality, while being resolutely Western, differs substantially between instrumental (as suggested, for example, by Weber and Hayek) and intrinsic (for example, Dicey and Sen), and between institutional (for example, Weber and Dicey) and substantive (for example, Hayek and Sen)).[23] It does not seem unreasonable to suggest that a particular form of rule of law conditionality does not exist because we in the West have a political view that some versions of rule of law are better than others, but rather because some types of rule of law conditionality in certain circumstances fit better with the needs of global capital than others.

The use of the concept of the rule of law as a means to facilitate capital accumulation and drive interstate competition for mobile capital has also been achieved through WTO obligations, which require national laws to be brought into conformity with WTO rules. Here we can see the mutually supportive relationship between homogenisation of markets through "free trade" and homogenisation of law. The effects of the fragmented system of international law and the de-politicization of international economic law are also fundamental in relation to the WTO. While the Bretton Woods institutions have, for example, developed their own concepts of human rights in order to discipline states to which they have given financial accommodation, the World Trade Organization appears to embrace the position that things like human rights and labour standards are simply outside its sphere of operation. Perhaps the honesty is refreshing, but the failure to acknowledge its role in the perpetuation of human misery as a result of downward pressure on labour standards, which are seen as constituting non-tariff barriers to trade, is not appealing.

4. Decolonization

[22] Celine Tan, "Reframing the debate: the debt relief initiative and new normative values in the governance of third world debt" (2014) 10 *International Journal of Law in Context* 249.
[23] Alvaro Santos, "The World Bank Uses of the 'Rule of Law' Promise in Economic Development" in David M Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (CUP 2006).

A critically important process that informs the birth of the international economic law system, and especially its entanglement with development, is the process of decolonization, which begins after the Second World War and the remaking of the international law system. Thus, the first and most obvious point to make about this process is that the former colonies, which today have a substantial degree of identity with those states usually described as "developing" or "least developed",[24] had no role in the diplomatic conferences at Dumbarton Oaks and Bretton Woods and so no role in the remaking of the system into which they were born as new states. The remaking of the system was, of course, led by the US, which had emerged as the leading global power after the Second World War, displacing Great Britain, the leading imperial power of the nineteenth century.

The terms of the new relationship between the states comprising the great metropolitan powers, their satellites, and the rest of the "developing" world were set by the leader of the greatest power, President Harry S Truman, when he famously gave voice to the concept of "underdevelopment". In a speech of 20 January 1949 he said:

> We must embark on a bold new programme for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas. The old imperialism – exploitation for foreign profit – has no place in our plans. What we envisage is a program of development based on the concept of democratic fair dealing.[25]

Of course, all this could only happen if the decolonising and newly emerging states were woven into the fabric of the newly remade international law system.

The chronological coincidence of the invention of the concept of development, with its consequent drive to enmesh newly decolonizing states in the remade system of international law, and the process of decolonization are not accidental.[26] In particular, the loss of the colonies presented the former imperial powers and the new hegemon, the US, with the problem of how to continue to extract resources on favourable terms.[27] This question of extraction of resources

[24] Or one might use the expression "third world", as Chimni suggests, in a spirit of resistance: B S Chimni, "Third World Approaches to International Law: A Manifesto" in Antony Anghie, B S Chimni, Karin Mickelson and Obiora Okafor (eds), *The Third World and International Order: Law, Politics and Globalization* (Martinus Nijhoff 2003).
[25] Harry S Truman, Inaugural Address, 20 January 1949 in *Documents on American Foreign Relations* (Princeton University Press, 1967), quoted in Gustavo Esteva, "Development" in Wolfgang Sachs (ed.), *The Development Dictionary: A Guide to Knowledge as Power* (Zed Books 2009), 7.
[26] Esteva, n 25 above.
[27] Cf B Porter, *British Imperial: What the Empire Wasn't* (IB Tauris 2016).

is a critical theme in international economic law in a number of ways. First, the principle of most favoured nation (MFN) treatment in WTO law operates to protect extraction of primary resources by countries lacking them on favourable terms. Secondly, the doctrine of comparative advantage upon which the idea of free international trade is based (and more on this shortly) has forced many resource rich countries, mostly from the global south, into the position of suppliers of primary resources without having the opportunity to develop manufacturing capacity. This has undoubtedly meant that such states have been unable to extract some of the economic benefits that might have flowed from participation in the capitalist system.[28] Thirdly, extraction of biological and knowledge-based resources seems to be one of the primary drivers behind the international patent system, which was reinforced with the conclusion of the WTO and its Agreement on Trade-Related Aspects of Intellectual Property (the TRIPs Agreement). If we accept the very plausible proposition that the WTO exists partly because of the two new major trade agreements that were created within its structure, the TRIPs Agreement and the General Agreement on Trade in Services (GATS)[29] (and more on this shortly as well), we might reasonably hypothesize that extraction of resources is one of the underlying concerns of the WTO system. Fourthly, the system overall operates to extract capital from the global south. From the beginning of the period of decolonization it was necessary to enmesh the newly created states within both the international law system and, concomitantly, the capitalist system, by making them somehow dependent on these systems and the powerful states within them. Not only would this ensure that these states would provide markets for Western manufactured products and thus extract capital from them, but it would also operate to control and discipline them. The internalization of trade within the domains of multinational corporations, which forms part of the post Second World War global economic landscape, has also operated to extract capital and other resources. This is because the direct relationship between multinational corporations and states of the global south has mostly taken place through a process of FDI, often on extremely disadvantageous terms.[30] The net result is that more capital and other resources go out than in.

5. Development as neo-colonialism

[28] Dunkley, n 13 above.
[29] Fiona Macmillan, "Looking Back to Look Forward: Is there a Future for Human Rights in the WTO?" [2005] *International Trade Law and Regulation* 163; Macmillan, n 12 above.
[30] Eg (directly from the belly of the beast) WTO Working Group on the Relationship between Trade & Investment (2002) *Communication from China, Cuba, India, Kenya, Pakistan and Zimbabwe: Investors' and Home Governments' Obligations*, WT/WGTI/W/152, 19/11/2002.

Hopefully, at this point, more or less half way through the chapter, the case for development as neo-colonialism is beginning to emerge. In the dual mandate of Lord Lugard "justifying" colonial rule[31] we can see the two threads that not only create continuity between colonialism and the concept of development, but also hold together the story of international economic law. Colonialism was *par excellence*, the export of Western concepts of the rule of law.[32] The extraordinary spread of the common law system in the Commonwealth countries, formerly colonies of Great Britain, is a tribute to the success of this project. In this way, in accordance with the first part of the Lugardian mandate, the "blessings of civilization" were dispersed through the Empire. The post-colonial period has witnessed a comparable process through two central devices of international economic law. One of these is loan conditionality[33] and the other is the requirement for states to bring their law into compliance with WTO standards. So far as the second part of the colonial dual mandate is concerned, the extraction of resources is a key factor in driving both the colonial enterprise and the development enterprise. The change in the political status of the former colonies after decolonization meant, however, that the task of extraction could no longer be achieved by simple plunder, rather recourse for this purpose has been made to international economic law.

While there is much debate about its desirability and morality, there seems to be very little debate about the fact of the relationship between the development project, including that part of it concerned with access to resources, and capitalist expansion. There is, on the other hand, a considerable amount of dispute and historical revision over the question of the extent to which the colonial project was driven by capitalist expansion. In a rather obvious sense, however, the argument that development is neo-colonialism depends on establishing this link between the colonial and post-colonial periods. The argument, at least recently, that the significance of the capitalist impulse in the colonial period has been exaggerated tends to depend upon the claim that imperialism was a state, rather than an entrepreneurial capitalist, project.[34] However, this position critically underestimates the extent to which capital accumulation and state power were, and continue to be, linked. This is so even if the nature of the relationship between states and multinational enterprises has altered radically during the US period of dominance. In the colonial period this relationship was expressed through the joint stock corporations, which were state backed trading enterprises, the role of which was to advance both empire and capitalist expansion. These corporations were features of the international

[31] See text accompanying n 2 above.
[32] Ugo Mattei and LauraNader, *Plunder: When the Rule of Law is Illegal* (Blackwell 2008), 19.
[33] Sundhya Pahuja, "Technologies of Empire: IMF Conditionality and the Reinscription of the North/South Divide" (2000) 13 *Leiden Journal of International Law* 749.
[34] See, eg, Andro Linklater, *Owning the Earth: The Transforming History of Land Ownership* (Bloomsbury 2013); Porter, n 27 above.

trade landscape since at least the establishment of the English East India Company in 1600 and its Dutch counterpart, the *Verenigde Oost-Indische Compagnie* (VOC), in 1602.[35]

Arrighi, in particular recognises the role of these corporations in his argument that capitalism is a history of cycles of capitalist accumulation (meaning success in attracting mobile capital) dominated by a leading agency of capital accumulation in the form of a state.[36] The current dominant agency of capital accumulation is, of course, the US, which is the fourth of the cycles identified by Arrighi, and was preceded by the Genoese, Dutch and British dominated cycles. He links these cycles to the continual expansion of international trade and its domination by the leading state agency of capital accumulation. Thus, the trade ascendancy of the VOC in the seventeenth century was, like the power of the Dutch Empire, on the wane by the middle of the eighteenth century.[37] At this time, as the British Empire superseded the Dutch, the English joint stock companies began their domination of international trade.

In Arrighi's theory each of these cycles of state led capital accumulation follows the same trajectory. That is, when capital can longer be profitably employed by use in the development of new markets that expand the productive capacity of the existing markets, then a switch occurs and excess profits are ploughed into the trade in money. That is, a switch is made from trade to finance.

> The switch is the expression of a "crisis" in the sense that it marks a "turning point", a "crucial time of decision," when the leading agency of systemic processes of capital accumulation reveals, through the switch, a negative judgment on the possibility of continuing to profit from the reinvestment of surplus capital in the material expansion of the world economy, as well as a positive judgment on the possibility of prolonging in time and space its leadership/dominance through a greater specialization in high finance.[38]

Arrighi argues that interstate competition for mobile capital has been essential to the material expansion of the capitalist world economy. However, Arrighi's gloss to this proposition is that capitalist power has intensified during each period of capitalist accumulation.[39] So returning to the relationship between colonialism and capitalism, it is arguable that what happens in the colonial period is that, due to this intensification, international capitalism becomes part of the engine of state power in a way that was not seen before.

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[35] Arrighi n 8 above; FionaMacmillan, "The Emergence of the World Trade Organization: Another Triumph of Corporate Capitalism?" in Richard Joyce and Sundhya Pahuja (eds), *Events: The Force of international Law* (Routeldge 2010).
[36] Arrighi, n 8 above.
[37] Arrighi, n 8 above, 139ff.
[38] Arrighi, n 8 above, 215.
[39] Arrighi, n 8 above, 12ff.

6. The New International Economic Order and "neoliberalism"

This seems like a good moment to pass onto a consideration of the current US-dominated cycle of capitalist accumulation. The key historical moments of this cycle are, first, the end of the Cold war and the *Pax Americana* or Washington Consensus, and secondly, the Uruguay Round of trade negotiations leading to the creation of the WTO in 1994. But the important phenomenon of the entire American period is the modern multinational corporate enterprise, which is very much a creature of the constant intensification of capitalist power identified by Arrighi. The pre-condition of the ascendancy of the multinational enterprise was the twentieth century processes of vertical integration and internalization of international trade within those enterprises. And the dominance of multinational enterprises is crucially linked to interstate competition for investment and its adverse effects on countries of the global South because it is this that puts pressure on the "weakest" states to make their legal regimes "welcoming" to the interests of capital.[40]

The so-called developing world did start to re-organize and fight back, agitating for changes in the world system to equal the unequal economic playing field, under the banner of a call for the famous, but never appearing, New International Economic Order (NIEO). This campaign was well placed to take advantage of the interruption to the process of corporate-led globalization as a result of the so-called "exogenous shocks" of the 1970s and 1980s, including the collapse of the fixed exchange rate system established under the auspices of the IMF and the OPEC crisis. As a result of these shocks, many states introduced non-tariff barriers to protect domestic production, which included things like labour rights, environmental protection, limits on the entry of foreign capital and differential taxation systems for foreign multinational corporations. The NIEO, however, never appeared for the very simple reason that a political decision was taken to create the conditions for the re-intensification of corporate-led globalization and expansion of the capitalist system. This is a decision that we commonly call the Washington Consensus, which imposed on states fiscal discipline, tax reform, interest rate liberalization, trade liberalization, liberalization of inward FDI, reduction and redirection of public expenditure, deregulation, privatization and a religious zeal for the security of property rights. In the end, the only new international economic order to emerge was what is now referred to as neoliberalism.

[40] See note 30 above.

7. The Uruguay Round, the WTO and Comparative Advantage

The Washington Consensus coincides historically with the beginning of the Uruguay Round of trade negotiations, which was primarily concerned with three things: first, removal of these "non-tariff barriers", which had been inhibiting the growth of international trade; secondly, putting in place a global intellectual property regime; and, thirdly, liberalizing trade in services, including financial services. These negotiations culminated in the birth of the WTO, which claims to promote free international trade based on the concept of comparative advantage, a doctrine of classical economics into which the neoliberal spirit has breathed new life. Derived from the ideas of Adam Smith and David Riccardo,[41] the modern version of the doctrine postulates that that optimal allocation of international resources will be achieved if each country uses its comparative advantage to produce only the commodities that it can most efficiently produce and trades those commodities with other countries in order to obtain the commodities that it does not produce.[42] Essentially, therefore, the argument is one about optimal allocation of resources as a consequence of the operation of an unfettered market mechanism. Ultimately, it is argued, that where there is optimal allocation of resources then economic welfare will be maximised. It is also frequently argued that economic growth will be stimulated and everyone will be better off in economic terms. However, even some prominent free trade advocates are doubtful about this proposition.[43] Non-economic benefits in the form of greater international cooperation and harmony are also postulated by adherents of the doctrine of comparative advantage and its concomitant of international trade free from government interference.[44] These non-economic benefits would, it is argued, flow from the fact of economic interdependence.

Leaving aside the deleterious social and welfare consequences of this doctrine, beautifully critiqued by Keynes and further addressed below,[45] a serious problem about its current applicability relates to its assumption that capital, along with skilled labour, is largely immobile.[46] The efficiency and welfare advantages predicted by the doctrine are based upon the movement of traded commodities, in the form of raw materials and manufactured goods, across borders. The twentieth century, however, marked an increase (that has continued unabated into the twenty first century) in the movement of the means

[41] See further Dunkley, n 13 above; Donatella Alessandrini, "WTO and the Current Trade Debate: An Enquiry into the Intellectual Origins of Free Trade Thought" [2005] *International Trade Law and Regulation* 53; Macmillan, n 12 above.
[42] Dunkley, n 13 above, ch 6.
[43] See, eg, Jagdish Bhagwati, *Free Trade Today* (Princeton University Press, 2002), 41-3.
[44] Alessandrini, n 41 above; Dunkley, n 13 above,110.
[45] John Maynard Keynes, "Pros and Cons of Tariffs", *The Listener,* 30 November 1932, reprinted in Donald Moggridge (ed) (1982), *The Collective Writings of John Maynard Keynes* (Macmillan 1982), Vol 21, 204-10.
[46] Gray n 11 above, 82.

of production across borders. This generally occurs by means of FDI by multinational enterprises, which establish subsidiary undertakings in another country for this purpose.

In order to make some sense of these developments in systemic terms, it is useful to revisit one of Arrighi's insights, which is that every cycle of capitalist accumulation has a signal point when the profits derived from trade become so poor that money switches from trade to investment capital. For the British dominated cycle the so-called signal point, when the profits derived from trade become so poor that money was switched from trade to investment capital, came as the result of the intensification of competition from Germany and the US consequent upon the depression of 1873 to 1896. For the Americans, in the 1970s and 1980s, the signal point was the economic challenge from Japan. These signal points and their accompanying switches are autumnal and generally inaugurate a period of economic turbulence. They do not, however, spell the immediate end of the dominant regime of capital accumulation.[47] In both cycles, the response of the dominant agency of capital accumulation to these signal points led to the establishment of international "free" trade agreements and international agreements on the protection of intellectual property.[48]

In the current turbulent stage Arrighi argues that a combination of structural changes in the form of "the withering away of the modern system of territorial states as the primary locus of world power", "the internalisation of world-scale processes of production and exchange within the organizational domains of transnational corporations" and "the resurgence of suprastatal world financial markets" have created a pressure to relocate state authority and counter systemic chaos through a process of world government formation.[49] Going further and reflecting on the nature and ideology of the WTO, do these represent an attempt on the part of the US, in its death throes as the dominant agency of capitalist accumulation, to control interstate competition for mobile capital? Certainly, the chronological coincidence between Arrighi's post-switch phase in the US cycle of capital accumulation and the Uruguay Round negotiations is striking, as is the fact that the two new Uruguay Round agreements, the TRIPs Agreement and the GATS, are quite conceivably conceptualised as being essentially concerned with investment.[50]

8. Developing countries in the global capitalist system

[47] Arrighi, n 8 above.
[48] Macmillan, n 12 above.
[49] Arrighi, n 8 above, 331.
[50] Macmillan, n 29 above, 178-80.

For developing countries, loan conditionality and structural adjustment requirements imposed by the Bretton Woods institutions, and also by the WTO as a condition of entry into the WTO system, are generally connected to gearing up for comparative advantage. This is notwithstanding the cogent criticisms that have been made about the ability of the doctrine of comparative advantage to deal with the obvious global disadvantage of developing countries.[51] The concern here, as Dunkley notes, is that "in a world of uneven development free trade, or even trade *per se*, may be inherently unequalising".[52] There is a range of economic arguments that explain why the doctrine of comparative advantage may be unable to deliver its promised welfare benefits to developing countries.

One of the important general arguments in this context is that comparative advantage is created and cumulative, rather than natural.[53] If this is so, then the cumulative comparative advantage of developed countries will ensure either that inequalities always remain or that they take an unacceptably long time to disappear. Another important school of economic thought postulates perpetual inequalities as a consequence of free trade. According to this argument, where there is low elasticity in demand for the exports of a country but high elasticity in domestic demand for imports, then export prices relative to import prices will result in a continuous trade deficit.[54] As this tends to describe the terms upon which at least some developing countries export their primary products and import manufactured products, this means that under free trade conditions these developing countries will remain trapped in a trade deficit preventing them from realising the welfare gains promised by free trade doctrine.[55]

It is, accordingly, the theory of comparative advantage and its concomitant doctrine of free trade that keep developing countries in the same economic position they have always been in: suppliers of primary products or suppliers of manufactured products made on the back of often appalling labour, environmental and human rights conditions. Domestic regulation to improve standards in these areas is not only directly constrained by the legal obligations placed on states through the international economic law system, but also by the need to survive in the international capitalist system by competing for mobile capital through FDI. The dominant state agencies, using the system of international economic law, have rigged the rules to give themselves a vast competitive advantage in the attraction of interstate mobile capital.[56] This rigging of the rules is quite consistent with the fact that the WTO is not really a

[51] See further Dunkley, n 13 above; Macmillan, 12 above.
[52] Dunkley, n 13 above, 119.
[53] Dunkley n 13 above, 122.
[54] John Stuart Mill, *Essays on Some Unsettled Questions of Political Economy*, (Parker 1844), 21.
[55] Dunkley n 13 above, 118 & 145ff.
[56] See also Amin, n 11 above, 97.

free trade organization in any case. The GATT, for example, does not eliminate tariffs, but rather limits them subject to an exhortation to member states to reduce them over time. The latitude that this provides has been used by powerful states to keep up protectionist barriers with respect to both primary and manufactured products in order to protect domestic markets from competition from products imported from states, usually from the global South, with relevant comparative advantage. An outrageous example is the US refusal to drop its tariffs on cotton products. These tariffs protect the US cotton based cotton industry from exports from Benin, Burkina Faso, Chad and Mali, which have comparative advantage in the growing of cotton.[57]

The grotesque hypocrisy of the WTO - and of the powerful states that are responsible for the legal architecture of its agreements - aside, there is no compelling argument that things would be better for so-called developing countries in a true free trade regime. Apart from the economic arguments to this effect, some of which have already been canvassed, a free trade regime raises serious ethical concerns, especially in a vastly unequal world. A particular issue here is the exploitation of labour, whether by multinational corporate interests or by domestically-based interests. The general issue, however, is the way in which free trade doctrine regards wealth maximisation as the ultimate measure of human happiness and attainment.

The critique of free trade based upon the rejection of wealth maximisation draws stark attention to the difficulty in attempting to divide the political and the economic. The decision to embrace a free trade regime is not, and can never be, a purely economic one. Rather, it is a political choice involving, amongst other things, economic considerations. In their failure to understand this point, as in so much else, modern free trade theorists appear to be embracing a type of intellectual foreclosure that dates back to the work of Adam Smith. Smith postulated non-economic effects of free trade, both positive and negative. On the positive side, both he and Ricardo cited cosmopolitanism and international harmony as a non-economic benefit of free trade. Smith also saw that the pursuit of material wealth had less desirable effects.[58] He was, however, unable to resolve the conflict between this concern and his commitment to the expansion of wealth, cosmopolitanism and international harmony through international trade. He consequently appears to conclude that the primary motivation of humankind is to better its material condition. This conclusion set the parameters to the post-Smithian debate about international trade, which has been conducted around the question of whether and to what extent international

[57] WTO, *Poverty Reduction: Sectoral Initiative in Favour of Cotton – Joint Proposal by Benin, Burkina Faso, Chad & Mali*, WT/MIN(03)/W/2, 15/8/2003; WTO, *Poverty Reduction: Sectoral Initiative in Favour of Cotton – Joint Proposal by Benin, Burkina Faso, Chad & Mali – Addendum*, WT/MIN(03)/W/2/Add.1, 3/9/2003.
[58] Hirschman, n 11 above, 106-107.

trade is capable of improving material well-being.[59] Somewhere along the way, the insidious idea that the maximization of material wealth is the ultimate human attainment seems to have become a foundational principle in this debate.[60]

Is There a Way Forward?

As with free trade, so too with development: the idea of maximization of economic benefit as the Holy Grail has had a long history in development thinking. The early decades of international development policy were dominated by the idea that development meant an increase in gross national product.[61] A cynic might suggest that either or both of the impossibility or undesirability of achieving economic parity for that part of the world said to be lacking development has meant that the predominance of economic development thinking has gradually given way to other discourses variously labelled as human development, popular development, reflexive development, alternative development and so on.[62] Important contributions in understanding what a development process that is not dominated by economic objectives might look like has been made by commentators such as Amartya Sen[63] and Martha Nussbaum.[64] Their "human capabilities" approach has been influential in the creation of the United Nations Development Programme Human Development Index.[65] But none of this, desirable or not,[66] can gain much traction in the divided system of international law. As this chapter has sought to argue, whatever might be happening in the United Nations instrumentalities, the real theatre of development is international economic law. And there "the idea that there are alternative development paths, and that therefore different pasts underlie different presents and may lead to different futures"[67] has gained no traction, except in the sense that the future for the so-called developing world looks much bleaker than that of the future of the so-called developed world.

In the context this debacle, strands of critical theory[68] grouped under the rubric of post-development have (in the same sentence) been praised for their "acute intuitions" and criticized for "being directionless in the end, as a consequence of

[59] Hirschman, n 11 above, 112.
[60] Alessandrini, n 41 above, 60.
[61] Esteva, n 25 above; Alessandrini, n 17 above, 41-55.
[62] Esteva, n 25 above; Pieterse, n 1 above.
[63] See especially Amartya Sen, *Development as Freedom* (OUP 1999).
[64] See, eg, Martha Nussbaum, "Capabilities and Human Rights" (1997) 66 *Fordham Law Review* 273.
[65] http://hdr.undp.org/en/content/human-development-index-hdi, accessed 27 December 2017.
[66] For an insightful critique of Sen, see Selwyn, n 12 above, ch 7.
[67] Boaventura de Sousa Santos, "Beyond Neoliberal Governance: The World Social Forum as Subaltern Cosmopolitan Politics and Legality" in Boaventura de Sousa Santos and César A Rodriguez-Garavito (eds.), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (CUP 2005), 31.
[68] Those represented by the work of Gustavo Esteva, Arturo Escobar and their followers.

the refusal to, or lack of interest in translating critique into construction".[69] This verdict views calls for "the expansion and *articulation* of anti-imperialist, anti-capitalist, anti-productivist, anti-market struggles"[70] as too aspirational and perhaps somehow lacking substance.[71] But practice must be informed by theory, and construction by critique. The particular contribution of critical legal theory, as this chapter has sought to demonstrate, has been to understand how the history and architecture of the international law system has dictated the real terms of the development project. It is clear, however, that we urgently need a theoretical framework that can open up a path ahead. Hopefully, it goes without saying that a just path ahead requires the abandonment of the current divided system of international law and the de-coupling of international law and global capitalism. At this point, given the size and complexity of the task, it is easy to sympathise with theorists who have found themselves in difficulty in coming up with a constructive basis for advancing the battle. Nevertheless, in a spirit of grounded optimism (after so much pessimism), this chapter concludes by advancing two critical approaches, not necessarily completely mutually exclusive, that may indicate a way forward for critical legal theory in the development context. One of them focusses on a re-cast and re-invigorated role for the state and the other looks at ways of harnessing the power of global labour in order to create a more just global order.

New developmentalism, which places the state at its strategic centre, is essentially neo-Keynesian.[72] This means that new developmental theorists do not reject the idea of the market nor its role in capitalist growth. The particular target of new developmentalism is the Washington Consensus and the "neoliberal" policies introduced in its wake. It has a primary concern with the question of how best to regulate the market "in order to achieve virtuous cycles of capitalist growth … devoid of the labour repression, climate change, gender inequality and state bureaucratisation characteristic of the first developmentalism".[73] The central tenets of new developmentalism, the state and the capitalist market, make it an easy target of critique. So far as its adoption of a virtuous capitalist market is concerned, the line of attack is fairly obvious and centres on (important) things like the role of capitalist markets in systematically oppressing workers and denying their rights,[74] and the neo-imperialist nature of capitalism which means that it is inherently productive of uneven and combined

[69] Pieterse, n 1 above, 361.
[70] Arturo Escobar, "Reflections on 'Development'": Grass Roots Approaches and Alternative Politics in the Third World" [1992] *Futures* 411, 431.
[71] Pieterse, n 1 above, 362.
[72] See S R Kahn and J Christiansen (eds), *Towards New Developmentalism: Market as Means Rather Than Master* (Abingdon and New York: Routledge, 2011).
[73], "Polarising Development – Introducing Alternatives to Neoliberalism and the Crisis" in Lucia Pradella and Thomas Marois (eds), *Polarising Development: Alternatives to Neoliberalism and the Crisis* (Pluto 2015), 8.
[74] See, eg, Benjamin Selwyn, "The Political Economy of Development: Statism or Marxism?" in Pradella and Marois, n 73 above.

development.[75] This is married to a characterization of the state as being an inherently repressive apparatus resting on unacceptable "historical social relations of class, gender and race".[76] Marxist critique is rightly sceptical of the idealistic view of the state as the moderator, in the name of the some concept of the overall good, of capitalist development based on national comparative advantage.[77] Nevertheless, for a critical legal theorist considering the possibility of an institutional model upon which to remake the international system perhaps the jettisoning of the concept of the state is a step in the wrong direction.

Marxist theories of labour-led development offer it as both a form of resistance to the current form of capital-centred development and as a new theoretical framework for alternative development.[78] It is evident, however, that despite their rejection of the capitalist state, this theoretical position does not jettison the concept of the state. Instead this vision is represented by "the capturing, holding and transformation of state power".[79] Selwyn, following Marx, speaks of "the reabsorption of the state by society"[80] but this does not mean the abolition of the state. Rather what is envisaged is, to paraphrase Marx, a political form of labour's social emancipation. This is a concept of the state that is, therefore, liberated from the burden of its repressive history. Working within this concept, Selwyn offers a plan for labour-led democratic development as follows:[81] banking, money and economic democracy; the introduction of a universal basic income; ecologically sustainable industrial policy; agrarian reform in order to ensure de-commodified food security; the protection of Indigenous Peoples and their knowledge; a non-aggressive foreign policy, which has both "political" aims (to establish links with other social movements and support equivalent transformations globally) and "economic" aims (to combat environmental destruction, control foreign trade and investment and use collective capacities at the international level with respect to trade and investment rules and environmental and labour standards);[82] reduction and equalization work; the eliminating of gender inequality, nationalism and racism; and, de-commodified cultural production as a form of personal and collective development.

Certainly, the concept of the state embedded in this vision shares no ground with the neoliberal idea of the state as one member of a constellation of actors,

[75] See, eg, Alfredo Saad Filho, "The 'Rise of the South'" in Pradella and Marois, n 73 above.
[76] Pradella and Marois, n 73 above, 8.
[77] Pradella and Marois,n 73 above, 8.
[78] See, eg, Benjamin Selwyn, *The Struggle for Development* (Polity 2017), especially chs 5 and 6.
[79] Selwyn, n 78 above, 126.
[80] Selwyn, n 78 above, 130. Cf Karl Marx, *The Civil War in France* (First published 1871, Peking Foreign Languages Press 1966): "the reabsorption of the state power by society as its own living forces instead of as forces controlling and subduing it, by the popular masses themselves, forming their own force instead of the organised force of their suppression – the political form of their social emancipation".
[81] Selwyn, n 78 above, 137-51.
[82] I, of course, would have described all of this as political.

including private sector actors. Here the state re-assumes importance as the central actor and carrier of a just and democratic vision. As should be obvious, however, this eminently desirable vision cloaks an enormous project for critical legal theory. Not only does it present a particular challenge to constitutional theorists, but in the context of the current chapter it can only be realised by the demolition (progressive or otherwise) of the post Second World War divided system of international law. (If Arrighi is right and we are now in the terminal stage of the US led cycle of capitalist accumulation perhaps we are already on the right track here.) A critical legal theory programme for international development must, in any case, aim to decouple development from both from the post-colonial constraints of the international law system and from its entanglement with the process of capital accumulation. A good first step would be the recognition that every initiative of the United Nations system is doomed to failure as a result of the systemic pre-eminence of international economic law. A second one might be, as the theorists of labour-led development suggest, the recognition that the current system has left us all "under-developed".

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