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The Limits of International Human Rights Law and the Role of Food Sovereignty in Protecting People from Further Trade Liberalization under the Doha Round Negotiations

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The Limits of International Human Rights Law and the Role of Food Sovereignty in Protecting People from Further Trade Liberalization under the Doha Round Negotiations

Wenonah Hauter*

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I. INTRODUCTION

International free trade agreements under the auspices of the World Trade Organization (WTO) seriously undermine the international human right to adequate food.¹ Conceivably, those deprived should be able to seek redress under Article 11 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which spells out the right to adequate food. Unfortunately, while the concept of the right to adequate food has developed substantially since its inception, its implementation has been slow.² It is not a well-developed tool for individuals or the groups representing them to redress harms that will likely result from the current Doha Round negotiations of the WTO. The limitations in the law's development suggest a need for an alternative strategy. Food sovereignty, a movement that has as one of its central tenets that food should be removed as a tradable commodity from WTO agreements, provides such an alternative.

Section I of this article discusses the present state of world food insecurity and draws from the experiences of Mexican farmers and consumers under the North American Free Trade Agreement (NAFTA)—the 1994 agreement liberalizing trade between the United States, Canada, and Mexico—to show how food security can be undermined by agricultural trade liberalization. It also discusses how further agricultural trade liberalization under the WTO's Doha Round will likely have similar results, even if agricultural goods are exempted from the negotiations. Section II details how the right to adequate food is embodied in international human rights law. It argues that developments in this area of the law have increased people's opportunities to obtain redress when their rights have been denied due to trade policies. It also details the law's developmental limits. Section III discusses the food sovereignty movement and argues that it is a better strategy for protecting people's food security than the right to adequate food.

II. FOOD INSECURITY AND THE CONSEQUENCES OF FURTHER AGRICULTURAL TRADE LIBERALIZATION UNDER THE DOHA ROUND

The end of 2006 marked the ten-year anniversary of the 1996 World Food Summit in Rome, where more than 180 countries pledged

1. And that is not all, for international trade agreements can harm labor rights and rights to healthcare and water, to name a few examples. This paper simply focuses on the right to adequate food.

2. See discussion *infra* Part II.B.

to halve the number of undernourished people in the world by 2015.³ Yet today, more undernourished people live in the developing world than in 1996, and the number of hungry people in the world is currently increasing by four million per year.⁴ Although the number of undernourished people in the developing world fell from 823 million to 800 million between 1990 and 1996, in 2006 that figure had increased to 820 million.⁵ By contrast, keeping the summit pledge would require reducing the number of undernourished by 31 million every year until 2015.⁶

Eighty percent of the world's impoverished live in rural areas.⁷ The majority are small farmers who depend on agriculture.⁸ Most do not simply suffer from a lack of food; they also do not have sufficient access to resources such as land, water, and seeds to enable them to feed themselves.⁹ Approximately twenty percent of the hungry live in urban areas, but migrants from rural areas are increasing that number.¹⁰

The United Nations (UN) Special Rapporteur on the Right to Food, the individual appointed by the UN Commission on Human Rights to ensure that governments are meeting their right to food obligations, reminds us that “[h]unger and famine are not inevitable—they are a violation of human rights.”¹¹ In fact, the planet could produce enough food to provide 2,100 calories per person per day for 12 billion people—almost twice the existing world population.¹²

A. *Corn and Food Insecurity in Mexico after NAFTA*

“Trade liberalization,” especially the lifting of state import barriers such as tariffs and import quotas that hinder the flow of goods across national borders, is often touted as a means to lift people

3. U.N. Food & Agric. Org. [FAO], *The State of Food Insecurity in the World 2006*, at 4 (2006) (prepared by Jakob Skoet & Kostas Stamoulis), <ftp://ftp.fao.org/docrep/fao/009/a0750e/a0750e00.pdf>.

4. FAO, *World Hunger Increasing: FAO Head Calls on World Leaders to Honour Pledges*, May 30, 2006, <http://www.fao.org/newsroom/en/news/2006/1000433/index.html>.

5. *Id.*

6. *Id.*

7. U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, *Economic, Social and Cultural Rights: The Right to Food*, ¶ 4, E/CN.4/2006/44 (Mar. 16, 2006) (prepared by Jean Ziegler).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* ¶ 3.

12. *Id.*

from hunger and poverty.¹³ The rosy promise of free trade has not been matched by reality, however. A primary example is how the liberalization of the corn trade under NAFTA and the WTO left Mexican farmers and consumers vulnerable to price shocks, eroding Mexico's food security.¹⁴

Trade liberalization in Mexico started before NAFTA, in the mid-1980s.¹⁵ By 1987, Mexico had signed more trade agreements than any other nation.¹⁶ In the 1990s, Mexico reduced trade barriers and lowered government intervention in agricultural markets in order to comply with these agreements.¹⁷ In 1992, for example, the government eliminated its program of subsidized credit for farmers.¹⁸ By 1999, Mexico completely dismantled CONASUPO, the state-trading agency responsible for support policies, marketing, and distribution of basic grains.¹⁹ This ended price supports for farmers.²⁰ This farm safety net was replaced with a smaller and declining market-based subsidy program, PROCAMPO, which has substantially decreased the support available to Mexico's farmers.²¹

In 1992, Mexico also radically overhauled farmland policy under the guise of "agrarian reform" by allowing private ownership of

13. See, e.g., Kym Anderson & Will Martin, *Agricultural Trade Reform and the Doha Development Agenda*, in *AGRICULTURAL TRADE REFORM AND THE DOHA DEVELOPMENT AGENDA* 12–21 (Kym Anderson & Will Martin eds., 2006).

14. "Food security" is a concept that has evolved after the World Food Summit to mean "a situation that exists when all people, at all times, have physical, social[,] and economic access to sufficient, safe[,] and nutritious food that meets their dietary needs and food preferences for an active and healthy life." FAO, *Trade Reforms and Food Security: Conceptualizing the Linkages*, at 29, (2003), available at <ftp://ftp.fao.org/docrep/fao/005/y4671E/y4671E00.pdf> [hereinafter *FAO Conceptualizing the Linkages*]. This definition has created controversy because it is seen as presupposing market mechanisms as reforms. The use of "food security" by the U.S. Department of Agriculture, in its assessment of householders' evaluations of their food supply, was also recently criticized as a sanitized and euphemistic description for hungry people. Whenever possible, this paper does not use the term food security to describe the condition of undernourished people, themselves, but rather uses it to describe the societal, physical, and economic situation that results in people becoming undernourished or unable to produce food for themselves.

15. GISELE HENRIQUES & RAJ PATEL, *NAFTA, CORN, AND MEXICO'S AGRICULTURAL TRADE LIBERALIZATION* 1 (Interhemispheric Resource Center Feb. 13, 2004), available at <http://www.irc-online.org/americaspolicy/pdf/reports/0402nafta.pdf>.

16. *Id.*

17. *Id.*

18. Alejandro Nadal & Timothy Wise, *The Environmental Costs of Agricultural Trade Liberalization: Mexico-U.S. Corn Trade under NAFTA* 17 (Working Group on Dev. & Env't in the Americas, Discussion Paper No. 4, 2004), available at <http://ase.tufts.edu/gdae/Pubs/rp/DP04NadalWiseJuly04.pdf>.

19. *Id.*

20. ALEJANDRO NADAL, *THE ENVIRONMENTAL & SOCIAL IMPACTS OF ECONOMIC LIBERALIZATION ON CORN PRODUCTION IN MEXICO* 26 (World Wildlife Fund for Nature 2000), available at http://www.oxfam.org.uk/what_we_do/issues/livelihoods/downloads/corn_mexico.pdf.

21. *Id.* at 28–29.

communal land for the first time in nearly 100 years.²² The Mexican government rewrote Article 27 of the 1917 constitution, which had made land available to peasant communities through *ejidos*, or communal farming communities.²³ The newly revised Article 27 allowed *ejido* land to be individually demarcated and certified so that it could be titled and privatized.²⁴ It was no longer illegal for *ejido* land to be rented, for example.²⁵ It was assumed that the resulting tenancy security would enable large, unproductive landholders to rent their land to peasants and smaller producers who did not have land, thereby increasing the productivity of the large landholders' operations.²⁶

Although the privatization program was supposed to be voluntary, local or regional authorities conditioned farmers' receipt of subsidies or credit on certification.²⁷ Between 1993 and the end of October 2003, nearly eighty percent of all *ejidos* and communities certified their land. This land reform allowed the biggest operators—big producers, agribusiness, local political bosses, and government officials—to consolidate their holdings and purchase larger, better parcels of farmland.²⁸ Smaller producers and communal landowners ended up selling and renting their lands, not to maximize productivity, but because of emergencies.²⁹ The land was increasingly bought and rented by the elite, who were able to obtain the land at very low rates.³⁰

At the same time that Mexican *ejidos* were selling or renting their lands, Mexico's reduction of agricultural tariffs and import quotas under NAFTA was opening the country's agricultural markets to U.S. and Canadian exports, especially corn.³¹ Corn is Mexico's most widely grown crop,³² accounting for more than two-thirds of the gross value of agricultural production and the source of income for 18 million people.³³ It is a vital food staple, with sixty-eight percent

22. Ana de Ita, *Mexico: Impacts of Demarcation and Tiling by PROCEDE on Agrarian Conflicts and Land Concentration*, Sept. 20, 2005, at 1, available at <http://www.landaction.org/display.php?article=336>.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 5.

27. *Id.* at 6.

28. *Id.*

29. *Id.* at 16.

30. *Id.*

31. Nadal & Wise, *supra* note 18, at 3.

32. Laura Carlsen, *The Mexican Experience and Lessons for WTO Negotiations on the Agreement on Agriculture*, Address Before the Committee on Industry, External Trade, Research, and Energy of the European Parliament (June 11, 2003), available at <http://www.irc-online.org/americaspolicy/pdf/commentary/0306eu.pdf>.

33. Nadal & Wise, *supra* note 18, at 4.

grown for humans, compared to a world average of twenty-one percent.³⁴

In the years after NAFTA went into effect in 1994, the United States further embraced free-market, free-trade policies for agriculture by abandoning price floors and food-security reserves.³⁵ As a result, prices for U.S. agricultural products collapsed.³⁶ A handful of transnational agribusinesses were able to export food to Mexico at prices below the cost of production because of U.S. policies that encouraged production.³⁷ Mexico's corn imports nearly tripled.³⁸ Cheap U.S. corn glutted the Mexican market and depressed prices below levels necessary for many intermediate and subsistence Mexican farmers to earn a living.³⁹ The average corn price that Mexican farmers received dropped by more than forty percent between 1990 and 2003.⁴⁰

Displaced corn farmers theoretically should have been able to switch to more profitable crops or find jobs in sectors where Mexico had a comparative advantage over the United States and Canada. In reality, agricultural prices fell for most traditional crops, making a shift to other crops less viable.⁴¹ Export-oriented crops, such as horticultural crops, did not need excess labor because they had become more mechanized and input efficient than expected.⁴² Many poor farmers were forced to continue to grow corn despite the hard conditions.⁴³ Approximately 1.7 million farmers in Mexico were displaced.⁴⁴ Many flocked to the cities, depressing urban wages.⁴⁵

Meanwhile, at the end of 1998, Mexico ended decades-old price controls over tortillas and ceased subsidizing tortilla mills.⁴⁶ These changes, along with the high degree of concentration in the entire corn-commodity chain, increased the price that Mexican consumers paid for tortillas.⁴⁷ Within a year, tortilla prices in Mexico City rose by fifty percent and by even more in rural areas.⁴⁸

34. *Id.*

35. TERRI RANEY & SHAYLE SHAGAM, U.S. DEP'T OF AGRIC. [USDA], NAFTA'S IMPACT ON U.S. AGRICULTURE: THE FIRST 3 YEARS (1997), available at <http://www.ers.usda.gov/publications/agoutlook/sep1997/ao244e.pdf>.

36. *Id.*

37. PETER M. ROSSET, FOOD IS DIFFERENT: WHY WE MUST GET THE WTO OUT OF AGRICULTURE 56–63 (Zed Books 2006).

38. Carlsen, *supra* note 32.

39. NADAL, *supra* note 20, at 7–9.

40. ROSSET, *supra* note 37, at 57.

41. NADAL, *supra* note 20, at 36.

42. *Id.* at 21.

43. HENRIQUES & PATEL, *supra* note 15, at 5.

44. Carlsen, *supra* note 32.

45. LORI WALLACH & PATRICK WOODALL, WHOSE TRADE ORGANIZATION? A COMPREHENSIVE GUIDE TO THE WTO 200 (The New Press 2004).

46. *Id.* at 199.

47. *Id.*

48. *Id.*

These and other trade-liberalization policies under NAFTA resulted in an increase in Mexican poverty, malnutrition, and school drop-out rates.⁴⁹ Three-fourths of Mexican households now live in poverty, an eighty percent increase since 1984.⁵⁰ Four-fifths of rural Mexico lives in poverty, defined as living on less than two dollars per day, and over half live in extreme poverty, defined as living on less than one dollar per day.⁵¹ Each year, more than 150,000 Mexican children die before reaching the age of five due to illnesses related to nutrition.⁵²

Ironically, immediately after the NAFTA negotiations, Mexico was perceived to be a winner because import quotas and tariffs were to be phased out over the course of 15 years through a “tariff rate quota system.”⁵³ Under this system, the Mexican government could fix monthly quotas on corn imports and impose a tariff on imports above the quota.⁵⁴ In effect, however, corn faced no tariffs less than three years into NAFTA.⁵⁵ Citing grain-supply shortages, Mexico unilaterally approved U.S. imports over NAFTA quotas and then declined to collect tariffs.⁵⁶ Revenues lost due to the government’s failure to implement the tariff rate quotas for corn are estimated to be more than two billion dollars.⁵⁷

Mexico’s dependence on imported corn continues to threaten Mexican consumers’ access to food today. Counterintuitively, increases in corn imports have not resulted in cheaper corn-product prices. But decreases *have* resulted in substantially increased food prices. In late 2006, Mexico experienced what has been described as the worst tortilla crisis in its modern history.⁵⁸ Dramatically rising international corn prices, spurred by demand for the corn-based fuel ethanol, have led to expensive tortillas.⁵⁹ Tortilla prices have tripled or quadrupled in some parts of Mexico since the summer of 2006.⁶⁰

49. *Id.* at 199–200.

50. TIM WISE, NAFTA’S UNTOLD STORIES: MEXICO’S RESPONSE TO NORTH AMERICAN INTEGRATION (Interhemispheric Resource Center June, 2003), available at <http://ase.tufts.edu/gdae/Pubs/rp/NAFTA'sUntoldStoriesJune03TW.pdf>.

51. *Id.*

52. Steven Suppan & Karen Lehman, Institute for Agriculture and Trade Policy, *Food Security and Agricultural Trade Under NAFTA*, July 11, 1997, <http://www.agobservatory.org/library.cfm?refID=29561>.

53. ROSSET, *supra* note 37, at 61.

54. *Id.*

55. Nadal & Wise, *supra* note 18, at 5.

56. *Id.*

57. HENRIQUES & PATEL, *supra* note 15, at 6.

58. Manuel Roig-Franzia, *A Culinary and Cultural Staple in Crisis: Mexico Grapples With Soaring Prices for Corn—and Tortillas*, WASH. POST, Jan. 27, 2007, at A1.

59. *Id.*

60. *Id.*

The Mexican federal government is investigating charges of price gouging against the company Gruma, which controls as much as eighty percent of Mexico's tortilla market,⁶¹ and others.⁶² Archer Daniels Midland (ADM), the leading U.S. ethanol maker,⁶³ also owns a twenty-seven percent stake in Gruma⁶⁴ and a forty percent share in a joint venture with Gruma to mill and refine wheat.⁶⁵ This means that when high tortilla prices force Mexican consumers to switch to less nutritious white bread, Gruma and ADM still win, while Mexican consumers lose.⁶⁶ On January 18, 2007, Mexican President Calderón announced an agreement with business leaders capping tortilla prices.⁶⁷ But Calderón's price cap is a voluntary "gentleman's agreement."⁶⁸ A 2007 study by the lower house of Mexico's National Congress showed that many tortilla makers were ignoring Calderón's edict.⁶⁹

B. *Agriculture and Food Insecurity in Developing Countries under the WTO Agreement on Agriculture*

The situation in Mexico under NAFTA is but one example of how agricultural trade liberalization under multilateral trade agreements can spur hunger and deprive farmers of their ability to grow food. But it is not an uncommon phenomenon; WTO and trade rules governing international agricultural trade have failed to yield the benefits promised to farmers and consumers worldwide.⁷⁰

The WTO's Agreement on Agriculture (AoA) was ostensibly designed to make agricultural trade more market oriented through policies that: (1) increased market access by removing various trade restrictions such as import quotas and tariffs; (2) removed domestic farm programs that supported safety nets for farmers; and (3) reduced export subsidies.⁷¹ Under the AoA scheme, developing

61. *Id.*

62. Marla Dickerson, *Mexico Probes Tortilla Price Hike An Agency Looks Into Potential Manipulation as Costs Soar More Than 60% in Some Markets*, L.A. TIMES, Jan. 12, 2007, at C3.

63. Bob Tita, *Alternative-Fuel Talk Boosts ADM 9%*, CRAIN'S CHI. BUS., Mar. 20, 2006.

64. Tom Philpot, *Bad Wrap: How Archer Daniels Midland Cashes in on Mexico's Tortilla Woes*, GRIST, Feb. 22, 2007, <http://www.grist.org/comments/food/2007/02/22/tortillas/>.

65. *Id.*

66. *Id.*

67. Roig-Franzia, *supra* note 58.

68. *Id.*

69. *Id.*

70. WALLACH & WOODALL, *supra* note 45, at 192–200.

71. *Id.* at 194–96; see also World Trade Organization [WTO], *Agriculture: Fairer Markets for Farmers*, http://www.Wto.Org/English/TheWto_E/WhatIs_E/Tif_E/Agrm3_E.Htm (last visited Sept. 21, 2007) [hereinafter WTO Agriculture] (discussing several details of the AoA).

countries were promised that their agricultural exports would increase, which would improve their agricultural sector and reduce poverty.⁷² They were also promised that decreased subsidies in developed countries would decrease agribusiness' grip on world commodity markets.⁷³ As in Mexico, however, developing countries faced increased imports, many of which were below farmers' costs of production, and these imports have threatened farmers' livelihoods. The AoA rules allowed developed countries to export low-priced agricultural goods into many developing countries' markets, collapsing their agricultural prices and bankrupting their farmers.⁷⁴ Only developed countries and a tiny handful of developing countries have had the administrative or legal resources to enact WTO-allowed safeguard mechanisms to protect their agriculture producers against import surges.⁷⁵

Further, in terms of exports, a number of policies inhibited developing countries from benefiting from further development or increased exports, and the people in those countries that did benefit were the elite.⁷⁶ For example, the WTO permitted "tariff escalation" to continue. This is a policy where developed countries institute higher import tariff rates on manufactured or processed agricultural goods compared to raw-commodity inputs.⁷⁷ This policy has made it more difficult for developing countries to establish an agricultural processing sector.⁷⁸ Such a sector could strengthen those nations' economies by generating higher levels of employment and wages than the exportation of raw materials for processed goods.⁷⁹

Additionally, WTO rules directed developing countries to dismantle domestic farm programs in exchange for access to foreign markets, much as Mexico eliminated its CONASUPO farm-payment programs and privatized communal *ejido* lands.⁸⁰ Other reforms encouraged transnational agribusinesses to invest in food retail, services, and processing.⁸¹ This has led to a rapid consolidation and increase in the scale of packing, processing, and exporting firms and

72. WALLACH & WOODALL, *supra* note 45, at 193.

73. *Id.*

74. *Id.* at 196.

75. Carin Smaller & Anne-Laure Constantin, Institute for Agriculture and Trade Policy, *Moving Forward in 2007: How to Let Go of the Past and Embrace the Present*, Jan. 11, 2007, <http://www.tradeobservatory.org/genevaupdate.cfm?messageID=121338>.

76. WALLACH & WOODALL, *supra* note 45, at 198.

77. *Id.*

78. *Id.*

79. *Id.*

80. *See de Ita, supra* note 22, at 4 ("On November 7, 1991, as part of a program for the neoliberal modernization of the countryside, the Mexican government reformed the agrarian law with the purpose of allowing and even promoting the privatization of ejidal land, previously inalienable.")

81. *Id.*

growers in some commodity sectors, as well as a substantial exclusion of small farmers and firms.⁸²

A United Nations Food and Agriculture Organization study of 14 developing countries found that trade liberalization in the agriculture sector has led, variously, to little change in developing countries' exports.⁸³ It has, however, led to an increase in their food imports, including those vital for the countries' food supply, and has also led to a decline in local production of products facing competition from cheaper imports.⁸⁴ Finally, it has led to the consolidation of farms and has marginalized small farmers and displaced farm labor.⁸⁵

A 2006 long-term study of 15 developing countries detailed a number of other negative consequences from agricultural trade liberalization.⁸⁶ Farmers have been vulnerable to agricultural-input price hikes when government subsidies and credit programs have been cut.⁸⁷ Further, developing states' economies have become dependent on a few export commodities that could be hit by adverse weather or collapsing global prices, as happened to coffee in the past decade.⁸⁸ Also, increased commodity imports have not necessarily translated into higher nutrient availability.⁸⁹ In the end, the study found that while the undernourished proportion of the population fell in all but four of the studied countries from 1990 to 2001, the number of undernourished people actually increased in half the countries.⁹⁰ Further, a number of the countries experienced a growing inequality in poverty rates between rural and urban areas and between poorer farmers and those wealthy enough access export markets.⁹¹ Countries also saw increased poverty rates for minorities, indigenous populations, and female-headed households.⁹²

C. *Agriculture and Food Insecurity in Developing Countries under the Doha Round*

The outcome of the current round of agricultural trade negotiations is unlikely to reduce the number of people in poverty.

82. *FAO Conceptualizing the Linkages*, *supra* note 14, at 128–29.

83. *Id.* at 144.

84. Martin Khor, *Implications of Some WTO Rules on the Realisation of the MDGs 17* (TWN Trade & Dev. Series, Working Paper No. 26, 2005), available at <http://www.twinside.org.sg/title2/t&d/tnd26.pdf>.

85. *Id.*

86. *FAO, Trade Reforms and Food Security: Country Case Studies and Synthesis* (2006) (prepared by Harmon Thomas), available at <ftp://ftp.fao.org/docrep/fao/009/a0581e/a0581e00.pdf>.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

The AoA included a commitment for countries to continue making changes to trade policies through new negotiations, which were launched in the 2001 Doha Round WTO talks.⁹³ Trade ministers dubbed the Doha Round a “development round”⁹⁴ in an effort to secure support of skeptical developing countries.⁹⁵ The negotiations have dragged on for six years and have yet to produce an agricultural agreement because developing countries are reluctant to increase access to their agricultural markets in the face of surging, low-priced commodities from industrial farms in developed countries.⁹⁶

A 2006 Carnegie Endowment for International Peace report modeled plausible outcomes of Doha and found that developed countries will likely receive all the agricultural gains and developing countries’ agricultural sectors will be made worse off.⁹⁷ Developing countries fare poorly under further agricultural trade liberalization because they cannot afford farm programs as generous as those in developed countries.⁹⁸ Further, developing countries have smaller farms and farms with less access to export facilities.⁹⁹ Thus, removing existing trade barriers erodes these countries’ current share of global exports.¹⁰⁰

The Carnegie paper found that the poorest countries lose under any likely Doha scenario.¹⁰¹ Although potential growth in manufacturing exports in countries such as China could offset agricultural losses, countries such as Bangladesh and many in Sub-Saharan Africa would experience losses in both their agricultural and manufacturing sectors. In these countries, more people live in extreme, one-dollar-per-day poverty—almost as many live in two-dollar-per-day poverty—than in China.¹⁰² Even “special and differential treatment” provisions, intended to protect developing countries’ agricultural sectors, would have little effect in actually doing so.¹⁰³

Thus, agricultural trade liberalization is not necessarily the solution for reducing world hunger, and it can have seriously negative

93. WTO Agriculture, *supra* note 71.

94. Smaller & Constantin, *supra* note 75.

95. *Id.*

96. *Id.*

97. The report also finds that all the plausible scenarios for negotiations only produce global gains of less than 0.2% of the global gross domestic product. Even full trade liberalization (no trade barriers) is only estimated to produce a global gain of about 0.5%. SANDRA POLASKI, WINNERS AND LOSERS: IMPACT OF THE DOHA ROUND ON DEVELOPING COUNTRIES 23 (Carnegie Endowment 2006), *available at* <http://carnegieendowment.org/files/Winners.Losers.final2.pdf>.

98. *Id.* at 24.

99. *Id.* at 30–31.

100. *Id.* at 31.

101. *Id.* at 69–70.

102. *Id.* at 56.

103. *Id.* at 25.

effects. In fact, the very theory upon which agricultural trade liberalization is based, the deeply held theory of comparative advantage, is flawed when it comes to agriculture. Under this theory, countries benefit most by producing goods in which they have the least disadvantage compared to other countries.¹⁰⁴ They should trade for other products.¹⁰⁵ The theory holds, for example, that because of their respective climates, many developing countries should be made better off by growing exportable crops such as coffee, cocoa, tea, rubber, cotton, or sugar, instead of food crops. Money made from exporting these goods should be used to purchase imported food from countries that can produce it more easily, either because of capital or climate. This assumes, however, that as agricultural prices fluctuate, resources can be easily reallocated to produce different crops.¹⁰⁶ In reality, costs and barriers prevent farmers from easily switching crops in developing countries.¹⁰⁷ Further, hunger is the real social consequence when prices drop and people can no longer afford to purchase or grow food. These transition costs and consequences are likely to be relatively greater in developing countries because they have less diversified economies and fewer alternative sources of employment than developed countries.¹⁰⁸

104. José María Caballero, Maria Grazia Quietì, & Materne Maetz, *International Trade: Some Basic Theories and Concepts*, in MULTILATERAL TRADE NEGOTIATIONS ON AGRICULTURE: A RESOURCE MANUAL—INTRODUCTION AND GENERAL TOPICS § 2.1.1 (FAO 2000).

105. *Id.*

106. *Id.*

107. *Id.*

108. POLASKI, *supra* note 97. Further, the theory of comparative advantage assumes that markets are perfectly competitive and that capital does not flow across national boundaries. Both of these assumptions are called into question in the existing world agricultural market. Caballero, Quietì, & Maetz, *supra* note 104, § 2.1.1. Trade distortions in the international agricultural market include inelasticities of supply and demand. Further, the market is dominated by a handful of large multinational corporations, which have created a market that is oligopolistic—that is, it has only a few suppliers—while their retail sectors are oligopsonistic with only a few buyers. For example, Cargill and ADM together control two thirds of the international market for cereals. Large companies use their market power to depress the prices at which farmers sell their commodities, while avoiding passing savings onto consumers. Such companies also pressure WTO and individual governments to accept rules such as tariff escalation and remove other national and international measures that help to protect domestic commodity prices. Jacques Berthelot, *Food Sovereignty* [sic], *Agricultural Prices, and World Markets* 3–6, Nov. 2006, http://www.roppa.info/IMG/pdf/J_Berthelot-Food_sovereignty_agricultural_prices_and_world_markets-ROPPA_November_06.pdf.

III. THE OPPORTUNITIES AND LIMITS OF THE RIGHT TO FOOD AS EMBODIED IN INTERNATIONAL HUMAN RIGHTS LAW

In light of the inevitable transitional costs and market distortions in international agricultural trade that can harm the poor, and in lieu of workable market-based safety nets, it is worth exploring whether and how human rights law can safeguard people's right to food and help the world meet its World Food Summit goals. Over the last 60 years, the international human right to food has been substantially refined as a concept, to the point where it could serve as a tool for redressing economic harms forced by trade liberalization.¹⁰⁹ The *implementation* of this area of law at the national, regional, and international levels has been slow, however.¹¹⁰ Further, no tribunal at any level has applied the treaty extraterritorially.¹¹¹ These limits mean that the right to food is unlikely to serve as a useful tool to provide redress to those facing food insecurity due to multilateral trade agreements arising out of the Doha Round.

A. *The International Human Right to Adequate Food*

The right to food was first recognized in Article 25 of the Universal Declaration of Human Rights, which was adopted by the UN General Assembly in 1948.¹¹² The right was codified in 1966 in Article 11 of the International Covenant on Economic, Social, and

109. Some observers have remarked that there is no formal link between international human rights law, such as the right to adequate food, and WTO negotiations. See, e.g., Kevin R. Gray, *Right to Food Principles Vis À Vis Rules Governing International Trade* 3, 7, Dec. 2003, <http://www.cid.harvard.edu/cidtrade/Papers/gray.pdf>. But states that have ratified human rights laws cannot completely abandon their obligations within an international trade framework because of the principle of *pacta sunt servanda*, as codified in the Vienna Convention on the Law of Treaties, Article 26, which has been ratified by 105 countries and which entered into force on January 27, 1980. Many other countries that have not ratified the treaty, such as the United States, recognize that this principle is binding as customary international law. Under this principle, later WTO treaties and the national implementing policies must operate in a manner that is compatible with a nation's prior human rights obligations, including the right to adequate food.

110. See discussion *infra* Part II.B.

111. See discussion *infra* Part II.C.

112. Universal Declaration of Human Rights, G.A. Res. 217A, at 25, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) available at <http://www.un.org/Overview/rights.html> ("Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food . . .").

Cultural Rights (ICESCR), which went into effect in 1976.¹¹³ It has been accepted by 153 countries, and has been signed by five additional countries.¹¹⁴ It has two basic provisions. The first has been described as a relative right to adequate food:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.¹¹⁵

The second is a right to be free from hunger.¹¹⁶ This paper primarily addresses the right to adequate food.

1. General Comment 12 and the Maastricht Guidelines

The UN body charged with monitoring this covenant, the Committee on Economic, Social, and Cultural Rights, was established in 1985.¹¹⁷ The committee has attempted to add detail to the ICESCR obligations through a series of General Comments.¹¹⁸ While the General Comments are nonbinding, the interpretation of the covenant's rights and obligations represent a substantial step towards the realization of ICESCR rights.

General Comment 12, issued in 1999, contains the committee's interpretation of the right to adequate food.¹¹⁹ It provides that the right to adequate food is to be construed broadly to ensure that ". . . every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement."¹²⁰ The right entails "[t]he availability of food in a quantity and quality sufficient to satisfy the dietary needs of

113. International Covenant on Economic, Social and Cultural Rights [ICESCR], G.A. Res. 2200A (XXI), art. 11 (Dec. 16, 1976), available at http://www.unhchr.ch/html/menu3/b/a_ceschr.htm.

114. Office of the United Nations High Comm'r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, 12 (July 14, 2006), available at <http://www.ohchr.org/english/bodies/docs/status.pdf>.

115. ICESCR, *supra* note 113, art. 11(1).

116. *Id.* art. 11(2).

117. Office of the United Nations High Comm'r for Human Rights, *The Committee on Economic, Social and Cultural Rights: Fact Sheet No.16 (Rev.1)*, § 6, <http://www.unhchr.ch/html/menu6/2/fs16.htm> (last visited Sept. 6, 2007).

118. *Id.*

119. U.N. Comm on Econ., Soc. & Cultural Rights [CESCR], *Substantive Issues Arising In The Implementation Of The International Covenant On Economic, Social And Cultural Rights: General Comment 12 The Right To Adequate Food (Art. 11)*, U.N. Doc E/C.12/1999/5 (May 12, 1999) [hereinafter *Right to Adequate Food*], available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3d02758c707031d58025677f003b73b9?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3d02758c707031d58025677f003b73b9?OpenDocument).

120. *Id.* ¶ 6.

individuals, free from adverse substances, and acceptable within a given culture[.]”¹²¹ It is not measured by a minimum set of calories or nutrients and ensures access and availability for future generations.¹²² *Access* to adequate food means that food must be both economically and physically accessible.¹²³ *Availability* refers to people’s ability to feed themselves directly from productive land or other natural resources or by way of well-functioning distribution, processing, and market systems.¹²⁴ Any person or group denied the right to adequate food is entitled to both adequate reparation, in the form of restitution, compensation, or a guarantee of non-repetition, and access to effective judicial or other appropriate remedies at national and international levels.¹²⁵

Thus defined, the right to adequate food can be seen as a safeguard against food insecurity in a world of free trade. States must afford all people physical and economic access to and the availability of food at all times, notwithstanding transitional costs or market failures. When they do not, they must provide compensation to people who are deprived.¹²⁶

General Comment 12 sets out a three-part typology detailing how states can meet their obligations: states have a duty to respect, protect, and fulfill.¹²⁷ The obligation to respect requires that states avoid taking actions that deny or make it difficult to gain access and availability to adequate food.¹²⁸ The obligation to protect requires that states act to ensure that other enterprises or individuals do not deprive individuals of their access to and the availability of adequate food.¹²⁹ Finally, the obligation to fulfill incorporates both an obligation to facilitate and an obligation to provide.¹³⁰ The obligation to facilitate means the state must proactively engage in activities to strengthen people’s access to, and utilization of, resources and means to ensure their livelihood.¹³¹ The duty to provide requires that states fulfill the right to adequate food when people cannot do so themselves

121. *Id.* ¶ 8.

122. *Id.* ¶¶ 6–7.

123. *Id.* ¶ 13.

124. *Id.* ¶ 12.

125. *Id.* ¶ 32.

126. Further, like the concept of food sovereignty, discussed below, the committee’s concept of availability recognizes that the right to food is more than simply ensuring that people have enough food, a concept that falls more in line with how the committee describes the right to be free from hunger. The committee’s concept of the right to adequate food measures the quantity and quality of food against cultural norms and that access to food should be sustainable. *Id.* ¶ 8.

127. *Id.* ¶ 15.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

for reasons beyond their control.¹³² States can violate the right to adequate food through either actions or omissions.¹³³ States do have a defense: a state does not violate the right to food if it is simply unable to comply, but only when it is unwilling to do so, or when it discriminates and denies the right to some people.¹³⁴

The right to adequate food, like the rest of the ICESCR, is intended to only be achievable through “progressive realization.”¹³⁵ This does not mean, however, that the right is somehow aspirational or otherwise devoid of concrete or enforceable obligations. Comment 12 incorporates by reference General Comment 3,¹³⁶ which states that the concept of progressive realization

constitutes a recognition of the fact that full realization of all economic, social[,] and cultural rights will generally not be able to be achieved in a short period of time Nevertheless, . . . the Covenant should not be misinterpreted as depriving the obligation of all meaningful content.¹³⁷

Thus, states’ obligations to respect, protect, and fulfill the right to adequate food are only met when they take steps forward. States may not take steps backward unless their maximum available resources require them to, or unless other rights would be jeopardized.¹³⁸ At the very least, states must ensure the minimum essential level of resources required so that people are free from hunger.¹³⁹ In implementing the right to adequate food, states are given some discretion in determining their approaches, but arguably it is not enough for a state simply to adhere to the doctrine of trade liberalization and to shrug its proverbial shoulders when the real world does not match the projections of its models. States must adopt “a national strategy to ensure food and nutrition security for all, based on human rights principles that define the objectives . . . and the formulation of policies and corresponding benchmarks.”¹⁴⁰

In 1997, a group of experts issued the Maastricht Guidelines, a document intended to reflect the current state of international law as it related to the ICESCR.¹⁴¹ For the most part, these mirror the General Comments. The Maastricht Guidelines also provide two

132. *Id.*

133. *Id.* ¶ 17.

134. *Id.* ¶¶ 17–18.

135. *Id.* ¶ 14.

136. *Id.*

137. CESR, *General Comment 3: The Nature of States Parties Obligations (art. 2, para. 1 of the Covenant)*, ¶ 9 (1990), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument).

138. *Right to Adequate Food*, *supra* note 119, ¶ 17.

139. *Id.*

140. *Id.* ¶ 21.

141. These updated the 1986 Limburg Principles. Maastricht, *Guidelines on Violations of Economic, Social and Cultural Rights*, 20 HUM. RTS. Q. 691, 691 (1998).

standards of care under which states are obliged to operate: "The obligation of conduct requires action reasonably calculated to realize the enjoyment of a particular right . . . The obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard."¹⁴²

2. Possible Claims for Violating the Right to Adequate Food

Thus, under the Comment 12 and Maastricht guidelines, one can see at least an outline of a case by consumers and farmers for compensation against the Mexican government (which acceded to the ICESCR in 1981)¹⁴³ for some of its most egregious trade-liberalization policies prior to and under NAFTA. For example, it might be argued that the Mexican government's failure to collect tariff duties for imports above its quotas unreasonably estimated, or even willfully neglected, the effects on Mexican farmers' right to adequate food.¹⁴⁴ Insofar as the Mexican government's disregard of the NAFTA tariff quota structure caused corn prices to fall below farmers' production costs, the Mexican government violated their obligations to respect and protect farmers by denying them the ability to supply food for themselves and their families through well-functioning markets.

It could also be argued that the "agrarian reforms" adopted by Mexico in the early 1990s were a violation of the duty to respect and protect because local and regional officials willfully manipulated *ejidos* in order to force them to certify their lands, thus depriving poor farmers of the ability to feed themselves directly from productive land after they were exposed to market forces.

Likewise, it could be argued that Mexico violated its obligation to protect Mexican consumers when it removed the price caps for corn products, such as tortillas, because it unreasonably failed to protect consumers from the inflated prices that likely would result from market concentration within the corn-commodity chain. This denied consumers the ability to feed themselves through well-functioning distribution, processing, and market systems. By the same standard, the Mexican government is currently violating its duty to protect consumers by failing to reinstitute workable price caps.

Under ICESCR, then, the Mexican government would be required, among other remedies, to enjoin all policies that deprive

142. *Id.* ¶ 7. The Guidelines also put out 17 examples of acts of omission and commission that would constitute violations. *Id.* ¶¶ 14–15.

143. Office of the United Nations High Comm'r for Human Rights, *supra* note 114, at 7.

144. This might not be that difficult to prove, given the Mexican Undersecretary of Agriculture Luis Tellez predicted that NAFTA, as written, would push an annual average of one million farmers off their farms each year for ten years. WALLACH & WOODALL, *supra* note 45, 350 n.80.

people of their rights or pay reparations to Mexican farmers and consumers.

As a result of the Doha Round negotiations, other states could similarly be held accountable for any further agricultural trade liberalization policies they implement that deny people's right to adequate food. Such policies might include those that increase developed countries' dumping of agricultural products into developing countries' markets, "agrarian reform" policies that force poor farmers from their land, or policies that enhance the abilities of corporations with substantial market share to raise consumer food prices.

This is not to say that any of the claims outlined here would succeed. They would have to be decided based on evolving precedent by courts or tribunals vested with the power to hear claims and defenses and weigh competing evidence. Further, as the Maastricht guidelines recommend, legislatures or administrative bodies should enact standards to further flesh out state obligations.¹⁴⁵ The claims outlined here simply demonstrate that the committee's work on General Comment 12 and the Maastricht guidelines are a substantial development towards more fully defining the right to adequate food,¹⁴⁶ and that this right could theoretically redress the economic harms forced by trade liberalization under multilateral trade agreements such as the Doha Round.

B. *The Developmental Limits of the International Right to Food: A Lack of Implementation*

To have any legitimacy, the right to adequate food must be recognized by national, regional, and international institutions that have been bestowed legitimate authority to decide when nations' policies unreasonably deny people their rights. Unfortunately, despite the progress that the General Comments and Maastricht Guidelines have made in defining the international right to adequate food, the *implementation* of this area of law at the national, regional, and international levels is in its infancy.

145. Maastricht, *supra* note 141, ¶ 30. In fact, in 2004, the FAO adopted voluntary guidelines. See FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (2004), http://www.fao.org/righttofood/vg/vgs_en.htm.

146. As two opponents to ICESCR's enforceability have pointed out: "Not only has the Committee defined ICESCR rights very broadly, but the substance of its commentaries makes its pro-adjudication stance abundantly clear. In its view, the ICESCR unquestionably imposes binding and enforceable obligations on states parties." Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 491 (2004).

1. National Development

Under ICESCR, the primary responsibility for ensuring the full enjoyment of the right to adequate food lies with the national authorities of each country.¹⁴⁷ Only a few countries have adopted national legislation to ensure the right to adequate food's enjoyment.¹⁴⁸ Approximately 77 signatory states have legal systems that directly recognize ICESCR rights as part of the domestic legal order,¹⁴⁹ but only a few countries' tribunals are like Argentina's and recognize the right of individuals to raise ICESCR claims simply due to the countries' ratification of the covenant.¹⁵⁰

Further, while more than 20 countries have enshrined the right to adequate food in their national constitutions,¹⁵¹ South Africa, India, and Switzerland are the only countries that have made the constitutional right to food enforceable through courts.¹⁵² India's Supreme Court and Switzerland's Federal Tribunal are the only national courts to have decided the substantive merits of cases directly involving the right to adequate food.¹⁵³ None of these cases directly involve deprivations due to trade-liberalization policies.¹⁵⁴

Thus, while progress has been made at the national level towards implementing the right to adequate food, such progress has been limited to a handful of cases with precedential value. For example, in South Africa, the state's denial of the right to adequate food has only been challenged once, in 2005.¹⁵⁵ The litigation stemmed from the government's effective denial of fishing rights for artisanal fishermen, who have historically lived in shoreside communities, used low-technology fishing gear, and harvested a

147. *Right to Adequate Food*, *supra* note 119, ¶ 20.

148. United Nations High Commissioner for Human Rights, *The Right to Food: Achievements and Challenges*, ¶ 28, delivered to the World Food Summit: Five Years Later (June 2002), available at <http://www.fao.org/Legal/rtf/wfs.htm>.

149. Margret Vidar, *State Recognition of the Right to Food at the National Level*, § 2.4 (U.N. Univ. World Inst. for Dev. Econ. Research, Research Paper No. 2006/61, 2006), available at <http://www.rlc.fao.org/iniciativa/pdf/DAmundo.pdf>.

150. Europe-Third World Centre [CETIM], *The Right to Food, A Fundamental Human Right Affirmed by the United Nations and Recognized in Regional Treaties and Numerous National Constitutions* 21, available at <http://www.cetim.ch/en/bro1-alim-an.pdf.pdf> [hereinafter CETIM] (prepared by Christophe Golay & Melik Özden).

151. United Nations High Commissioner for Human Rights, *supra* note 148, ¶ 20.

152. CETIM, *supra* note 150, at 23.

153. *Id.* at 24, 26. The India Supreme Court recognized the right to food in 2003 in *People's Union for Civil Liberties v. Union of India & Others*, Interim Order, Writ Petition (Civil) No.196 of 2001 (May 2, 2003), available at http://www.escri-net.org/usr_doc/Interim_Order_of_May_2.doc.

154. See CETIM, *supra* note 150, at 24, 26.

155. See *Minister of Envtl. Affairs & Tourism v. George & Others* 2007 (3) SA 62 (SCA) (S. Afr.).

specific variety of marine species.¹⁵⁶ After active lobbying by large-scale commercial fishing companies, the South African authorities implemented a long-term fishing rights policy that forced artisanal fishermen to either form companies and compete with the larger commercial sector for high-value species or apply as individuals for a limited catch of a few nearshore species.¹⁵⁷ The artisanal fishermen sued claiming among other things that the legislative framework denied their right to adequate food.¹⁵⁸ The case is pending.¹⁵⁹

2. Regional Development

Three regional human rights systems recognize the right to adequate food: the African, European, and Inter-American systems.¹⁶⁰ In the Inter-American system, the Protocol of San Salvador's addition to the 1969 American Convention on Human Rights is the only regional text that explicitly recognizes the right to adequate food.¹⁶¹ Article 12 states that "[e]veryone has the right to adequate nutrition[,] which guarantees the possibility of enjoying the highest level of physical, emotional[,] and intellectual development."¹⁶² In Africa, the right to adequate food is protected by the 1981 African Charter on Human and Peoples' Rights (the ACHPR), which is binding on 53 states.¹⁶³ The African Commission on Human and Peoples' Rights has recognized that a country that has ratified the ACRHPR and the ICESCR has the obligation to take

156. *Id.* at 66.

157. Naseegh Jaffer & Jackie Sunde, *Fishing Rights vs Human Rights? An Ongoing Class Action Litigation in South Africa Brings to Focus the Challenge to the Rights-Based Management System in the Country's Fisheries*, 44 SAMUDRA REP. 20, 20, 22 (2006), available at http://www.icsf.net/icsf2006/uploads/publications/samudra/pdf/english/issue_44/art04.pdf.

158. *Id.* at 24.

159. *Id.* at 22.

160. On the other hand, no regional text for the protection of human rights exists in Asia. CETIM, *supra* note 150, at 12.

161. *Id.*

162. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 12, Nov. 14, 1988, 28 I.L.M. 156.

163. Org. of Afr. Unity [OAU], *List of Countries that Have Signed, Ratified/Acceeded to the African Union Convention on African Charter on Human and People's Rights* (May 26, 2007), <http://www.africa-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf> (last visited Sept. 22, 2007). It is also protected by the 1990 African Charter on the Rights and Welfare of the Child (ACRWC). ACRWC signatories have effectively committed themselves "to ensure the provision of adequate nutrition and safe drinking water." OAU, *African Charter on the Rights and Welfare of the Child* art. 14, O.A.U. Doc. CAB/LEG/24.9/49, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf>.

measures to fulfill the right to adequate food.¹⁶⁴ The European Social Charter does not specifically recognize the right to food because the drafters contemplated no need to protect it as long as the rights to work, social security, and social welfare are guaranteed.¹⁶⁵

Notwithstanding that all but the European system have commissions empowered to decide individual complaints for violations of the right to adequate food,¹⁶⁶ those deprived of their right have only been able to obtain redress for violations in a few instances using the regional systems. This is perhaps due to the lack of power that regional commissions have to enjoin or demand reparations from non-complying states, or the burdensome procedures that injured parties must follow to have their complaints heard before regional courts.

The Inter-American Commission on Human Rights, for example, does not have the power to demand injunctions or reparations.¹⁶⁷ The Commission has only decided one case involving the Protocol's right to food.¹⁶⁸ The Inter-American Court of Human Rights, on the other hand, can demand reparations from violating states under the Protocol of San Salvador, but can only hear individual complaints referred by the Commission.¹⁶⁹ The Inter-American Court has only decided one case on the right to adequate food. In the 2005 case of *Comunidad Indígena Yakye Axa v. Paraguay*, a Paraguayan indigenous community alleged that Paraguay had failed to acknowledge its right to property over ancestral land.¹⁷⁰ Among other findings, the court concluded that, in denying the community access to its traditional means of livelihood, Paraguay had denied the indigenous people the right to life, which included standards of health, education, and food set forth in the San Salvador Protocol.¹⁷¹ In its decision, the court found the General Comments by the Committee on Economic, Social, and Cultural Rights to be influential.¹⁷² The court stated that it would supervise enforcement

164. See *Soc. & Econ. Rights Action Ctr. for Econ. & Soc. Rights v. Nigeria*, Comm. No. 155/96, arts. 64–65 (Afr. Comm'n on Human & People's Rights, Oct. 2001), available at http://www.escri-net.org/caselaw/caselaw_show.htm?doc_id=404115.

165. CETIM, *supra* note 150, at 14.

166. *Id.*

167. Org. of American States [OAS], American Convention on Human Rights arts. 34–51, 9 I.L.M. 643 (Nov. 1969).

168. See *Enxet-Lamenxay & Kayleyphapopyet (Riachito) Indigenous Communities v. Paraguay*, Case No. 11.713, Inter-Am. C.H.R., Report No. 90/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999).

169. OAS, *supra* note 167, arts. 61, 63.

170. *Yakye Axa Indigenous Community of the Enxet-Lengua People v. Paraguay*, Case No. 12.313, Inter-Am. C.H.R., Report No. 2/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 2 (2003).

171. *Id.* ¶¶ 161–68.

172. *Id.* ¶¶ 166–67.

of measures Paraguay was required to adopt to address the violation.¹⁷³

Perhaps the African Court on Human and Peoples' Rights has the most potential among the regional courts to serve as a forum to redress violations of the right to adequate food. Created in 1998, when African countries adopted the Protocol to the ACHPR, it became effective in 2004, and judges were first inaugurated in 2006.¹⁷⁴ Those deprived of the right to food will be able to file complaints against all parties to the African Protocol and request reparations and compensation.¹⁷⁵ Bureaucratic hurdles exist, however. In order to file a complaint, the parties must have exhausted all recourses available at the national level.¹⁷⁶ Further, no standing is given to non-governmental organizations on behalf of individuals.¹⁷⁷

3. International Development

Internationally, the sole implementing body for the right to adequate food is the UN Committee on Economic, Social and Cultural Rights, which is not a treaty body and whose recommendations are not binding on the state parties to the ICESCR.¹⁷⁸ In 1990, the committee initiated discussions on the adoption of an Optional Protocol that would enable individuals and groups to bring complaints for violations of the ICESCR.¹⁷⁹ The committee finally issued its first mandate to a working group to draft such a protocol in 2006.¹⁸⁰

C. *The Developmental Limits of the International Right to Food: Limits on Extraterritoriality*

Perhaps the biggest pragmatic limitation in using the right to adequate food to remedy violations from trade rules resulting from the Doha Round negotiations or other multilateral trade agreements is the extent to which the right applies extraterritorially. This paper has thus far focused on a state's violation of its own peoples' right to

173. *Id.* ¶ 241.

174. Scott Lyons, *The African Court on Human and Peoples' Rights*, 10 ASIL INSIGHTS 24 (2006), available at <http://www.asil.org/insights/2006/09/insights060919.html>.

175. CETIM, *supra* note 150, at 29.

176. *Id.*

177. *Id.*

178. *Id.* at 32–33.

179. The International Network for Economic, Social and Cultural Rights (ESCR-Net), *Resource Page on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights Section 1: History of the OP-ICESCR Process*, http://www.escr-net.org/resources_more/resources_more_show.htm?doc_id=421703 (last visited Sept. 22, 2007).

180. *Id.*

adequate food, particularly Mexico's possible violations from trade-liberalization policies and NAFTA. But the United States, arguably, also should be held accountable for its policies that encouraged Mexico to import U.S. corn at levels that harmed Mexican farmers and consumers. And therefore—setting aside the fact that the United States has signed but not ratified the ICESCR, which substantially complicates the matter¹⁸¹—the United States also should be held responsible for denying Mexicans their right to adequate food.

With trade liberalization, a substantial number of actions that violate the right to adequate food are likely to harm—if not be directed at—people living beyond violating states' borders.¹⁸² Therefore, in order to serve as a truly useful tool, state obligations to respect, protect, and fulfill the right to adequate food must apply irrespective of state boundaries.¹⁸³ Unfortunately, there has been little clarity about the extraterritorial reach of the right to adequate food. Under Article 29 of the Vienna Law of Treaties, a treaty is binding only upon each party with respect to its own territory, “[u]nless a different intention appears from the treaty or is otherwise established . . .” And while the ICESCR does not contain a provision specifying its jurisdictional scope, it also, unlike other human rights treaties,¹⁸⁴ does not specifically state that it has extraterritorial application either.¹⁸⁵ Rather, the ICESCR indicates that states only have obligations to those outside their borders under an “obligation of international cooperation.” Article 11(1) provides that states “will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.”¹⁸⁶

181. Arguably, the United States must still refrain from taking action that would go against the object and purpose of the treaty. But this obligation only applies until the state has made its intention clear not to become a party to the treaty. See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 332.

182. As the U.N. Special Rapporteur for the Right to Food states:

. . . [I]n an age of globalization and increasing interconnectedness, when the actions and policies of every country can have far-reaching effects on people living in other countries, there is a need to extend a State's obligations under human rights to include extra-territorial obligations towards the right to food of people living in other countries.

ECOSOC, *supra* note 7, at Summary.

183. In addition, small underdeveloped nations may be unable to cope with the power of large companies. In many instances, developing countries' governments and their ruling elites actually benefit from corporations' unregulated behavior to the detriment of poorer populations. Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT'L L. 691, 757 (2006).

184. *Id.* at 728.

185. See *id.* at 694 (explaining that States Parties' obligations are limited to individuals in their territory or under their jurisdiction).

186. ICESCR, *supra* note 113, ¶ 11.

It is unclear what the "obligation of international cooperation" requires. The Maastricht Guidelines have a limited view on states' extraterritorial duties under IESCR. They provide that states have obligations outside their territory when "exercising effective control" over a territory, such as "under conditions of colonialism, other forms of alien domination[,] and military occupation."¹⁸⁷ The guidelines do state, however, that states must ". . . take into account its international legal obligations in the field of economic, social[,] and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations[,] or multinational corporations."¹⁸⁸

In General Comment 12, the Committee on Economic, Social, and Cultural Rights indicates that states have both individual and joint obligations under the right to adequate food, and that these commitments extend outside of states' territorial borders. Certain actions, such as food embargoes, are strictly forbidden, notwithstanding that the effects might be felt solely within other countries.¹⁸⁹ The committee also states:

In implementing this commitment, States parties 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.¹⁹⁰

The UN's Special Rapporteur has seized on this language to offer the most developed and progressive conception of the extraterritorial reach of the right to adequate food.¹⁹¹ The extraterritorial obligation to *respect* requires that states refrain at all times from implementing policies with foreseeable negative effects on people's right to adequate food in other countries:

Policies such as export subsidies for agriculture may also have negative effects when production is exported to agrarian-based developing countries. It is clear that such policies will have a negative impact on the right to food of people living in those countries since their

187. Maastricht, *supra* note 141, ¶ 17. This aligns with traditional international jurisprudence, under which a nation's obligations have only been found to apply outside its territory in situations where the state exercises jurisdiction through "effective control," involving situations of occupation or armed conflict. For the effective control doctrine to be useful within the context of international trade, it would have to apply when states exercise effective *economic* control over countries outside their territories. This would be a radical departure from the doctrine as it currently stands. And while such arguments might be worth pursuing, they are completely untested. Narula, *supra* note 183, at 734–35.

188. Maastricht, *supra* note 141, ¶ 15(j). States must also "use their influence" to ensure that violations of ICESCR do not result from policies they adopt within international organizations. *Id.* ¶ 19.

189. *Right to Adequate Food*, *supra* note 119, ¶ 37.

190. *Id.* ¶ 36.

191. See ECOSOC, *supra* note 7.

livelihoods will be destroyed and they will not be able to purchase food, even if the food is cheaper.¹⁹²

Further, the extraterritorial obligation to *protect* requires states to engage in adequate regulation to ensure that the policies and activities of transnational corporations respect the right to food of all people in the countries where they are working, especially “[w]ith the increasing monopoly control by transnational corporations over all components of the food distribution chain.”¹⁹³ Finally, governments have an extraterritorial duty to protect the right to adequate food by cooperating to provide an enabling environment for the realization of the right in all countries.¹⁹⁴ For example, states must implement equitable trade rules.¹⁹⁵ Governments must also provide assistance, to the extent that their resources permit, when individuals are suffering in another country, such as in a situation of widespread famine.¹⁹⁶

Under this construction, it might be argued that the United States violated Mexican farmers’ right to adequate food by adopting policies that abandoned price floors and food-security reserves, thereby encouraging oversupply and causing corn prices to plummet. The U.S. failure to adopt policies to prevent the export of corn at prices and levels that would inevitably displace farmers was also likely a violation.¹⁹⁷ Further, the U.S. might be liable to consumers for its failures to enforce antitrust laws that have led to a concentration in agribusiness and resulted in the price gouging of corn products.

Similar arguments might also apply within the context of any further trade-liberalization policies that result from the Doha Round. Unfortunately, the argument advanced by the Special Rapporteur has not been recognized thus far by any national, regional, or international body.

IV. AN ALTERNATIVE STRATEGY: THE FOOD SOVEREIGNTY MOVEMENT

While its slow development is not a fundamental flaw, if the ICESCR is the only tool to protect people’s right to adequate food in a world of increased trade liberalization, it is, pragmatically speaking, woefully inadequate; trade liberalization is occurring at the speed of

192. *Id.* ¶ 35.

193. *Id.* ¶ 36.

194. *Id.* ¶ 37.

195. *Id.*

196. *Id.* ¶ 38.

197. After all, when NAFTA was being negotiated, U.S. corn cost \$110 per ton, compared to Mexico’s floor price of \$240 per ton, after all. WALLACH & WOODALL, *supra* note 45, at 199.

light, while the implementation of the right to adequate food is moving at a slow crawl. The limitations in the law's development suggest a need for an alternative strategy.

The concept of food sovereignty, first launched in 1996 at the World Food Summit, provides such a strategy. Food sovereignty is the right of peoples to define their own food and agriculture policies, to protect and regulate domestic agricultural production and trade in order to achieve sustainable development, and to determine the extent to which they want to be self-reliant in food production.¹⁹⁸ It is not against trade, but it is against dumping imports and argues that production for local and national markets is more important than production for exports.¹⁹⁹ Each country should have the right to determine the extent to which it wants to be self-reliant in domestic production for basic food needs.²⁰⁰ A stable trading system can contribute to improving overall food availability, but true food security for farmers and consumers cannot be assured through cheap food imports, such as in the case of corn in Mexico.²⁰¹

Unlike the ICESCR, which might be seen as an overlay to the separate system of free trade under the WTO,²⁰² one of food sovereignty's key principles is that the WTO should cease control over food and agriculture and that individuals and nations should reclaim sovereignty over food-security policy.²⁰³ While the implementation of the ICESCR over time might advance to the point that it could redress deprivations of the right to adequate food brought on by agricultural trade liberalization, in essence, food sovereignty states that, given trade liberalization's harms, the only way to protect people's right to adequate food is to protect the right before liberalizing trade.²⁰⁴

On February 23, 2007, more than 500 people from more than 80 countries, including representatives from organizations of peasants and family farmers, artisanal fisherfolk, indigenous peoples, landless peoples, rural workers, migrants, pastoralists, and forest communities, as well as representatives from women, youth, consumer, and environmental and urban movements, gathered together in the village of Nyéléni in Selingue, Mali to deepen their

198. Special Rapporteur on the Right to Food, *Economic, Social and Cultural Rights: The Right to Food*, ¶ 25, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2004/10 (Feb. 9, 2004), available at <http://www.righttofood.org/ECN4200410.pdf>.

199. *Id.* ¶ 28.

200. *Id.*

201. *Id.*

202. See Narula, *supra* note 183.

203. Nyéléni, Declaration of Nyéléni 2–3 (Feb. 27, 2007), <http://www.nyeleni2007.org/IMG/pdf/DeclNyeleni-en.pdf>.

204. See *id.* at 1–3.

understanding of food sovereignty.²⁰⁵ A set of joint strategies and an action agenda were formulated to more fully flesh out the movement's aims.²⁰⁶ Paraphrasing the items most relevant to this paper, their strategies include:

- Fighting for alternative policies in developed countries that include production controls, supply management, and price supports to prevent dumping and promote family-farm agriculture over agribusiness;
- Targeting the WTO and regional and bilateral trade agreements to stop allowing dumping and the inappropriate use food aid;
- Pressuring governments to implement international agreements that support food sovereignty and, in the framework of these agreements, enact legislation that eliminates policies and practices that undermine it;
- Fighting against the corporate control of the food chain by demanding that governments enact policies that limit corporate control and facilitate community control over food production and distribution; and
- Fighting for a comprehensive, genuine agrarian reform that ensures priority use of land, water, seeds and livestock breeds for food production and other local needs, rather than production for exports, and that upholds the rights of women, indigenous peoples, peasants, fisherfolk, workers, pastoralists, migrants, and future generations.

Through these and other strategies, the movement intends to prevent food insecurity by promoting local autonomy in food production.²⁰⁷

In January 2007, the United Organizations of the National Union of Autonomous Regional Campesino Organizations, a non-profit network of Mexican campesino and indigenous farming organizations, issued a declaration that highlights how these general food sovereignty principles might translate into a specific national policy for corn in Mexico.²⁰⁸ Among other things, the organization demanded that the Mexican government: (1) renegotiate the agriculture chapter of NAFTA; (2) establish a floor price for corn and other basic food products that compensates for the costs of production and allows for a comparable standard of living to the producers of Mexico's trading partners; (3) introduce an antitrust initiative to

205. *Id.* at 1.

206. Nyéleni, Synthesis Report (2007), <http://www.nyeleni2007.org/IMG/pdf/31Mar2007NyeleniSynthesisReport-en.pdf>.

207. *Id.*

208. Food First, Institute for Food and Development Policy, *Chilpancingo Declaration for Food Sovereignty in Mexico Issued January 26, 2007*, <http://www.foodfirst.org/node/1650> (last visited Dec. 4, 2007).

discourage the monopolistic concentration of the basic crops market; and (4) guarantee a maximum sale price of tortillas to consumers, subsidized by the State if necessary.²⁰⁹ These policies would go a long way towards protecting Mexican farmers and consumers from further food insecurity created by agricultural trade liberalization.

V. CONCLUSION

The experiences of Mexican consumers and farmers after NAFTA show that trade-liberalization policies and free trade agreements do not solve food insecurity. Unfortunately, the international human right to adequate food is not a well-developed tool for individuals to redress harms resulting from the Doha Round negotiations. Promoting food sovereignty is a more viable strategy because one of its central tenets is that the WTO should cease control over agriculture and that people should reclaim sovereignty over food policy. In fact, in his 2004 report, the Right to Food's Special Rapporteur insinuated that food sovereignty might even be obligatory for ICESCR signatories. Stating that since under the right to adequate food governments are legally bound to

. . . find[] the best way of ensuring food security for all their people . . .[,] it is now time to look at alternative means that could better ensure the right to food. Food sovereignty offers an alternative vision that puts food security first and treats trade as a means to an end, rather than as an end in itself.²¹⁰

209. *Id.*

210. Special Rapporteur on the Right to Food, *supra* note 198, ¶ 33.