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## Liberalizing Trade in Agriculture and Food Security—Mission Impossible?

Christine Kaufmann

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# Liberalizing Trade in Agriculture and Food Security—Mission Impossible?

Christine Kaufmann  
Simone Heri\*

## ABSTRACT

*The Agreement Establishing the World Trade Organization (WTO) foresees that trade should be conducted with a view to raising standards of living. It is undisputed that raising living standards contributes to the implementation of the right to food. Indeed, state parties to the WTO have obligations regarding the right to food not only under the international trade system, but also under the human rights regime. All WTO state parties are bound by customary human rights law, and most have ratified the International Covenant on Economic, Social, and Cultural Rights, of which Article 11 contains the most important codification of the right to food. This Article analyzes the structural similarities between the legal regimes for trade and human rights. It concludes that the tools necessary to reconcile some of the potential conflicts between the two regimes are already built into the agreements. Building on this conclusion, this Article analyzes proposals on how to better implement food security in the current negotiations on agriculture.*

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## I. INTRODUCTION

Developments in food aid, the production of genetically modified foods and seeds, the use of foodstuffs to produce biofuels, and awareness of the cultural significance of certain foodstuffs are just a few of the elements that have led to heated discussions about the relationship between international trade and the right to food—especially food security. Taking into account the multifaceted nature of the above-mentioned elements, this Article attempts to shed light

on the legal relationship between trade and food security, that is, between international trade law and the human right to food security.

The preamble of the Agreement Establishing the World Trade Organization (WTO) does not envision trade as an end in itself. Instead, it foresees that trade “should be conducted with a view to raising standards of living.”<sup>1</sup> This objective, in language and in spirit, is close to the “adequate standard of living”<sup>2</sup> envisaged in Article 11(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR). In fact, both the codification of human rights and what later became the General Agreement on Tariffs and Trade (GATT) have their common starting point in the Atlantic Charter, which contained a vision of a post-war world order resting on the four pillars of trade, finance, peace, and human rights.<sup>3</sup> Despite this commonality between ICESCR and the GATT, the liberalization of trade in agriculture and the right to food have nevertheless developed in very different ways.

Conflicts and tensions may arise at the implementation level. This is reflected in the widespread concern that the openness of agricultural trade may jeopardize food security in developing countries, for example by flooding local markets with imported products or even with goods provided under the guised heading of food aid.<sup>4</sup> The concern is that exposure to international markets may increase the instability of food supplies and prices, disrupt markets, and undermine incentives for local production.<sup>5</sup> Yet from an economic point of view, empirical evidence on an aggregate country level “does not point to a negative relationship between agricultural trade and food security; on the contrary, a higher degree of openness to trade is associated with lower levels of undernourishment.”<sup>6</sup>

The preceding statement is flawed in several respects. First, while this observation may hold true in general, it is also true “that some households lose in the process of trade liberalization,” even in the long run.<sup>7</sup> Trade reform could also exacerbate poverty and

1. Marrakesh Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter WTO Agreement].

2. International Covenant on Economic, Social and Cultural Rights, art. 11, Dec. 16, 1966, 993 U.N.T.S. 7 [hereinafter ICESCR].

3. Christine Breining-Kaufmann, *The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations*, in HUMAN RIGHTS & INT'L TRADE 95, 96 (Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi eds., 2005).

4. See, e.g., Carmen G. Gonzalez, *Institutionalizing Inequality: the WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 435–36 (2002) (attributing decreased agricultural revenues in the southern hemisphere to the openness of agricultural trade).

5. *Id.* at 438.

6. Food & Agric. Org. of the U.N. [FAO], *The State of Food and Agriculture 2005: Agricultural Trade and Poverty—Can Trade Work for the Poor?*, at 83–84 (2005).

7. *Id.* at 84.

therefore reduce food security temporarily.<sup>8</sup> Second, the concept of food security includes more than the alleviation of malnourishment; it refers to other factors such as culture or the survival of subsistence farmers.<sup>9</sup> Regardless of the complementarity of goals between liberalization of trade in agriculture and the right to food security at the abstract level, tensions may arise: even if there are overall gains at the national level, the impact on individuals can be negative. The liberalization of trade in agriculture is conceptually concerned with aggregate improvements in global welfare; the human right to food, on the other hand, grants a minimum standard to the individual that must not be violated, even at the price of an aggregate rise in the standard of living.<sup>10</sup>

To lay the groundwork for a discussion of both regimes (trade liberalization on the one hand, and the human right to food on the other), this Article will start with a brief discussion of the legal architecture for world trade in agriculture. Next, it will analyze the normative content of the right to food and the corresponding state obligations. A discussion of potential avenues for reconciling the legal frameworks of trade in agriculture and the right to food will follow. Finally, the Article will explore current issues and critically review some of the proposals put forward during the Doha Round that intend to shape agricultural trade in a way that would be more supportive of the right to food.

## II. THE LEGAL FRAMEWORK FOR TRADE IN AGRICULTURE

Agriculture has proven particularly problematic for international trade regulation. Although the disciplines introduced by the General Agreement on Tariffs and Trade (GATT)<sup>11</sup> in 1947 applied to agricultural and industrial products without distinction, the approach of the GATT toward agriculture was “one of waivers from, exceptions to, or disregard of the applicable rules.”<sup>12</sup> This approach was

8. WORLD TRADE ORG., SPECIAL STUDIES NO. 5, TRADE, INCOME DISPARITY & POVERTY 6 (1999) (prepared by Dan Ben-David et al.); see also SANDRA POLASKI, WINNERS AND LOSERS—IMPACT OF THE DOHA ROUND ON DEVELOPING COUNTRIES (2006) (presenting findings that there are both net winners and net losers under different scenarios and that the poorest countries are among the net losers under all likely Doha scenarios).

9. See, e.g., MARSHA ECHOLS, FOOD SAFETY AND THE WTO: THE INTERPLAY OF CULTURE, SCIENCE, AND TECHNOLOGY 17–19, 29–33 (2001).

10. See Kerstin Mechlem, *Harmonizing Trade in Agriculture Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture*, 10 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 127, 187 (2006).

11. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 194 [hereinafter GATT].

12. JOSEPH MCMAHON, THE WTO AGREEMENT ON AGRICULTURE: A COMMENTARY, at vii (2006).

abandoned following the Uruguay Round and its Agreement on Agriculture (AoA).<sup>13</sup> The AoA attempts to establish “a fair and market-oriented agricultural trading system”<sup>14</sup> through “substantial progressive reduction in agricultural support and protection.”<sup>15</sup> The AoA consists of three main pillars: market access, cuts in domestic producer subsidies, and reduction in export subsidies.<sup>16</sup> The implementation period was an agreed-upon six years (ten years for developing countries),<sup>17</sup> with the exception of Article 13, the so-called “peace clause.”<sup>18</sup> This provision limited the possibility of disputes and would remain in effect for nine years.<sup>19</sup> These rules were accompanied by the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Process on Least-Developed and Net-Food-Importing Developing Countries (Marrakesh Decision).<sup>20</sup> The Marrakesh Decision itself recognizes that implementation of the reform package in agriculture may have negative effects on the ability of these countries to finance normal levels of commercial imports of basic foodstuffs, and that appropriate measures need to be established.<sup>21</sup>

#### A. Market Access

As in other WTO agreements, the AoA committed its members to improve market access through tariffication and through binding these tariffs against future increases.<sup>22</sup> This resulted in a key

13. *Id.*

14. Agreement on Agriculture pmb., Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 1867 U.N.T.S. 410 (1994) [hereinafter AoA].

15. *Id.*

16. WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS 52 (John Croome ed. 1999).

17. AoA, *supra* note 14, arts. 1(f), 15(2) (stating that least-developed countries were not required to undertake reduction commitments).

18. *Id.* art. 13; WTO SECRETARIAT, *supra* note 16, at 61.

19. WTO SECRETARIAT, *supra* note 16, at 61.

20. Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Decisions adopted by the Trade Negotiations committee—Results of the Uruguay Round, 1867 U.N.T.S. 60 (1994) [hereinafter Reform Programme].

21. *Id.* arts. 2–3.

22. The reduction commitments apply to both traditional tariffs and the tariffs resulting from tariffication. In case of bound tariffs, the reduction was to be from the bound rate, in case of unbound tariffs, from the rate in effect on 1 September 1986. For developed Members the average reduction was to be 36% over six years, whereas for developing Members the average reduction was to be 24% to be implemented over a ten-year period. Least-developed Members were not required to undertake any reduction commitments, although they were required to tariffy and bind their tariffs. Negotiating Group on Access, *Note by the Chairman of the Market Access Group: Modalities for the Establishment of Specific Binding Commitments*, ¶¶ 3–5,

systemic change, with many of the existing non-tariff trade barriers being subject to conversion into tariffs (tariffication),<sup>23</sup> thus limiting virtually all import protection to tariffs and tariff quotas.<sup>24</sup> These are “more transparent and easier to negotiate than non-tariff measures.”<sup>25</sup>

The level of import protection for agriculture remains very high, however, especially in industrialized countries.<sup>26</sup> One of the reasons for the limited impact of the market access provisions is that the reduction commitments were expressed as an average reduction rather than as a reduction in the average tariff.<sup>27</sup> This formula allowed Members to reduce high tariffs on sensitive products by a smaller percentage, while cutting already low tariffs on less sensitive products by a higher percentage.<sup>28</sup>

### B. Domestic Support

The second pillar of the AoA is the commitment to reduce trade-distorting domestic support measures.<sup>29</sup> Conceptually, there are two categories of domestic support: support with little or no distortive effect on trade, and trade-distorting support.<sup>30</sup> Distortive support measures are subject to different reduction commitments.<sup>31</sup> These commitments are expressed as a single figure, called the “Total Aggregate Measurement of Support” (Total AMS, Article 1 of the AoA), which includes all existing support measures.<sup>32</sup>

MTN.GNG/MA/W/24 (Dec. 20, 1993), available at [http://docsonline.wto.org/gen\\_search.asp?searchmode=simple](http://docsonline.wto.org/gen_search.asp?searchmode=simple) (search “Basic search” for article title)

23. Christine Breining-Kaufmann, *The Right to Food and Trade in Agriculture*, in HUMAN RIGHTS AND INTERNATIONAL TRADE 341, 344 (Thomas Cottier, Joost Pauwelyn & Elisabeth Bürgi eds., 2005).

24. MCMAHON, *supra* note 12, at 33.

25. *Id.*

26. WORLD BANK GROUP, INT’L TRADE DEP’T, TRADE NOTE 6, MARKET ACCESS: AGRICULTURAL POLICY REFORM AND DEVELOPING COUNTRIES 1 (2003) (prepared by Harry de Gorter et al.), available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/TradeNote6.pdf>.

27. *Id.* at 2.

28. *Id.* at 3. Since the actual conversion of non-tariff barriers into the tariff equivalents was left to the countries themselves, a number of Members engaged in what, since the GATT 1947, has been referred to as ‘dirty tariffication’ by establishing tariff equivalents at much higher levels than their corresponding non-tariff barriers in order to create artificially high levels of tariffs from which reductions had to start. As a result, the US and the EC have de facto not significantly facilitated access to their markets. Mechlem, *supra* note 10, at 142–43.

29. WTO SECRETARIAT, *supra* note 16, at 52.

30. *Id.* at 56.

31. MCMAHON, *supra* note 12, at 69. See also MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE AND POLICY 301–05 (2006) (describing the calculation of the Base Total Aggregate Measurement of Support as benchmark for commitments).

32. MCMAHON, *supra* note 12, at 69; AoA, *supra* note 14, art. 1(h).

Article 6 of the AoA “exempts a number of domestic support measures from the reduction commitments.”<sup>33</sup> “The fundamental criterion that support must meet in order to be exempt is to be economically neutral, in accordance with Annex 2, paragraph 1.”<sup>34</sup> “In addition, the specific requirements listed in Part 2 of Annex 2 must be fulfilled.”<sup>35</sup> The first exemption allows members to provide product-specific support up to a *de minimis* threshold, which is set at five percent for developed countries and ten percent for developing countries.<sup>36</sup> Second, Article 6.2 of the AoA lists exempted domestic support measures to encourage agricultural and rural development in developing countries. This list includes generally available agricultural investment subsidies, agricultural input subsidies generally available to low-income and resource-poor producers, and domestic support to encourage diversification away from growing illicit narcotic crops.<sup>37</sup> The third exemption from the reduction commitments is direct payment provided under production-limiting programs.<sup>38</sup> This is the notorious “Blue Box,” which allows support that is clearly market-distorting, but “was considered necessary to secure an overall agreement on agriculture, especially from the point of the view of the [European Community].”<sup>39</sup> The rationale for this provision is that eventually, “through such programmes[,] the total output of farm products in some [regions] will fall (and so will the argument for trade protection in these [regions]).”<sup>40</sup>

The final group of domestic support measures not subject to the reduction commitment, the so-called “Green Box,” is defined in Annex 2 of the AoA.<sup>41</sup> The first category of Green Box measures encompasses *government service programs* for agriculture and the rural community.<sup>42</sup> Such programs may include pest and disease control, support for training and information, providing infrastructure such as drinking water,<sup>43</sup> or research programs.<sup>44</sup> A

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33. MCMAHON, *supra* note 12, at 69; AoA, *supra* note 14, art. 6.1.

34. Breining-Kaufmann, *supra* note 23, at 345.

35. *Id.*

36. AoA, *supra* note 14, art. 6.4.

37. *Id.* art. 6.2.

38. *Id.* art. 6.5.

39. MCMAHON, *supra* note 12, at 70 (noting that the Blue Box “would accommodate the 1992 reforms of the Common Agricultural Policy without making such reforms subject to reduction commitments.”).

40. MATSUSHITA ET AL., *supra* note 31, at 306.

41. See Breining-Kaufmann, *supra* note 23, at 345.

42. AoA, *supra* note 14, Annex 2, ¶ 2.

43. This relates directly to the recent General Comment of the Committee on Economic, Social and Cultural Rights [CESCR] on the right to water. U.N. Econ. & Soc. Council [ECOSOC], CESCR, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social, and Cultural Rights, General Comment No. 15*, arts. 11–12, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); Breining-Kaufmann, *supra* note 23, at 345 n.19.



second category deals with *food aid*, where several specific criteria must apply before there is an exemption. For instance, paragraph 3 of Annex 2 exempts public stockholding for food security purposes, subject to compliance with specific requirements.<sup>45</sup> Food aid, in the form of a domestic food-aid program for people in need, is exempt as well, provided that the government buys products at “current market prices,” and that the financing and administration of the aid is transparent.<sup>46</sup> The third category of Green Box support, *direct payments*, can become relevant in the food context when they are granted for relief from natural disasters,<sup>47</sup> as structural adjustment assistance,<sup>48</sup> under environmental programs,<sup>49</sup> or under regional assistance programs.<sup>50</sup> Direct payments cannot be linked to production decisions (decoupling).<sup>51</sup>

### C. Export Competition

The third pillar of the AoA is the commitment to reduce export subsidies.<sup>52</sup> The AoA limits the use of export subsidies to specific situations mentioned in Article 9.<sup>53</sup> Article 9.1 lists the six types of export subsidy that are subject to a reduction commitment.<sup>54</sup> Generally, “[t]he export subsidy commitments relate to both the amount of money spent and the quantity exported.”<sup>55</sup>

Article 8 prohibits Members from providing export subsidies that do not conform to the Agreement or to the commitments in their schedule. In order to prevent countries from using export subsidies not specifically listed in Article 9 to circumvent reduction of other export subsidy commitments, the AoA contains an anti-circumvention provision in Article 10.<sup>56</sup> That provision includes a definition of food aid<sup>57</sup> “so that transactions claimed to be food aid, but not meeting the criteria in the AoA, cannot be used to undermine commitments.”<sup>58</sup>

44. AoA, *supra* note 14, Annex 2, ¶ 2.

45. *Id.* Annex 2, ¶45 n.5.

46. *Id.* Annex 2, ¶ 4.

47. *Id.* ¶ 8.

48. *Id.* ¶ 11.

49. *Id.* ¶ 12.

50. *Id.* ¶ 13.

51. *Id.* ¶ 6.

52. WTO SECRETARIAT, *supra* note 16, at 52.

53. *Id.* at 59.

54. AoA, *supra* note 14, art. 9.1.

55. MCMAHON, *supra* note 12, at 96.

56. AoA, *supra* note 14, art. 10, ¶ 1.

57. *Id.* art. 10, ¶ 4 (stipulating not a firm commitment but that Members “shall ensure” the provisions set forth). See generally FAO, Trade Policy Technical Note 8, *Food Aid In The Context Of International And Domestic Markets And The Doha Round* (2005), available at <ftp://ftp.fao.org/docrep/fao/007/j5072e/j5072e00.pdf> (providing an overview of the food aid disciplines in the AoA).

58. Breining-Kaufmann, *supra* note 23, at 346.

Food aid that meets the criteria is not considered to be a subsidized export, and thus is not limited by the AoA.<sup>59</sup>

D. *The Marrakesh Decision on Least-Developed and Net Food-Importing Countries*

The Food and Agriculture Organization of the United Nations (FAO) has noted that “[d]uring the Uruguay Round, negotiators were concerned that agricultural reform could have negative effects on least-developed and net-food importing developing countries (LDCs and NFIDCs). . . .”<sup>60</sup> Specifically, negotiators were concerned about available supplies of “basic foodstuffs from external sources on reasonable terms and conditions,” as well as

short-term difficulties in financing normal levels of commercial imports. . . . Several analyses had shown that the reform process was likely to increase food import bills as world prices of basic food[stuff]s were expected to increase, and that these countries could be[come] [increasingly] dependent on food imports as they open[ed] their economies, while food aid would [simultaneously] decline.<sup>61</sup>

The response was the Marrakesh Decision.<sup>62</sup> The Marrakesh Decision included four response mechanisms: (1) food aid, (2) short-term financing of normal levels of commercial imports, (3) favorable terms for agricultural export credits, and (4) technical and financial assistance to improve agricultural productivity and infrastructure.<sup>63</sup> The definition of the beneficiaries of the Marrakesh Decision was left to the Committee on Agriculture.<sup>64</sup>

59. *Id.*

60. FAO, *The Right to Food Guidelines: Information Papers and Case Studies*, at 66 (2006), available at <ftp://ftp.fao.org/docrep/fao/010/a0511e/a0511e02.pdf> [hereinafter *Right to Food*].

61. *Id.* at 66–67; see also Breining-Kaufmann, *supra* note 23, at 346–47.

62. *Right to Food*, *supra* note 60, at 67; see also Reform Programme, *supra* note 20.

63. Reform Programme, *supra* note 20, ¶¶ 3–5.

64. The Committee used the least-developed countries as recognized by the U.N. As for net food-importing countries, the Committee decided that any developing country which had been a net importer of basic foodstuffs in any three of the past five years for which data was available and which notified the Committee that it wished to be listed as a net food-importing developing country would be so listed. Comm. on Agric., *WTO List of Net Food-Importing Developing Countries for the Purposes of the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (“The Decision”)*, G/AG/5/Rev.8 (Mar. 22, 2005), available at <http://docsonline.wto.org/DDFDocuments/t/G/AG/5R8.doc> (listing net food-importing countries as Barbados, Botswana, Côte d’Ivoire, Cuba, Dominica, Dominican Republic, Egypt, Gabon, Honduras, Jamaica, Jordan, Kenya, Mauritius, Mongolia, Morocco, Namibia, Pakistan, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Trinidad and Tobago, Tunisia and Venezuela); see also MCMAHON, *supra* note 12, at 177 n.45.

The Marrakesh Decision, however, has not been satisfactorily implemented. In fact, the Doha WTO Ministerial Conference included the Marrakesh Decision as one of its implementation issues.<sup>65</sup> Notwithstanding its weak implementation, the Marrakesh Decision is important because it calls for “a level of food aid commitments sufficient to meet the *legitimate needs* of developing countries during the reform programme.”<sup>66</sup> The Marrakesh Decision thereby acknowledges that increasing welfare through trade liberalization is coupled with an increase in the legitimate needs for assistance of those countries that are harmed by the process.<sup>67</sup>

### III. THE LEGAL FRAMEWORK FOR THE RIGHT TO FOOD

Food security is a concept which includes diverse elements, as reflected by the many attempts to define it in both research and political practice.<sup>68</sup> More than a decade ago, there were already about two hundred such definitions in published writings.<sup>69</sup> The most widely accepted definition of food security can be found in the 1996 World Food Summit Declaration, which understands food security as a situation in which “all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.”<sup>70</sup>

#### A. *Legal Instruments*

In this Article, food security is reviewed under a rights-based perspective, which is thus conceptualized as being included in the human right to adequate food.<sup>71</sup> The right to food has been

65. World Trade Org., Ministerial Decision of 14 November 2001, WT/MIN(01)/17, 41 I.L.M. 757 (Nov. 14, 2002).

66. Reform Programme, *supra* note 20, ¶ 3, sec. (i) (emphasis added).

67. Mechlem, *supra* note 10, at 160.

68. Marisol Smith et al., *Household Food Security: Concepts and Definitions*, in HOUSEHOLD FOOD SECURITY: CONCEPTS, INDICATORS, MEASUREMENT 136 (Simon Maxwell & Timothy Frenkenberger eds., 1992).

69. *Id.*

70. FAO, *World Food Summit Plan of Action*, ¶ 1, FAO Doc. W3613/E (Nov. 13, 1998), available at <http://www.fao.org/DOCREP/003/W3613E/W3613E00.HTM> [hereinafter *World Food Summit*].

71. A rights-based approach to food security introduces the fundamental principles of participation, accountability, equality and non-discrimination to food policies. The accountability dimension facilitates the conceptual clarification of the responsibilities and corresponding duties of a state to protect, respect, and fulfill the right to adequate food of its citizens. See *infra* Part III.B. Compare Breining-Kaufmann, *supra* note 23, at 359 (noting that a rights-based concept of food security could also help in “drawing the line between a morally required right to food and morally unacceptable claims or want[s]”), with Thomas Pogge, *Recognized and Violated*

recognized as a human right in numerous binding and non-binding legal instruments since it was first established in 1948 as part of Article 25(1) of the Universal Declaration of Human Rights.<sup>72</sup> Of all these documents, Article 11 of the International Covenant on Economic, Social, and Cultural Rights of 1966 contains the most important codification of the right to food: "The States Parties . . . recognize the right of everyone to an adequate standard of living . . . including adequate food."<sup>73</sup>

The first link between the realization of the right to food and international trade is expressed in Article 11(2) of ICESCR, which states that

[t]he States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed[,] . . . [t]aking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.<sup>74</sup>

In 1996, the World Food Summit adopted by consensus the Rome Declaration on World Food Security and World Food Summit Plan of Action, which outlined ways to achieve universal food security.<sup>75</sup> Commitment Four of this Plan of Action specifically addresses the link between trade and the right to food, and aims at a coherent interpretation of state obligations in both international trade law and human rights instruments.<sup>76</sup> Commitment Seven, on the other hand, introduces a concept of mainstreaming the right to food into other legal obligations.<sup>77</sup>

by *International Law: The Human Rights of the Global Poor*, 18 LEIDEN J. INT'L L. 717, 720 (2005) (describing his approach to conceiving economic and social rights narrowly as only imposing negative duties not to harm).

72. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948); see, e.g., Convention on the Rights of the Child, G.A. Res. 44/25, Annex, arts. 24(2), 27, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989); Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, art. 12, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1979); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 6, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

73. ICESCR, *supra* note 2, art. 11(1). The United States is not a party to the ICESCR. See Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 372-77 (1990) (offering an overview of the U.S. position with respect to economic, social and cultural rights).

74. ICESCR, *supra* note 2, art. 11(2), at 7.

75. *World Food Summit*, *supra* note 70.

76. *Id.* ¶¶ 37-41.

77. *Id.* ¶¶ 54-62.

In response to the invitation in objective 7.4 of the World Food Summit Plan of Action,<sup>78</sup> the United Nations Committee on Economic, Social, and Cultural Rights (CESCR) adopted General Comment No. 12 in May 1999, in which it developed the normative content of the right to adequate food as reflecting the core minimum obligations of states, as well as the obligations of the international community.<sup>79</sup> According to the CESCR, the core content of the right to adequate food implies: (a) “the *availability* of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;”<sup>80</sup> and (b) “the *accessibility* of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”<sup>81</sup>

General Comment No. 12 defines the right to food as being “realized when every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement.”<sup>82</sup> For the one hundred and fifty-seven states party to the Covenant, this constitutes an authoritative interpretation of their obligation to progressively realize the right to adequate food as enshrined in Article 2(1) and Article 11 of ICESCR.<sup>83</sup>

The most recent international instrument containing a provision for the realization of the right to food is the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Voluntary Guidelines), which were adopted by FAO in 2004.<sup>84</sup> According to the Voluntary

78. See *id.* ¶ 61 (inviting a better definition of the rights related to food in Article 11 of the ICESCR and proposals for ways to implement and realize these rights).

79. CESCR, *General Comment 12, Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter *General Comment 12*]. See generally Philip Alston, *The Historical Origins of the Concept of ‘General Comments’ in Human Rights Law*, in *THE INTERNATIONAL LEGAL SYSTEM IN QUEST OF EQUITY AND UNIVERSALITY* 763 (Laurence Boisson de Chazournes & Vera Gowlland-Debbas eds., 2001) (analyzing the status of General Comments under international law).

80. General Comment 12, *supra* note 79, ¶ 8 (emphasis added); see also *id.* ¶ 12.

81. *Id.* ¶ 8 (emphasis added); see also *id.* ¶ 13.

82. *Id.* ¶ 6.

83. Since the United States has not ratified the ICESCR, see *supra* note 74, the General Comment has neither force nor effect on its international responsibilities. See, e.g., George P. Smith, II, *Human Rights and Bioethics: Formulating a Universal Right to Health, Health Care, or Health Protection?*, 38 VAND. J. TRANSNAT’L L. 1295, 1318 (2005) (noting the impracticability of enforcing a General Comment, as well as its nonjusticiability). But see Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT’L L. 691, 771–97 (2006) (discussing accountability of non-ratifying states via customary international law).

84. FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (2004), available at <http://ftp.fao.org/docrep/fao/meeting/009/y9825e/y9825e01.pdf>.

Guidelines, “[i]nternational trade can play a major role in the promotion of economic development . . . and improving food security at the national level.”<sup>85</sup> Therefore, the Voluntary Guidelines recommend states to promote international trade.<sup>86</sup> At the same time, paragraph 8 “recall[s] the long-term objective of the [AoA] to establish a fair and market-oriented trading system,” and calls for a “fundamental reform . . . in order to correct and prevent restrictions and distortions in world agricultural markets.”<sup>87</sup> However, the Voluntary Guidelines cover a combination of binding and non-binding content and do not create new rights or obligations.<sup>88</sup> The guidelines are intended to provide governments with a practical instrument for the implementation of the right to adequate food according to their obligations under the ICESCR, at both the national and international levels.

### B. *State Obligations under the ICESCR*

In his report on the right to adequate food as a human right, then-Special Rapporteur Asbjørn Eide (senior fellow at the Norwegian Institute of Human Rights, University of Oslo) developed a three-level typology of states’ duties<sup>89</sup> that is now a widely used framework for analyzing the human rights obligations of states.<sup>90</sup> Moreover, the Committee follows Eide’s approach in General Comment 12, stating that “the right to adequate food . . . imposes three types or levels of obligations on States parties: the obligations to *respect*, to *protect* and to *fulfill*.”<sup>91</sup> Although the Committee places responsibility to respect, protect, and fulfill the right to adequate food on the national government, the Committee also considers that state parties to the Covenant “should take steps to *respect* the enjoyment of the right to food in other countries, to *protect* that right, to *facilitate* access to food and to *provide* the necessary aid when required.”<sup>92</sup>

85. *Id.* § III, ¶ 6.

86. *Id.* ¶ 7.

87. *Id.* ¶ 8.

88. *See id.* §§ II–III.

89. ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right*, Fig. 1, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987).

90. *Id.*; General Comment 12, *supra* note 79, ¶ 15.

91. General Comment 12, *supra* note 79, ¶ 15.

92. *Id.* ¶ 36 (emphasis added). Extraterritorial obligations advocated *inter alia* by the Special Rapporteur on the right to food, *infra* note 93, are currently widely debated to improve the understanding of the definition and content of these obligations. *See, e.g.*, Sigrun Skogly, *The Obligation of International Assistance and Co-operation in the International Covenant on Economic, Social and Cultural Rights*, in HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJØRN EIDE 403 (Morten Bergsmo ed., 2003) (discussing the “extraterritorial

## 1. The Obligation to Respect

According to Jean Ziegler, current UN-Special Rapporteur on the right to food,

[t]he obligation to respect means that the Government should not arbitrarily [deprive people] of their right to food or make it difficult for them to gain access to food. The obligation to respect the right to food is effectively a negative obligation, as it entails limits on the exercise of State power that might threaten people's existing access to food. Violations of the obligation to respect would occur, for example, if the Government arbitrarily evicted or displaced people from their land, especially if the land was their primary means of [subsistence].<sup>93</sup>

Further examples include the government lifting social security provisions without ensuring alternatives for vulnerable groups to feed themselves, or the government knowingly introducing toxic substances into the food chain, and thus violating the right to access to food that is "free from adverse substances."<sup>94</sup>

The extraterritorial obligation to respect the right to food requires states to "do no harm."<sup>95</sup> In other words, it requires states to ensure that their policies and measures do not lead to violations of the right to food for people living in other countries.<sup>96</sup> In addition, states have to ensure that the right to food is given adequate consideration in international agreements.<sup>97</sup> "[T]he failure of a state to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations" therefore amounts to a violation of its obligations under the ICESCR.<sup>98</sup>

## 2. The Obligation to Protect

General Comment 12 also states that "[t]he obligation to protect requires measures by the state to ensure that enterprises or individuals do not deprive individuals of their access to adequate food," i.e., to ensure horizontal effectiveness.<sup>99</sup> If private subjects are

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obligations that derive from the [ICESCR]"); Narula, *supra* note 84, at 727–35 (discussing extraterritorial application of the ICESCR where (1) jurisdiction is exercised through "effective control" and (2) under the obligation of international cooperation).

93. Special Rapporteur on the Right to Food, *Report of the Special Rapporteur on the Right to Food—Economic, Social and Cultural Rights: The Right to Food*, ¶ 22, delivered to the U.N. Econ. & Soc. Council, *Comm. on Human Rights*, U.N. Doc. E/CN.4/2006/44 (Mar. 16, 2006), available at <http://daccessdds.un.org/doc/UNDOC/GEN/G06/118/82/PDF/G0611882.pdf?OpenElement> [hereinafter Special Rapporteur].

94. General Comment 12, *supra* note 79, ¶ 8.

95. Special Rapporteur, *supra* note 93, ¶ 35.

96. *Id.*

97. General Comment 12, *supra* note 79, ¶ 36.

98. *Id.* ¶ 19.

99. *Id.* ¶ 15.

to be held directly responsible, relevant domestic provisions, usually in constitutional law, are necessary.<sup>100</sup> In sum, governments must establish bodies to investigate and provide effective remedies, including access to justice, for investigating potential violations of the right to food.<sup>101</sup>

Extraterritorially, the obligation to protect requires states to ensure that their citizens and the institutions within their jurisdiction do not violate the right to food of people living in other countries.<sup>102</sup> As mentioned above, fulfilment of this obligation can be ensured best by establishing domestic regulations which make sure that activities by private actors, including business enterprises, do not undermine their home state's obligation to protect the right to food in other countries.<sup>103</sup>

### 3. The Obligation to Fulfill

According to General Comment 12, "[t]he obligation to fulfill (facilitate) means the state must pro-actively engage in activities intended to strengthen people's access to and [use] of resources and means to ensure their livelihood, including food security."<sup>104</sup> Given its positive nature, the obligation requires a government to actively "identify vulnerable groups and implement policies to improve . . . people's access to adequate food and their ability to feed themselves."<sup>105</sup> The FAO states that "[t]hese activities do not necessarily entail the provision of substantial financial resources and could [simply entail] ensuring access to information regarding opportunities to satisfy the right to food."<sup>106</sup> The FAO elaborates that "[e]xamples of typical measures to facilitate access to food include education and training, agrarian reform, policies supportive of urban and rural development, [and] market information," among others.<sup>107</sup>

"Finally," General Comment 12 states, "whenever an individual or a group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, states have the

100. The so-called *Drittwirkung*. See MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 111–12 (Clarendon Press 1995); Breining Kaufmann, *supra* note 23, at 363.

101. General Comment 12, *supra* note 79, ¶¶ 32–33.

102. *Id.* ¶ 19.

103. Fons Coomans, *Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social and Cultural Rights*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 183, 190, 193 (Fons Coomans & Menno T. Kamminga eds., 2004).

104. General Comment 12, *supra* note 79, ¶ 15.

105. Special Rapporteur, *supra* note 93, ¶ 24.

106. *Right to Food*, *supra* note 60, at 82.

107. *Id.*



obligation to *fulfill (provide)* that right directly.”<sup>108</sup> Direct assistance may take the form of safety nets such as food voucher schemes or social security provisions to ensure freedom from hunger. General Comment 12 goes on to say that “[t]his obligation also applies for persons who are victims of natural or other disasters.”<sup>109</sup>

The extraterritorial obligation to “*facilitate [the]* realization of the right to food does not necessarily require resources or international aid,” but rather international cooperation to meet the goal of creating an environment that allows for the realization of the right to food in all countries.<sup>110</sup> States claiming that resource constraints make it impossible for them to fulfill the right to food are obliged to actively seek international assistance.<sup>111</sup> The Special Rapporteur to the United Nations states that

[t]o support the *fulfillment* of the right to food . . . [s]tates have a joint and individual responsibility . . . to cooperate in providing disaster relief and humanitarian assistance in times of emergency. . . . Each state should contribute to this task in accordance with its ability.<sup>112</sup>

Products included in international food aid programs must be “safe and culturally acceptable to the recipient population.”<sup>113</sup> Studies show, however, that food aid is often not tailored to the needs of countries, but rather used as an instrument for disposing of the surpluses of developed countries.<sup>114</sup> As a result, there is not an empirically established relationship between food crises or shortages and food aid.<sup>115</sup> Additionally, food aid “should be organized in ways that facilitate the return to food self-reliance” and do not adversely affect local producers and local markets.<sup>116</sup> Again, because of the described strategy, food aid often consists of products that, due to mass production, are much cheaper than local foods and therefore hinder the recovery of local market structures.<sup>117</sup> In addition, such a policy may also affect culturally important goods since they are

108. General Comment 12, *supra* note 79, ¶ 15.

109. *Id.*

110. Special Rapporteur, *supra* note 93, ¶ 37.

111. General Comment 12, *supra* note 79, ¶ 17. “States that, through neglect or misplaced national pride, make no such appeal or deliberately delay such appeals are violating their obligation.” *Id.*; see also Special Rapporteur, *supra* note 93, ¶ 24.

112. Special Rapporteur, *supra* note 93, ¶ 38 (emphasis added).

113. *Id.*

114. See FAO, *The State of Food and Agriculture 2006: Food Aid for Food Security?*, at 10–11 (2006), available at <http://www.fao.org/docrep/009/a0800e/a0800e00.htm> [hereinafter *State of Food*] (noting a finding, among others, that “[e]conometric evidence from the early years of international food aid confirmed the role of commodity prices and stocks as the key determinants of food aid donations.”) (emphasis added).

115. *Id.* at 40.

116. General Comment 12, *supra* note 79, ¶39.

117. See *State of Food*, *supra* note 114, at 38–40 (analyzing the effect of food aid on food prices in certain types of markets).

usually produced locally. In sum, the practice of disposing of food surpluses as food aid conflicts with the obligation to fulfill the right to food in a manner that does not adversely affect local markets. The case of Somalia, a country that reduced its own farming activities and thus became completely dependent on food aid, illustrates this argument.<sup>118</sup>

### C. Progressive Realization of the Right to Food

The ICESCR requires state parties to take steps toward the progressive realization of the right to adequate food.<sup>119</sup> Progressive realization implies moving “as expeditiously as possible”<sup>120</sup> toward this goal. According to the Special Rapporteur, “[t]he concept of ‘progressive realization’ cannot be used to justify persistent injustice and inequality. It requires [g]overnments to take immediate steps to continuously improve” the enjoyment of the right to adequate food.<sup>121</sup> This also implies the “principle of non-regression”: if state parties deteriorate access to food through policy or legislation without implementing compensatory measures, those policies or laws would be inconsistent with the obligations under the Covenant.<sup>122</sup> A prominent example of this is an increase in the country’s military budget at the expense of food production or food imports.<sup>123</sup>

While the right to adequate food in Article 11(1) is a “relative” standard, the right to be free from hunger in Article 11(2) is “absolute,”<sup>124</sup> and is the only right in the Covenant termed “fundamental.”<sup>125</sup> To further clarify, the CESCR stated in General

118. *Id.* at 38.

119. ICESCR, *supra* note 2, art. 11(1).

120. General Comment 12, *supra* note 79, ¶ 14.

121. Special Rapporteur, *supra* note 93, ¶ 26.

122. *Cf.* Office of the U.N. High Comm’r for Human Rights [OCHCR], CESCR, *The Right to Adequate Housing: CESCR General Comment 4*, art. 11(1), ¶ 11, U.N. Doc. E/1992/23 (Dec. 13, 1991), reprinted in U.N. Doc. HRI/GEN/1/REV.8, available at <http://www.ohchr.org/english/bodies/cescr/comments.htm>.

123. *See, e.g.*, STEPHAN HAGGARD & MARCUS NOLAND, HUNGER AND HUMAN RIGHTS: THE POLITICS OF FOOD IN NORTH KOREA 16 (U.S. Committee for Human Rights in North Korea ed., 2005); *cf.* ECOSOC, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Democratic Republic of Korea*, U.N. Doc. E/C.12/1/Add.95 (Dec. 12, 2003) (inviting the Democratic People’s Republic of Korea to explore the possibility of increasing the budgetary allocations for social expenditure and public assistance for people in need).

124. THE RIGHT TO FOOD: GUIDE THROUGH APPLICABLE INTERNATIONAL LAW, at xviii (Katarina Tomaševski ed., 1987).

125. ICESCR, *supra* note 2, art. 11(2). It is interesting that the International Covenant on Civil and Political Rights implies a right to food as part of the fundamental right to life found in Article 6. *See* OCHCR, *General Comment No. 06, The Right to Life*, (art. 6), ¶ 5, U.N. Doc. HRI/GEN/1/REV.1 (Apr. 30, 1982), available at <http://www.unhcr.ch/tbs/doc.nsf/0/84ab9690ccd81fc7c12563ed0046fae3?Opendocument> (stating that

Comment 3 that state parties “have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels.”<sup>126</sup> Thus, states have a core obligation to take action to ensure that, at the very least, people under their jurisdiction have access to the minimum essential food necessary to achieve their freedom from hunger.<sup>127</sup>

The obligation of non-discrimination is also subject to immediate implementation.<sup>128</sup> Discrimination in access to food, as well as to the means and entitlements for its procurement, “on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, as stated in article 2, paragraph 2 of the [ICESCR], cannot be justified under any circumstances,” including when a state has limited resources.<sup>129</sup>

It is important to note that “in terms of political and economic systems[,] the [ICESCR] is neutral” and was drafted deliberately so as to accommodate a variety of approaches.<sup>130</sup> Accordingly, one commentator has argued that “[t]he different levels of state obligations described above are of crucial importance in understanding [that the right to adequate food] must not be provided by the state—such a misconception would overlook the now widely accepted different levels of state obligations.”<sup>131</sup> Hence, “[a]n internationally liberalized market economy shaped in a human rights conforming manner can . . . offer an appropriate framework to realize the right to food.”<sup>132</sup>

#### IV. RECONCILING TRADE IN AGRICULTURE AND THE RIGHT TO FOOD

According to Christine Breining-Kaufmann, a leading scholar on the intersection of trade and human rights, “[t]he similarities between the legal approach that emphasizes the manifold obligations of states with regard to the right to food, and the acknowledgement of the [concerns regarding non-trade issues] are striking.”<sup>133</sup> This is

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the protection of the “inherent right to life” requires States to “adopt[] measures to eliminate malnutrition”).

126. OCHCR, CESCR, *General Comment 3, The Nature of States Parties Obligations (Art. 2, par. 1)*, ¶ 10, U.N. Doc. E/C.12/1990/8 (Dec. 14, 1990), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/94bdar59b43a424c12563ed0052b664?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/94bdar59b43a424c12563ed0052b664?Opendocument) [hereinafter *General Comment 3*].

127. See *General Comment 12, supra* note 79, ¶¶ 19, 21.

128. Craven, *supra* note 100, at 181.

129. Special Rapporteur, *supra* note 93, ¶ 27. However, by contrast to *de jure* discrimination, the elimination of *de facto* discrimination will not always be capable of being achieved immediately. Craven, *supra* note 100, at 182.

130. *General Comment 3, supra* note 126, ¶ 8.

131. Breining-Kaufmann, *supra* note 23, at 364.

132. Mechlem, *supra* note 10, at 137.

133. Breining-Kaufmann, *supra* note 23, at 372.

particularly true regarding food security in the legal framework of trade in agriculture: “both put the right to food and the liberalization of agricultural trade within the broader context of development and [the enhancement of] general welfare.”<sup>134</sup> In this sense, the text of the WTO Agreement appears to have been carefully drafted so that countries would not be compelled to make commitments that contradict their obligations under other multilateral frameworks.<sup>135</sup>

Indeed, states party to the WTO have human rights obligations concurrent with their commitments in the area of international trade. Of the WTO’s 151 members, 125 have ratified the ICESCR, and all are bound by customary human rights law and have ratified at least one human rights treaty.<sup>136</sup> Consequently, a number of human rights bodies have addressed the relationship and tensions between trade and human rights in general, or between trade in agriculture and the right to food.<sup>137</sup>

Despite these similarities, in reality, conflicts between the right to food security and international trade liberalization occur.

#### A. *Conflicts Between the Right to Food Security and Liberalized Trade in Agriculture*

Food aid is one of the most sensitive areas when it comes to ensuring food security and liberalizing trade in agriculture at the same time. On one hand, non-emergency food aid can easily undermine the system of the AoA if it is a disguised commercial transaction that would otherwise be subject to export competition rules.<sup>138</sup> On the other hand, foodstuffs that are bought at subsidized prices under the current regime will be accounted for in the AMS regardless of whether their purpose is to fight hunger and poverty.<sup>139</sup>

134. *Id.*

135. *Cf. id.* at 373 (stating that a provision of the UN charter, “which deals with cases of conflicts between international agreements, is . . . not necessary” because calls for consistency are already built into WTO agreements).

136. For a list of WTO member states, see World Trade Org., Members and Observers, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Oct. 8, 2007) (numbers current as of June 15, 2007). For an updated list of signatories and parties to the ICESCR, see OHCHR, Status by Treaty, <http://www.unhchr.ch/tbs/doc.nsr/newhvstatbytreaty?Openview> (follow “CESCR–International Covenant on Economic, Social and Cultural Rights”) (last visited Oct. 11, 2007). As of the date of this Article, the Russian Federation had not become a member of the WTO. See *Russian ministry hopes to settle remaining WTO issues shortly*, ITAR-TASS, Oct. 4, 2007, available at [http://www.wto.ru/en/news.asp?msg\\_id=21237](http://www.wto.ru/en/news.asp?msg_id=21237).

137. See, e.g., ECOSOC, Comm’n on Human Rights, *Globalization and its Impact on the Full Enjoyment of Human Rights*, U.N. Doc. E/CN.4/2002/54 (Jan. 15, 2002), available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?s=115](http://ap.ohchr.org/documents/dpage_e.aspx?s=115).

138. See *id.* ¶ 29.

139. For current proposals to amend this rule in the ongoing negotiations, see Special Session of the Comm. on Agric., *Communication from the Chairman of the*

One of the issues currently being discussed in the ongoing AoA negotiations is re-exports of food aid.<sup>140</sup> Some countries have developed a practice of selling food aid received from other countries abroad.<sup>141</sup> Since food aid does not always fit the needs of a particular country, such re-export may actually improve the situation in certain countries by creating the financial means to buy more appropriate foodstuffs for that country.

The principle of non-discrimination between foreign and domestic products may affect culturally significant foodstuffs, such as Japanese rice or Mexican corn. Both have an important cultural value and are generally produced domestically.<sup>142</sup> For instance, over forty percent of Mexican corn is grown by subsistence farmers.<sup>143</sup> The production costs of these farms, however, are relatively high compared with U.S. farms; American farmers not only benefit from economies of scale, but are also heavily subsidized.<sup>144</sup> The result is the so-called “Mexican Corn Crisis.” A similar situation for Japanese rice has led to a great deal of Japanese pressure on the WTO to remove its very restrictive rice import policy.

On the other side of the coin, the risk of using cultural importance as an argument for unneeded protectionism is real. This makes it difficult to find a solution that accommodates both culturally acceptable food security and the principle of non-discrimination. Possible approaches are being discussed in ongoing negotiations and will be addressed in Section V of this Article.

### B. *Methods for Reconciliation—The ‘Linkage’ Debate*

Article 31(3)c of the Vienna Convention on the Law of Treaties (VCLT) requires states to act in good faith and to comply with the

*Committee on Agriculture: Second Instalment*, ¶¶ 24–25 (May 25, 2007), available at [http://www.wto.org/english/tratop\\_e/agric\\_e/agchairtxt\\_25may07\\_e.pdf](http://www.wto.org/english/tratop_e/agric_e/agchairtxt_25may07_e.pdf).

140. Special Session of the Comm. on Agric., *Chair’s Reference Paper: Food Aid*, ¶ 1(v) (May 10, 2006), available at [http://www.wto.org/English/tratop\\_e/agric\\_e/ref\\_paper\\_foodaid\\_r1\\_e.doc](http://www.wto.org/English/tratop_e/agric_e/ref_paper_foodaid_r1_e.doc).

141. See Special Session of the Comm. on Agric., *G-20 Comments on Food Aid*, art. IV, JOB(06)/150 (May 19, 2006), available at [http://www.agtradepolicy.org/output/resource/G-20\\_Food\\_Aid\\_19May06.pdf](http://www.agtradepolicy.org/output/resource/G-20_Food_Aid_19May06.pdf) (stating that the re-exportation of food aid should be “prohibited” due to the “humanitarian nature of food aid”).

142. OXFAM, BRIEFING PAPER NO. 50, DUMPING WITHOUT BORDERS: HOW US AGRICULTURAL POLICIES ARE DESTROYING THE LIVELIHOODS OF MEXICAN CORN FARMERS 5 (2003), available at [http://www.oxfamamerica.org/newsandpublications/publications/briefing\\_papers/art5912.html/OA-Dumping\\_Without\\_Borders.pdf](http://www.oxfamamerica.org/newsandpublications/publications/briefing_papers/art5912.html/OA-Dumping_Without_Borders.pdf); Linda S. Wojtan, *RICE: It’s More Than Just a Food*, JAPAN DIGEST, Nov. 1993, available at <http://spice.stanford.edu/digests/Japan/digest6-pfv.html>.

143. ALEJANDRO NADAL, *THE ENVIRONMENTAL & SOCIAL IMPACTS OF ECONOMIC LIBERALIZATION ON CORN PRODUCTION IN MEXICO* 8 (2000).

144. *Id.*

obligations they have accepted.<sup>145</sup> Although it has been suggested that WTO law is a self-contained regime, the very first report of the Appellate Body refuted this position, stating that WTO agreements are not to be “read in clinical isolation from public international law.”<sup>146</sup> According to Article 3(2) of the Dispute Settlement Understanding, WTO panels and the Appellate Body are to apply the “customary rules of interpretation of public international law,”<sup>147</sup> above all the Vienna Convention on the Law of Treaties.<sup>148</sup>

Because ICESCR has been ratified by a large number of countries but not all WTO members, the question has arisen as to whether the reference in article 31(3)c VCLT to *the parties* should be considered as a reference to *the parties to the dispute*, or to *all the parties to the treaty under interpretation*.<sup>149</sup> Since the WTO, in contrast to human rights treaties, admits non-sovereign members such as Hong Kong, it is impossible for the WTO to have an identical membership to any treaty.<sup>150</sup> Relevant rules of treaties with broad membership, such as human rights treaties, can therefore be considered in WTO disputes. The Appellate Body confirmed this principle in *US-Shrimp* when it examined the notion of “exhaustible resources” by referring to a number of multilateral environmental agreements.<sup>151</sup> Although many of the agreements did not have the

145. Vienna Convention on the Law of Treaties, art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 340 [hereinafter VCLT]; Breining-Kaufmann, *supra* note 3, at 115.

146. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, § IIIB, WT/DS2/AB/R (Apr. 22, 1996) [hereinafter United States Gasoline]. See generally JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003) (providing a comprehensive analysis on the relationship of trade law to public international law).

147. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 1869 U.N.T.S. 401 (1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf) [hereinafter DSU]; see also Panel Report, *Korea—Measures Affecting Government Procurement*, ¶ 7.96, WT/DS163/R (May 1, 2000) (noting that “[c]ustomary international law applies generally to the economic relations between the WTO Members”).

148. See VCLT, *supra* note 145 (explaining that states must comply with all obligations that they have accepted).

149. See Gabrielle Marceau, *WTO Dispute Settlement and Human Rights*, 13 EUR. J. INT’L. L. 753, 781 (2002) (noting that the use of the word “parties” could be interpreted to mean either all WTO members or those members which are parties to the dispute).

150. *Id.* (noting that the requirement for identical membership would lead to the paradoxical result that as the WTO membership grows, fewer international agreements would match its membership and thus, the WTO would become increasingly “isolated from other international systems of law”).

151. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 127–34, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *United States—Import Prohibition*] (examining multilateral environmental agreements such as the United Nations Convention on the Law of the Sea and the Resolution on

same membership as the WTO,<sup>152</sup> the Appellate Body nevertheless took them into consideration reasoning that there was evidence of sufficient consensus on some elements of the term “exhaustible resources.”<sup>153</sup>

The situation was different in *EC-Biotech*, where the Panel found that the Cartagena Protocol cannot be regarded as “any relevant rule of international law applicable in the relations between the parties,” since “the European Communities is the only party in this WTO dispute bound by the provisions of the Protocol.”<sup>154</sup>

In its final report, the International Law Commission’s Study Group on Fragmentation supported the Appellate Body’s approach in *US-Shrimp* with regard to Article 31(3)c VCLT and developed a general rule.<sup>155</sup> It held that “Article 31(3)(c) also requires the interpreter to consider other treaty-based rules” to arrive at a consistent meaning.<sup>156</sup> “Such [] rules are of particular relevance where parties to the treaty [that is being] interpret[ed] are also parties to the other treaty.”<sup>157</sup> The rules are also relevant “where the treaty rule has passed into or expresses customary international law,” or where the treaties “provide evidence of the common understanding of the parties as to the object and purpose of the treaty under interpretation or as to the meaning of a particular term.”<sup>158</sup>

Furthermore, the Study Group clarified the distinction between jurisdiction and applicable law.<sup>159</sup> While Articles 3(2) and 19(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) limit jurisdiction by providing that the Dispute Settlement cannot add to or diminish from the rights and obligations of Members provided in the covered agreements, “there is no explicit provision identifying the scope of applicable law.”<sup>160</sup> Hence,

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Assistance to Developing Countries); Marceau, *supra* note 152, at 781 (noting that the Appellate Body disapproved of the “identical membership” approach in *United States—Import Prohibition* through examination of numbers multilateral agreements).

152. *United States—Import Prohibition*, *supra* note 151, ¶¶ 127–34.

153. *Id.*

154. Panel Report, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, ¶ 4.688, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sep. 29, 2006) [hereinafter *Biotech Panel Report*].

155. Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 17, U.N. Doc. A/CN.4/L.702 (July 18, 2006).

156. *Id.* ¶ 21.

157. *Id.*

158. *Id.*

159. See Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 45, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

160. *Id.*

even [though] the competence of WTO bodies is limited to consideration of claims under the covered agreements (and not, for example, under [] human rights treaties) . . . WTO bodies must situate the rights and obligations under the covered agreements within the overall context of general international law (including the relevant [] human rights treaties).<sup>161</sup>

In addition to treaty interpretation, general exceptions in Article XX of the GATT provide another mechanism for reconciling the objectives of the multilateral trading system with those of human rights law.<sup>162</sup> Article XX grants exceptions from the most-favored nation principle in order to protect “important state interests,”<sup>163</sup> such as, *inter alia*, protecting public morals,<sup>164</sup> protecting human life, or promoting health.<sup>165</sup> The concept of public morals is “not an established concept in international law,” however; in fact, “[a]t least since the Second World War, human rights have been considered a core element of public morality.”<sup>166</sup> The right to food has been so widely accepted that it could be regarded as being part of the public morals of most states.<sup>167</sup> From a human rights perspective, the concept of “human life and health is connected to a wide range of economic, social, and cultural rights relating to a person’s well-being.”<sup>168</sup> A strong case could be made for reading the right to food, and specifically food security, into article XX(b) GATT, since without the realization of the right to food, human health suffers and life can be endangered.<sup>169</sup> Professor Breining-Kaufmann elaborates:

If a state can establish that a measure violates the most-favored nation principle [] for reasons mentioned in Article XX(a) or (b), the measure still needs to comply with the chapeau of Article XX, which is an expression of the principle of good faith . . . Measures taken under Article XX . . . [cannot] arbitrarily discriminate between countries where the same conditions prevail[,] . . . [and are justified only if they] do not result in a disguised restriction of international trade.<sup>170</sup>

To sum up, this Article argues that the two sets of obligations under the right to food and agricultural trade can in most cases be

161. *Id.* ¶ 170.

162. *See generally* GATT, *supra* note 11, art. XX (GATT remains applicable for trade in agriculture, except to the extent that the AoA contains specific provisions dealing specifically with the same matter, which is not the case with GATT article XX).

163. United States Gasoline, *supra* note 146, at 28.

164. GATT, *supra* note 11, art. XX(a).

165. *Id.* art. XX(b).

166. Breining-Kaufmann, *supra* note 3, at 107.

167. Mechlem, *supra* note 10, at 173.

168. OHCHR, HUMAN RIGHTS AND WORLD TRADE AGREEMENTS: USING GENERAL EXCEPTION CLAUSES TO PROTECT HUMAN RIGHTS 5 (2005).

169. Mechlem, *supra* note 10, at 173.

170. Breining-Kaufmann, *supra* note 3, at 108; *see generally* MARION PANIZZON, GOOD FAITH IN THE JURISPRUDENCE OF THE WTO: THE PROTECTION OF LEGITIMATE EXPECTATIONS, GOOD FAITH INTERPRETATION AND FAIR DISPUTE SETTLEMENT (Hart Publ’g 2006).



interpreted in a conciliatory manner. Whenever possible, provisions in international trade law must be interpreted in light of the existing human rights obligations of the parties involved, thus providing for coherence between the different obligations. However, a human-rights-compatible interpretation of WTO law may not apply to all conflicts. An example of this is the issue of non-discrimination, which will be examined further below.

### C. Need for “Affirmative Action” to Ensure Non-Discrimination

As stated above, trade-liberalization in agriculture, even when shown to have aggregate welfare gains, may have negative impacts at the individual level.<sup>171</sup> Applying the human rights principle of non-discrimination to trade law encourages affirmative action for the affected individuals. Although non-discrimination is also a principle of international trade law, there is a distinction in the application of the principle; “in trade law, the principle of non-discrimination is included in the principles of national treatment and most-favoured-nation treatment.”<sup>172</sup> National treatment envisions “equal treatment for nationals and non-nationals, whether they are poor farmers or large agribusinesses or industrial firms.”<sup>173</sup> This notion of non-discrimination is problematic for the enjoyment of human rights, as “[t]reating unequals as equals . . . could result in the institutionalization of discrimination against the poor and marginalized.”<sup>174</sup>

According to human rights law, states undertake to guarantee that rights will be exercised “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”<sup>175</sup> The Human Rights Committee elaborated in its General Comment No. 18 that non-discrimination under human rights law “sometimes requires . . . affirmative action to diminish or eliminate the

171. BEN-DAVID ET AL., *supra* note 5 (discussing the connection between trade liberalization and poverty).

172. ECOSOC, Comm’n on Human Rights, *Globalization and its Impact on the Full Enjoyment of Human Rights: Report of the High Commissioner for Human Rights Submitted in Accordance with Commission on Human Rights Resolution 2001/32*, at 24 n.42, U.N. Doc. E/CN.4/2002/54 (Jan. 15, 2002).

173. *Id.* ¶ 43.

174. *Id.* Indirect discrimination “occurs when a neutral measure has a disparate and discriminatory effect on different groups of people and that measure cannot be justified by reasonable and objective criteria.” ECOSOC, Comm’n on Human Rights, *Analytical study of the High Commissioner for Human Rights on the Fundamental Principle of Non-Discrimination in the Context of Globalization*, ¶ 12, U.N. Doc. E/CN.4/2004/40 (Jan. 15, 2004); *see also* Craven, *supra* note 100, at 166–67 (noting that policies are considered discriminatory if their effects are discriminating in practice, even if those effects were not intended).

175. ICESCR, *supra* note 2, art. 2(2).

conditions” preventing the enjoyment of human rights for part of the population.<sup>176</sup> Professor Breining-Kaufmann notes that, “[a]t first glance, such a concept contrasts sharply with the principle of non-discrimination in WTO law, which focuses on national treatment and most favoured nation treatment.”<sup>177</sup> She goes on to say, however, that “the provisions for special and differential treatment as well as the consideration of non-trade concerns could be instrumentalized for affirmative action measures.”<sup>178</sup>

## V. SHAPING THE FUTURE RULES OF TRADE IN AGRICULTURE

The AoA was only the beginning of the liberalization process: its Article 20 foresees new negotiations beginning one year before the end of its implementation period.<sup>179</sup> It also states that the negotiations must take into account “non-trade concerns, special and differential treatment of developing country [m]embers, the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to th[e] Agreement . . . .”<sup>180</sup>

The Fourth Ministerial Conference and the resulting Doha Ministerial Declaration of November 2001 (Doha Declaration) launched a new round of multilateral trade negotiations. With respect to agriculture, the Doha Declaration built on the work already done, elaborated on the objectives of the negotiations, and set a timetable for their conclusion.<sup>181</sup> WTO Members committed themselves to substantial improvements in market access.<sup>182</sup> Members additionally committed themselves to “reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.”<sup>183</sup> It was also

176. ECOSOC, Comm’n on Human Rights, *General Comment No. 18, Non-discrimination*, ¶ 10 (Nov. 10, 1989), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?opendocument).

177. Breining-Kaufmann, *supra* note 23, at 375.

178. *Id.*

179. AoA, *supra* note 14, art. 20. (The end of the implementation period was the end of 1999. Negotiations began in early 2000.)

180. *Id.* art. 20(c).

181. See World Trade Org., Ministerial Declaration of 14 November 2001, ¶¶ 13–14, WT/MIN(01)/DEC/1 (Nov. 14, 2001) [hereinafter Doha Declaration]. Since the negotiations under Article 20 of the AoA were initiated, a large number of negotiating proposals have been submitted on behalf of a total of 121 Members. Included was a submission by Mauritius identifying the right to food as particularly relevant for future negotiations on the provisions of the AoA dealing with “non-trade concerns.” Special Session of the Comm. on Agric., *Note on Non-Trade Concerns*, 44, G/AG/NG/W/36/Rev.1 (Nov. 9, 2000).

182. Doha Declaration, *supra* note 181, ¶ 13.

183. *Id.*

agreed “that special and differential treatment for developing countries [would] be an integral part of all elements of the negotiations and would be embodied in the Schedules of concessions and commitments . . . so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development.”<sup>184</sup> In addition, given the lack of progress on the Marrakesh Decision, the Doha Declaration included the resolutions made at Marrakesh amongst its implementation issues.<sup>185</sup> Since the Doha Ministerial Conference, the agenda has been revised several times. After a deadlock at the Cancun Ministerial Conference in 2003, it took until August 2004 to reach an agreement on the framework for further negotiations.<sup>186</sup> In December 2005, the Ministerial Conference in Hong Kong confirmed an important issue relevant for food security in the ongoing negotiations: with regard to market access, the Ministerial Declaration holds that “[d]eveloping country Members will have the flexibility to self-designate an appropriate number of tariff lines as Special Products guided by indicators based on the criteria of food security, livelihood security and rural development.”<sup>187</sup>

Not surprisingly, given the manifold interests at stake, the negotiations are difficult. The following sections will look at some of these issues in more detail.

#### A. Market Access

WTO Members agreed to adopt four bands for structuring tariff cuts, with the two objectives of (1) cutting more deeply the higher tariff levels, and (2) cutting tariffs from bound rates rather than applied rates.<sup>188</sup>

With regard to food security, both developing and developed countries will be able to designate “sensitive products” for which tariff cuts will be more lenient than those required by the formula.<sup>189</sup> This may be an avenue for tackling the aforementioned issue of culturally significant foodstuffs, such as Japanese rice and Mexican corn.

In addition, for developing countries, various mechanisms have been proposed to mitigate the risks associated with the further

184. *Id.*

185. *Id.* ¶¶ 2–3, 6.

186. See World Trade Org., *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, ¶ 1, WT/L/579 (Aug. 1, 2004) [hereinafter July Framework].

187. World Trade Org., *Doha Work Programme: Ministerial Decision adopted on 18 December 2005*, ¶ 7, WT/MIN(05)/DEC. (Dec. 18, 2005) [hereinafter Hong Kong Declaration].

188. *Id.*; July Framework, *supra* note 186, ¶ 29. For a detailed account of the negotiations, see MCMAHON, *supra* note 12 at 224–48.

189. July Framework, *supra* note 186, ¶ 31.

opening of agricultural markets to international trade, either by excluding certain special products from the full extent of tariff reduction, or by permitting the imposition of an additional tariff in the face of sudden increases in imports—a special safeguard mechanism.<sup>190</sup>

*Special Products* are products self-designated by a developing country as being particularly important to its overall development because of their significant role in enhancing food security, livelihood security, and rural development.<sup>191</sup> These products will be exempted from the full extent of any tariff reductions agreed to in the Doha Round of trade negotiations.<sup>192</sup> Simply designating these products without clearly linking that designation to enhancing food security, livelihood security, and rural development might help to achieve an agreement in the WTO, but would not necessarily contribute to the achievement of development goals.<sup>193</sup> Therefore, the Food and Agriculture Organization of the United Nations (FAO) has developed a methodology for identifying Special Products by appropriate indicators for the three criteria of food security, livelihood security, and rural development.<sup>194</sup> In the revised draft modalities, dated 17 July 2007, the Chair of the Agriculture Special Sessions outlines the methodological challenges of indicators designating special products that need to be tackled before a precise text could be drafted and agreed upon, but also states that there had been some convergence in the positions of WTO members lately.<sup>195</sup>

It was also agreed that developing countries should “have the right of recourse to a *Special Safeguard Mechanism* based on import quantity and price triggers” to protect them against price slumps and import surges.<sup>196</sup> Both Special Products and the new Special Safeguard Mechanism will be crucial mechanisms offering countries the flexibility to use measures at their borders to protect the livelihoods of small-scale and subsistence farmers.<sup>197</sup> Even though the Hong Kong Declaration reiterates that “Special Products and the

190. See Hong Kong Declaration, *supra* note 187, Annex A, ¶ 16.

191. *Id.*

192. *Id.* ¶ 7.

193. See FAO, *The State of Agricultural Commodity Markets 2006*, at 11 (2007) [hereinafter *State of Agriculture*].

194. Deep Ford et al., *Identifying "Special Products"—Developing Country Flexibility in the Doha Round*, in COMMODITY MARKET REVIEW 2005-2006, at 5, 10-17 (FAO ed., 2005); see also, e.g., LOUISE BERNAL, METHODOLOGY FOR THE IDENTIFICATION OF SPECIAL PRODUCTS (SP) AND PRODUCTS FOR ELIGIBILITY UNDER SPECIAL SAFEGUARD MECHANISM (SSM) BY DEVELOPING COUNTRIES (Int'l Centre for Trade & Sustainable Dev. 2005).

195. Special Session of the Comm. On Agric., Draft Modalities for Agriculture, ¶¶ 90-97 (July 17, 2007), available at [http://www.wto.org/english/tratop\\_e/agric\\_e/agchartxt\\_17july07\\_e.pdf](http://www.wto.org/english/tratop_e/agric_e/agchartxt_17july07_e.pdf).

196. Hong Kong Declaration, *supra* note 187, ¶ 7.

197. Mechlem, *supra* note 10, at 181.

Special Safeguard Mechanism shall be an integral part of the modalities and the outcome of negotiations in agriculture,”<sup>198</sup> both mechanisms remain controversial and negotiators in the Doha Round have struggled to reach acceptable operational solutions.<sup>199</sup> As of May 2007, it seems that a consensus on special agricultural safeguards can only be reached, if at all, for a “very considerably reduced coverage.”<sup>200</sup>

### B. Domestic Support

The Total Aggregate Measurement of Support defines three bands, or categories, of countries for the purposes of defining reductions goals, with all developing countries in the bottom band requiring the least reduction.<sup>201</sup> Some developing countries proposed a “Development Box.”<sup>202</sup> They argued that the Green Box had been used to accommodate the non-trade concerns of developed countries rather than address similar concerns of developing countries, such as food security and the protection of small farmers’ livelihoods.<sup>203</sup> Contrastingly, developed countries are concerned that accommodating such requests would open a “Pandora’s Box of large-scale subsidisation by developing countries.”<sup>204</sup> What was agreed to, therefore, was a review of the Green Box criteria to ensure that the programs of developing countries are effectively covered.<sup>205</sup> That is, the goal is to make Green Box criteria more development-oriented and better tailored to the realities of agriculture in developing

198. Hong Kong Declaration, *supra* note 187, ¶ 7.

199. See, e.g., Special Session of the Comm. on Agric., *Communication from the Chairman of the Comm. on Agric.*, (Apr. 30, 2007), available at [http://www.wto.org/english/tratop\\_e/agric\\_e/agchairtxt\\_30apr07\\_e.pdf](http://www.wto.org/english/tratop_e/agric_e/agchairtxt_30apr07_e.pdf) [hereinafter *Communication from the Chairman*] (stating that existing positions on Special Products are “a long way apart” and have the potential to sink the whole negotiations).

200. *Id.* ¶ 139.

201. Hong Kong Declaration, *supra* note 187, ¶ 5.

202. Special Session of the Comm. on Agric., *Agreement on Agriculture: Green Box/Annex 2 Subsidies*, G/AG/NG/W/14 (June 23, 2000). This proposal was presented by the so-called like-minded group in agriculture, consisting of Cuba, the Dominican Republic, El Salvador, Haiti, Honduras, Kenya, Nicaragua, Pakistan, Sri-Lanka, Uganda, and Zimbabwe. See generally SOPHIA MURPHY & STEVEN SUPPAN, INTRODUCTION TO THE DEVELOPMENT BOX—FINDING SPACE FOR DEVELOPMENT CONCERNS IN WTO’S AGRICULTURE NEGOTIATIONS (International Institute for Sustainable Development, 2003), available at <http://www.agradepolicy.org/output/resource/DB.pdf>

203. *Id.*

204. See Special Session of the Comm. on Agric., *Agriculture Negotiations: Status Report II Looking Forward to the Hong Kong Ministerial*, at 10, TN/AG/19 (Aug. 1, 2005); Mechlem, *supra* note 10, at 182.

205. Hong Kong Declaration, *supra* note 187, ¶ 5. But see MCMAHON, *supra* note 12, at 246 (observing that although there was some movement on promoting development-friendly Green Box policies, there had been little discernible convergence on the review and clarification of the Box).

countries.<sup>206</sup> In addition, following the current negotiations, the “current permissible ceiling for developed countries” under the Blue Box will be reduced from 5% to 2.5%.<sup>207</sup>

### C. *Export Competition*

The main achievement of the Doha Declaration was the commitment by Members to negotiate to reduce all forms of export subsidies with a view to phasing them out.<sup>208</sup> At the Hong Kong Ministerial Conference, Ministers agreed on the parallel elimination of “all forms of export subsidies and disciplines on all export measures with equivalent effect . . . by the end of 2013.”<sup>209</sup> As provided for in the Marrakesh Decision, the disciplines will make provisions for special and differential treatment for LDCs and NFIDCs.<sup>210</sup>

Disciplines to be developed regarding food aid would ensure the elimination of commercial displacement and address issues such as “in-kind food aid, monetization, and re-exports[,] [ensuring] that there can be no loop-hole for continuing export subsidisation.”<sup>211</sup> It was agreed that a “safe box” would be developed for bona fide emergency food aid to ensure that there are no unintended impediments when dealing with emergency situations.<sup>212</sup> In this context, the question of how to ensure food aid was discussed intensively; the food aid would “be need-driven, untied from commercial exports of goods or services, and should not be linked [to] the market development objectives of the donor Member.”<sup>213</sup> One potential solution put forward was to include a definition of emergency situations in WTO law.<sup>214</sup> The Chairman of the Committee on Agriculture was quite clear in answering such proposals when he replied:

[I]t seems to me at least clear that WTO has no business trying to set itself up as the authority to pass judgement on these things. It simply has no credibility as it does not have the expertise to do so; nor is its function to set itself up as some kind of judge and jury on such matters within the international system. The definition that has been under consideration is that of the World Food Programme. . . . Therefore, in the absence of a compelling reason to override the definitions used by those that are responsible for administering and delivering food aid the

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206. July Framework, *supra* note 186, ¶ 16.

207. Communication from the Chairman, *supra* note 199, ¶ 30.

208. Doha Declaration, *supra* note 181, ¶ 13; Mechlem, *supra* note 10, at 183.

209. Hong Kong Declaration, *supra* note 187, ¶ 6.

210. Reform Programme, *supra* note 20, ¶¶ 4–5; July Framework, *supra* note 186, ¶ 24.

211. Hong Kong Declaration, *supra* note 187, ¶ 6.

212. *Id.*

213. Communication from the Chairman, *supra* note 199, ¶ 57.

214. *Id.* ¶ 58.

furthest it would seem to me to be reasonable to go as regards a definition is to include the WFP definition as a reference.<sup>215</sup>

With this reference to competent authorities outside the WTO, the negotiators are adopting the legal approach first used by the Appellate Body in *US-Shrimp*. It seems that, as of May 2007, this approach will also be applied with regard to operational issues, such as the question of which entity should be responsible for a needs assessment and an emergency appeals process.<sup>216</sup> Currently the plan is to refer to the relevant United Nations agencies, the International Committee of the Red Cross, and the International Federation of the Red Cross.<sup>217</sup> While this development may seem natural at first glance, it will be a very big step for the WTO once it enters into force. In dispute settlement, there has only been one case so far in which the body settling the dispute asked for the advice of another organization.<sup>218</sup> In *Thai-Cigarettes*,<sup>219</sup> the World Health Organization—with the consent of the parties to the dispute—delivered a report.

## VI. CONCLUSION

The two legal frameworks of international trade in agriculture and the right to food seem to pursue the same abstract objective of raising standards of living. This Article concludes that both frameworks were carefully drafted to make them, at least in principle, reconcilable, although for some groups or individuals, affirmative action may be required to reach this goal. However, concrete examples show that in practice conflicts arise between the right to food and international trade law. Food security involves not only legal but many other considerations, such as cultural appropriateness and importance. Negotiations on these issues are ongoing in the Committee on Agriculture, and progress has been made in reconciling the two legal regimes. Further steps, however, are necessary.

Since the return to full-negotiation mode in February 2007, the Chair of the Committee on Agriculture has issued a number of papers intended to motivate participants to allow some flexibility and move

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215. *Id.*

216. *See id.* ¶ 60.

217. *See id.* ¶ 61.

218. *See* Panel Report, *Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R - 37S/200 (adopted Nov. 7, 1990) (relying on advice from the World Health Organization).

219. *Id.* ¶¶ 50–57.

away from current positions toward consensus.<sup>220</sup> The slow progress of the negotiations illustrates the difficulties in balancing the measures intended to address the concerns of developing countries—such as Special Products and the Special Safeguard Mechanism—with “the long-term objective . . . of establishing a fair and market-oriented agricultural trading system through strengthened and more operationally effective GATT rules and disciplines that result in the correction and prevention of restrictions and distortions in world agricultural trade.”<sup>221</sup>

While slow progress is not a problem *per se*, from a right to food perspective, sequence and pace matters in the transition from traditional agriculture to competitive production. Developing countries need policy space to protect their small-scale and subsistence farmers from being displaced as a consequence of reduced tariffs and the lack of alternative earning opportunities.<sup>222</sup> Today, close to eighty percent of the world’s 852 million hungry live in rural areas.<sup>223</sup> The majority of those facing hunger and malnutrition are subsistence farmers who depend mainly or partly on agriculture for their livelihoods.<sup>224</sup> In fact, it is estimated that half of the world’s hungry people are peasants who eke out a living from small plots of land.<sup>225</sup> Since most developing countries lack unemployment benefit schemes or other social safety nets, poor farmers who are displaced due to their lack of competitiveness are forced to find alternative incomes in order to survive. That being said, history shows that such alternatives will most likely take the form of low-productivity work in the urban informal sector, or emigration.<sup>226</sup> In this context, it is interesting to note that the United Nations Special Rapporteur on the Right to Food, in his most recent report, pointed out the need to recognize refugees from hunger.<sup>227</sup> He argues that the extraterritorial obligation of states under the ICESCR must include the principle of non-refoulement where there are substantial grounds for believing that a person’s fundamental right to be free from hunger would be at risk.<sup>228</sup>

220. See *e.g.*, Communication from the Chairman, *supra* note 199 (discussing “ideas on where members’ positions might converge”).

221. See MCMAHON, *supra* note 12, at 223.

222. Mechlem, *supra* note 10, at 182.

223. U.N. Millennium Project 2005, Task Force on Hunger, *Halving Hunger: It Can Be Done*, at 19, 154 (2005).

224. *Id.* at 3.

225. *Id.* at 4–5.

226. SANDRA POLASKI, CARNEGIE ENDOWMENT FOR INT’L PEACE, AGRICULTURAL NEGOTIATIONS AT THE WTO: FIRST, DO NO HARM 5 (2005).

227. U.N. Human Rights Council, *Report of the Special Rapporteur on the Right to Food*, U.N. Doc. ¶¶ 62–67, A/HRC/4/30 (Jan. 19, 2007) (prepared by Jean Ziegler).

228. *Id.* ¶¶ 64–67, 69. See also MICHELLE FOSTER, INTERNATIONAL REFUGEE LAW AND SOCIO-ECONOMIC RIGHTS—REFUGEE FROM DEPRIVATION (2007) (discussing



To sum up, “although critical to the resolution of the current round of negotiations, the designation of Special Products and the Special Safeguard Mechanism are measures that, . . . on their own, cannot address long-term structural problems of agriculture in developing countries.”<sup>229</sup> Many of them face supply-side constraints, particularly a lack of rural infrastructure, high-yield seed, water, technical assistance, and other necessary inputs for their production. Thus, their agriculture sectors are often uncompetitive and prevent them from capitalizing on new trade opportunities, especially for processed and value-added products.<sup>230</sup> Developing countries will have to become competitive, and they will need assistance to reach a level where they are able to compete. This need is apparent in the current discussions of the “aid-for-trade” initiative<sup>231</sup> and a new “Geneva Consensus,”<sup>232</sup> which will make trade work for development.

It thus becomes clear that a legal background that allows liberalized trade in agriculture to be reconciled with the right to food is not enough to alleviate the plight of people and countries in need. Life is not taking place in textbooks but in the real world, where law is crucial in establishing a fair system that creates a level playing field for everybody. Yet in order to craft rules that can accommodate the many features of food security, rule makers need to learn more about the different relationships with culture, rural development, and other factors. Is this an impossible mission? The answer is certainly no. However, it will take more research and knowledge before we can declare mission accomplished.

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the conceptual and analytical challenges presented by refugee claims based on socio-economic deprivation).

229. *State of Agriculture*, *supra* note 193, at 29.

230. *See id.* at vi.

231. *See, e.g.*, World Trade Org., *Recommendations of the Task Force on Aid for Trade*, WT/AFT/1 (July 27, 2006) (noting that “Aid for Trade should aim to help developing countries, particularly LDCs, to build the supply-side capacity and trade-related infrastructure that they need to assist them to implement and benefit from WTO Agreements and more broadly to expand their trade”).

232. Pascal Lamy, *Making Trade Work for Development: Time for a Geneva Consensus*, Emile Noël Lecture at New York University Law School (Oct. 30, 2006), *available at* [http://www.wto.org/english/news\\_e/sppl\\_e/sppl45\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl45_e.htm).