




THE GLOBAL FOOD CHALLENGE

TOWARDS A HUMAN RIGHTS APPROACH TO TRADE AND INVESTMENT POLICIES


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THE GLOBAL FOOD CHALLENGE: INTRODUCTION

It started with the tortilla crisis in Mexico. Slum dwellers had to renounce their daily staple food because of exploding corn prices. Their loud protest in January 2007 was just the first in a series of food riots¹ in about 40 countries. The last straw came in April 2008, in Haiti, when car tires burned in, barricades were built and the Prime Minister was overthrown. Finally the global food crisis was a story for primetime in the international media. An almost unprecedented price explosion for important agricultural commodities on the global market triggered the crisis. The price hikes were caused by growing use of commodities (such as soybean and maize) for agrofuels; excessive speculation on commodities' futures markets; increased meat consumption; poor harvests in the United States, Australia and Turkey; increased oil and energy prices; and, depleted food stocks. In the first half of 2008 alone, prices for food staples such as rice and cooking oil doubled (FAO 2009a).

Particularly in those countries that most relied on food imports, this international development was almost immediately reflected in the prices of food on grocery store shelves. And within these countries, the people who were most affected were the poor. Several hundred million more people joined the ranks of those unable to afford their daily food. The Food and Agriculture Organization (FAO) of the United Nations (UN) estimates that, because of higher food prices, the number of chronically undernourished people increased from 850 million to 915 million between 2005 and 2009. In June 2009, the news worsened: for the first time in human history the number of hungry people passed one billion. It is striking that record hunger in 2009 followed record grain harvests in 2008. FAO clearly stated: The increase in undernourishment is not a result of limited international food supplies (FAO 2009b). In 2009 the global grain harvest would only modestly fall short of the previous year's record output level of 2,287 million metric tons.

Instead, FAO identifies the main cause of still-rising hunger levels as the global financial and economic crisis, whose effects overlap with and worsen those of the food price crisis. Since autumn 2008, international agricultural commodity prices have dropped significantly but real domestic average prices for food staples are still 24 percent above June 2007 levels. As a consequence of financial market deregulation and speculation on commodity exchanges in industrialized countries, the economic crisis hit the global south with full strength. Scarcity of loans blocked badly needed in-

vestment in agriculture. Reduced orders and bankruptcies, especially in export sectors, destroyed the jobs of millions of people. And extreme inflation in a number of developing countries meant domestic food prices did not drop, despite lowering world market prices for agricultural commodities. To top it all off, the International Monetary Fund (IMF) says Overseas Development Aid (ODA) might decline by 25 percent in 2009 (FAO 2009b).

It would be unfair to say that the world's governments and the international community remained passive in the face of the food crisis. In 2008, this global human disaster (which was a long time in the making) finally attracted the public attention it deserves. A range of international conferences like the High Level Conference on World Food Security organized by the FAO in June 2008 in Rome, a High Level Conference in January 2009 in Madrid and the G8 Summits in 2008 and 2009 made it clear that hunger had reached the top of the international agenda. Since April 2008, the reaction of the international community to the food crisis has been coordinated by the High Level Task Force on the Global Food Crisis (HLTF), which was initiated by UN Secretary General Ban Ki-moon and which is composed of all UN organizations dealing with food and agriculture, as well as the World Bank, the IMF and the World Trade Organization (WTO).

In July 2008, the HLTF released a Comprehensive Framework for Action (CFA). The document sets out the joint position of HLTF members on proposed action to overcome the food crisis (HLTF 2008). Like other recent reports of intergovernmental organizations (IGOs), such as the World Development Report 2008 of the World Bank (WB 2008a), the CFA recommended that policymakers pay more attention to agriculture and increase their support for the sector for smallholder farmers in particular. The CFA calls for developing countries to increase public spending in agricultural and rural development to at least 10 percent of the budget, and for developed countries to increase the percentage of ODA dedicated to food and agricultural development from 3 percent (where it is today) to at least 10 percent within the next five years. These are proposals that point in the right direction. Also welcome is the declared objective to strengthen social protection systems. All of these measures, against the backdrop of soaring food prices, are more important than ever. On the other hand, social movements and NGOs are critical of the CFA for promoting the old paradigm of trade liberalization, ignoring the need for land

reforms and more sustainable methods of production and following a very narrow understanding of social security (FIAN International 2008). There is still a lot of work to be done to get the global policy agenda right.

The declarations and promises were followed by action (Brock and Paasch 2009). Since June 2008 alone, the World Food Programme (WFP) has spent \$5.1 billion USD on food aid (the larger share) and, to a lesser degree, on cash for work programs. The World Bank set up a Global Food Crisis Response Programme (GFRP) in 2008 to grant immediate relief to those countries that were hit particularly hard by high food prices and to assist countries to meet higher production and marketing costs (WB 2009). The World Bank announced a rapid financing facility of \$1.2 billion USD to this end. The budget was increased to \$2 billion USD in April 2009 (WB 2009). FAO launched its Initiative on Soaring Food Prices (ISFP) in 2007. Between June 2008 and September 2009, it mobilized around \$37 million USD of its own resources and received an additional \$311 million USD in funding to assist governments to take emergency measures, in efforts to increase local production in the current planting season as well as to expand plantings in the dry season. FAO has also supported governments with policy advice (HLTF 2009).

The question arises, however, as to why these joint efforts have not had the expected result of lessening the food crisis. The main focus of these international responses to the food crisis is the distribution of food aid, hybrid seeds and fertilizers. The measures are by and large focused on increasing productivity. Yet the FAO itself has said that lack of food is not the reason for the food crisis. The authors of this publication argue that fundamental causes of hunger are instead to be found in unfair market structures. The articles focus in particular on global trade and investment policies that have impoverished and marginalized landless farm workers, smallholder farmers, pastoralists, indigenous people and slum dwellers, and particularly women within all these social groups. Moreover, these policies have led to severe violations of human rights, particularly the universal human right to food. This basic human right is enshrined in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR has been ratified by 160 states. The right to adequate food establishes clear legal obligations for states and the international community, which, according to international law, precede other legal obligations states may have, for example in the areas of trade and investment (see chapter 1 by Olivier De Schutter).

However, governments and intergovernmental organizations (IGOs) are still largely neglecting these human rights obligations and risk repeating many of the same errors that caused the food crisis. The papers compiled in this publication analyze some of these errors: the displacement of farming communities from their local markets through a combination of export dumping by industrialized countries and forced market access in developing countries (see chapters 2 by Tobias Reichert and 3 by Armin Paasch); forced land evictions of small-scale farmers and rural workers as a result of investment in large scale plantations for cash crops or agrofuels and insecure land rights (see chapter 4 by Rolf Künneemann) and a systematic neglect and discrimination of women, who make up around 70 percent of the hungry, in food and agriculture policies (see chapter 5 by Alexandra Spielfoch). The right to food of these marginalized food producers and poor urban consumers was further undermined though excessive speculation in the future markets in the context of the mortgage and more general financial crises (see chapter 6 by Peter Wahl). Furthermore, man-made climate change is heavily threatening harvests in poor countries in Africa, Latin America and Asia and will hit hardest those who are already facing hunger. (see chapter 7 by Thomas Hirsch, Christine Lottje and Michael Windfuhr).

These and other root causes of hunger were the subject of the international conference The Global Food Challenge Finding Approaches to Trade and Investment that support the Right to Food that took place in November 2008 in Geneva.² The year 2008 marked the 60th anniversary of both the adoption of the Universal Declaration of Human Rights and the creation of the international trading system through the General Agreement on Tariffs and Trade (GATT) and WTO. The participants of this conference 130 representatives of social movements and NGOs from 40 countries analyzed concrete cases of violations of the right to food through unfair trade and investment policies and their underlying structural problems. Beyond analysis, the conference aimed to identify alternative ways to integrate human rights principles in trade and investment policies and reconcile their distinct and sometimes competing legal regimes (see chapter 10 by Sophia Murphy and Carin Smaller). Existing human rights instruments that can already be used to influence trade and investment policies were assessed (see chapter 8 by Elvira Domínguez Redondo and Magdalena Sepúlveda Carmona) and the need for new instruments discussed (see chapter 1 by Olivier De Schutter and chapter 9 by Christophe Golay).

This publication compiles background papers that were presented at the conference as well as some more recent material that develops some of the arguments presented during the conference. Brot für Alle, Brot für die Welt, the Ecumenical Advocacy Alliance (EAA), the FoodFirst Information and Action Network (FIAN), Germanwatch, the Heinrich Böll Foundation and the Institute for Agriculture and Trade Policy (IATP) decided to publish this book in order to make the analyses and approaches discussed in the conference accessible to a broader audience. The publishers are aware that there are no easy solutions for the food crisis, yet they hope to feed a debate that is attracting more and more interest and that remains front and center of any agenda for social justice and environmental sustainability.

¹ The term food riot is used because food was in all cases one of the main reasons for the riots, even though it was often not the only one.

² The conference was initiated by the Ecumenical Advocacy Alliance (EAA), FoodFirst Information and Action Network (FIAN) and the Institute for Agriculture and Trade Policy (IATP). The conference was held under the auspices of the UN Special Rapporteur on the right to food. It was co-organized by a broad group of civil society organizations including: ActionAid, Agency for Cooperation and Research in Development (ACORD), Brot für Alle, Brot für die Welt, Canadian Food Security Policy Group, East and Southern Africa Small Scale Farmers Forum (ESAFF), Eco-Fair Trade Dialogue, Equipo Pueblo-Social Watch Mexico, ESCR-Net, International Gender and Trade Network (IGTN), Heinrich Böll Stiftung, Lutheran World Federation (LWF), Network of Farmers' and Agricultural Producers' Organization of West Africa (ROPPA), NIYEL, Oxfam International, Social Watch, Working Group in Trade and Agriculture (Hemispheric Social Alliance), World Alliance of YMCAs, and the World Council of Churches.

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EXECUTIVE SUMMARY

In November 2008, the Ecumenical Advocacy Alliance (EAA), FoodFirst Information and Action Network (FIAN) and the Institute for Agriculture and Trade Policy (IATP) jointly hosted an international conference: “The Global Food Challenge – Finding New Approaches to Trade and Investment that support the Right to Food.” The conference was held under the auspices of the UN Special Rapporteur on the right to food, Olivier De Schutter. The event received the support and advice of a broad group of civil society organizations, including ActionAid, the Agency for Cooperation and Research in Development (ACORD), Brot für Alle, Brot für die Welt, the Canadian Food Security Policy Group, the East and Southern Africa Small Scale Farmers Forum (ESAFF), the Eco-Fair Trade Dialogue, Equipo Pueblo-Social Watch Mexico, the International Network for Economic, Social and Cultural Rights (ESCR-Net), the International Gender and Trade Network (IGTN), the Heinrich Böll Stiftung, the Lutheran World Federation (LWF), the Network of Farmers’ and Agricultural Producers’ Organization of West Africa (ROPPA), Niyel, Oxfam International, Social Watch, the Working Group on Trade and Agriculture of the Hemispheric Social Alliance, the World Alliance of YMCAs, and the World Council of Churches.

The conference offered a rich forum of learning, dialogue and debate. The event brought together 130 people from 40 countries, in a year that proved a watershed in global policies governing food and agriculture. The year, 2008, was the 60th anniversary of both the adoption of the Universal Declaration of Human Rights and the establishment of the international trading system through the General Agreement on Tariffs and Trade (GATT), an agreement that much later gave rise to the WTO (in 1995). It was also a year of sky-rocketing food prices, in global commodity markets and local bodegas alike, price hikes that prompted civil unrest in almost 40 countries, and that toppled a few governments as well. Too much of the same policy that went before persists, and in too many places the crisis is only deepening as levels of hunger continue to rise in the context of the global financial and economic crisis. But there is a marked change in the tone of the official government discourse, and a marked change in the way in which people – policy makers, policy advisors, and the public – are talking about food and agriculture. The conference provided a discussion of the food price crisis and the structural causes that led to it, particularly in the world of global trade, investment and finance. Conference participants agreed that trade, investment and finance must be regulated to support the realization of the right to food.

This book has been written for two reasons. First, to capture the papers and presentations made at the conference in a format designed to reach more people over a longer period of time. Second, to mark the necessity of continuing these debates with a view to realizing significant changes to the rules and public policies that govern trade and investment, in order to make such economic tools more supportive of the realization of the human right to food.

The book is organized in four sections: Fundamentals; Case Studies on Trade, Investment and the Right to Food; New Challenges and Threats; and, Human Rights Based Alternatives and Tools. The following pages offer a brief summary of each of the ten chapters.

THE FRAGMENTATION OF INTERNATIONAL TRADE, INVESTMENT AND HUMAN RIGHTS LAW

The first section, Fundamentals, includes two chapters. Chapter 1, written by Olivier De Schutter, the UN Special Rapporteur on the right to food, proposes a framework for a human rights approach to the negotiation and implementation of trade and investment agreements. In the first part De Schutter recalls the sources of international human rights law, especially the UN Charter, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. He argues that, within international law, human rights have a specific normative status. This implies that any international treaty, for example on trade and investment, which conflicts with human rights obligations of states, should either be considered void, or not be applied to the extent that there exists such a conflict. Human rights, such as the right to adequate food, impose three types of obligations to any state: to respect the rights which individuals enjoy, to protect these rights from being infringed by the acts of private parties, and to fulfill these rights for any person that does not currently enjoy them. The state must not only comply with these obligations towards the persons on its national territory, but also towards persons situated outside its borders. De Schutter claims that these extraterritorial obligations (ETO) should guide the negotiation and implementation of trade and investment agreements.

In the second part of chapter 1, De Schutter points out the practical problems with enforcing human rights over other international obligations, despite their higher standing. This difficulty arises from the fragmentation of international law into self-contained

regimes and the separate development of “trade law,” “investment law” and “human rights law.” In the absence of coordination among these regimes, the fact that trade and investment rules are often enforced by sanctions, while human rights obligations are not, gives trade and investment rules the *de facto* advantage. De Schutter proposes four mechanisms to avoid or overcome conflicts between the different regimes while ensuring the primacy of human rights: 1) the insertion of exception clauses and flexibilities in trade and investment treaties allowing states to comply with their human rights obligations without having to fear economic sanctions; 2) Human Rights Impact Assessments (HRIA) done before new regulations are passed into law to evaluate the potential impacts of trade and investment agreements that are still in negotiation; 3) “harmonization through interpretation,” which means that trade and investment treaties must be interpreted, to the fullest extent possible, as being coherent with human rights obligations; and, 4) sunset or “rendezvous” clauses that, based on HRIAs done after new rules take effect, allow for a revision of a treaty where it appears to have a negative impact on human rights.

Chapter 2 by Tobias Reichert shows that, in absence of the mechanisms proposed by De Schutter, deregulation remains the panacea of trade and investment negotiations. Reichert first looks at the evolution of multilateral and bilateral trade and investment agreements, and their implications for agriculture and development in developing countries. The continuing push for more market access for agri-businesses based mostly in developed countries has had many negative implications for the food security and livelihood possibilities of local people across the developing world. At the same time, as the chapter shows, the governments of industrialized countries have still not addressed the problem of dumping food and feed at prices below the costs of production. Structural distortions in world market prices continue unchecked. Indeed, in response to the global financial crisis, export supports of various kinds are again on the rise.

The chapter sets out the main provisions of the WTO Agreement on Agriculture and looks at the proposals now in negotiation among WTO members for changes to the agreement as part of the so-called Doha Agenda. The chapter looks at the effects of liberalizing trade on developing countries’ food security and agricultural development. It discusses the trend towards more regional agreements as multilateral negotiations have stalled, and the relatively less favorable position that

developing countries find themselves in such negotiations. The effect of the existing rules has been to limit the tools that developing countries might use, such as border measures to block dumped commodities, without effectively limiting the domestic support typically used by rich countries to insulate their agriculture from world markets, or, worse, to subsidize the activities of their exporting firms. In the face of increasing challenges from the crises of hunger, climate, energy and the world economy, Reichert calls for more targeted government intervention to support the realization of the right to food. He says the discussion needs to focus on consideration of which types of intervention are supporting domestic and international food security and which ones can be harmful.

VIOLATIONS OF THE HUMAN RIGHT TO FOOD THROUGH TRADE AND INVESTMENT POLICIES

The connection between agricultural trade and investment, on the one hand, and human rights, particularly the right to food, on the other, is normatively acknowledged by states. But there is no consensus as to the question which trade and investment policies are to be seen as being in accordance with human rights. Section 2 therefore examines concrete cases, where the right to food has been violated through trade and investment policies.

In Chapter 3, Armin Paasch briefly introduces a methodology proposed for case based HRIAs of trade policies. The chapter then summarizes the results of empirical case studies on the impact of trade policies on selected farming communities in Ghana, Honduras, Indonesia, Uganda and Zambia conducted on the basis of this methodology. Studies on rice gave clear evidence that the forced deregulation of trade in Ghana, Honduras and Indonesia contributed considerably to the violation of smallholders' right to adequate food. Increased and under priced imports have considerably lowered access of rice farmers to local town markets and driven down the price which they received from traders, processors and costumers. The result was that families lost their permanent access to adequate food. Opening of markets and the privatization of agricultural services in these countries, mainly implemented in the framework of structural adjustment programs forced on them by the IMF, are identified as main structural reasons of the imports surges registered by the FAO. Moreover, dumping and misallocated food aid by rice exporters from the United States enabled U.S. companies to access local markets abroad.

A similar pattern was observed in the cases of chicken and tomato farmers in Ghana, who were affected by import surges from the EU and other countries. The new Interim Economic Partnership Agreement (EPA) with the EU will force Ghana to further open its market for European imports and, in the case of so called "sensitive products," it will freeze tariffs at the current low levels and thereby limit Ghanaian policy space to protect the right to food of small holders. Other case studies on dairy farmers from Uganda and Zambia do not provide evidence of import surges and the displacement of farming communities through misled trade policies. However the EPAs, the increased EU dairy quota (associated with increased exports) and the reintroduction of EU export subsidies in January 2009 are posing major risks to the right to food of these farmers in the future. The author argues that upcoming bilateral free trade agreements between the EU and South Korea, India, ASEAN, Central America and others pose the same kind of threats to already vulnerable and marginalized farmers' right to food.

Chapter 4 by Rolf Künemann, looks at how the provisions of bilateral investment treaties lock in privileges for foreign investors that undermine local people's ability to secure their access to a livelihood, including the means to secure adequate food for themselves and their dependents, and thus their basic human right to adequate food. Governments and IGOs have rightly identified underinvestment in agriculture as one of the main reasons for hunger in general and for the rise in food prices in 2007 and 2008. Investing in agriculture is a must. Yet not just any kind of investment will do. In many cases, investment can directly lead to hunger. For example, large scale plantations that grow cash crops and exploit their workers; or the lease of land to produce feedstock for agrofuels that leads to forced evictions of small scale farmers or rural workers from their traditional land, can both result in serious violations of the right to food. The new phenomenon of large-scale land acquisitions by foreign investors is rightfully denounced as "land grabbing" by many NGOs (and has been criticized by several IGOs as well). Strong and enforceable rules are needed to ensure such contracts respect people's fundamental rights. The author insists that states have "extra-territorial obligation" for human rights implementation – that a state cannot just ensure the human rights of its own citizens, but must also ensure its companies and people are not responsible for violating human rights in other countries.

The chapter looks at a range of investment projects, in Kenya, Malawi, Uganda, Nigeria and Paraguay. In each

case, the role of investment agreements (and, in some cases, the lack of any domestic legislation governing foreign investment) in the violation of human rights is reviewed. Künnemann proposes five criteria to assess investments from a right to food perspective. They are: 1. After the investment is made, the people affected by the project have access to adequate food and resources; 2. All project-affected persons have access to natural resources and to knowledge systems and production methods which are ecologically and economically more sustainable than they were before; 3. The number of people who enjoy access to adequate food or productive resources increases; 4. The resource and food needs of future generations have been taken into consideration; and, 5. The justiciability of the right to food and resources has been strengthened.

Chapter 5 by Alexandra Spieldoch looks at both trade and investment from a gender perspective, considering the implications of policies of deregulation for women, who are disproportionately present among the hungry, among the landless and among the most marginal farmers. In many countries women make up more than 70 percent of food producers and, at the same time, globally, they make up around 70 percent of the hungry. They usually lack sufficient land rights under national law, they almost always receive lower wages than their male counterparts, and they are much more likely than men to have their rights as workers violated. Yet official strategies such as the UN High Level Task Force on the Global Food Security Crisis's Comprehensive Framework for Action (CFA) seem blind to gender issues and are silent on solutions to end gender discrimination in relation to food and agriculture policy.

Spieldoch's paper makes three arguments, looking at what has failed and at how to develop food and agriculture policies that make a positive contribution to the right to food and to gender justice. The first is that the global food crisis and the long-term decline in agriculture over the last thirty years have worsened the situation for women producers and food providers globally. While many women have been able to benefit from global markets, too many are left out, unable to fully benefit from new opportunities because of their lack of social standing and because national legislation discriminates against women. Second, governments and institutions must prioritize gender in responding to the food crisis. Leaders need to increase funding and to adopt a rights-based approach to food and agriculture that includes a commitment to empower women. Third, women need the information and opportunity to be able to partici-

pate in the formation of policy directives, and to take the lead in their implementation. Women's knowledge and engagement are invaluable. The chapter looks at some examples of successful projects spearheaded by women and makes recommendations as to what kinds of policy approaches can help to respond to the global food challenge from a gender perspective.

NEW THREATS AND CHALLENGES

The third section looks at two new threats to the realization of the right to food: unregulated speculation on commodity markets that disrupts normal supply and demand signals (chapter 6 by Peter Wahl); and, climate change, which threatens to disrupt agricultural production all around the globe, but in particular around the equator, where many of the world's poorest peoples are concentrated (chapter 7 by Thomas Hirsch, Christine Lottje and Michael Windfuhr).

In chapter 6, Peter Wahl looks at the effects of speculation. After decades of long-term declining prices in real terms, there are signs that agricultural commodity prices are likely rise, albeit modestly. There are many reasons for the change, rooted in structural trends such as increased energy prices, increased use of cereals for feed and fuel, global population growth, declining rates of productivity growth from existing agricultural technologies and the increased uncertainty in output due to climate change. These structural factors however do not fully explain the extent of the price hikes in 2007 and 2008, nor the subsequent continued volatility of agricultural commodity prices. An important element, external to supply and demand, was speculation on the futures markets in the context of the mortgage and more general financial crises. The speculative bubble was possible because of the deregulation of future markets over the past 20 years. Yet although there is discussion about how to re-regulate financial markets, for example at the September 2009 summit of the Group of 20 in Pittsburgh, the question of how to stem speculation on agricultural commodities has been ignored.

In his chapter, Peter Wahl reviews the different reasons given for the food price spikes in 2007 and 2008. He sets out the argument that the price spikes were what he describes as a "classic case of a speculative bubble." The damage done is real and deadly and the problem, argues Wahl, is not difficult to contain with regulatory measures (unlike the challenges posed by unsustainable diets, for example, or a food system dependent on

unsustainable use of freshwater resources). Wahl explains the distinction between speculation and investment and describes why, if left unchecked, speculation can destabilize the whole economy. In the last five to seven years, deregulation and the wider pattern of economic growth gave rise to a massive increase in the presence of speculative money in commodity markets (between 2003, the amounts increased from \$13 billion to \$260 billion USD). The effect was not only to drive prices very high very fast, but also to disconnect the market price from the “fundamentals” of supply and demand. The wider economic crisis, argues Wahl, drove institutional investors to move out of mortgage markets and into other sectors, including agricultural commodities, which in turn drove prices still higher.

Wahl argues that states are responsible for the protection and fulfillment of human rights, including the human right to food. The failure to regulate speculation is a failure to protect these rights. States have an obligation, argues Wahl, to protect people from speculation and excessive price volatility in the markets that determine the cost of food. He concludes his chapter with a recommendation for the implementation of two, linked, measures: a registry at the commodity exchanges that would exclude actors whose speculative activity was excessive; and, regulation of the traders who are authorized to operate at the exchange. The regulations would keep out speculators with no interest in the stability of the market long-term.

In chapter 7, Thomas Hirsch, Christine Lottje and Michael Windfuhr look at the changes in agricultural output linked to changes in weather patterns, particularly those associated with anthropomorphic climate change. The convergence of bad harvests in Australia, the U.S., Turkey and other countries in 2006/2007 has been identified as one factor behind the food price crisis. At the same time, evidence is growing that increased frequency of such bad harvests is due to climate change. The authors run through the evidence in support of the claims that anthropomorphic activity is affecting the climate.

They then make the link to food security, arguing that the current focus on global food security issues is obscuring the differentiated impact of the likely changes. Scientists are predicting that agriculture in poor countries in Africa, Latin America and Asia will be hit the hardest by climate change. Those who live close to the equator in particular will be hard hit, and that is a belt that contains many poor countries with large food-insecure populations already. These are not countries with the resources to pay for the

adaptation that is now widely expected to be necessary. Within these countries, the first victims will be those who are already facing hunger or who are otherwise socially vulnerable. The authors argue for developing the tools and indicators needed to assess which populations will be most vulnerable to the effects of climate change, including household assessments of food insecurity.

The authors then look at some of the tools now in use to assess needs, such as National Adaptation Programs of Action. They look at some of the tools available at the local and community level to adapt to climate change. They argue for a rights-based approach to such policy planning, to ensure the government puts the interests of the most vulnerable populations first. Clearly adaptation strategies need policy input and financing at the global level as well. Negotiations on sufficiently ambitious and binding global goals to reduce greenhouse gas emissions, however, do not look likely to emerge any time soon. In the intergovernmental negotiations on the Adaptation Fund, the special needs and the right to food those vulnerable people are still widely ignored. The authors call for a rights-based approach to climate policy at every level: international, national and local.

HUMAN RIGHTS BASED TOOLS AND ALTERNATIVES

The fourth and final section looks at alternatives and tools that support the right to food. In chapter 8, Elvira Domínguez Redondo and Magdalena Sepúlveda Carmona analyze the extent to which existing human rights tools can be – and are – actually used to challenge trade and investment rules. First, the authors explore the different strategies used to scrutinize the relationship between human rights, trade and investment policies. Among others they highlight the efforts of the Office of the High Commissioner for Human Rights (OHCHR) which prepared a series of reports addressing subjects as trade and investment liberalization, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), agricultural trade and the liberalization of trade in services, and which requested states to undertake HRIAs on trade and investment. As first important steps in standard setting, the authors mention the Draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprise with Regard to Human Rights, the UN Global Compact and the OECD Guidelines for Multinational Enterprises and others, however point to the limited character of these guidelines as non-legally binding standards.

The second part of the chapter outlines the main UN human rights treaty-based and charter-based bodies that have used their competence and procedures to raise human rights concerns in the field of trade and investment. The authors emphasize the pioneering role of the UN Committee on Economic, Social and Cultural Rights (CESCR), which was among the first to join protest from civil society against the Multilateral Agreement on Investments (MAI). The CESCR has since raised concerns on trade and investment policies in many discussions with states, in Concluding Observations to periodic reports and in General Comments on the Rights to Health and to Food. Additionally, the authors consider the Human Rights Council (HRC) as a “privileged forum” to further develop the nexus of trade, investment and human rights. Its Public Special Procedures, such as the UN Special Rapporteurs on the rights to health, to housing, to food and on torture have been very active in addressing these issues and moving forward the international debate. Moreover, the Universal Periodic Review mechanism of the HRC, where the behavior of 48 states annually is reviewed, offers a good opportunity for states and human rights advocates to challenge trade and investment policies. Nevertheless, the authors conclude that, so far, long-established legal tools and techniques used to promote and protect human rights are ill-equipped to deal with these issues traditionally addressed by disciplines and methodologies unfamiliar to jurists and human rights experts. To address this challenge, they propose a few possible avenues, such as thematic discussions within the Treaty Bodies on the nexus of human rights obligations and trade and investment policies, seeking clarification from the International Court of Justice (ICJ) in relation to legal lacuna regarding trade agreements and human rights obligations, and complaints under conventions of the International Labour Organisation (ILO).

In Chapter 9, Christophe Gollay discusses the need to further strengthen the human rights standards and instruments for a specific group of people, namely peasants, defined by the global peasant movement Vía Campesina as “women or men of the land, who have a direct and special relationship with the nature through the production of food and/or other agricultural products.” Peasants represent around 70 percent of undernourished people worldwide. No other social group suffers as many violations of their rights to food, water, healthcare, education, work and social security. Gollay reminds that peasants, like all human beings, benefit from the protection of the rights enshrined in the International Covenant on Economic, Social and

Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). As a complement to this universal protection, women peasants and indigenous peasants also benefit from the protection granted by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and by the United Nations Declaration on the Rights of Indigenous Peoples.

Yet the desperate situation of millions of peasants shows that this protection is still insufficient. Gollay argues that a Peasant Rights Convention could strengthen the position of peasants in international law by recognizing in a single document their numerous rights that have already been recognized in other international instruments, and by giving coherence and visibility to these existing rights. Furthermore such a convention would strengthen their rights against the growing control over food and productive resources exercised by multinationals and could push governments to take action against the discrimination faced by peasants. To that end, in June 2008, Vía Campesina adopted The Declaration of the Rights of Peasants – Men and Women, which was developed after seven years of internal discussion and consultation of its member organizations and human rights experts. Following the model of the UN Declaration on the Rights of Indigenous Peoples, the Vía Campesina declaration reaffirms the existing civil, political, economic, social and cultural rights of peasants, and reinforces them by incorporating new rights, such as the right to land, the right to seeds and the right to the means of agricultural production. The UN was slow to respond to the demands of La Vía Campesina. It was only with the work of its Special Rapporteur on the right to food in response to the global food crisis, that peasants’ rights were really discussed by the United Nations. In 2009, La Vía Campesina was invited by the Human Rights Council and the UN General Assembly to give its point of view on the food crisis and the way in which it might be remedied. The UN is a long way from adopting a Peasant Rights Convention but the experience of indigenous peoples shows that it is possible.

Chapter 10, the final chapter, by Carin Smaller and Sophia Murphy, looks at the tensions between the demands of (and assumptions implicit in) the global trade system with those created by human rights obligations. The authors propose a reconciliation that would give human rights the deciding role in shaping trade and investment relations among states. They argue that there are a number of features of human rights law that are

especially pertinent to trade regulation, including its universal, indivisible and interdependent nature; its forming a binding set of laws on all signatory states (which is all members of the UN); the centrality of a number of principles, including equality, non-discrimination, accountability, transparency, and participation; and, the extraterritorial obligations created by human rights law. In contrast, the authors point to a number of areas where the WTO system creates barriers to the respect and fulfillment of human rights. These include the trade system's push to limit the state's role in the economy, even though it might be necessary to correct market outcomes that discriminate against the poor, and the way the system ignores the effect of trade regulations on the most vulnerable populations, despite the obligation under human rights law to help the most vulnerable populations first. Despite some recent improvements, multilateral (and bilateral) trade negotiations fail to meet a minimal level of participation and inclusion from affected people.

The paper concludes with some ideas for a new and different basis for the regulation of international trade in food and agriculture. Echoing the points made in chapter 1, the authors call for coherence in a system that gives first place to human rights obligations. The authors propose the WTO focus on disciplining poor trade practice (such as dumping and regulated concentrations of market power) rather than promoting a single vision of how trade should be organized. The authors argue for accountability, transparency and participation to be founding principles of the trade system, and for formal monitoring and assessment that considers human rights concerns be formally included. The final recommendations look at proposed content for trade regulation. They call for a fresh look at border measures and their possible contribution to policy objectives related to the realization of human rights; for competition law that addresses concentrations of market power in global commodity and food markets; for a fresh look at what kinds of public investment and support are needed to build resilient and lasting food systems (including a role for public stocks and for state trading enterprises); and for disciplines to eliminate dumping and to better manage food aid.

As editors, we trust you will find the book a useful addition to a growing literature of critical writing on how best to make trade and investment serve just and ecologically resilient outcomes rooted in human rights. Bonne lecture!

The background of the page is a grayscale topographic map showing intricate contour lines and valleys, suggesting a mountainous or hilly terrain. The lines are more densely packed in some areas, indicating steeper slopes, and more spread out in others, indicating flatter land.

A. FUNDAMENTALS

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I. A HUMAN RIGHTS APPROACH TO TRADE AND INVESTMENT POLICIES

This paper proposes a framework for a human rights approach to the negotiation and implementation of trade and investment agreements. It is structured in two parts: The first part presents the normative framework (1.). It recalls the sources of international human rights law, the status of human rights in international law, and the content of human rights obligations imposed on states under human rights treaties or other sources of human rights law. A second part lists techniques that may be explored to avoid the conflict between states' obligations under trade and investment agreements, on the one hand, and their human rights obligations, on the other hand (2.). This second part is divided into two sections: The first section explains how trade and investment regimes develop in isolation from human rights regimes, giving rise to what has been referred to as the "fragmentation" of international law (2.1). The second section reviews potential solutions to the problem of fragmentation (2.2).

1. THE NORMATIVE FRAMEWORK

The obligation of states to comply with human rights has its source, first and foremost, in the treaties they have ratified. But this obligation also follows from the United Nations Charter itself. And human rights have acquired the status of customary international law and they constitute general principles of law, both of which sources are mentioned in Article 38(1)(c) of the Statute of the International Court of Justice as sources of international law. This is explored in 1.1: The sources of international human rights law. In addition, human rights have a specific normative status, implying that any international treaty which conflicts with the obligation of the state to comply with human rights law should either be considered void, or disapplied to the extent that there exists such a conflict. This is considered in 1.2: The normative status of international human rights. Finally, the content of the obligations imposed on states under human rights instruments (or, indeed, under human rights as part of general public international law) is now better understood, allowing states to identify which measures they take to ensure their trade and investment policies remain consistent with their human rights obligations. States are under an obligation to respect, protect, and fulfill human rights. These obligations are not limited geographically: a state must not only comply with these obligations toward the persons on its national territory, but also towards persons situated outside its borders. A matrix can therefore be developed that takes those obligations into account, although it should be complemented by taking into account the right to development. This is the subject of 1.3: The matrix of human rights obligations.

1.1. THE SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

As members of the Organization of the United Nations, all states have pledged to “take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55” of the UN Charter, which imposes on the United Nations a duty to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.” Scholars have sometimes questioned whether these provisions in fact impose legal obligations on states, or simply define in general terms a program of action for state to follow (Hudson 1948, 105; Kelsen 1950, 29-32; Lauterpacht 1950, 147-149).¹ These skeptical views, however, often confused the question of whether the Charter’s provisions were self-executing with the question of whether they were legally binding. Moreover, they were premised on the indeterminate character of the content of the “human rights and fundamental freedoms” referred to in the Charter, which the Universal Declaration of Human Rights, adopted in 1948, was intended to clarify definitively.²

The International Court of Justice seems to have definitively put an end to the controversy in its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970), where it stated that “to establish [...], and to enforce, distinctions, exclusions, restrictions and limitations exclusively based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter.”³ Although the statement was made in relation to the obligations of South Africa as a mandatory power in South West Africa, there is no reason to restrict it to this hypothesis (Schwelb 1972, 337): instead, it would seem to follow from the opinion that the UN Charter imposes on all states the obligation to comply, at a minimum, with a core set of human rights, which the Charter refers to without listing them exhaustively.

In addition, the Universal Declaration of Human Rights, although adopted as a non-binding resolution by the United Nations General Assembly on December 10, 1948, is considered to have acquired the status of customary international law (Henkin 1990, 19; Rodley 1989, 333; Meron 1989, 93; Sohn 1977, 129; Hannum 1995-1996; Tomuschat 2003, 34)⁴ or alternatively to codify prin-

ciples which, due to their large recognition and due to the fact that they are replicated in a large number of national constitutions throughout the world, across various regions and legal systems, may be said to constitute general principles of law (Simma and Alston 1988-1989).⁵

1.2. THE NORMATIVE STATUS OF INTERNATIONAL HUMAN RIGHTS

Should a conflict arise between the obligations imposed on a state under international human rights law and obligations imposed under a trade agreement, the former should prevail. Two arguments are traditionally put forward in order to justify the view that human rights occupy a hierarchically superior position among the norms of international law (Seiderman 2001).

First, Article 103 of the UN Charter provides, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” Since one of the purposes of the UN Charter is to achieve international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination (Art. 1(3) and 55), and since Article 56 clearly imposes obligations both on the organization itself and on its Member states to contribute to the fulfillment of this objective, it would follow, then, that any international obligation conflicting with the obligation to promote and protect human rights should be set aside, in order for this latter objective to be given priority.

Second, although the norms of international law (customs, treaties and the “general principles of law recognized by civilized nations”) are otherwise not hierarchically ordered according to their various sources, certain norms are specific in that they embody a form of international public policy. In the specific context of the law of treaties, the Vienna Convention on the Law of Treaties states that any treaty which, at the time of its conclusion, is in violation of a peremptory norm of general international law, is to be considered void. A peremptory norm of general international law is defined as, “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”⁶ The existing judicial prac-

tice shows that such *jus cogens* norms are those which ensure the safeguard of two fundamental interests of the international community: those of its primary subjects, the states, whose essential prerogatives are preserved by the recognition of their equal sovereignty and by the prohibition of the use of force in conditions other than those authorized by the UN Charter; and those of the international community in the preservation of certain fundamental human rights (Dupuy 2002, 303).

In theory, the sanctions attached to the hierarchical principle will differ according to whether it is based on Article 103 of the Charter or on the nature of the superior norms recognized as *jus cogens*: whereas a treaty found to be in violation of a *jus cogens* norm is void and must be considered to have never existed, a treaty incompatible with obligations flowing from membership in the United Nations does not disappear, but shall not be applied to the extent of such an incompatibility.⁷ However, the logics under which each of these mechanisms operate are not systematically opposed to one another (Combacau 1991): where a treaty is not per se in violation of a *jus cogens* requirement but may lead to certain decisions being adopted which result in such a violation, only those decisions shall have to be considered invalid, while the treaty itself will remain in force.⁸

Human rights obligations imposed on states are also specific in that they do not primarily define obligations owed to other states, as do rules contained in traditional treaties. Rather, these obligations are owed, first and foremost, by a state to its own population. Human rights treaties therefore have an “objective” character in that they are not reducible to bilateral exchanges of advantages between the contracting states. The principle has been put concisely by the Human Rights Committee: “Such treaties, and the Covenant specifically, are not a web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with rights.”⁹ The idea is not a new one. In its Advisory Opinion on the issue of Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,¹⁰ the International Court of Justice already noted the specificity of the 1948 Genocide Convention which, it stated:

[...] was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups

and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to states, or of the maintenance of a perfect contractual balance between rights and duties.

The same idea was expressed as follows by the Inter-American Court on Human Rights:

[...] modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting states. In concluding these human rights treaties, the states can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction.¹¹

This characteristic of human rights rules – which also is visible from the Vienna Convention on the Law of Treaties¹² – has sometimes led courts to dismiss the idea that states could invoke their other international obligations, such as obligations imposed under trade or investment treaties, to justify setting aside or restricting their obligations under human rights treaties. In the Case of the Sawhoyamaya Indigenous Community v. Paraguay, Paraguay argued before the Inter-American Court of Human Rights that it was precluded from giving effect to the indigenous community’s right to property over their ancestral lands because, among other reasons, these lands now belonged to a German investor, protected by a bilateral investment treaty. The Court answered: “the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among States.”¹³

1.3. THE MATRIX OF HUMAN RIGHTS OBLIGATIONS

1.3.1. Obligations to respect, protect and fulfill

Human rights impose on states three types of obligations: to respect the rights which individuals enjoy, to protect these rights from being infringed by the acts of private parties, and to fulfill these rights. As regards the right to food for instance, these obligations have been described as follows:

The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.¹⁴

1.3.2. Extraterritorial obligations

These obligations are imposed on states not only towards persons found on their national territory, but also towards persons situated outside the national borders, although in this second set of situations, the state must discharge its obligations taking into account the sovereign rights of the other territorial state concerned, so that the tools which a state uses to comply with its obligations may be different. Indeed, it is now widely agreed that human rights treaties may, in principle, impose on states parties obligations not only when they adopt measures applicable on their own territory, but also extraterritorial obligations, which may include positive obligations going insofar as the state can influence situations located abroad (Coomans and Kamminga 2004, Dennis 2005 and Meron 1995). In the General Comment adopted in 2002 on the right to water, the UN Committee on Economic, Social and Cultural Rights notes:

To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.¹⁵

For instance, where a state heavily subsidises agricultural products that are exported by companies under its jurisdiction, with the effect of crowding out the local producers in the receiving markets, this should be treated as a violation of the right to food by the exporting state, since it constitutes a threat to food security in the importing country.¹⁶ This is also the spirit of the General Comment which the Committee on Economic, Social and Cultural Rights adopted on the relationship between economic sanctions and respect for economic, social and cultural rights.¹⁷ The core message of that General Comment was that states imposing sanctions should not, in doing so, jeopardize the economic, social and cultural rights of the population in the targeted state, since this would constitute a violation of their obligations under the International Covenant on Economic, Social and Cultural Rights and, indeed, since the Universal Declaration on Human Rights may be considered as binding under general international law, whether or not they have ratified the Covenant.¹⁸

These obligations should guide states in the negotiation and implementation of trade and investment agreements. The Committee on Economic, Social and Cultural Rights has identified, "the 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," as a specific instance of violation of the right to food.¹⁹ Similar statements may be found, for instance, in the General Comment on the right to the highest attainable standard of health, which it adopted in 2000,²⁰ or in the General Comment adopted in 2002 on the right to water:

States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements

concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.²¹

The recognition by the human rights treaty bodies that states have extraterritorial obligations in addition to their obligations towards persons on their territory has solid foundations in general international law. The law of the UN Charter is no more limited territorially than customary international law or the "general principles of law recognized by civilized nations" also mentioned in Article 38(1)(c) of the Statute of the International Court of Justice as sources of international law – both of which, as we have seen, may be seen to include, at a minimum, a core set of the rights explicated in the Universal Declaration of Human Rights. States are bound to contribute to the aims of the UN Charter, and to respect human rights either as customary international law or as general principles of law, in all their activities, whether these activities affect the human rights of their own population or whether they affect the enjoyment of human rights abroad. Indeed, it would be rather paradoxical if, as a price of the copernician revolution effectuated by human rights in international law – the international law of human rights imposing obligations on states not only vis-à-vis other states, but also towards their own population – human rights were to be considered applicable only in the latter relationships, and not where their enjoyment in the territory of State A is affected by measures adopted by State B; i.e., by another state than the territorial sovereign. Denying, in that sense, the extraterritorial effect of the obligation of all states to respect internationally recognized human rights, would place human rights apart from other norms of general public international law. In the *Trail Smelter* case, it was stated that

Under the principles of international law [...] no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.²²

The principle according to which no state may allow damage to be caused to another state by use of its territory is not limited to environmental damage.²³ In the *Corfu Channel Case*, while accepting that an activity cannot be imputed to the state by reason merely of the fact that it took place on its territory, the International Court of Justice nevertheless noted, "a State on whose terri-

tory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation" where the state knew or ought to have known that activities unlawful under international law (i.e., activities that would constitute a violation of international law if they were imputed to the state in question) are perpetrated on its territory and cause damage to another state, the first state is expected to take measures to prevent them from taking place or, if they are taking place, from continuing.²⁴ Brownlie comments on this basis that the state, "is under the duty to control the activities of private persons within its State territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another State" (Brownlie 1983, 165).²⁵

Indeed, a failure by a state to ensure that no activities are conducted on its territory which could lead to human rights being violated on another state's territory could violate the prohibition imposed on all states to aid or assist another state in committing an internationally wrongful act, in the meaning of Article 16 of the ILC's Articles on State Responsibility.²⁶ This is relevant, in particular, as regards the various forms of support a state routinely provides to corporations domiciled on its territory, which intend to export or invest abroad. When such support is given with the knowledge that this will facilitate the commission of human rights violations by that corporation abroad which the host state will be unwilling or unable to prevent or to sanction, the home state is in effect aiding or assisting the host state to violate its obligation to protect human rights, thus becoming a complicit in this omission (McCorquodale and Simons 2007, 598-625, 611-612). States offer significant support to their companies investing abroad, in most cases without imposing compliance with human rights as a condition to the provision of such support.²⁷ Such support takes a variety of forms, the most spectacular of which consist in the conclusion of bilateral or multilateral investment treaties recognizing a number of rights to the investors of each state party having established themselves on the territory of another party, and in the guarantees offered by export credit agencies or other institutions, which provide insurance against the risks of investment in foreign jurisdictions. According to the argument based on complicity, such support may lead to a situation where the home state knowingly facilitates or encourages the violation of human rights by the host state. This would be the case, in particular, where "economic stabilization" clauses are inserted into host government agreements concluded between the host state and the foreign investor, insulating the investor from

the risks of a diminished profitability which would result, for instance, from the adoption by the host state of social or environmental standards, although these may be evolving in conformity with the international obligations of that state.²⁸ In such situations, by actively supporting the investor, whose presence in the host state makes it more difficult or even impossible for that state to comply with its international obligations, the home state might become a complicit in the violation by the host state of the said obligations.²⁹ Similarly, “States which have provided financial banking for these projects through [export credit agencies] to corporate nationals involved [...] may be found to be complicit in a host State’s internationally wrongful act (i.e., a violation of its human rights obligations) in relation to respecting and protecting the international human rights of persons affected by the [corporation’s] activities” (McCorquodale and Simons 2007, 613).

In a situation of complicity such as that described above, the extraterritorial human rights obligations of states derive not only from the human rights obligations of the state in a position to affect the enjoyment of human rights of populations under the territory of another state, but also from the human rights obligations of the territorially competent state itself. The obligations of the latter state may be relevant also in another way. When, in 1997, the Committee on Economic, Social and Cultural Rights adopted its General Comment on the relationship between economic sanctions and respect for economic, social and cultural rights,³⁰ it took the view that states imposing sanctions should not, in doing so, jeopardize the economic, social and cultural rights of the population in the targeted state. It stated in this regard:

While this obligation of every State is derived from the commitment in the Charter of the United Nations to promote respect for all human rights, it should also be recalled that every permanent member of the Security Council has signed the Covenant, although two (China and the United States) have yet to ratify it [31]. Most of the non-permanent members at any given time are parties. Each of these States has undertaken, in conformity with article 2, paragraph 1, of the Covenant to “take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means [...]” When the affected State is also a State

party, it is doubly incumbent upon other States to respect and take account of the relevant obligations. To the extent that sanctions are imposed on States which are not parties to the Covenant, the same principles would in any event apply given the status of the economic, social and cultural rights of vulnerable groups as part of general international law, as evidenced, for example, by the near-universal ratification of the Convention on the Rights of the Child and the status of the Universal Declaration of Human Rights.³²

The notion that an obligation would be ‘doubly’ incumbent upon a state can only be understood by reference to the idea of complicity. Of course, all that matters, where sanctions adopted by one state have an impact on the population of another state, are the obligations of the first state under international law, which may or may not include the obligation not to violate the rights of populations outside its borders. And the General Comment clearly implies not only that a state party to the International Covenant on Economic, Social and Cultural Rights is under an obligation not to violate the rights stipulated in the Covenant in other countries, but also that such an obligation could be violated by that state voting in favor of adopting or upholding economic sanctions which have a severe impact on the realization of economic and social rights in the targeted country. But this does not mean that the obligations of the targeted state towards its own population are irrelevant to the determination of the question whether or not the state adopting sanctions has violated its own obligations. For, in addition, states parties to the International Covenant on Economic, Social and Cultural Rights may be violating their international obligations by coercing other states into violating their own obligations under either the Covenant or under other rules of international law.³³

1.3.3. The matrix

The tripartite typology developed in order to clarify the set of human rights obligations imposed on states applies similarly as regards their extraterritorial dimensions. The following table illustrates the obligations of states to take into account their human rights obligations in their trade or investment policies:

	OBLIGATIONS TOWARDS THE STATE'S POPULATION	EXTRATERRITORIAL OBLIGATIONS
Obligation to respect (to abstain from measures which unjustifiably lead to negatively impact on the enjoyment of human rights)	Obligation not to conclude trade or investment treaties that may threaten the livelihoods of certain segments of the population	Obligation not to impose on other countries' trade or investment treaties which may impede the realization of human rights on their territory Obligation to abstain from practices, such as dumping, which threaten livelihoods in other countries
Obligation to protect (to take measures which regulate the activities of private actors in order to ensure that they do not violate human rights)	Obligation to use existing flexibilities within trade or investment agreements which could shield the vulnerable segments of the population from the negative impacts on human rights Obligation to regulate the activities of companies, including foreign companies and investors, in order to ensure that they do not violate human rights	Obligation for the home state to regulate the activities of companies domiciled in that state, in order to ensure that they will not negatively impact on human rights abroad
Obligation to fulfill (to take measures to realize human rights, either by facilitating the exercise of such rights by individuals, or by providing social goods)	Obligation to provide local producers with the means that will allow them to benefit from the opportunities of trade and investment liberalization, eg., by helping them to comply with standards or by subsidizing inputs, by making technologies available, or by organising the producers in order to strengthen their bargaining power	Obligation to facilitate the compliance of producers of other countries with standards, to transfer technologies, etc., in order to ensure that producers in others countries may effectively have access to markets

Whether or not there is general agreement on the obligations thus outlined, one clear limitation to this approach is that it imposes a framework to the negotiation, conclusion and implementation of trade and investment agreements, but may not be sufficient to guard against the risks entailed by the kind of development which trade and investment liberalization may lead to. For instance, trade liberalization may lead a country to favor cash crops for export instead of food crops for local consumption, leading to increased vulnerability both when prices go up on international markets – leading to balance of payments problems for net-food importing countries, who depend on imports in order to feed their population – and when prices

go down – leading to loss of revenues for local producers, particularly if they face competition from food imported at dumping prices on domestic markets. The development of monocultures for exports, which is encouraged by trade liberalization, leads to increased competition with other forms of agriculture for cropland and water resources. Specialization of countries in the production and export of certain goods or commodities – particularly agricultural commodities, for developing countries – may lock those countries into a form of development which will inhibit the development of an industry or services sector, making it more difficult for them to climb the ladder of development.

These issues can be addressed most effectively through the lense of the right to development, as proclaimed by the UN General Assembly in 1986.³⁴ The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights can be fully realized' (Art. 1). It should be seen as enabling states to implement policies which allow them to pursue a form of development which is not limited to economic growth but includes the full realization of all human rights. States have both a right to development, to which corresponding duties are attached for the international community, and a duty towards their population, to pursue a form of development leading to an expansion of human freedoms. The trade and investment agreements they conclude, or which are pressed upon them, should also be tested against this requirement.

2. THE PROBLEM OF FRAGMENTATION

Nevertheless, despite this theoretical affirmation a normative superiority of human rights over other commitments that states may have (see above, part 1. 2.), including those contained in trade and investment agreements, difficulties remain at the level of implementation, due to the fragmentation of international law into self-contained regimes. Section 2.1 explains the problem. Section 2.2. explores a number of possible solutions to the problem.

2.1. THE RISKS ENTAILED BY THE DEVELOPMENT OF SELF-CONTAINED REGIMES

The different rules recalled above should allow the coexistence of different sets of obligations imposed on states – under human rights regimes, under WTO agreements, and under trade and investment agreements concluded at a regional or bilateral level – by affirming the primacy of human rights obligations. Such coexistence may nevertheless be problematic in practice, however, due to what is referred to as the problem of fragmentation of international law, i.e., the fact that international law is split up “into highly specialized ‘boxes’ that claim relative autonomy from each other and from the general law.”³⁵ The separate development of “trade law,” “investment law,” and “human rights law,” each with their own set of rules and institutions for dispute-resolution, in the absence of coordination between these regimes,³⁶ results in a mismatch between the affirmation of a hierarchical priority of human rights and the reality of trade and investment regimes which allow for the

enforcement of states' obligations under trade or investment regimes through the adoption of sanctions, which have a particularly strong disciplining power when applied against smaller countries (Peterson 2003, 12-13).

With regard to the relationship between human rights law and treaties concluded in the areas of trade and investment, three risks in particular deserve to be highlighted:

- The first risk is that of conflicting obligations being imposed on one state. For instance, a state might need to adopt certain measures in the environmental or social field to comply with provisions contained in human rights treaties protecting the right to a healthy environment or labor rights, but by doing so, the state may be found in violation of investment treaties protecting the rights of foreign investors in the form of “economic stabilization” clauses³⁷ or clauses prohibiting indirect expropriation. Or a state might need to raise import tariffs to protect the livelihood of its farmers, whose ability to live off their crops could be threatened by sudden import surges of agricultural commodities sold at dumping prices on the international markets. In the absence of clear rules contained in trade and investment treaties which would allow the adoption of measures required in order to comply with a state's human rights obligations, a state may be unwilling to run the risk of being found in violation of the former obligations, because of the trade sanctions or arbitral awards this could lead to. This may be called “regulatory chill.”
- A second and quite different risk is that the state, having opened its economy under the obligations of trade and investment treaties, may fear to put in place policies that would result in it becoming a less attractive destination for foreign direct investment, or that would make its producers less competitive. Even if (under the trade and investment treaties in force in the state in question) the policies are perfectly allowable, a state may be reluctant to implement them because of possibly negative effects on the state's competitive position on international markets. This may be called “competition chill.”
- Finally, a third risk is that, by opening up its economy to trade and investment, the country loses revenues; for example, as a result of lowering import tariffs or because foreign companies operating on the national territory pay their taxes in another jurisdiction where

their profits are repatriated. This could make it difficult for the country concerned to finance certain public policies, in health or education for instance, although such policies may be crucial in realizing human rights. There is no “chill” here, but rather an incapacity of the state to make progress towards fulfilling human rights under its jurisdiction, and to reap the full benefits of trade and investment liberalization.”

While the question of fragmentation of international law into a number of separate, self-contained regimes, only has direct bearing on the first of these three difficulties, a number of solutions which are proposed to overcome that difficulty – such as human rights impact assessments or sunset clauses inserted into trade and investment treaties – may also contribute to alleviating the other problems which have been referred to. The following section reviews such solutions.

2.2. SOLUTIONS TO THE PROBLEM OF FRAGMENTATION

To the fullest extent possible, conflicts between different regimes should be avoided *ex ante*, by preventing the risks of conflicts. Among such preventative mechanisms are in particular: a) the insertion of exception clauses or flexibilities into trade or investment agreements; and b) *ex ante* human rights impact assessments. Yet these measures may not be sufficient. Human rights evolve under the influence of the body of case law developed by human rights treaties expert bodies and international courts. The extent to which agreements concluded in the areas of trade and investment may create obstacles to the ability of states to comply with their human rights obligations may therefore be difficult to predict before the implementation of those agreements, since such impacts may depend, for instance, on the attitudes of investors and traders, on the ability of the resources to shift from the least competitive to the most competitive sectors of the economy, or on the evolution of the terms of trade as a result of the evolution of the relative prices of commodities on international markets. Therefore, mechanisms should also be put in place that allow for such impacts to be mitigated. These include: c) harmonization of international agreements through interpretation, in accordance with evolving international law; and d) the insertion of sunset (or *rendezvous*) clauses into trade and investment agreements, allowing such agreements to be revised if it appears that they conflict with the commitments of states towards fulfilling their human rights obligations. The following paragraphs review these different possibilities (Kaufmann and Meyer 2007, 61):

a) *Exception clauses and flexibilities*

Trade and investment agreements should include exception clauses and flexibilities allowing states to comply with their human rights obligations without having to fear economic sanctions. For example, to preclude the risk that the protection of investors from one Party against forms of “indirect expropriation” by the host state will result in this state fearing to adopt regulations which may impose excessive burdens on that investor, the 2004 Model Bilateral Investment Treaty guiding United States negotiators contains the following clarification: “(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred; (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and (iii) the character of the government action. (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.”³⁸

Such exceptions or flexibilities are well known in the area of trade law. In the framework of the WTO for instance, Article XX GATT and Article XIV GATS justify derogations from the most-favored nation clause and non-discrimination, *inter alia*, for reasons of public morals (Charnovitz 1998, 689) and the protection of human life and health. In the *Gambling Case* a panel and the Appellate Body referred to the notion of public morals as it appears in Article XIV (a) GATS as denoting standards of right and wrong conduct maintained by or on behalf of a community or nation; as to the notion of public order, which also is referred to in Article XIV (a) GATS, it is seen to refer to the preservation of the fundamental interests of a society, as reflected in public policy and law.³⁹ These notions thus seem construed broadly enough to allow for human rights considerations to trump the requirements of trade law, at least to the extent that this does not lead to arbitrary or unjustifiable discrimination or a disguised restriction of international trade, as would be the case, in particular, if the restrictive measure appeared disproportionate, *i. e.*, if it went beyond what is necessary in order to achieve the desired objective.

In certain cases, the conflict between human rights considerations and the requirements of trade or investment agreements will only appear after the conclusion of such agreements, without such agreements providing for the necessary exceptions or flexibilities. In that case, it may be useful to provide for the possibility of waivers, under a simplified procedure, not requiring a formal amendment to the treaties concerned. Under the WTO framework, this is what allowed the initial establishment (in 1971) of a generalized system of preferences (GSP) scheme improving market access for developing countries,⁴⁰ before this was confirmed in the Enabling Clause adopted in 1979.⁴¹ It is also on the basis of a waiver that the Kimberley Process Certification Scheme restricting trade in conflict diamonds could be made compatible with the GATT non-discrimination requirement.⁴² And of course, this is also the mechanism which was used in order to respond to the concern that the intellectual property rights of the pharmaceutical companies on medicines could constitute an obstacle to the fight against certain epidemics, particularly HIV, in developing countries: a Decision of the General Council of the WTO on August 30, 2003, provided for an interim waiver allowing least-developed countries and certain other countries to go beyond the flexibilities provided for in Article 31 f) and h) of the TRIPs Agreement, in the case of a national emergency of other circumstance, since it was recognized that these countries may not have the manufacturing capacities in the pharmaceutical sector allowing them to make effective use of a system of compulsory licensing.⁴³

b) Ex ante human rights impact assessments

Human rights impact assessments must be prepared in order to evaluate the potential impacts of trade or investment agreements prior to the completion of the negotiations. The results of such impact assessments should not only guide their negotiators, but also be taken into account by their partners, who should refrain from imposing concessions which are demonstrated by such impact assessments to be detrimental to the full realization of the right to food. If properly conceived, the conduct of human rights impact assessments would not only ensure the compatibility of trade agreements with the obligations of states under international human rights instruments. They also have the potential to significantly improve the content of the trade and/or investment agreements negotiated, in particular by helping the negotiators to identify any potential flanking measures that could ensure that the agreement will work in favor of human development. Such flanking measures may include, for instance, the setting up of funds to

facilitate transition, retraining of workers, back-payments to producers in sectors who will have to adapt to new conditions, etc. In addition, explicitly basing impact assessments of trade agreements on a human rights framework presents a number of distinct advantages.

First, by basing impact assessments on human rights, we provide them with a sound, and universally agreed, analytical framework. In the field of social and economic rights which require that individuals have access to certain social goods (such as the right to education, housing, medicine or food), it is now generally accepted and this has been made clear in the approach of the Committee on Economic, Social and Cultural Rights that the following dimensions should play a role, and guide the examination of the question whether the right has been complied with:

- (a) Availability: The good to be provided should be available in sufficient quantity within the jurisdiction of the State party.
- (b) Accessibility: The good has to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:
 - 1) Non-discrimination (specifically, the most vulnerable groups, in law and fact, must have adequate access to the good without discrimination.);
 - 2) Physical accessibility (the good must be within safe physical reach, and accessible to persons with disabilities.); and,
 - 3) Economic accessibility (affordability).
- (c) Acceptability: The good has to be acceptable to all: there should no obstacles, cultural or religious, to its access, and it should be of sufficient quality.
- (d) Adaptability: The good must be provided under conditions that are flexible so it can adapt to the needs of changing societies and communities.

The impacts of trade liberalization on all these levels should be assessed not only at country level, but for different groups of the population, through indicators appropriate for the local circumstances. Such indicators may, for instance, disaggregate the impacts according to gender, ethnic origin, level of education or professional qualification, or sector of activity. This is one of the reasons why human rights based impact assessments go beyond the standard practice of examining whether a state as a whole, taking into account its comparative advantages in the production of certain goods or in the provision of certain services, will gain from concluding a trade agreement. From the point of view of human rights, this aggregate measure is insufficient: what truly

matters is the impact on different sectors, and differently situated households, of the reform process brought about by trade liberalization.

Second, procedural requirements, in addition to requirements about the fairness of outcomes, would be examined through adequately prepared human rights impact assessments. Indeed, in addition to indicators related to the outcome i. e., the impact on human rights of the trade/investment agreement in question human rights indicators as used in human rights impact assessments should focus on the structural and the process dimensions. They should therefore address not only the question of how human rights might be affected by certain trade and/or investment agreements, but also which institutional structures exist to ensure that human rights are not violated (ratification of international human rights instruments by the state concerned; transparency of the negotiations; accountability of the Executive, responsible for the trade negotiations, before Parliament; existence of consultations with civil society organizations, including trade unions), and which measures are being adopted by the state concerned to avoid, or mitigate, any negative impact the agreement may have on the enjoyment of human rights (public policies or programs to facilitate reconversion; safety nets for workers of certain less competitive sectors).

Third, the use of human rights indicators may be empowering for individuals and communities who, on the basis of the results of HRIAs, will be able to formulate claims where their human rights are threatened by trade and/or investment negotiations. As noted by the Office of the High Commissioner for Human Rights, the demand for appropriate indicators is not only for monitoring the implementation of the human rights instruments by States parties, but indicators are also seen as useful tools in reinforcing accountability, in articulating and advancing claims on the dutybearers and in formulating requisite public policies and programmes for facilitating the realization of human rights. In this attempt to make the reporting, implementation and monitoring of human rights treaties more effective and efficient, there is an understanding that one needs to move away from using general statistics, the relevance of which to such tasks is often indirect and lacks clarity, to using specific indicators that, while embedded in the relevant human rights normative framework, can be easily applied and interpreted by the potential users.⁴⁴

The preparation of HRIAs should be envisaged in a participatory setting, with the active involvement of human

rights and development NGOs, and in close cooperation with the Office of the High Commissioner for Human Rights, together with the International Labor Office (to consider labor rights, specifically). The definition of the terms of reference for HRIAs, including the choice of indicators and methodology, should be set in dialogue with these actors. Specialized institutions should also be involved. For example, UNICEF to ensure proper consideration of the right to education and children's rights, WHO to consider the right to health, and FAO to look at the right to food.

The HRIAs themselves should be performed in conditions that guarantee the full independence of the assessments provided, not exclusively by international trade experts, but also by human rights experts, both acting in close cooperation with one another. The teams in charge of HRIAs should consult broadly within the civil society of the countries concerned, and in cooperation with the local agencies of the UN or of the ILO. A participatory methodology should be used, alongside other methodologies such as modelling, causality analysis, empirical studies, etc.

c) Harmonization through interpretation

As a rule, when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.⁴⁵ As far as treaty interpretation is concerned, this general maxim of interpretation is reflected in Article 31, para. 3 (c) of the Vienna Convention on the Law of Treaties, which stipulates that the interpretation of treaties must take into account any relevant rules of international law applicable in the relations between the parties. Trade and investment treaties must therefore be interpreted, to the fullest extent possible, so as to be compatible with evolving customary international law and with the general principles of law which are part of international law, as well as with the rules of any treaty applicable in the relationships between the parties to the dispute giving rise to the question of interpretation, as such rules may develop, in particular, through adjudication.⁴⁶ In the specific context of the WTO agreements, Article 3.2. of the Dispute Settlement Understanding confirms that WTO norms may be clarified [&] in accordance with customary rules of interpretation of international law, leading the Appellate Body to remark that WTO law cannot be seen in clinical isolation from general international law.⁴⁷ The Vienna Convention on the Law of Treaties is therefore fully applicable to the interpretation of the WTO agreements, including the principle of systemic integration embodied

in Article 31, para. 3 (c) of that Convention (MacLachlan 2005, 279), and taking into account any developments of international law applicable in the relations between the parties.⁴⁸

In the system of the WTO, the requirement that the agreements be interpreted in accordance with the other international obligations of the Members is further strengthened by the fact that the authoritative interpretation of the agreements lies in the hands of the Members themselves, within the Ministerial Conference or the General Council.⁴⁹ It would be unacceptable for the Members to ignore their other international obligations in their interpretation of the WTO agreements since, if this were authorized, this would constitute an easy means to evade those other, competing obligations.

d) Sunset (or rendezvous) clauses

Finally, it may be recommended that, in addition to ex ante HRIAs, ex post HRIAs be prepared. Ex ante HRIAs are essential in order to guide the negotiations and to ensure that the parties are fully aware of the human rights implications of the commitments they are entering into. But ex post assessments, three to five years following the entry into force of the agreement, are equally important, in order to take into account the need to follow indirect impacts and the requirement of progressive realization of human rights. For such ex post assessments to be truly useful, trade and/or investment agreements should contain a rendezvous clause allowing revision where it appears that certain impacts have been underestimated or entirely neglected.

Article 20 of the Agreement on Agriculture says, Recognizing that the long-term objective of substantial progressive reductions in support and protection resulting in fundamental reform is an ongoing process, Members agree that negotiations for continuing the process will be initiated one year before the end of the implementation period [January 1, 1995 January 1, 2001], taking into account:

- (a) the experience to that date from implementing the reduction commitments;
- (b) the effects of the reduction commitments on world trade in agriculture;
- (c) non-trade concerns, special and differential treatment to developing country Members, and the objective to establish a fair and market-oriented agricultural trading system, and the other objectives and concerns mentioned in the preamble to this Agreement; and

- (d) what further commitments are necessary to achieve the above mentioned long-term objectives.

This calls for an objective evaluation of the impact of the Agreement on Agriculture prior to its revision, and in particular, for an evaluation of the impact of the implementation of the agreement on the enjoyment of the right to food. The right to food should be clearly included among the 'non-trade concerns' referred to in Article 20 (c), in accordance with the principle of systemic integration referred to above.⁵⁰

¹ See, e.g., Hudson 1948 and Kelsen 1950. In favor of seeing in these provisions of the UN Charter the source of legal obligations, see in particular Lauterpacht 1950.

² G.A. Res. 217, U.N. GAOR, 3d sess., U.N. doc. A/810 (1948) (adopted on December 10, 1948 by 48 votes to none, with 8 abstentions).

³ 1971 I.C.J. Reports 16.

⁴ On the status of internationally recognized human rights as customary international law see, in particular, Henkin 1990, 19; Rodley 1989, esp. 333; Meron 1989, 93; Sohn 1977, 129; Hannum 1995-1996; and Tomuschat 2003, 34.

⁵ For the argument that founding the recognition of human rights in general public international law should be on the basis of the notion of "general principles of law" rather than on customary international law, see Simma and Alston 1988-1989.

⁶ Article 53. Article 64 of the Vienna Convention on the Law of Treaties adds that If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.

⁷ Dupuy 2002, 305. See also the Report of the Study Group of the International Law Commission (chaired by Martti Koskeniemi), Fragmentation of international law: difficulties arising from the diversification and expansion of international law, U.N. doc. A/CN.4/L.702, 18 July 2006 (also reproduced in the Report on the work of the fifty-eighth session (May 1 to June 9, and July 3 to August 11 2006) of the International Law Commission to the UN General Assembly, Official Records, Sixty-first Session, Supplement No. 10 (A/61/10), chapter 12), para. 41 : (a) A rule conflicting with a norm of jus cogens becomes thereby ipso facto -void; (b) A rule conflicting with Article 103 of the United Nations Charter becomes inapplicable as a result of such conflict and to the extent of such conflict."

⁸ See Official Records of the General Assembly, Fifty-sixth Session, Supplement 10 (A/56/10), commentary to article 40 of the International Law Commission's draft articles on State Responsibility, para. (3) (also reproduced in Crawford 2002, at 187) ("[...] one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen,").

⁹ Human Rights Committee, General Comment n°24 (1994): Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, at para. 17.

¹⁰ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, pp. 19 (May 28, 1951).

¹¹ Inter-American Court on Human Rights, The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82, September 24, 1982, Inter-Am. Ct. H.R. (Ser. A) No. 2 (1982), at para. 29. See also, under the European Convention on Human Rights, Eur. Comm. HR, Austria vs Italy, Appl. No. 788/60, European Convention on Human Rights Yearbook, vol. 4 (1961), pp. 116, at pp. 140 (1961).

¹² The Vienna Convention on the Law of Treaties recognizes the specificity of human rights treaties by stating in Article 60(5) that the principle according to which the material breach of a treaty by one party authorizes the other party to terminate or suspend the agreement does not apply to "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

¹³ Inter-American Court of Human Rights, Case of the Sawhoyamaya Indigenous Community v. Paraguay, Judgment of March 29, 2006, Series C No. 146, para. 140.

¹⁴ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), The right to adequate food (art. 11), U.N. doc. E/C.12/1999/5, at para. 15.

¹⁵ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11 (November 26, 2002), para. 31.

¹⁶ See, mutatis mutandis, as regards the appropriate provision of food aid, U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), The right to adequate food (art. 11), U.N. doc. E/C.12/1999/5, at para. 39 ("Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food selfreliance of the beneficiaries.").

¹⁷ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights, U.N. doc. E/1998/22.

¹⁸ See para. 51 of General Comment No. 8.

¹⁹ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), The right to adequate food (art. 11), U.N. doc. E/C.12/1999/5, at para. 19. See also para. 36: "States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end,"

²⁰ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (2000), para. 39 (In relation to the conclusion of other international agreements, States parties should

take steps to ensure that these instruments do not adversely impact upon the right to health.).

²¹ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11 (November 26, 2002), paras. 31 and 35-36.

²² Trail Smelter Case (United States v. Canada), 3 R.I.A.A. 1905 (1941).

²³ As regards environmental damage, see particularly the dissenting opinion of Judge Weeramantry to the Advisory Opinion of the International Court of Justice on the Legality of threat or use of nuclear weapons. Referring to the principle that "damage must not be caused to other nations," Judge Weeramantry considered that the claim by New Zealand that nuclear tests should be prohibited where this could risk having an impact on that country's population, should be decided "in the context of [this] deeply entrenched principle, grounded in common sense, case law, international conventions, and customary international law."

²⁴ Corfu Channel Case, Judgment of April 9, 1949, I.C.J. Reports 1949, pp. 4, at pp. 18. The fact of territorial control also influences the burden of proof imposed on the claiming State that the territorial State has failed to comply with its obligations under international law. Although "it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors," nevertheless "the fact of this exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions. It must be regarded as of special weight when it is based on a series of facts linked together and leading logically to a single conclusion."

²⁵ See also Jägers 2002, 172 (deriving from "the general principle formulated in the Corfu Channel case that a State has the obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States that home State responsibility can arise where the home State has not exercised due diligence in controlling parent companies that are effectively under its control.").

²⁶ Article 16 of the ILC's Articles on State Responsibility provides that: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State."

²⁷ See generally O. De Schutter, Transnational Corporations as Instruments of Human Development, in Alston and Robinson 2005, 403-444.

²⁸ On such clauses, see Stabilization Clauses and Human Rights. A research project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights, March 11, 2008, XV + 43 pages.

²⁹ See, on such situations, the Baku-Tbilisi-Ceyhan and Chad-Cameroon Pipeline projects, also referred to by McCorquodale and Simons 2007, 612-613. The risks entailed by the BTC Pipeline project are examined in depth in Amnesty International 2003, and are also discussed in detail by Terra Eve Lawson-Remer, *A Role for the International Finance Corporation in Integrating Environmental and Human Rights Standards into Core Project Covenants: Case Study of the Baku-Tbilisi-Ceyhan Oil Pipeline Project*, in De Schutter (dir.) 2006, 395-425. See also on both projects Leader 2006, 657.

³⁰ U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights, U.N. doc. E/1998/22.

³¹ China ratified the International Covenant on Economic, Social and Cultural Rights in 2001, after the date at which this General Comment was adopted.

³² U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997), cited above, para. 51.

³³ This is of course the hypothesis envisaged under Article 18 of the International Law Commission's 2001 articles on Responsibility of States for internationally wrongful acts (cited above, n. 12), under the heading "Coercion of another State": "A State which coerces another State to commit an act is internationally responsible for that act if: (a) The act would, but for the coercion, be an internationally wrongful act of the coerced State; and (b) The coercing State does so with knowledge of the circumstances of the act."

³⁴ G.A. Res. A/RES/41/128, December 4, 1986, annex 41 UN GAOR Suppl. (No. 53) 186, UN Doc. A/RES/41/53 (1986).

³⁵ Fragmentation of international law, para. 8.

³⁶ These are referred to as "self-contained regimes." See Simma 1985, 111.

³⁷ On such clauses, see above, note 28.

³⁸ 2004 Model BIT, annex B. On the evolution of the U.S. policy in the field of international investment, see Gagné and Morin 2006, 357.

³⁹ Appellate Body Report, April 7, 2005, United States – Measures affecting the cross-border supply of gambling and betting services, *Gambling Case (Antigua v. United States)*, WT/DS285/AB/R (para. 296). The question presented to the panel, whose decision was reviewed by the Appellate Body, was whether the United States could adopt measures making it unlawful for suppliers located outside the United States to supply gambling and betting services to consumers within the United States.

⁴⁰ Decision on a Generalized System of Preferences, June 25, 1971, BISD 18S/24.

⁴¹ Decision on Differential and favourable treatment, reciprocity and fuller participation of developing countries, November 28, 1979, L/4903, GATT BISD 26S/203.

⁴² General Council Decision of May 15, 2003, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, WT/L/518.

⁴³ Decision of the General Council of August 30, 2003, Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, WT/L/540. The temporary waiver should lead in time to the TRIPS Agreement being amended, by the insertion of a new Article 31bis: Decision of the General Council of 6 December 2005, Amendment of the TRIPS Agreement, WT/L/641.

⁴⁴ Office of the High Commissioner for Human Rights, Report on indicators for monitoring compliance with international human rights instruments: a conceptual and methodological framework (HRI/MC/2006/7, May 11, 2006), para. 3.

⁴⁵ Fragmentation of international law, para. 14, at (4).

⁴⁶ The "relevant rules of international law" referred to by Article 31 para.

3 (c) of the Vienna Convention on the Law of Treaties are not deemed to be static. On the contrary, it has been noted by the International Court of Justice that the interpretation of treaties should be dynamic, since it should take into account the context as it has developed since the initial conclusion of the treaty. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 at p. 31, para. 53; *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, pp. 76-80, paras. 132-147.

⁴⁷ Appellate Body Report of May 20, 1996, United States – Standards for Reformulated and Conventional Gasoline (*United States v. Brazil and Venezuela*), WT/DS2/AB/R

⁴⁸ On the need for an evolutionary interpretation, see Appellate Body Report, October 12, 1998, United States – Import Prohibition of Certain Shrimp and Shrimp Products (*United States v. India, Malaysia, Pakistan, Thailand*), WT/DS58/AB/R, para. 129.

⁴⁹ See Article IX(2) of the WTO Agreement, also referred to in Article 3.9. DSU. And see Ehlermann and Ehling 2005, 814.

⁵⁰ This has been the position of Mauritius, see Submission to the Special Session of the WTO Committee on Agriculture, Note on Non-Trade Concerns, G/AG/NG/W/36/Rev.1.

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II. AGRICULTURAL TRADE LIBERALIZATION IN MULTILATERAL AND BILATERAL TRADE NEGOTIATIONS

1. INTRODUCTION

The liberalization of international trade in agricultural products is a relatively recent phenomenon: while tariffs and other trade barriers for industrial products have been progressively reduced since the late 1940s, effective international commitments to reduce government intervention in agricultural markets only came into effect in the 1980s, and in the multilateral trading system only since the creation of the World Trade Organization (WTO) with its agreement on Agriculture (AoA) in 1995.

This article will give a brief overview of the development of agricultural trade policies in developing and developed (industrialized) countries since the 1950s, and then describe the current state of play in negotiations to further liberalize agricultural trade, with a focus on the Doha Round at the WTO and the Economic Partnership Agreements between the European Union (EU) and 80 countries in Africa, the Caribbean and the Pacific (collectively known as the ACP), with which the EU has special trade relations.

2. HISTORY

2.1. 1950s TO 1970s: INTENSIVE GOVERNMENT INTERVENTION IN AGRICULTURAL MARKETS

Historically, and especially since the end of World War II, agriculture has been one of the most protected and distorted sectors in international trade. The 1947 General Agreement on Tariffs and Trade (GATT) was supposed to deal with limiting government intervention and liberalizing trade in all goods, including agricultural commodities. Already in the 1950s, however, the U.S. Congress decided unilaterally that the United States would not apply the GATT rules to farm products. They obtained a waiver to allow domestic support for U.S. farmers in the form of higher tariffs and price support to continue, although such programs were not allowed under GATT rules. The European Communities (now renamed the European Union or EU) followed suit in 1963, when the Common Agricultural Policy (CAP) was established. The CAP relied heavily on price support and border protection measures to boost production with the aim of establishing self-sufficiency in basic food products within the common market. Japan also provided significant support to its agriculture in this period.

By the end of the 1970s, therefore, three of the world's biggest economic powers had de facto excluded agricultural products from the GATT. Until the 1990s, there were few effective regional trade agreements, hence also little agricultural trade liberalization from regional integration. The notable exception was the CAP, which created a single market for farm products among the EU members, which over the years expanded from the original six to now 27 countries.

The EU single market in many ways goes beyond a simple free trade area. Two distinct features are as follows:

- All tariffs and quantitative restrictions are eliminated for trade among EU member states.
- All standards for farm products are harmonized, according to standards defined by the European Commission (the administration of the EU) and approved by the Council of the European Union (the forum for the member state governments).

The single EU market was accompanied by heavy government intervention in agriculture. The intervention consisted mainly of guaranteed minimum prices, which in turn required protection against cheaper imports. In addition, investments in productivity enhancing measures were subsidized, and specifically targeted at larger farms with "growth potential," accelerating structural change in the sector that consolidated farms and reduced employment in the sector.

By the end of the 1970s, the objective of self-sufficiency in major farm products had not only been achieved but also, for many products, exceeded. EU farmers produced more than could be consumed domestically. Since no major adjustments were made to the CAP and the high domestic prices continued to be protected without effective production limits, the EU had to resort to ever-larger public stocks and export subsidies to try to get rid of the excess (which did not sell otherwise because domestic prices within the EU were considerably higher than average world prices for most agricultural commodities).

During the 1960s and 1970s, many developing country governments maintained strong interventions in their agricultural markets as well. Especially in Asia, price support was an important element in the "Green Revolution" to encourage investment in new production technologies. The most important instrument was government-organized marketing boards, which bought and sold all or parts of the harvests at government-

administered prices. They were also often used to supply farmers with inputs such as fertilizer, often at subsidized prices. Their purpose was not only to stabilize prices for farmers, but also to keep consumer prices low to support industrialization. Frequently, domestic prices in countries like China and India were below world market prices. In some countries, the domestic prices were too depressed to support necessary growth in local agricultural capacity.

The 1960s and 1970s also saw attempts to stabilize prices for agricultural export commodities originating in developing countries through International Commodity Agreements. However, most of these agreements were short-lived and ineffective. The few important exceptions – i.e., coffee, cocoa and rubber – did have stabilizing effects on world prices. These, too, eventually failed, however, when in the 1980s and 1990s internal conflicts among producer countries as well as between producer and consumer countries proved irreconcilable.

2.2. 1980s: ENFORCED LIBERALIZATION IN DEVELOPING COUNTRIES AND INCREASING INTERVENTION IN INDUSTRIALIZED COUNTRIES

The debt crisis, triggered by the second oil crisis in the late 1970s and the high interest rate policy of the United States in the early 1980s, forced many developing countries to use emergency loans from the International Monetary Fund (IMF) and the World Bank. These loans were conditional on developing country governments making certain commitments, including:

- To reduce budget deficits, often through reducing subsidies for the agriculture sector;
- To reform the functioning of domestic markets, including through the dismantling of agricultural marketing boards; and,
- The liberalization of trade, including through tariff reductions on agricultural products.

This liberalization took place independently of trade negotiations and agreements, hence there were no commitments in GATT, nor were there reciprocal agreements with regional trade partners to keep overall tariffs and support measures down. Thus industrialized countries were neither bound by trade rules, having negotiated exemptions for agriculture within the GATT system, nor by IMF/World Bank conditionalities, because they were not forced to find emergency funding in the face of economic crisis.

Unconstrained by multilateral or bilateral commitments, industrialized country governments were able to increase tariffs and subsidies, especially export subsidies, when world market prices for major agricultural products dropped in the early 1980s. The drop in world prices was in part the result of the emergence of the EU as a major exporter. The traditional big exporter of farm products from temperate zones, the United States, reacted to the new competition from the EU by increasing subsidies for its own agriculture sector, especially export subsidies. This escalation in the use of subsidies between the two biggest and wealthiest trade blocs drove world prices further down and left smaller exporters (such as Australia, Argentina and Canada) at a disadvantage in world markets. In many developing countries, especially in Africa, parts of South and Southeast Asia, the Andean Region and Central America, small producers supplying the domestic markets also faced increasing competition, especially for staple foods (when cereal imports displaced local staple foods) and animal products (meat and dairy). The prevalence of subsidized exports and depressed global prices came just as government support for agriculture was reduced and markets were opened in developing countries as a result of the IMF and World Bank programs.

The subsidy race between the EU and the U.S. also led to increasing economic and political tensions between the two trade blocs, and mounting internal criticism because the programs cost so much taxpayer money. As a result, government officials on both sides of the Atlantic agreed that an internationally coordinated approach to reforms of agricultural policy was needed to address the tensions. At the launch of the Uruguay Round of trade negotiations, in Punta del Este in 1986, the GATT was mandated to include agriculture among the sectors for negotiation. Unsurprisingly, agriculture proved to be one of the most controversial issues and led to several breakdowns in the talks. Instead of being concluded in 1989, as originally envisaged, the Uruguay Round only finally concluded in 1994. Agricultural trade was dealt with in a separate agreement to the GATT: the Agreement on Agriculture. At last, from January 1, 1995, agriculture came to be dealt with comprehensively in international trade agreements.

2.3. 1990s: THE WTO DEFINES RULES FOR AGRICULTURAL TRADE

The negotiation process in the Uruguay Round of the GATT and the domestic reform processes of agricultural policies in the EU and the U.S. were strongly linked and

influenced by each other. Both trade blocs tried to design the WTO rules in a way that matched the reforms they were planning domestically and at the same time ensured that their main competitors were not allowed to maintain or introduce measures that would give the competitors an advantage. Consequently, a final agreement in the Uruguay negotiations could only be achieved after the EU had finalized its domestic agricultural policy reforms and the process in the U.S. was sufficiently advanced to ensure that the WTO rules would be compatible with the changes envisioned in domestic policies (such as moving away from price support to farmer income support programs). In turn, the domestic reforms were shaped by the agreements that started to emerge from the GATT negotiations by the early 1990s, and the compromise texts in the GATT reflected the domestic debates in the EU and the U.S.

All this meant the WTO's AoA was primarily designed to accommodate the agriculture trade interests of the major industrialized countries. It hardly addressed the specific needs of developing countries with food security problems, including the need to support and protect agriculture. Nor did the AoA satisfy the demand of export-oriented countries to significantly improve market access and effectively reduce unfair competition through the use of domestic and export subsidies. Yet the rules govern trade among the now 151 countries that are members of the WTO and dictate policies on market access, export competition and domestic support policies.

The following provides a brief overview of the main provisions of the AoA:

i) Market Access

In the area of market access, the "core" business of the WTO, the first step was to simplify the trade barriers and allow fixed tariffs as the only instrument to restrict market access. Hence measures such as import bans, quantitative restrictions and variable tariffs had to be converted into fixed tariffs (a process called tariffication). This provision applied mainly to developed countries, especially the EU and Japan, since many developing countries had already changed their import regime to rely on tariffs as part of IMF/World Bank programs.

In addition, the average level of tariffs across all products had to be reduced by 36 percent in industrialized countries and 24 percent in developing countries. The minimum cut to all individual tariffs was 15 percent in

industrialized and 10 percent in developing countries. If countries made a minimum cut on some products, then other tariffs had to be cut relatively more to achieve the overall average cut. Least developed countries (LDCs) were exempt from reduction commitments but had to bind their tariffs, which meant a commitment to not raise tariffs above a fixed level.

A special safeguard clause (SSG) allows all WTO members to levy additional duties on imports of sensitive products if the imported quantities exceed a certain level or if the import prices fall below a certain level. In contrast to the general safeguard mechanism of the GATT, the SSG does not require proof that the imports are causing serious injury to domestic producers. However, the clause only applies to products that were subject to tariffication, and hence is mainly a tool for developed countries.

More important for many developing countries than the flexibility they were granted in the agreement of lower tariff reduction commitments and longer implementation periods, is the fact that they were able to bind their tariffs at a level higher than the levels they actually applied. This allowed developing countries that set their tariff bindings high to then lower the bound tariffs as required without having to change their actual tariffs. As long as the tariffs remain below the bound level, a variable tariff policy is possible, and can be used to protect domestic markets from fluctuations in world-market prices. This policy flexibility is still available to the majority of developing country WTO members, most of whom set their bound tariffs at the relatively high levels of (on average) 50 to 100 percent. Average applied rates are much lower (around 20 percent) according to World Bank and FAO data (FAO 2003 and World Bank 2005).

However, some developing countries bound tariffs at low levels during the Uruguay Round, and those developing countries that did not join the WTO until after the Uruguay Round was concluded (often called the Recently Acceded Members or RAMs) were frequently urged during the accession negotiations to bind their tariffs at levels that would reflect their actual applied rates. Those countries do not have any margin for tariff increases.

ii) Export Competition

Under the AoA, export subsidies must not be increased, and no new subsidies may be introduced. Budgetary outlays must be reduced by 36 percent by 2000 and the volume of subsidized exports must be lowered by 21 per-

cent. However, this applies only to direct export subsidies in the form of payments to exporting companies. No effective disciplines were established for other support to exporters, such as subsidized loans or governmental export-credit insurance, which is an instrument heavily used by the U.S. government. It is important to underline that the AoA regulates – and thereby de facto accepts – the use of subsidies that are expressly prohibited in the WTO Agreement on Subsidies and Countervailing Measures.

iii) Domestic Support

Under the Agreement on Agriculture, governments have committed to reduce “market distorting” forms of support, referred to as “amber box measures.” This concerns, primarily, domestic prices guaranteed by the government that are above world-market prices and direct payments to farmers linked to production volume (e.g., “premiums” paid for each animal slaughtered). The reduction commitments are calculated on the basis of the Aggregate Measurement of Support (AMS), itself based on a formula developed by the OECD called the Producer Support Equivalent (now renamed the Producer Support Estimate). The calculation of the AMS includes all income and material support that farmers receive beyond the sale of their products at world-market prices and that are not excluded pursuant to other provisions of the Agreement on Agriculture. Total AMS support had to be reduced by 20 percent in industrialized countries by 2000. There were exceptions for programs that were only worth a small percentage (5 percent or less) of the total.

To distinguish between the different forms of support, trade officials classified domestic support into various “boxes” – a term not used in the agreement itself, but in almost all comments related to the agreement. In fact, the term “boxes” is now used in official WTO documents and the negotiation proposals submitted by members. In addition to the “amber box” measures that had to be reduced, there are “green box” and “blue box” measures that are excluded from the AMS calculations and are, thus, exempt from the reduction commitments.

The “blue box” includes direct payments under production limiting programs determined by historic (not current) production levels. A prominent example is the land set-aside scheme of the EU.

The “green box” contains all those measures that are assumed to have no or almost no trade-distorting effects.

To be included in the green box, measures must be publicly funded and must not have any price-supporting effects. Permitted measures, and the conditions on which they may be applied, are described in Annex 2 to the Agreement on Agriculture. The most important programs in the green box are:

- Provision of general services such as infrastructure and extension
- Decoupled direct payments and income support for farmers
- Programs for producer and resource retirement
- Environmental and regional assistance programs

There is also what some refer to as the “special and differential treatment box” Within the context of domestic support provisions, developing countries are allowed to exempt from reduction programs that provide investment or agricultural input subsidies for low-income or resource-poor producers. In addition, domestic support to encourage diversification from growing illicit narcotic drugs is exempt from reduction commitments. Developing countries do not need to limit spending on programs that cost 10 percent or less of the total production value of the product receiving the support. If the programs cost more than 10 percent of the total value of the affected product, the programs are considered amber box and must be reduced by 13.3 percent. LDCs are not required to reduce their support, but they are not allowed to raise it above the current limit, which in most cases is set at 10 percent of the total value of the given product.

The AoA rules on domestic support depict most clearly the influence of the EU and the United States. They both decided to move away from price support, which allowed them to agree to restrictions to their amber box support, and they both moved toward compensating farmers using direct payments instead. Therefore, different schemes of direct payments are allowed in the green and the blue box. Subsequent reforms in the EU were designed to match the support programs with the criteria of the green box, since the blue box was not liked by most of the WTO membership and immediately came under pressure for reform when negotiations were launched for revised trade agreements under the Doha Agenda in 2001. The lower level of permitted price support allowed the EU to reduce tariffs on agricultural imports without undermining market price support schemes, since the guaranteed minimum prices for many important commodities were maintained, but at lower levels.

2.4. 1990s: BEYOND THE WTO, AGRICULTURAL TRADE LIBERALIZATION CONTINUES

The WTO was not the first trade agreement to define rules for international agricultural trade. In 1994, the North American Free Trade Agreement (NAFTA) came into force, liberalizing trade between Canada, Mexico and the United States on almost all goods, a range of services and investments. The most notable development in the agriculture sector was the opening of the Mexican maize sector to the imports of heavily subsidized maize from the United States. The effects on traditional small-scale maize farmers was exacerbated by the fact that the Mexican government didn’t make use of the fifteen-year phase-in period for the elimination of maize tariffs, but instead opened the market fully at the beginning of the implementation period. As a result, farmgate prices for corn in Mexico dropped drastically, while retail prices for the staple tortillas stayed at the same level – the lower prices for imported maize only allowed the monopolistic corn processing industry to reap extra benefits, with no benefit to consumers or maize producers. While NAFTA led to the dismantling of all direct trade barriers between three countries, it didn’t discipline the use of domestic subsidies. The agreement even allows the U.S. and Canada to subsidize exports to Mexico, to counter subsidized exports from other countries, i.e., the EU (FAS 2008).

The direct effects of the WTO’s AoA on developing countries were much more limited than those of NAFTA on Mexico. As described above, many countries had already dismantled trade policy instruments such as quantitative import restrictions, either as part of IMF/World Bank conditionalities or as a result of unilateral liberalization. The World Bank estimates that two thirds of the market liberalization of all sectors in developing countries in the 1990s was due to these factors, while WTO agreements account for one quarter and bilateral and regional trade agreements for one tenth (World Bank 2004). Specific figures for the agriculture sector are not available. The main effect of the AoA was therefore to lock in the elimination of quantitative restrictions, and limit the use of tariffs with the introduction of bound ceiling levels.

The influence of IMF and World Bank continued to be more relevant in a number of countries, for example in Ghana where the IMF intervened to block an increase of tariffs on agricultural products such as rice and chicken, which would have left the applied tariffs well below the WTO ceiling. A more indirect impact of the WTO on liberalization resulted from the conditions it defines for

bilateral and regional trade agreement to make them compatible with its rules. They require the complete elimination of tariffs and other trade barriers on “substantially all” trade, thereby limiting the possibility to exempt sensitive agricultural products (see section 4 below).

3. THE NEW MILLENNIUM: CURRENT NEGOTIATIONS IN THE WTO AND REGIONAL TRADE AGREEMENTS

Already during the negotiations in the Uruguay Round, it became obvious that the AoA, while defining a framework for agricultural trade policies, would achieve only limited additional liberalization. Hence, the AoA itself included a clause that mandates further negotiations on the liberalization of agricultural trade, to begin after the end of the implementation period, i.e., 2000. After the failed attempt to start the WTO’s Millennium Round in Seattle in 1999, the agriculture negotiations were incorporated in the Doha Round launched in Qatar in 2001, at the fourth WTO Ministerial Conference.

During the Uruguay Round, the only developing countries to play a prominent role in the agriculture negotiations were those who had strong agricultural export interests. They played this role as members of the Cairns Group, a group of about 15 countries that included Canada, New Zealand and Australia from the industrialized world. The Cairns Group agenda was to demand more aggressive liberalization commitments than the U.S., the EU and Japan were ready to commit to.

In the preparation of the Doha Round, developing countries with defensive interests in protecting their often small-scale staple food production, countries that had not played an active role in defining the AoA disciplines during the Uruguay Round, took a more coordinated approach to defend their interests. The informal group called the “Friends of the Development Box” developed a joint platform for a fundamental change to the AoA rules to give developing countries greater flexibility to maintain and expand their opportunities to protect and support food security and small-scale agriculture through border protection and domestic support. The “Development Box” idea was supported by a broad range of international NGOs and farmers’ organizations, although the international network of peasant organizations called “La Via Campesina” rejected the approach in favor of a more radical call to “get the WTO out of agriculture.”

Initially, the success of the Development Box initiative was relatively limited. The Doha Work Program, which provided the mandate for renewed negotiations, essentially restates the overall objective of broader liberalization of agriculture. The paragraph on Special and Differential Treatment in the agriculture negotiations, however, opened a possibility that materially different rules could be instituted for developing countries:

“We agree that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, 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.” (WTO 2001).

At the same time, the Doha Agenda did not call for the complete elimination of the most trade distorting subsidies, but on the insistence of the EU only for “reductions of, with a view to phasing out, all forms of export subsidies.”

Unsurprisingly, agriculture again proved to be one of the most contentious issues in the negotiations. The U.S. in particular emphasised its objective to expand market access not only to the EU and Japan but also to emerging economies in Asia, most notably India and Indonesia. At the same time, the U.S. had already started to abandon its attempt at domestic reform with agricultural support measures that were fully decoupled from production and prices. The 2002 Farm Bill reinstituted certain elements of trade-distorting support disciplined under the AoA rules. As a result, the United States is one of the few countries that is struggling to observe the AoA limits on trade-distorting amber box support.

In the preparations for the fifth WTO Ministerial Conference in Cancun 2003, the EU and the U.S. tried to frame an agreement for reform of the AoA by presenting a joint proposal on tariff and subsidy reduction. However, it contained few if any of the central demands of developing countries, specifically not the proposals of the Friends of the Development Box, but also not the demands of the export-oriented Cairns Group countries. This one-sided initiative of the major trading powers triggered a joint response by developing and emerging economies, who realized that there was a danger of them being sidelined in the negotiations again, if they did not develop a more coordinated approach. Hence in an immediate reaction to

the U.S.–EU proposal, a new coalition – now known as the Group of 20 or G-20 – was formed. It consisted of developing countries with strong export interests such as Brazil and Argentina and those with a more defensive approach, such as India and Indonesia. In their joint positions they called for deeper cuts in developed country tariffs and subsidies, while allowing for more support and policy space for developing countries.

The Cancun Ministerial collapsed over disagreements on investment and competition rules before negotiations on agriculture could even start. This did not stop the G-20 from taking shape as a collective voice on agriculture. In the attempt to restart the negotiations in 2004, the proposals of the G-20, and especially the tariff reduction formula they had outlined, became the basis for the negotiations on market access. Equally important, two key instruments developed in the original “Development Box” proposal – Special Products (SP) and a Special Safeguard Mechanism (SSM) – were included in the official negotiation texts, and endorsed by WTO members at the fifth WTO Ministerial Conference in Hong Kong, in December 2005. The only other important agreement in Hong Kong was the commitment to eliminate all forms of export subsidies and other forms of export assistance such as preferential export credits by 2013, should the Doha Round be concluded by that date.

The coordinated approach of the G-20, the G-33 (the group of countries that is focused specifically on ensuring that the SP and SSM mechanisms are included in a new agreement), and the so-called G-90 (which includes LDCs, the African Group and ACP countries) have ensured that food security and livelihood concerns are now accepted as central issues in the WTO negotiations. Yet while there is now explicit support for the SP and SSM as the primary instruments to respond to food security and livelihood concerns, the exact design and likely effect of these instruments continues to be controversial. This fight is one of the more important reasons that there is still no sign of conclusion to the Doha Round.

The ongoing negotiations have not led to further formal agreements on overall tariff and subsidy reductions, nor on the design of the SP and SSM. For illustration purposes, the respective elements of the latest revised draft of modalities submitted by the chair of the agriculture negotiations in December 2008 are summarized below.

The table below shows the proposed tariff reductions according to the tiered formula for industrialized countries (IC), developing countries (DC), recently acceded (devel-

oping) countries (RAM) and Small and Vulnerable Economies (SVE). LDCs are fully exempt from tariff reduction commitments. The required tariff reduction is higher for products with higher bound tariffs. Hence, according to this proposal, industrialized countries need to reduce tariffs that are already less than 20 percent by half, and those that are more than 75 percent by 70 percent.

TIERED FORMULA FOR TARIFF REDUCTION							
IC	bound level	reduction	DC	bound level	reduction	DC	RAM SVE
1	<20	50	1	<30	33.3	25.3	23.3
2	>20<50	57	2	>30<80	38	30	28
3	>50<75	64	3	>80<130	42.7	34.7	32.7
4	>75	70	4	>130	46.7	38.7	36.7

RAMs are not required to reduce tariffs that are already bound at less 10 percent. SVEs have the alternative option not to apply the formula but to reduce their tariffs by an overall average of 24 percent, no matter the starting level. They can only exercise this option if they don't make use of the provision to designate special products described below.

Both IC and DC are entitled to exempt a certain share of products from the full reduction formula through a category called “Sensitive Products.” In the chair's proposal, the maximum number should be four 4 percent of all tariff lines for IC, which is rejected by Japan and Canada (who want more). The current proposal suggests DC would be allowed to designate up to six 6 percent of all tariff lines as sensitive. The tariffs for sensitive products have to be reduced by a smaller amount than the rest, but this needs to be compensated by a stronger reduction in tariffs for an amount of at least three 3 percent of domestic consumption of the sensitive product in question, which has to result in effective market access.

There are additional conditions for the result of the tariff liberalization. For industrialized countries, the application of the tiered formula, including the use of sensitive products, has to result in a minimum average reduction of all tariffs by 54 percent. If this is not achieved, reductions have to be proportionally higher across all tariff bands. For developing countries the maximum average reduction from the application of the formula does not have to exceed 36 percent or two-thirds of the industri-

alized country minimum reduction. Should this reduction be exceeded, the reduction commitment in each band can be proportionally lower.

Should the tariff reductions be applied according to such a formula, developing countries would commit themselves to steeper reductions on average than during the Uruguay Round, where the average reduction of bound tariffs was only 24 percent. However, the difference to the commitments made by industrialized countries would be bigger than during the Uruguay Round, since reduction commitments set in at higher tariff bands, and industrialized countries have to meet a minimum average reduction, while there is a maximum for developing countries. Given the large differences between applied and bound tariffs for agricultural products, in most developing countries, the actual impacts on current levels of protection would be limited in most countries for most products. However, policy space to increase tariffs to react to changes in world prices would be all but eliminated, since bound tariffs would be reduced to levels close to the applied rates, at least for those countries that do not belong to the LDC and SVE categories. The largest reductions in applied tariffs would be applied to RAMs (because they had to reduce their tariffs to applied levels in many cases to gain WTO membership) and the few countries with relatively low-bound tariffs such as Sri Lanka and Ivory Coast. Though the latter two countries are also in the SVE category, and can therefore benefit from additional flexibilities, as described above. Also, in some countries like India, bound tariffs for products that are essential to food security and rural livelihoods such as rice and dairy are bound at relatively low levels.

Since greater instability and bigger price fluctuations are to be expected, the restriction of policy space may create problems for developing countries aiming to create stable conditions for peasant farmers and domestic investment in agriculture. The SP and SSM mechanisms are supposed to address these problems. They provide additional flexibilities to developing countries to protect agricultural markets. According to the latest proposal by the chair, developing countries would be entitled to designate up to 12 percent of all products as special based on criteria of food and livelihood security and rural development. Five percent of all tariff lines can be exempt from all tariff cuts, as long as the average reduction for all SPs is at least 11 percent. Hence, if 5 percent of all products are exempt from tariff cuts, tariffs on the other SP would have to be reduced by almost 19 percent. RAMs would be allowed to designate 13 percent of all tariff lines as SP, so long as the overall average cut on

all tariffs combined was 10 percent (or more). Members of the G-33 have objected both to the proposed limits of the total number of SP and the number of tariff lines that can be fully excluded from all tariff cuts, demanding higher limits for both.

Even more contested is the SSM, which would allow developing countries an automatic increase in tariffs if import quantities exceed a certain threshold, or import prices fall under a certain level. Besides the question of how big a change in import quantities and prices should trigger how much additional tariff, the most controversial point is whether additional duties triggered by the SSM should be allowed to reach a level that results in higher tariff protection for the product in question than is currently in place under tariff limits agreed in the Uruguay Round. The U.S., Australia and a few export-oriented developing countries such as Argentina and Uruguay argue that such a possibility would actually lead to a deterioration of market access and should not be allowed. The G-33 and others argue that food security and livelihood concerns should override market access objectives. If the Uruguay Round ceilings were accepted as the limit for tariff protection, then the products designated as SP, because of their importance for food security and rural livelihoods, and therefore excluded from tariff reductions, would then not be protected by the SSM, since the bound tariffs for these would remain at Uruguay Round levels. Current “compromise” proposals foresee only extremely limited options for SSM products to exceed Uruguay Round bindings, such that the tariffs after the application can exceed the Uruguay Round rate by at most 15 percent and only for two to six products at a time.

In spite of these limitations, most developing countries insist on using the current texts as a basis for further negotiations in the Doha Round. From a narrow trade negotiation perspective this may be justified, since they were able to secure a relatively large differentiation between their commitments and those of the industrialized countries, while the SP/SSM mechanism, even in the current limited form, would provide some room for protecting vulnerable sectors. However, a result along the lines of the current texts would not be sufficient to correct imbalances resulting from the existing AoA rules and the previous IMF/World Bank programs. Hence it is also not clear whether a Doha agreement along the proposed lines would provide sufficient policy space to support and protect small farmers. This is especially of concern in a situation where both domestic and international market conditions are likely to be less stable

because climate change is creating less predictable weather patterns, while poorly regulated speculation on world commodity markets has increased price volatility (Deutsche Bank Research 2009).

4. REGIONAL TRADE AGREEMENTS ARE LIKELY TO FURTHER RESTRICT POLICY SPACE FOR DEVELOPING COUNTRIES

The continuing stalemate in the WTO Doha Round has led to increased activities in bilateral and regional trade agreements. According to the WTO rules that govern bilateral and regional agreements, they need to result in the full liberalization of “substantially all” trade between the countries entering into the agreement. This implies, unlike in the WTO, that negotiations are not about the percentage by which to cut tariffs but rather about if any products can be excluded from complete tariff and quota elimination, and, if so, how many can be excluded. The most extensive negotiations of this kind have taken place between the EU and the ACP countries in the context of Economic Partnership Agreements or EPAs. In the EPA negotiations, the EU has proposed that ACP countries exclude up to 20 percent of their trade (both industrial and agricultural goods) from liberalization, while the EU liberalizes all trade, so that on average 90 percent of the trade between the two blocks will be fully liberalized. The EU claims this is the minimum level of liberalization that can satisfy the WTO’s “substantially all trade” requirement.

In many of the EPAs negotiated with different ACP regions, however, the EU sought to introduce a standstill clause that would prevent the signatories from increasing tariffs above the currently applied rates, even if the applied rates were below the rates bound in the country’s WTO schedule. This provision would have severely restricted opportunities for ACP countries to protect the products they wanted to exclude from liberalization. In recent months, the EU has softened its stance on this issue somewhat, in an attempt to persuade more ACP countries to sign at least interim EPAs. In spite of a December 2007 deadline for the negotiations, many of the agreements have so far only been initialled by negotiators and are yet to be signed by governments and turned into law.

The EPAs also contain safeguard clauses, some of which allow for a temporary increase in tariffs (up to the levels bound in the WTO), if domestic agricultural markets are distorted or food security is at risk. There are no automatic safeguards as proposed by the SSM in the WTO. Hence the

effectiveness of EPA safeguards would rest on the ACP-countries ability to demonstrate potential harm resulting from EU imports and the EU’s acceptance of such a claim.

In spite of these strict conditions, EPAs are so far, the “softest” form of regional and bilateral trade agreement. The EU offers much less exemptions from full liberalization in other negotiation processes with India or the ASEAN countries, and the U.S. insists on higher market access commitments in its own bilateral agreements as well. However, it is highly questionable whether or not the EPAs provide sufficient policy space for ACP countries to support their development strategies with trade policy instruments. One of the reasons why, for example, the West African ECOWAS region has not yet reached an agreement with the EU, is that it is in the process of developing its own common agricultural policy for the region and may want to protect its markets more strongly against EU imports than is possible under an EPA.

5. CONCLUSION

Multilateral trade rules in the WTO have so far had only a limited impact on the liberalization of agricultural markets in developing countries. This is mainly because previous conditionalities under the auspices of IMF and World Bank programs had already lead to a far-reaching reduction in trade barriers. The tariff ceilings set in the Uruguay Round of the WTO were set at relatively high levels and the reduction commitments relatively modest. However, the structure of the AoA is flawed, since it provides a relatively effective framework to limit and reduce tariff protection while offering a wide range of options to provide domestic support, tailored to the needs of industrialized countries.

The attempts of developing countries to correct these imbalances in the still inconclusive Doha Round negotiations had significant but limited success. The market access commitments most developing countries would have to make if current “compromise” proposals were agreed, would once more not require them to reduce applied tariffs on most products. This is to a large extent due to the new instrument of “special products.” However, policy space to increase tariffs beyond currently applied rates would be all but eliminated. The new Special Safeguard Mechanism would – in the current compromise form – do hardly anything to provide additional policy space. Hence, the ability of developing countries to use trade instruments to provide a conducive envi-

ronment for the expansion of small-scale production in times of increasingly volatile international food markets would be severely restricted.

Given the increasing challenges of the multiple crises of hunger, climate, energy and the world economy, more targeted government intervention is needed to support the realization of the right to food. The approach of WTO and bilateral and regional trade agreements to limit these interventions as far as possible has to be reconsidered. The discussion should shift to the question of which types of intervention support domestic and international food security and which ones can be harmful.

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B. CASE STUDIES ON TRADE, INVESTMENT AND THE RIGHT TO FOOD

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III. WORLD AGRICULTURAL TRADE AND HUMAN RIGHTS – CASE STUDIES ON VIOLATIONS OF THE RIGHT TO FOOD OF SMALL FARMERS

The current hunger crisis makes it clearer than ever that global agricultural trade and its underlying rules can have considerable – positive or negative – effects on the human right to food. Although this general recognition has now become virtually uncontested on an international level, opinions differ as to the political conclusions to be drawn. While the UN Special Rapporteur on the right to food warns of the negative consequences of opening the market further, the new UN strategy on the hunger crisis plans radical liberalization on all levels. The debate concerning what kind of trade policy is in accordance with human rights should not solely follow ideological models, but should be conducted on the basis of scientifically verifiable empirical data. This background paper, therefore, summarizes the results of some empirical case studies on the impact of trade policy on the right to food in selected farmers' communities in Ghana, Honduras, Indonesia, Uganda and Zambia. These examples of Human Rights Impact Assessments (HRIA) aim to explore the connection between trade and human rights, to draw some conclusions about how to formulate trade agreements, and to support the development of human rights instruments for the monitoring of trade policy.

1. HUMAN RIGHTS ACKNOWLEDGED AND IGNORED AS CRITERIA FOR TRADE POLICY

There is no doubt on the normative level that human rights obligations continue to be valid when it comes to the regulation of agricultural trade. For instance, General Comment No. 12 of the Committee on Economic, Social and Cultural Rights (CESCR) of the UN states that strategies for the implementation of the right to food at national level “should address critical issues and measures in regard to all aspects of the food system, including the production, processing, distribution, marketing and consumption of safe food”.¹ Each signatory state of the UN Covenant on Economic, Social and Cultural Rights (ICESCR) must therefore as far as possible create a favorable environment in the framework of his trade policy so that domestic small farmers can market their produce and eat appropriately from the proceeds.

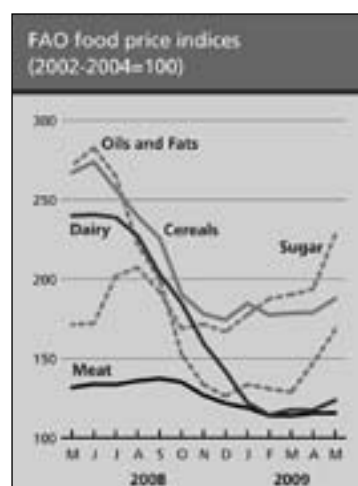
According to the CESCR, the same is also true on an international level: “States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end”². Making reference to this, in its report on the effects of globalization on human rights

in 2002, the Office of the United Nations High Commissioner for Human Rights (OHCHR) called upon states “to give adequate consideration to human rights in trade rules.” particularly with respect to the rights to food and development.³ All states, including the industrially developed countries, are hence obliged to make sure that the trade rules which they negotiate, whether on a bilateral or multilateral level, do not lead to violations of the right to food anywhere (see also Windfuhr 2005 and FIDH 2008).

Particularly in the context of the current hunger crisis, this perspective has been confirmed and reinforced several times by UN human rights committees. For instance, on March 26, 2008, the UN Human Rights Council emphasized “that all States should make every effort to ensure that their international policies of a political and economic nature, including international trade agreements, do not have a negative impact on the right to food in other countries”⁴. The fact that the mistaken agricultural trade policies of rich countries share the responsibility, from the point of view of human rights, for the hunger crisis, was acknowledged by the former German Minister of Development Cooperation, Heidemarie Wiecek-Zeul: “If agricultural export subsidies have the effect that in developing countries not enough is grown to feed people in times of crisis, then that is not just a moral problem. It is a violation of the right to food” (Wiecek-Zeul 2008, 3).

In a background paper of May 2, 2008, on the hunger crisis, the new UN Special Rapporteur on the right to food, Olivier De Schutter, pointed out the negative role not only of export subsidies, but also of the liberalization of trade. Particularly in the Least Developed Countries (LDCs) the far-reaching opening of the market had had the effect that not enough was produced in the countries themselves, and that international price increases were directly passed on to the price of food-stuffs in these countries (De Schutter 2008, 10-11). In fact, according to the FAO, 43 states in Asia, Africa, Latin America and the Caribbean further decreased their tariffs or custom fees on import tariffs in 2008 as a reaction to the price increases (FAO 2009a, 7). According to De Schutter, this is a problematic response because it can lead to serious losses in government revenues and, in the medium term, can encourage a further increase in imports at the cost of local producers. FAO and the World Food Programme (WFP) share this preoccupation: “High food prices have prompted the removal of import restrictions. Tariffs on food imports were reduced or eliminated in many low-income, food-

deficit countries (LIFDCs). When such measures are maintained for long periods, there is a risk that they reinforce the import surges that started in the mid-1990s, with negative consequences on long-term domestic food production” (FAO and WFP 2009, 58). In fact this risk is getting higher as agricultural commodity prices have come down considerably since mid-2008 (FAO 2009b).



Source: FAO 2009b, 1

Unfortunately, these objections are wholly excluded in the most recent statements and strategies of governments and international organizations on the hunger crisis. Neither the closing statements of the Food Summit of the FAO in June 2008, nor the G-8 Summit Declarations of 2008 and 2009, nor yet the Comprehensive Framework for Action (CFA) of the UN High Level Task Force on the Global Food Crisis (HLTF)⁵ mention a connection between trade and the right to food. And all the papers mentioned demand in unison a hasty conclusion of the Doha Round of the World Trade Organization (WTO) as well as further liberalization of agricultural trade. Even if monitoring of the customs and tax policy in its effects on farmers, consumers and public revenues is indeed demanded within the CFA, the conclusion is already anticipated: the High Level Task Force wants to stand up in particular for the reduction of import tariffs, subsidies and export taxes in the name of combating hunger. No country-specific or situation-specific consideration of the advantages and disadvantages of particular trade policy instruments is anywhere to be found (UN 2008).

The gap between the warnings of UN human rights committees and the orthodox demands for the liberalization of the remaining UN and Bretton Woods organizations indicates two fundamental problems:

1) While the connection between agricultural trade and human rights is normatively acknowledged by states, there is no consensus as to the question of which trade policy is to be seen as being in accordance with human rights. Although the OHCHR recommended analyses on the impacts on human rights as early as 2002, no such study has been carried out on the right to food by a state so far. Equally, to date no scientifically well-founded methodology has been developed to this end.

2) The same governments that acknowledge the connection between human rights and trade policy in the Human Rights Council claim to know nothing about this connection when speaking in other UN or Bretton Woods organizations, or at the WTO. Until now there has been no institutionalized mechanism to gain a hearing for human rights-related objections to trade agreements in the relevant committees for trade policy.

2. APPROACH AND QUESTIONS DEALT WITH IN THE CASE STUDIES

The advice on trade policy which international organizations give states in the name of combating hunger should not depend solely on ideological preferences, but should be derived from scientifically verifiable empirical findings in the various countries. At the macro level, many solid studies of Food and Agriculture Organization (FAO) and NGOs such as ActionAid International (AAI), the German Church Development Service (Evangelischer Entwicklungsdienst – EED), Oxfam, Third World Network (TWN), the Institute for Agriculture and Trade Policy (IATP) and others have shown that trade liberalization had caused considerable rises in agricultural imports and a consequent reduction of domestic food production in many countries. These studies had raised serious concerns that food security might be strongly affected or endangered by these import surges. Some of them have also investigated in depth the actual injuries caused rural communities in the importing countries and the impact on small holders at the micro level in terms of income, poverty and food security (Sharma 2005).

One well-documented case is Mexico. When Mexico ratified the North American Free Trade Agreement (NAFTA) in 1994, it committed itself to abolish all tariffs on imports from Canada and the U.S. within 15 years. While implementing NAFTA, Mexico cut tariffs even faster than required. Moreover, while the U.S. government insisted in radical trade liberalization in Mexico, it simultaneously increased its own agricultural subsidies in a way, that U.S. companies were able to export maize at prices 20 percent below its production cost. The consequence of

tariff cuts and dumping was that maize imports tripled and producer prices in Mexico dropped by 50 percent. All in all, about 1.5 million Mexican farmers have given up their farms since 1994 (Wise 2007, 2). The reliance on imports increased and made the country extremely vulnerable for price surges on the world market. Last but not least the Mexican TNC Maseca used its dominant market position in order turn prices artificially high. To conclude, misled trade policies and the lack of market regulation finally resulted in the tortilla crisis that attracted so much media attention in 2007.

Mexico is not the only case where a concrete negative impact on the livelihoods of smallholders has been demonstrated. Surprisingly however, only very few studies have analyzed such impact out of the perspective of the human right to food. Against this backdrop, and on behalf of the Ecumenical Advocacy Alliance (EAA), Brot für die Welt and the FoodFirst Information and Action Network (FIAN) carried out a study on the effects of trade liberalization on the right to food of individual rice farming communities in Ghana, Honduras and Indonesia (Paasch, Garbers and Hirsch 2007) which also allow important conclusions for the current debate on different trade policy options to overcome the food crisis.

Rice was chosen as an example product because, as an important staple food for half of the world's population and a main source of income for two billion farmers, it has a particular significance for worldwide food security. The period under investigation spanned the years between 1980 and 2005. While a dramatic rise in the price of rice on the world market was observable in 2007 and 2008, before this many developing countries generally had to contend with the opposite problem. Not least because of low world market prices: between 1983 and 2003 the FAO recorded 408 cases of import surges in 102 countries for rice alone, most of the countries being in Africa, the Pacific Islands and Central America (FAO 2007). As will be shown later, it was due in good part to these surges of imports that the high prices of today had such a fatal effect in some countries.

The case studies combine a macro-economic examination with a qualitative inquiry on the level of communities, and evaluate the results from the perspective of human rights. On the macro level analysis is carried out on the available data about the development of the rice imports and domestic rice policy, including border measures to regulate imports. Equally, on the macro level analysis is carried out of potential dumping practices of the countries from which the rice imports originate, along with any pressure which other countries may have placed on Honduras, Ghana and

Indonesia by means of bilateral and multilateral trade agreements or intergovernmental organizations (IGO) to adopt a particular trade policy for rice. In addition to this macro level, the studies contain a qualitative analysis of the effects of increases in rice imports on the income, livelihood and food security of selected rice-producing communities, on the basis of semi-structured interviews. The inquiries close with an evaluation of the behavior of the states from the perspective of the human right to food. The added value of the studies lies primarily in this combination of macro-economic data with the empirical analysis on community level and the evaluation with respect to human rights.

The challenge of the evaluation relating to human rights lies primarily in the examination of possible causal links, firstly between a particular trade or agricultural policy and considerable rises in rice imports, and secondly between these increases in imports and hunger or malnourishment in the communities. Proving these causal links all the way up to a violation of the right to food also requires a careful evaluation of other additional factors that may have impeded the access of the farmers to food, such as natural disasters, violent conflicts or war, any possible changes in land ownership relations or reduced access to infrastructure, means of production, loans or advisory services. A further challenge of the human rights evaluation is to decide the responsibilities of different states for a particular trade policy. In many cases national governments, intergovernmental organizations (IGO) and external state actors share this responsibility.

3. PRESCRIBED STARVATION DIET FOR RICE FARMER COMMUNITIES

All three case studies give clear evidence that the liberalization of trade and the agricultural sector have contributed quite considerably to the violation of the human right to adequate food of the rice farmer communities investigated in Ghana, Honduras and Indonesia. The increased flow of cheap imports reduced rice farmers' access to local town markets across all the communities looked at, and drove down the prices they received. In this way incomes were reduced, poverty was exacerbated and malnutrition and food insecurity among the rice producers increased. Even if it was not reported that people died directly of hunger, the testimonies show quite clearly that many members of the community have no permanent access to adequate food of sufficient quantity and quality as is required for realization of the right

to food. For these families, purchasing food requires increasing financial sacrifices, which limit the realization of other human rights such as the right to health and education. Women and children are the worst affected by this malnutrition.

The negative effects of the liberalization affect a social group of people who in many cases, due to limited access to land, a weak bargaining position vis-à-vis the middlemen, and poor infrastructure, were already marginalized. Natural disasters such as Hurricane Mitch, the tropical storm Michelle and droughts were other important factors that limited the ability of the communities living on rice-farming in Honduras and Indonesia to feed themselves. However, it is important to note that the farmers' access to the market was already weakened by increases in imports, and their incomes had fallen. Because of this, the natural disasters hit them harder than was necessary – largely due to the policy of liberalization.

The case studies show that the opening of the market represents a key factor for increases in imports and import surges. The liberalization of trade took place in Honduras and Ghana at the beginning of the 1990s, and in Indonesia in 1997. In all three countries, liberalization was followed by substantial rises in imports. In Honduras and Ghana, the FAO even registered several "import surges," where the import volume exceeded the yearly average of the last three years by 30 percent. In all three countries the tariff reductions were the result of conditions in the structural adjustment programs that had been imposed by the IMF and the World Bank as a condition for granting the governments loans. It is noteworthy that the governments of all three countries reacted to the increases in imports after 2000 with moderate regulation. These initiatives, which were absolutely necessary (although not sufficient) to protect the right of the rice farmers to adequate food, were, however, thwarted by external actors and/or international agreements. In Honduras, for example, the Dominican Republic – Central American Free Trade Agreement (DR-CAFTA) prescribes that the rice tariffs must be reduced step by step to zero by 2024. In Indonesia, the World Bank exerted great pressure to push for deeper liberalization.

The most noteworthy case of external influence being exerted is that of Ghana. In 2003, as a reaction to the import surges, the government and the parliament decided to increase the tariff on rice from 20 to 25 percent. The implementation of this, however, was stopped

only four days after the corresponding law (Act 641) came into effect. As the IMF report on the consultations on the poverty reduction strategy in Ghana expressly states: “The authorities have committed that these tariff increases will not be implemented during the period of the proposed arrangement” (IMF 2003). On May 9, 2003, the IMF agreed to a three-year credit amounting to 185.5 million Special Drawing Rights (SDR) (\$258 million USD) as well as additional aids within the framework of the Initiative for Highly Indebted Poor Countries (HIPC) amounting to over 15.15 million SDR (around \$22 million USD). And on May 12, only three days later, the directive to repeal Act 641 was published. The same consultations that had led to the granting of the funds “convinced” the Ghanaian government to bring the tariffs back down to the previously applied level.

Other components of the structural adjustment program, such as the privatisation of the agricultural sector and the lending system, the liberalization of the market for production equipment, and the abolishing of price guarantees and state purchasing guarantees, also put a strain on the rice farmers in all three countries. By these measures, the access of the farmers to seed, fertilizer, machines, advisory services and marketing facilities was considerably limited, which led to a massive rise in production costs. In combination with displacement from the markets and a drop in producers’ prices caused by cheap imports, the cuts in production support caused drastic losses in income, and were demonstrably a key cause of malnutrition and food insecurity. The fact that the countries all experienced a rise in cheap imports while they reduced the support for domestic production is tragically ironic, since in many cases it was only through strong subsidies that these imports were possible. In Honduras and Ghana, for instance, dumping by the U.S. in the form of commercial exports and poorly targetted food aid were a significant determining factor for the import surges. Due to government programs, the export price for U.S. rice in the years from 2000 to 2003 was 34 percent below the cost of production in the U.S. (Murphy, Lilliston and Lake 2005 and Oxfam 2005).

On the basis of the empirical findings, the study comes to the result that the human right to adequate food of the rice-farming families in question in all three countries was violated. Both the governments of these countries and external actors disregarded obligations relating to human rights. Ghana, Honduras and Indonesia violated their obligation to protect the right of food – although to different degrees – by opening up the markets to cheap imports and by consenting to international agreements

that ban appropriate import protection. These states also violated their obligation to respect and ensure the right to food by dismantling existing support services for the rice-farming communities, who in any case already belonged to the groups of those endangered by hunger. This also constitutes a violation because no alternative income opportunities existed or were created for the farmers.

At the same time, all three country studies clearly show the sometimes extraordinary pressure to open national markets and to dismantle public services in agriculture that is exercised by external actors (first and foremost by the IMF and the World Bank). The International Financial Institutions (IFIs) have therefore clearly disregarded their responsibility – and the most influential member states their obligation – to respect the right to food of the rice farming communities in the countries investigated.⁶ The countries from which the rice imports came also partly disregarded this obligation to respect the right inasmuch as their lower prices were made possible through state intervention. Particularly the United States, through the subsidizing of surplus production, through export credits and through the monetization of food aid, have carried out a practice of export dumping of rice which is partly responsible for the hunger among local rice farmers in Honduras and Ghana.

The policy of liberalization, particularly the tariff reductions, was justified by reference to the interest of low-income consumers in low prices. The case studies do not support the contention, however, that consumer prices decrease as a result of liberalization. In Indonesia the consumer prices even rose at the times of the market being opened. In Honduras, the decreasing import prices and producers’ prices were not reflected in correspondingly low consumers’ prices. The main reason in both cases was the oligopolistic structure of the market, where market power is shared among only a few firms, a fact which is largely neglected by the supporters of liberalization. The cheap imports therefore exercise considerable pressure on the producers’ prices and hence on the income of the farmers, without the consumer prices being reduced to a similar degree. What has increased the most with this change is the profit margin of traders and retailers.

The postulated link between liberalization and the lower prices of foodstuffs is anyway rendered absurd by the exorbitant price increases in 2007 and 2008. It became clear that international price increases are reflected in domestic prices most strongly in those places where do-

mestic production has been given up in favor of imports, i.e., where import dependency is the greatest. While the price increases in Indonesia, which is eager to preserve self-sufficiency, remained modest, in Honduras local rice prices in Honduras climbed by 53 percent between August 2007 and August 2008 (FAO 2009a, 31). The number of rice producers had declined from 25,000 at the end of the 1980s to 1,300 today. These are, needless to say, not at all in a position to increase their production quickly enough in the short term to close the supply gap that has resulted from the lack of affordable rice imports in recent months.

In the case of Ghana, according to a World Bank report, prices for rice and maize have increased by 20 to 30 percent between the end 2007 and spring 2008 (Wodon et al. 2008). Ghanaian rice producers, according to the report, seem to benefit from this increase to some extent. However, after two decades of structural adjustment in this sector, they currently represent only 3.9 percent of the population and only cover 20 percent of the national consumption. The consequence is that domestic prices followed the international ones and food insecurity is sharpened, especially among poor urban consumers. For maize, in contrast, the effects of the price increase are more ambiguous according to the report. Around 28 percent of the population are still maize producers, and most maize is still produced in the country. This means that more people benefit from higher prices, and the country is less vulnerable to external price volatility. All in all, the World Bank recently predicted that, because of the financial and economic crisis, the number of poor people in Ghana might increase by 500,000. Eighty percent of the country's poverty is concentrated in the three northern regions.

These experiences above all make any strategy relying on imports for food security seem highly questionable, not only for producers but for consumers as well.

4. EPAS BETWEEN THE EU AND ACP STATES LIMIT POLICY SPACE TO PROTECT HUMAN RIGHTS

While it is primarily the U.S. and the IFIs which appeared as external actors in the case studies on the rice trade, in three further recent studies by FIAN, Both Ends, Germanwatch and the UK Food Group, it is primarily the role of the EU which is investigated. Following the methodology outlined above, in 2007 and 2008 they analyzed the effects of the European agricultural and trade policy on small producers of tomatoes and chicken breeders in Ghana, and of

dairy farmers in Zambia and Uganda (for background see Bertow und Schultheis 2007). The objects of the investigation were both the problems which were already visible, and the dangers for the right to food which could emerge from the recently negotiated Economic Partnership Agreements (EPAs).⁷

The negative consequences of the EU agricultural exports can already be demonstrated, particularly for tomato farmers and chicken breeders in Ghana (Issah 2007 and Paasch 2008). FAO's data show that since the opening of the market in 1992, Ghana, has again and again faced import surges of tomato paste and poultry meat, much as it did with rice, of which a large proportion has come from the EU (FAO 2007). In Ghana this immediately squeezed out the poultry keepers in Ashaiman, close to the port of Tema. While they had formerly earned their living by selling eggs and chickens for meat, the latter mainstay completely disappeared within a few years for all those interviewed, due to the unbeatably cheap imported chickens. While in 2004, according to the FAO, Ghanaians offered their poultry meat for sale at around € 2.60 per kilo, the European meat was sold at a loss for € 1.50 per kilo. In the case of the tomato farmers, the displacement of local producers has taken a more complicated form because it competes with a different product: fresh tomatoes. In the past 10 years, the imported tomato paste has found its way into cooking and eating habits, primarily in the towns, and hence increasingly competes with the domestic fresh tomatoes. Moreover, the cheap imports prevent Ghana from developing its own tomato industry with processing facilities that would be essential for stable sales for the local farmers. The result is that many families of tomato farmers and poultry keepers in the communities concerned have to reduce their meals in number, volume and quality over a number of months, become increasingly indebted, and have therefore become even more vulnerable to external adversities. Their right to food is no longer fulfilled.

Here as well, key factors for this development are the opening of the market and the dismantling of state support as part of the Structural Adjustment Programs (SAPs). On the one hand it was the Ghanaian government who implemented these, but on the other hand this happened primarily because of the corresponding credit conditions of the IMF. Moreover, in 2003 the IMF prevented not only the tariff increase for rice imports from 20 to 25 percent, but also for poultry imports from 20 to 40 percent. Both changes had been part of the same act, Act 641, which was suspended on pressure from the IMF. In addition, any increase in tariffs towards the EU will

generally no longer be possible for Ghana in the future. According to the EPA interim agreement⁸ with the EU, which the government initialled on December 13, 2007, Ghana is obliged to reduce the tariffs for over 80 percent of imports to zero by the year 2023. It is probable that tomatoes and poultry will not belong to these 80 percent, but will instead be exempted from the lowering of the tariff because they will be protected as “sensitive products.” But even in the latter case, the farmers are not yet out of trouble. Even for these products, a Standstill Clause in the agreement forbids Ghana to raise the tariff over the level currently applied. In concrete terms this means that while Ghana had the right up until now, according to the rules of the WTO, to increase its tariffs on tomato or poultry imports from 20 to 99 percent (the level at which it bound those tariffs), the government would be forbidden from raising its tariffs on European imports once the Interim EPA is ratified by the EU, its member states and Ghana (unless the Standstill Clause is amended). Ghana would thereby lose freedom of action in its trade policy, freedom it needs to protect the right to food of the tomato and poultry farmers hurt by dumped imports.

Here as well, then, it is the case that obligations relating to human rights are violated, both by the state of Ghana and by external actors, in this case by the member states of the IMF and the EU.⁹ The latter first violated its obligation to respect the right to food in Ghana by exerting considerable pressure on the Ghanaian government in the EPA negotiations. Secondly, through unfair export practices it contributed to violations of the right to food in Ghana. For the support of European tomato producers, particularly in Italy, Spain and Portugal, the EU allots a generous budget each year of 300 million Euros and more. Moreover, exports of tomato paste have sometimes been considerably assisted by export subsidies (Bunte und Roza 2007). Export grants were not at all necessary in the case of the exported poultry meat, since they were residual products which the European companies would otherwise have had to dispose of at high expense (Marí und Buntzel 2007). In this way, what had been a liability became a lucrative business for the companies. It is true the EU offered no active export assistance in this case. It should be considered, however, whether, by omission, the EU might have neglected its obligation to protect the right to food of the Ghanaian poultry keepers. For despite numerous complaints about the devastating effects of the cheap exports, the EU did not introduce any effective measures to counteract the export practices of the European companies responsible.

5. NEW THREATS THROUGH THE EU AGRICULTURAL REFORM AND GLOBAL EUROPE

In the investigations of milk farmers in Uganda and Zambia (FIAN 2008 and FIAN 2009) no processes of squeezing out have been found to date which are comparable to those found in the cases discussed. No import surges of milk powder from the EU have appeared yet in Uganda and Zambia. However, in both countries there are serious fears that this could still happen in the future. To date, the European milk quota, remains more than ten percent above European consumption, creating a large surplus. In April 2008, the EU increased this quota by a further 2 percent. Furthermore, the EC decided a further annual increase of one percent per year until 2015. The increased quota was decided in spite of the fact that domestic consumption in the EU was flat. The official aim of this measure is to “prepare” European farmers for the price decline that will result from the total abolition of the quota scheduled for 2015. “In general terms,” according to the Commission, “the phasing-out of milk quotas would expand production, lower prices and increase the competitiveness of the sector” (European Commission 2008, 9).

The EU hopes to increase exports not least for skimmed milk powder, which in the past has often been sold in great quantities on African markets. For the milk farmers in Zambia and Uganda this is grim news. Even the last quota increase of April will raise the volume of milk on the world market by an estimated 0.5 percent. As little as 0.3 percent, according to the estimates of the Dutch bank Rabobank, can determine whether the world market price is ruinous or bearable (Reichert 2008). For the Magoye dairy farmers’ co-operative investigated in Zambia, whose producers’ prices are closely oriented to the world market price because of their close connection to the formal sector, this could already have considerable negative effects.

If production increases, the European Commission hopes European milk prices will fall allowing European milk products to find their way onto world markets without requiring export subsidies. Indeed, prices did decline dramatically, putting European dairy farmers under such a price pressure that they repeatedly boycotted the delivery of milk and used it as a fertilizer in protest actions. But even at such a low price level, the hope that the surplus could be exported without subsidies was not realized. In mid-2006, EU export subsidies on milk products were virtually suspended for the first time in 40 years. Due to higher world market prices, they were not

needed. But when prices started to fall again in January 2009, against the backdrop of the still unfolding global economic crisis, the EU decided to re-introduce export subsidies on dairy products. A large part of these subsidized exports are destined for developing country markets, and a considerable part goes to Least Developed Countries (LDCs). For 2010, the EC plans to spend 450 million Euro on export subsidies for dairy products alone. Even in the long run, the EU wants to retain the right to make use of this unpopular instrument, despite its promise in the context of WTO negotiations to put a definite end to all export subsidies by 2013. Now that the WTO negotiations in Geneva are faltering, the EU has put this commitment aside.

Even though subsidies for dairy exports to Zambia and Uganda have not been reported so far, this possibility cannot be ruled out in the future. Furthermore, dairy farmers in both countries suffer the indirect negative impact of export subsidies on world market prices, which, to a large extent, also determine the price they receive from domestic creameries. Against this background, the fact that the EPAs will further restrict freedom to determine trade policy for the protection of the farmers in Uganda and Zambia could have fatal effects in the long term. Even though most agricultural products are listed as sensitive products, the room for maneuver for tariff increases might be affected by the EPAs, if the Standstill Clause remains in the agreements, as the EC had insisted at least until recently. It remains to be seen if the announced flexibility of the EC will be reflected in the final agreements. If not, Uganda and Zambia would no longer be in a position to adequately protect local market access and income for local producers and therefore the right to food of domestic dairy farmers.

The problem is not restricted to dairy farmers, and is not limited to Africa. The economic partnerships with the ACP states are only the beginning. "Global Europe: Competing in the World" is the name of the EU trade strategy that was presented in October 2006 by the Trade Commissioner, and that was waved through by the EU Council without public discussion. This was a decision of far-reaching consequences. The EU plans to make "Global Europe" the basis for all future trade and investment agreements with all regions of the world. The negotiations have already begun with India, South Korea, the Andean Community, the Association of Southeast Asian Nations (ASEAN) and the countries of Central America. Radical tariff cuts in trade in industrial and agricultural goods are to be one component. In fact, after the signing of a Free Trade Agreement between the EU and South

Korea in October 2009, European companies expressed their hope that their dairy and meat products would now find their way to the South Korean market more easily.

The Global Europe Strategy is above all targeting liberalization in those areas which are high on the wish list of European corporate groups: more protection of intellectual property, easier access to energy and raw materials, the opening up of the service sector and of public procurement, as well as the loosening of investment restrictions. The countries of the South had already categorically rejected some of these themes during the WTO negotiations, but the EU has put them back on the agenda. According to the International Federation for Human Rights (FIDH), the liberalization agenda of the EU threatens not only the right to food, but also the right to health, a sufficiently high standard of living, education, work and development (FIDH 2008, 6).

6. HUMAN RIGHTS INSTRUMENTS NECESSARY

Even if the impact analyses of the NGOs reveal important differences, nonetheless in most cases very similar problems could be observed. The privatization of public services and the opening of the market in the global South, as well as the dumping of agricultural commodities produced in the U.S. and the EU have, demonstrably and frequently, had negative effects on the right to food of farmer communities. This does not allow the conclusion that liberalization measures are always contrary to human rights. Yet the results of the studies underline that the demand for more liberalization contained in almost all official strategies to overcome the hunger crisis is highly questionable from the point of view of human rights. The lobby work for comprehensive liberalization announced in the CFA of the High Level Task Force on the Global Food Crisis is not acceptable against this background. In particular, following particular formulae in trade policy must not, under any circumstances, become the condition for gaining allowances or loans to combat hunger. The fact that similar practices have still been carried out by the IMF, even in the recent past, and that the IMF, together with the World Bank, is intended to carry out the trade policy consulting for the developing countries in the CFA, certainly gives cause for concern in this respect.

Trade policy advice on combating hunger must not follow solely ideological preferences, but must be based on empirical studies, including those from the perspective of the human right to food. The studies sum-

marized above by Brot für die Welt, the EAA, FIAN, and Germanwatch and others are examples of case-based impact assessments of trade policy from the point of view of human rights, and are intended to provide methodical stimulus for further studies. It is also important that such studies not remain the sole domain of NGOs. What is required instead is an institutionalization in the member states of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The EU already routinely commissions in advance so-called Sustainability Impact Assessments (SIA) for all trade agreements. However, FIDH rightly points out the deficiencies of the studies carried out so far, and also the fact that these studies do not in any way replace an assessment of the consequences from the perspective of human rights (FIDH 2008, 11ff). Analyses from the perspective of human rights not only assess the consequences for living conditions, but also evaluate the extent to which states are fulfilling their obligations with relation to human rights when making trade agreements. Moreover, analyses from the perspective of human rights look much more carefully at the consequences for particular social groups, such as women, ethnic groups or particular regions, instead of solely arguing on the macro level. FIDH therefore demands impact analyses from the perspective of human rights both *ex ante* and *ex post*. A rendezvous clause in the trade contracts must allow a monitoring of individual provisions and potential changes to them if so required for the sake of human rights. Only in this way can states ensure that in both the negotiation and implementation of trade agreements the realization of human rights in their own country and in other countries is not impaired, but is promoted.

It is also true that the judgment of trade policies with respect to human rights must not be left solely to the states responsible for them. Active involvement of civil organizations from all states involved is indispensable at a stage as early as the impact analyses. Moreover, it is necessary on UN level to systematically monitor the trade policy of the signatory states of the CESCR pact. This already occurs to a rudimentary extent. For instance, in 2006, in its concluding observations on the report on Canada, the Committee on Economic, Social and Cultural Rights (CESCR) indicated some problems related to human rights in the North American Free Trade Agreement (NAFTA). With respect to Germany, too, Brot für die Welt, EED and FIAN dealt with questions of trade policy in a parallel report. In order for the scope of this to be increased, however, states must be called upon to systematically include trade policy in their reports to the CESCR. In the medium term it would be

worthwhile as well to have the same requirement made of the new Universal Periodic Reviews (UPRs) of the UN Human Rights Council.

Finally, the OHCHR should be instructed to play a much clearer role in the monitoring of trade and investment agreements with respect to human rights. Good starting points are provided by the 2002 report mentioned on the effects of globalization with respect to human rights. In order to continue this work and to intensify it, however, considerable increases in the resources devoted to this area would be necessary. At present there is less than half a post available for this topic at the OHCHR. If the trade policy capacities there were lifted to a level that is usual in other UN organizations such as the FAO or even the World Bank the OHCHR could take on an important monitoring function.

It is of course a long way before these or similar measures can be implemented. One sign of hope is that besides those already mentioned, many other international NGOs and networks such as ActionAid International (AAI), EAA, FIDH, the Institute for Agriculture and Trade Policy (IATP), and Misereor now also analyse trade policies from the perspective of human rights. For the UN Special Rapporteur on the Right to Food, Olivier De Schutter, trade is also a clear focal topic. Moreover, with the hunger crisis and the repeated failures of the negotiations at the WTO, the inadequacies of concepts and mechanisms used to date are becoming more and more obvious, and hence the search for new instruments in many areas is becoming more intense.

¹ UN Committee on Economic, Social and Cultural Rights (CESCR). 1999. General Comment 12, The Right to adequate Food (Art. 11). Twentieth Session. Para. 25, emphasis in the original. <http://www.unhchr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9?OpenDocument>. (accessed August 20, 2008)

² Ibid. Para. 36.

³ OHCHR. 2002. Globalisation and its impacts 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. UN doc. E/CN.4/2002/54. January 15. Para. 45.

⁴ UN Human Rights Council. 2008. Seventh Session, Agenda Item 3: A/HRC/7/L.6/Rev.1. Para. 17.

⁵ The Task Force was formed in April 2008 by UN General Secretary Ban Ki-moon, and consists of representatives of all UN organizations that are concerned with food and agriculture, as well as the World Bank and the IMF. The UNHCHR is not a participant.

⁶ While “obligations” are spoken of with respect to states, with respect to interstate organisations the somewhat weakened term “responsibility” is used here. On this see the discussions on extraterritorial or international obligation in Windfuhr, 2005 and Hausmann, 2006.

⁷ The necessity of the EPAs was justified with the argument that the one-sided trade preferences which the EU had given the ACP states until this time were no longer compatible with WTO law. Since an exemption with the WTO expired by December 31 2007, the EU applied pressure to gain reciprocal free trade agreements by this date.

⁸ Originally the EU had insisted on comprehensive EPAs, which would also include areas such as services, investments, intellectual property rights and procuring bodies. However, it was only possible to implement this form of EPA politically with the Caribbean states. Other states, such as Ghana, Uganda and Zambia, could only be persuaded to make agreements on the trading of goods. These agreements are called interim agreements, as they are only seen as a preliminary stage to “comprehensive” EPAs. However, even these agreements have only been initialled so far, in other words neither signed nor ratified. Despite the great political pressure, 43 of the 78 ACP states have not even consented to interim agreements.

⁹ The European Court has clarified that the EU must observe general legal principles, including the basic rights in international pacts which are ratified by all member states (see FIDH 2008, 7).

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Rolf Künemann

IV. FOREIGN INVESTMENT AND THE RIGHT TO FOOD

1. INTRODUCTION

The food crisis is not over – it is growing. Prices continue at double the pre-crisis level, and the structural violations of the right to food, which led to the crisis, continue as before. As a crucial lesson learnt from the crisis, governments and intergovernmental organizations (IGOs) now unanimously recognize that more money has to be invested in the agricultural sector in developing countries. However, their strategies often ignore the fact that not all kinds of investment will help to reduce hunger. In fact, the crisis has even led to additional threats to the right to food. Against this backdrop, this paper examines the role of foreign investment in agriculture and its relationship to the realization of the human right to food. Based on the examination of concrete cases, the paper indicates that the reaction of foreign investment to the food crisis is in fact “business worse than usual” – due to the negligence of food as a human right for all practical investment purposes.

1.1. THE BASICS

Food is, first of all, a product of nature. There is reason to be grateful to Mother Earth, to the sun and to water. Natural resources (topsoil, water, seeds, fishing grounds and forests) are indispensable for producing food. Those who control the resources, however, control the choice of what is produced – and control the product. This is critical as there are competing uses for the natural resources mentioned: basic foodstuffs or luxury food, food or feedstuffs, fiber, agrofuels, timber. Moreover, space is crucial for industries and urban conglomerates – and space means land.

Natural resources provide the essential ingredients to grow food. In addition to natural resources, food production requires know-how (human experience) and tools. To invest in agriculture is to improve production methods (knowledge systems, methods and tools) so that the existing natural resources have increased sustainable yield.

This paper is about a specific kind of investment: foreign direct investment (FDI). This refers to capital held by private firms that are not based in the country where the investment is made. Most of such investment is currently made among developed countries, but there is also considerable investment, especially in primary industries (including agriculture), that flows from industrialized countries to developing countries. A number of these investments have raised serious human rights concerns.

Political and civil rights, as well as economic, social and cultural rights (including the right to food) are violated in the implementation of projects funded by foreign direct investment.

One of the ways to avoid such human rights abuses is to impose criteria on what kind of investment is acceptable. What can be judged as an improvement to the mode of production? This is a values question and the answer will depend on the value framework used in the economy. According to the human right to food, vulnerable people's sustainable access to food (and food-producing resources) is a fundamental element in the fabric of our societies, economies and legal systems. It is a source of states' obligations to respect, protect and fulfill human rights. The obligation to protect means that states (individually and jointly) have to take the measures necessary to prevent third parties from depriving people of sustainable access to food and resources. Under the obligation to fulfill, states have to make sure that people who are deprived of access to adequate food and resources are provided such access as quickly as possible. And under the obligation to respect, states must not deprive people of their food and resources. These three classes of obligations also apply – in different degrees – to persons outside the state's territories. Moreover the right to food, as other human rights, is meant to be justiciable: persons should be able – in a timely way – to seek legal redress if their rights are violated.

1.2. RIGHTS-BASED INVESTMENT VERSUS PROFIT-BASED INVESTMENT

All three types of states' right to food obligations are relevant for foreign investment. The obligation that comes to mind immediately when considering investment as a tool to improve agriculture is the obligation to fulfill. What kinds of investment, into which modes of food production, will best support the fulfillment of the fundamental right to be free from hunger? How can investment conform to the International Covenant on Economic, Social and Cultural Rights (ICESCR) article 11.2(a), which requires "improvement of the methods of production, conservation and distribution making full use of technical and scientific knowledge"? And, of course, states' obligations to protect and respect human rights are also very relevant.

From a human rights perspective, the following criteria are suggested to assess whether an investment in agriculture is an improvement over what went before:

1. After the investment, all project-affected persons have access to adequate food and resources.
2. All project-affected persons have access to natural resources and to knowledge systems and production methods which are ecologically and economically more sustainable than before.
3. The number of people who enjoy access to adequate food or productive resources increases.
4. The resource and food needs of future generations have been taken into consideration.
5. The justiciability of the right to food and resources has been strengthened.

Investment which provides this kind of improvement can be called rights-based investment under one additional condition: the investment must also safeguard the project-affected persons' other economic, social, cultural, civil and political rights, including their right to political participation. In deciding whether to permit a given investment (either in an individual case or through regulation of the sector as a whole), states have to apply a "human rights check"¹ which tells them whether the investment is rights-based. The burden of proof here is on the state. A human rights check has to be transparent, it has to make available all pertinent information and be open to public review.

Investors usually defend their investment with the argument that it will create jobs and add to economic growth. States often use the same arguments to win public support for FDI that has aroused public concern. Sometimes the livelihood rights of the future workers are used to justify breaches of states' obligations to respect and protect the economic, social and cultural rights of the people who stand to lose from the proposed investment. This "balancing" of human rights obligations, however, is flawed. The rule of "doing no harm" cannot be derogated when it comes to the core content of human rights. Nothing can justify a breach of a state's obligations to respect and protect vulnerable persons or communities. For the FDI project to be approved, it should improve the livelihoods of the intended beneficiaries without undermining anyone's enjoyment of their rights. Such investment is decidedly possible, but sadly uncommon.

Can private FDI meet the criteria for rights-based investment? The general understanding of private investment is that it has to make a profit on the capital invested. Profit-based investment does not see its purpose in meeting the criteria defined above for rights-based investment. Rather, profit-based investment usually has only one criterion: to make money. This has far-reaching

consequences for the modes of production pushed by private investors – and for the government and inter-governmental organizations (IGOs) that are often heavily influenced by them. The technology used in such investments has to offer – and maximize – return on investment. Non-monetary criteria, such as maximizing the long-term health of the topsoil or improving the nutritional standing of children under five, are not factored in, though if these are necessary to realize profits down the line, private commercial investors might also pay attention to such concerns.

When profit-based investment dominates policy making, agrarian policies are capital-intensive – even if the short-term yields per hectare under the competing mode of production are the same. Indeed, interest deriving from rights-based investment may be comparatively modest – simply because much of the economic value created benefits the peasants and future generations (through sustainability).

It should also be noted that buying or leasing a productive resource such as land alone is not an investment in itself. It just establishes control over a resource: The money paid gives the investors a right to use this resource in future and to benefit from the often-violent measures of states to uphold investor's control in the face of poor people trying to defend their use of the resource or attain access because they are hungry.

1.3. FOREIGN INVESTMENT AND EXTRATERRITORIAL OBLIGATIONS

In human rights circles, obligations towards persons abroad are called extraterritorial obligations (ETOs). Then-UN Special Rapporteur Jean Ziegler analysed ETOs in his 2005 report to the Commission on Human Rights using the three categories mentioned.² While the obligations to respect are as valid abroad as they are at home, the extraterritorial dimensions of the obligations to protect and fulfill are qualified whenever they could negatively affect the obligations to protect and fulfill human rights in the government's home state.

The home state of the investor carries obligations to regulate such investment, whenever it deprives people abroad of their access to food and productive resources or intervenes with rights-based investment. Moreover states individually – and the international community of states – are duty-bound to cooperate in the expeditious fulfillment of the right to food for every person in each

country. In doing so it is obliged to start with the most deprived and with the core content of the human right to food – freedom from hunger.

As far as the eradication of hunger is concerned, the performance of economic cooperation has been poor. Over the past four decades, the percentage of the hungry has been decreasing slowly. This was largely the result of trickle down of gains in an unsustainable mode of production. Most of the hungry and malnourished are peasants living in rural areas and more than half of them are smallholder farmers. Nevertheless there was hardly any rights-based investment in agriculture in those regions that needed it most. Agriculture was marginalized within the development context. In many areas, investment was left to agribusiness, which meant that some areas did not get any investment at all, while others saw their agricultural system tilted towards capital-intensive agribusiness beyond the scope of capital-poor peasants. The millennium goal of halving the percentage of the hungry and malnourished by 2015 will be missed by a wide margin. Since 2008-2009 this percentage of the malnourished has started to rise again.

Today's dominant technologies are unsustainable, capital-intensive and biased against the vulnerable peasant farmer. Alternative modes of production are available providing the same yield per hectare, but peasant-friendly and sustainable (Pretty 1995 and CBTF 2008). In 2008, the International Assessment of Agricultural Knowledge, Science and Technology for Development (IAASTD) report "Agriculture at a Crossroads" alerted the international public that agriculture needs radical reform and to be oriented towards peasants and sustainability objectives, to safeguard present and future food security (IAASTD 2008).³ Peasant-oriented sustainable agriculture produces food under the control of those who need it most – the peasants. Introducing such modes of production usually multiplies yields per hectare on complex terrains by the factor two or sometimes even three. On prime soils with sufficient water, the kind of land preferred by green revolution farmers and plantation owners, peasant-oriented sustainable agriculture can reach the same yields as unsustainable industrialized agriculture.

Peasant-oriented sustainable agriculture is in need of investment. The input to improve the modes of production, however, is very little capital, but a lot of knowledge, skills and some infrastructure. Investment is necessary mainly in capacity building and training to introduce resource conserving and production enhanc-

ing technologies. Investment is necessary to build the respective enabling institutional environment for the peasant communities and their production. Where will this investment come from? States' support for peasant agriculture in the South is minimal (Mahalambe 2008).⁴ What could be the role of FDI?

The following case studies will mainly deal with foreign investment in agriculture.⁵ The conclusion will make the human rights check on these investments and provide some lessons learned.

2. FOREIGN INVESTMENT IN THE CONTEXT OF THE FOOD CRISIS, AGROFUELS: THE TANA CASES IN KENYA

In December of 2008, the Arab League invited African leaders, scholars and farmers associations to a conference in Riyadh, Saudi Arabia, to discuss the outlook for Arab investment in land and food production in Africa. The report said most of the Arab states have too little fertile land to secure their food security in coming years. The governments of a number of Arab countries are eager to buy or lease land in Africa, where land is abundant and affordable. Many African leaders see foreign investment as a motor for development, a way to ensure technology transfer and a generator of employment.

In November 2008, Kenya's president Mwai Kibaki paid a three-day official visit to the Gulf emirate of Qatar at the end of which he announced that emir Sheikh Hamad bin Khalif Al Thani had promised to invest \$3.5 billion U.S. dollars in the extension of the Lamu port in Coast Province (Daily Nation News 2008). According to Kenyan Planning Minister Wycliffe Oparanya, Qatar would finance the project "without conditionality." However, Qatar, where no more than one percent of the land is arable, had at the same time requested that the Kenyan government lease it 100,000 acres (40,469 hectares) of land in the Tana Delta for farming (Telegraph.co.uk 2008).

Since the Tana deal was reported in the Kenyan press in early December 2008, no further details have been made known. Indeed, even high-ranking public officials have no knowledge from official sources. As the deal is an agreement between two heads of state, the only obligation on the President is to inform the ministers. The law makes no provision for public discussion about the viability of the project or its social and ecological implications.

The Tana River is Kenya's largest river. Its delta on the northern coast has created one of the most fertile agricultural areas in the country. What used to be the Tana River district was divided in 2007 into the Tana River and the Tana Delta districts. Together they have a population of just over 200,000 people. The Bantu ethnic groups, Pokomo, Munyoyaya, Malakote and Mijikenda, engage in farming while the Cushites, Orma, Wardei and Somali, are mainly pastoralists. Some of the farmers also engage in small-scale fishing in the rivers and numerous ponds found in the region.

The pastoralist communities live mainly in the hinterland of the district in villages around watering points, dams, wells and boreholes where there is pasture. During the dry seasons, the pastoralists move with their cattle to the Tana River delta where they frequently get into conflict with Bantu agriculturalists. In the rainy season, they return to the hinterland with their livestock. A recent international report on the impact of pastoralism stresses the importance of pastoral lifestyle to the conservation of the environment (IUCN 2008).

Nearly all the land in the Tana River and Tana Delta districts is trust land and the overwhelming majority of the settlers do not have title deeds to their ancestral lands. This legal situation makes them vulnerable to land grabs by powerful people, who use the district administration and Ministry of Lands and Settlement to acquire title deeds for land occupied and tilled by others. As a result, the farming communities are fighting to obtain title to their land. The pastoralists, who feel their access to land to graze their cattle is more secure under a common land ownership system, oppose this struggle. The common land ownership is recognized by Kenyan law and administered as trust land.

If the project to lease land in the Tana districts goes through, around 40,000 hectares of this highly fertile land will be leased to the emirate of Qatar to provide horticultural produce for the Qataris. It has not officially been made known where in the district this acreage will be located. According to locals, the only place possible is in the middle of the delta where the river divides. Kenyan Mumias Sugar Company Ltd. has earmarked another large portion of the delta for sugarcane monoculture for the production of agrofuels, a project approved by the National Environment Management Authority (NEMA).⁶ The land belongs to the Tana and Athi River Development Authority (TARDA). Mumias, which is the largest sugar company in the country and the first to be partly privatized, is the leaseholder and will invest. Both projects

are likely to displace tens of thousands of small farmers, mainly members of the Pokomo tribe, who have settled there and survive on food crops such as maize, cassava, beans, vegetables and mango. The delta has also been used as grazing land for cattle by generations of pastoralist tribes like the Orma and the Wardei. At least 2,000 pastoralists depend on the fertile pastures during the long dry season. For them, the projects spell doom. The grazing land, community land held in trust by the county council, would be fenced off and converted into plantations. Access to the river would be blocked.

There is no law that demands that the social impact of a project be examined. But under Kenya's environmental law, any proposed law or policy is supposed to be subjected to an environmental impact assessment (EIA), which would give all concerned parties a chance to question the proposals. In the case of the Tana River delta projects, the negative aspects of the ecological impact are obvious. NEMA (National Environment Management Authority) can refuse to give permission (it has the ultimate authority before a project is given final approval). The EIA is conducted according to minimum standards laid down in the Environmental Management and Coordination Act (EMCA) of 1999. Under the law, the use of land and land-based resources should adhere to the principles of sustainability and inter-generational equity; the principle of prevention; the precautionary principle; the polluter pays principle; and, should ensure public participation in the project review (Hunter, Salzman and Zaelke 2005, 379-438). In the Tana River delta, no proper public consultation was done. However, the EIA found that the project presented no adverse impacts.

Impact on the right to food is not considered in any Kenyan law. The question of whether compensation is given to people who lose their livelihoods as a result of an investment is at the discretion of the government. The government generally does not feel obliged to give full compensation, particularly if the affected parties do not possess legal title deeds.

The FAO/IFAD/IIED report on the new wave of land lease and purchase agreements says this about the proposed project: "The Qatar-Kenya deal has drawn particular media attention as the project, implying the alienation of land and export of food crops, was revealed just as Kenya had experienced severe droughts and failed harvests, forcing the government to admit it would have to declare a national food shortage emergency" (Cotula et al. 2009).

Kenya Wetland Forum, a platform which groups more than 50 organizations, including government agencies, has launched a petition against the sugar plantations using both social and ecological concerns to express their objections. Kenyan Nobel laureate and environmentalist Wangari Maathai warned: "We cannot just start messing around with the wetland because we need biofuel and sugar" (Miriri 2008). Nature Kenya, a government agency, has filed a court injunction against the project because the ecological changes would threaten bird life in the delta. Moreover, Nature Kenya has carried out a cost-benefit analysis on the alternative development options for the Tana River delta that shows that the income generated by traditional farming, fishing and cattle grazing is almost three times higher than the potential earnings from sugar cane.⁷

3. INVESTMENT IN FOREIGN LUXURY: FORCED EVICTIONS AND CHEATING

Coffee and tobacco are two tropical products that consumers in industrialized, temperate climates have come to take for granted. Yet their production is rife with problems, as the two following examples illustrate.

3.1. PRICE COLLUSION AMONG FOREIGN INVESTORS IN MALAWI'S TOBACCO SECTOR

Tobacco is the largest foreign exchange earner in Malawi, a country with high levels of poverty and chronic food insecurity. During a right to food assessment in Malawi in 2006, foreign investors were accused of price-fixing. Farmers alleged that despite efforts by the government to set minimum prices (\$1.10 U.S. dollars per kilo), the foreign investors colluded to offer only 60 cents (USD). Tobacco is a key livelihood crop for poor farmers. The farmers' inability to get a fair market price for their crop had a specific impact on the farmers' access to adequate food not only because cash earnings were decreased but also because the investors had previously encouraged local farmers to convert food-producing land to tobacco. Malawi's president, Bingu wa Mutharika, has said that small-farmers are being cheated by an international cartel. His accusation was substantiated in two respected studies (Maeresa 2006 and Rights & Democracy 2006). No action has been taken however, and the investor home states have not taken steps to hold the companies accountable through domestic competition regulatory processes.

3.2. NEUMANN COFFEE GROUP IN MUBENDE, UGANDA

On August 18, 2001, the Government of Uganda deployed its army to move 392 peasant families (approximately 2,040 persons) by force. The peasants' houses were demolished, their properties destroyed, and staple crops such as cassava and potatoes were confiscated. The victims were pushed off to the forest nearby. Most of them received neither adequate compensation nor social assistance for the lost land. Soon after, the land was handed over by the government in lease to the Kaweri Coffee Plantation Ltd., a subsidiary of the German Neumann Kaffee Gruppe (NKG). The owner of the German company and the president of Uganda, President Museveni, were present at the ceremony marking the granting of the lease. In June 2002, the African Development Bank (ADB) approved a loan of \$2.5 million U.S. dollars to finance the plantation project. According to a press release (No. SEGL3/B/45/02) of the Bank, the project is, "in line with the Bank's vision of developing the private sector in its Regional Member Countries (RMCs), and in the context of ADB support to the agribusiness sector."

The Kaweri plantation is the first large-scale coffee plantation ever established in Uganda. Until recently, coffee has been produced exclusively by small farmers. In 2002, the plantation won the Uganda Investment Authority's (UIA) "Silver Investor Award." The plantation does in fact fit perfectly with the government's strategy to promote export oriented economic growth with the help of foreign investors.

The coffee sector is the mainstay of the formal Ugandan economy, accounting for about 70 percent of its export earnings. In 2003, the country was the seventh largest coffee exporter in the world and the biggest in Africa. Other important export products are fish, tea, cotton and tobacco. The entire agricultural sector has a share of about 46 percent of the gross national product (GNP) and feeds about 90 percent of the population, most of them through subsistence farming. Since the beginning of the 1990s the Ugandan government has pursued a strategy of economic restructuring and privatization according to the tenets of the "Washington Consensus" and in close cooperation with the International Monetary Fund and the World Bank. In 1991, the Investment Code was passed and the UIA was founded to attract foreign direct investors to the country. In 2000, the "Plan for Modernization of Agriculture" (PMA) was established as a strategy for the sector within the "Poverty Eradication Action Plan" (PEAP). It became the basis of the state's

agricultural policy. The aim of the PMA is "poverty eradication through a profitable, competitive, sustainable and dynamic agricultural and agro-industrial sector," which is to be achieved primarily through the conversion of subsistence into commercial agriculture. The government considers the Kaweri plantation to be a key project in this plan.

The displacement of the people resulted in increased cases of illnesses and deaths due to lack of access to clean water and health care. Many of the victims, now living around the edges of the plantation have had to construct makeshift homes. They have lost the land they were farming. As the new owners of the land that had belonged to over 2,000 smallholder farmers, Kaweri took over the local school building to serve as their headquarters, leaving the community's children without a school for one year. One of the evictees was put in prison for his national and international engagement for justice. The violation of the victims' right to feed themselves is still not remedied due to Uganda's refusal to properly rehabilitate and compensate the disposed peasant families. To gain redress for their grievances, the victims first addressed authorities and politicians, but when that failed, they decided in the summer of 2002 to sue the government as well as Kaweri. While the activities in hearing the case were very slow, the court ruled in favor of an application by Kaweri's attorneys demanding a cautionary deposit of the equivalent of € 9,000 Euros from the claimants. By 2009 the case was still pending. Neither Kaweri nor the Neumann group ever addressed the situation of the victims.

4. SUBSIDISING FOREIGN INVESTMENT THROUGH "ECONOMIC ZONES": THE LEKKI CASE IN NIGERIA

During a prestigious ceremony on Thursday, May 11, 2006, the Executive Governor of Lagos State, Asiqaju Bola Ahmed Tinubu, announced the plan to compulsorily acquire the lands and coastal areas of communities living in the Nigerian Lekki peninsula, for the purpose of establishing the Lekki Free Trade Zone (LFTZ). The project, a \$260 million (U.S. dollars) joint venture⁸ between the Lagos state government and a consortium of Chinese businessmen, was designed to stimulate economic development in the country. The government claimed the project would, amongst other benefits, create many jobs for the unemployed in the affected communities, improve local people's living standards and promote local business. Members of the communities would receive appropriate benefits and advantages upon the imple-

mentation of the project. Those with genuine claims that the project would hurt their economic interests were promised reasonable compensation.

The lack of clear and detailed information on the intent and purpose of the project, however, as well as the failure to include the affected communities in the planning process, triggered fear, mistrust and resistance. Nigeria's history of compulsory acquisition of lands and forced evictions by the government reinforced the concern that thousands of people would be removed from their ancestral homes without compensation, resettlement, restitution or rehabilitation. The communities that would be adversely affected included Tiye, Imobido, Lege, Idasho, Imagbon-Segun, Itoke, Idotun, Lujagba, Elekuru, Olomowewe, Okunraye, Origanringan, Okegelu, Ikegun, Abejoye, Mudano, Eto, Idafa, and Ebute-Kosu. Jointly, these communities risked losing over 16,000 hectares of land, including their homes, ancestral villages, cultural and burial grounds, farmlands, and access to fishing resources (SERAC 2009).

In the same month that the project was announced, nine of the affected communities⁹ approached the Social and Economic Action Center (SERAC) for aid. SERAC is a Nigerian human rights group headquartered in Lagos, who had worked on the Ogoni case among others. SERAC took up the task of organizing advocacy and campaigning at the local and international level to ensure that the LFTZ project would be carried out in accordance with due process of law and respect for the human rights of the affected communities. Also, SERAC initiated and facilitated consultations and dialogue with the affected communities, the Lagos state government and the LFTZ project officials. These efforts ultimately led to the successful conclusion of a Memorandum of Understanding (MoU). The MoU ensures that the rights, interests and welfare of the members of the affected villages and communities are protected, and that the LFTZ project complies with the relevant national and international legal standards. The memorandum was signed on Tuesday, March 27, 2007, by the Lagos state government, the Ibeju Lekki Local Government Council, Lekki Worldwide Investment Limited (LWIL), and the accredited representatives of the villages and communities affected by the LFTZ project.

This positive outcome has unfortunately been tempered by the investors' failure to comply with aspects of the MoU. In a meeting in June 2009, the nine affected communities voiced their concerns about the investors' failure to implement a number of clauses in the MoU.

Members of the community have since started partially disrupting implementation of the project by denying the project companies access to the community lands.

5. FOREIGN INVESTMENT AND THE BITS: THE PALMITAL AND SAWHOYAMAXA CASES, PARAGUAY

Foreign investors sometimes claim to offer win-win situations. They seem to suggest that governments have nothing to lose by giving the project a go – that proper human rights monitoring will be enough to prevent violations. Yet it is hard to undo damage once it's done and even once harm is acknowledged, foreign investors can be hard to get rid of. Most of the estimated 3,500 bilateral investment treaties (BITs) that were negotiated and signed in the last 20 years protect the foreign investor much more than the people in the country receiving the investment, or their government. BITs often give foreign investors the right to sue the government before investment arbitration tribunals – many of them secret (Peterson 2009) – should the host government try to interfere with their investment (Anderson and Grusky 2007). Some governments don't even try. BITs hardly ever refer to human rights. The "public interest clause" they normally contain is often disputed if a legal complaint is lodged.

The following two case examples from Paraguay never reached the stage of investor arbitration. They illustrate how the mere existence of Paraguay's BIT with Germany had a chilling effect on agrarian reform (in the Palmital case) and on the implementation of indigenous peoples' rights (in the case of Sawhoyamaxa).

5.1. THE PALMITAL CASE

The population of Paraguay is 47 percent rural. According to the national census of 2002, 48 percent of the population is without food security, and according to the data of Economic Commission for Latin America and the Caribbean (CEPAL) (2004), 50 percent of the rural population lives below the poverty line. An estimated 14 percent of the total population is undernourished (FAO 2004). The main reason for undernourishment in the rural areas is landlessness. Land holdings in Paraguay are profoundly unequal. On the one hand, most peasants and agricultural workers face hunger and malnutrition and have no land of their own. On the other, there is a tiny class of landowners, many of whom bought the land for speculative interests (hoping the value will rise) and who do not even farm it.

Palmital (also known as *Compañía 7 de Agosto*) is located in the district of Carlos Antonio Lopez, in the Department of Itapúa. It is a settlement, home to 120 landless families. More than 10 years ago, these families occupied an estate that had been left idle. They now have their fields, houses and animals on this occupied land. The estate covers 1,003 hectares and is owned by several Germans who live in Germany and have not made any improvements on the land for more than 10 years. The landless peasants of Palmital applied under the agrarian reform provisions of Paraguay for a transfer of title to their names. The law requires that the land be sold by the owners or (if the owners refuse to sell) gives the government the right to expropriate the land. The government of Paraguay refused to expropriate the land on the grounds that the Bilateral Investment Treaty (BIT) between Paraguay and Germany of 1993 prohibits the expropriation of rural property belonging to German citizens and companies under article 4 of the treaty. In 2000, the German Embassy in Paraguay intervened, sending a letter about another case that involved German landowners to the Paraguayan government. The letter said expropriating the German-owned land would violate the BIT.

Once the expropriation was refused, the police violently expelled the Palmital families from their settlement three times, burned down their farms and destroyed their fields. The leaders of the peasants were imprisoned. For several months the entire community (men, women and children) lived without a roof over their heads and without secure access to food. Faced with hunger, disease and homelessness elsewhere, the families always returned to the estate. Eventually, an out of court settlement between the peasants, the owners and the state of Paraguay was reached, allowing the families to return and stay on the land; other similar cases, however, continue. Each time, the Paraguayan Senate has sought to block demands for expropriation if German investors are involved, citing the BIT has their legal obligation.

5.2. THE CASE OF THE SAWHOYAMAXA

Another case that exemplifies how a BIT impeded a land transfer, called for on the basis of social legislation passed in Paraguay, is the case of Sawhoymaxaxa. Sawhoymaxaxa is a settlement of 100 indigenous families who have traditionally inhabited the eastern edge of the Chaco region (called “*el Chaco Paraguayo*” in Spanish). Since the land has been in private hands, significant areas have been deforested and turned into

grazing pastures. By the mid-1970s, the members of the Sawhoymaxaxa community were scattered over several settlements in diverse smallholdings, without assured income or means of subsistence. In 1991, the community initiated procedures to gain legal title to a portion of their traditional lands. The land in question (some 14,404 hectares) is part of an estate titled to a German citizen who owns 60,000 hectares in the area. In 1997, the community set up a camp in front of the land they were claiming at the side of the road.

In 2001, after exhausting Paraguayan legal remedies, the community turned to the Inter-American Human Rights Commission, which forwarded the case to the Inter-American court in February 2005. In the meantime, on February 10, 2003, the Paraguayan authorities acknowledged the legitimacy of the people’s claim to Sawhoymaxaxa. But they reported that their attempt to buy the land from the German owner so as to return it to the community was refused, and that the authorities would have difficulties expropriating the land, as the bilateral investment treaty between Paraguay and Germany protected the owner’s rights. By 2006, the camp was made up of 407 people living in 83 huts in conditions of extreme poverty. On March 29, 2006, the Inter-American Court on Human Rights issued a judgment in favor of the indigenous community. Moreover, the court found the State of Paraguay guilty of neglect and responsible for the deaths of 18 children from the community. The court ordered the return of the lands to the people of Sawhoymaxaxa within a period of three years. In the meantime, the government of Paraguay was to provide food, water, health care and other basic services to the community. The court said in its ruling that a BIT does not release a state from its human rights obligations, which the court claimed created a special class of inviolable obligations.

After three years, however, at end of March 2009, the land was still not handed over despite the court ruling. Nor had the government fully complied with the provisions for providing interim care, and the deaths continue (to date 13 in total), caused by diseases related to lack of basic services.

In 2006, 2007 and again in 2008, German NGOs and representatives from Palmital and from the Sawhoymaxaxa community met with officials from German ministries for foreign affairs (AA), economy (BMWI) and for development cooperation (BMZ). The objective of these talks was to persuade the German government to implement its extra-territorial obligation (ETO) to co-operate with the government of Paraguay in the fulfillment of the hu-

man right to food and in particular the right of the communities to feed themselves. The ETO obligations would, at a minimum, require the German government to overrule the letter sent by the German Embassy in Paraguay in 2000, which claimed that expropriation of land owned by German citizens would contravene the provisions of the BIT. In fact, the BIT should have respected the existing domestic legislation that allowed for such expropriations. Even though the German government finally recognized that the BIT should not be interpreted as an obstacle for the land reform based on the Paraguayan constitution, it refused to provide a written statement to this effect, claiming that “investors may get scared” and that “compensation for expropriations in Paraguay is not adequate.” The government effectively refused to acknowledge its extra-territorial obligations.

6. CONCLUSION: HUMAN RIGHTS ANALYSIS OF THE CASES PRESENTED, AND LESSONS LEARNED

A human rights lens looks at purported human rights violations at two levels: the systemic (What laws and institutions are in place? How well do they work?), and the specific. In the case of the right to food, the specific often translates into people’s access to the resources they need to grow food, especially land and water.

The implementation of human rights requires that those who work for the government understand their obligations. In the cases discussed above, the home states of the investors (Germany, Qatar and China) displayed an alarming level of indifference to their extra-territorial obligations.

The two Paraguayan cases show how difficult it is to implement the safeguard clause in a BIT, which should in theory safeguard the policy space of states to meet their obligations to fulfill human rights if there is a conflict with the investors’ rights under the investment treaty. This experience is not unusual (Yu and Marshall 2008). Some of the recipient governments involved appear not to question the assertion that FDI is essentially beneficial to all parties concerned.

The micro level failures to respect, protect and fulfill human rights point to the need for systemic change. The definition of rights-based investment offered above, in section one, comes close to what IAASTD and many others have identified as an urgent need. The first step in this direction is for governments to start applying human rights checks to their investment policies and to each

major investment project, whether private or public. For too long, FDI has been promoted as inherently a good thing, a sign of “global economic integration” that improves welfare. A rights-based approach is a reminder that states have an obligation to regulate investment. There is no neutral investment. Investment can create or foreclose options that affect people’s ability to feed themselves and their families, now and in the future.

There is need for profound change. Economic models that unquestioningly promote FDI should not be allowed to survive the crises they have generated. Governments need to take a fresh look at economics in general and at agriculture in particular. It will not be sufficient to just make a few concessions to development and environment, and then to proceed to smooth global investment in agriculture as recently pronounced at the G-8 summit in Italy (Reuters 2009).

The change implied is fundamental. It will require the support of social movements, civil societies and communities. It will take courage to put human rights law before commercial law. In particular states should:

- Assert the primacy of human rights law in the context of each investment treaty;
- Reject the emergence of a system of investment law in parallel with other obligations (Peterson 2009, Anderson and Grusky 2007);
- Insist that alleged breaches of investment treaties be settled publicly in international courts and in secrecy behind closed doors;
- Insist that the domestic legal system is exhausted before disputes are treated before international tribunals;
- Renegotiate or reject current investment treaties;
- Insist all new investment treaties conform to the human rights criteria outlined in section 1 above.

Respect for human rights does not preclude private profit. It simply asserts the primacy of human rights: the human right to adequate and appropriate food for all is the overriding obligation and objective.

¹ The term “human rights check” underlines the fact that the investment could also be ruled out as a result of such a check. A human rights check includes a human rights impact assessment .

² Ziegler, J. 2005. The Right to Food. Report of the Special Rapporteur. E/CN.4/2005/47. UN ECOSOC. January 24. www.righttofood.org

³ IAASTD, the "International Assessment of Agricultural Knowledge, Science and Technology for Development" was set up in 2002 by the World Bank and the FAO. The report mentioned was elaborated by hundreds of scientists over three years, and in 2008 approved by 58 governments.

⁴ States overall state expenditure in agriculture as percentage of GDP was in 2004 for Kenya 3.6, Malawi 5.9, Mozambique 4.2, Nigeria 1.1, Uganda 3.5.

⁵ Foreign direct investments in mining or petroleum affect the right to food as well, as can be seen by the numerous mining cases worked by FIAN International (www.fian.org).

⁶ Flourishing wetland sacrificed for sugar and biofuels, Tana Delta Statement by Paul Matiku, given at a press conference on 25th June 2008, http://www.tanariverdelta.org/tana/press/articles/paul_matiku.html

⁷ Ralf Leonhard, Report of a fact finding mission to Kenya (Interview on May 13th, 2009) FIAN International, to appear

⁸ The Chinese company Beyond International Investment and Development Company Limited (CCECC) holds 60 % of the shares. CCECC is a joint venture by and amongst 4 shareholders, i. e., Nanjing Be-yond Investment Ltd., Jjiangning Economic & Technical Development Corp., China Civil Engineering Construction Corp. and China Railway Construction Corp. The latter two are state-owned. Nigeria's Lekki Worldwide Investment Limited (LWIL) holds the remaining 40 % of the shares. LWIL is a private company incorporated in March 2006 to promote and manage the development of the LFRZ.

⁹ The Idasho, Idotun, Ilege, Imobido, Itoke, Okunraiye, Ilekur, Tiye, and Imagbon-Segun.

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Alexandra Spielfoch

V. WOMEN AT THE CENTER OF THE GLOBAL FOOD CHALLENGE

The accounts of the global food crisis continue to trickle in. The overall picture is grim: achievements toward ending hunger and poverty are slow, stagnant or even being reversed. The FAO writes in its report, *The State of Food Insecurity in the World 2008*, that progress to eradicate hunger has been reversed amid the high food prices and in this period the poor have been hardest hit (FAO 2008, 8). The policies in place are simply not working to protect the most vulnerable populations. News coverage includes images that seem hardly imaginable: people eating mud biscuits in Haiti, women and children being shot by warlords in Somalia as they run to get their food aid rations, women and girls being raped multiple times while en route for food, water and fuel in conflict zones. According to the UN High Level Task Force on the Food Crisis, “the world food situation is rapidly being redefined [...] unprecedented increases in the price of food and overall import bills for the poorest countries, coupled with diminishing food stocks and difficulties accessing food by some communities, has created a host of humanitarian, socio-economic, developmental, political and security-related challenges” (HLTF 2008).

It is women and children who bear the brunt of the crisis. Women and children are disproportionately represented among the poorest in all societies. They are not only at risk because of decreased revenue and diminished food supply, they are also at higher risk from sexual violence and in relation to displacement, among other things. Policymakers have much more to do to address the complexity of this crisis from a gender perspective.¹

Even as governments and international institutions recognize the impact of the food crisis on women, there is still little substantive analysis of why they are at particular risk and even less attention to what can be done about it. Incorporating gender often gets reduced to a conversation about safety nets rather than better rules. While safety nets really matter, the policy dialogue cannot stop here. More radical and sustainable solutions are needed – not only for women but for everyone. Official responses should be building on the existing leadership of women to break out of crisis mode.

This paper makes three points that contribute to the understanding of what has failed and makes proposals for the direction that food and agricultural policies might take from a right-to-food and gender-aware perspective.

The first is that the global food crisis and the long-term decline in agriculture over the last thirty years have worsened the situation for women producers and

food providers globally. While many women have been able to benefit from global markets, too many are left out and/or are hindered from being able to fully benefit due to their social status and unfair rules. Second, governments and institutions must prioritize gender in responding to the food crisis. Clearly, the time is ripe for leaders to increase funding and also to adopt a rights-based approach to food and agriculture that is committed to the empowerment of women. Third, women need the information and space to be able to participate in the formation, and lead in the implementation, of policy directives. Their knowledge and their presence are invaluable. This section offers some examples of successful projects spearheaded by women and recommendations as to what kinds of policy approaches can help to respond to the global food challenge from a gender perspective.

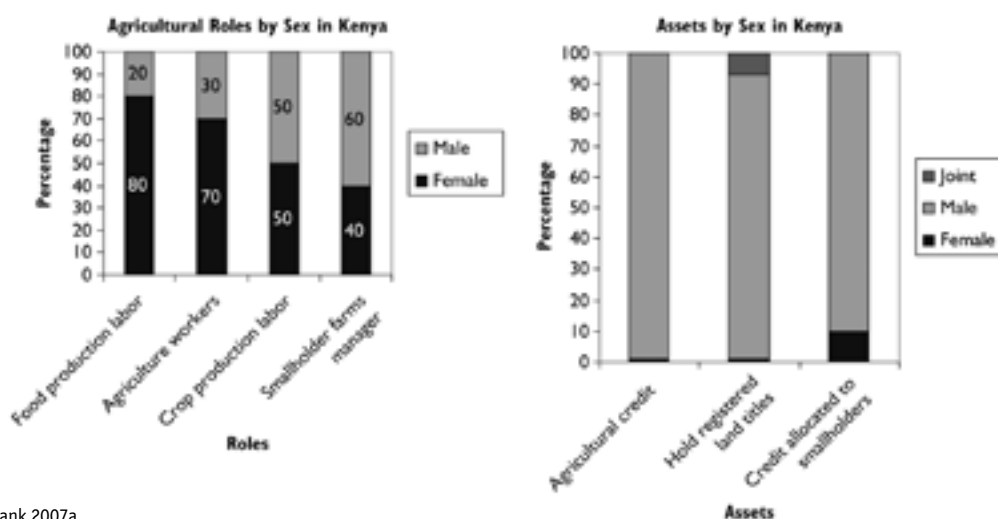
1. GLOBAL FOOD CRISIS – HURTING WOMEN DISPROPORTIONATELY

For women, the crisis compounds existing problems that are characterized by their social status and unrealized rights, particularly in agriculture. In times of crisis, they are exposed to more risk (UN 2008). Unfortunately, there is little gender-disaggregated data or media coverage of what women are experiencing. Yet Isatou Jallow, head of the World Food Programme's gender unit, reports that women are shouldering the heaviest burden in the food crisis as the chief food providers (WFP 2009).

In most developing countries, women are the main food providers and those who take the responsibility for the care of their families in both the rural and urban sectors. In this crisis, they are experiencing increased hunger and other heightened problems such as lack of shelter, medical care and access to other basic needs. They are pushed to the limit.

As the majority of the world's food producers, their struggle is immense (ILO 2009, 10). The FAO reports that the percentage of women active in agriculture is between 60 and 80 percent in the Least Developed Countries (LDCs) in Asia and Sub-Saharan Africa. Often referred to as the "feminization of agriculture," the number of women in agriculture has been growing in developing countries.² Eighty-five percent of farms that provide agricultural value-added crops to the global market are no more than two hectares and the majority of these are run, though not usually owned, by women (Spielfeld 2006) who lack access to land, water and other resources. Other women work as waged laborers. Often these jobs are temporary, low-paid, demand long hours and are not secure. In some cases, their work on the farm or in processing can last as long as 12 to 18 hours a day as is the case in asparagus production in Peru (Ferm 2008). Women workers are often subject to violence and sexual abuse. Historically, women have had more difficulty than men in getting loans, training and access to markets. The graphs below highlight the type of women's employment in agriculture in Kenya and their lack of access to resources and credit.

ROLES AND ACCESS TO ASSETS BY WOMEN AND MEN IN THE AGRICULTURE SECTOR



Source: World Bank 2007a

Existing discrimination against women is exacerbated by the global financial crisis. In many areas the crisis has diminished the already low levels of available capital and the number of women-headed households is growing as men migrate from their rural communities to seek employment in urban centers. Even when they run the household, women are left with the responsibility but not the power to improve their lot. One major hurdle for them is that they do not have formal land rights. This is a serious problem in Africa, one that has proven difficult to reverse due to entrenched discrimination. Women generally have customary rights to land but seldom have formal legal rights and, therefore, no legal recourse when land is taken from them. Because they do not own their land, they have more difficulty obtaining resources or collateral to use as credit to grow their food. This dynamic contributes to the fact that the number of women working in the informal sector is growing. The fact that women do not have land rights means that they end up living on the margins (Kimani 2008, 10). Lack of land title is one of the most pressing issues of the food crisis and one of the biggest barriers for women in this food crisis.

Droughts and floods are negatively affecting food production in different parts of the world and are expected to get worse. The IPCC predicts that agricultural yields could be decreased by 50 percent in Sub-Saharan Africa by 2020 as a result of climate change (IPCC 2007). The UN reports that climate change has a disproportionate impact on women and children in West Africa (Shryock 2009). Women producers are more at risk for a variety of reasons. They bear the cost when weather ruins their crops. They must walk longer distances for water and firewood in times of drought. When they lose their crops, they lose income and often their children must abandon school to help out bring in money. Poverty and hunger decreases their long-term potential.

Agricultural research and development as well as extension programs have reinforced a male bias toward agricultural production (which also dates back to the colonial period), marginalizing women's approaches to farming. "Private sector research concentrates on internationally trade crops, but women tend to farm locally important crops such as sorghum, millet, and leafy vegetables" (Farnsworth and Hutchings 2009). Technological inputs have tended toward mechanized production and high-yielding results while marginalizing women's knowledge of production methods and biodiversity. As governments prioritize solutions to the food crisis, women's knowledge of food production and biodiversity is hardly visible.

2. FOCUSING ON GENDER

The international community has indicated that women's needs must be prioritized in order to resolve the food crisis. The FAO Secretariat writes, "to ensure sustainable global food security and promote sustainable management of water, forest and other natural resources, there should be special focus on small farmers, women and families and their access to land, water, inputs and financial services including microfinance and market" (FAO 2009). The World Bank increased its gender lending for agriculture and rural development, economic policy, private sector development and infrastructure – up from 25 percent to 34 percent from 2007-2008 (World Bank 2009). The Bill and Melinda Gates Foundation has developed a Gender Impact Strategy for Agricultural Development that would "mainstream gender into its income-generating activities, increase the quantity and quality of food, highlight gender dynamics in communities and ensure that gender becomes a high investment priority in agriculture" (Bill and Melinda Gates Foundation 2008). The EU and the U.S. have promised more aid for women in agriculture as part of their lending to developing countries.

When developing viable policy options, donors and policymakers need to assess the degree to which investment and trade will have a positive impact on growth and employment for women. They also need to understand where women fit into market practices and decisions. Unfortunately, a lack of available gender-disaggregated data means that women's contribution to agriculture is still poorly understood and this continues to be a major challenge.

Some believe women's empowerment will come from inserting them into global supply chains. For example, the World Bank is supportive of this approach. The notion is that if investors can secure a sound business environment, then they can help develop the capacity small-scale producers to be able to sell their goods to markets, contributing at different points in the chain of production while also contributing to the expansion of global food trade. The difficulty for women in this context is that it is unlikely that they are negotiating the terms of their role in the supply chain. Moreover, if the bottom line is about making more money and one of the simplest ways to do that is to squeeze small producers by not paying a fair price or engaging in unfair labor practices, it is unclear how female small producers would stand to gain.

This approach also has serious limitations in terms of incorporating those aspects of women's work that are underpaid and unaccounted for – in particular, their work as care

providers and the need for comprehensive approaches that are both quantitative and qualitative in nature. Of course, women producers need market access and the necessary resources to be able to participate in production that is sustainable and culturally appropriate. More importantly, they need land rights, information and a central role in the decision-making that affects their lives. Other needs include but are not limited to: affordable, accessible health-care and childcare; education; and freedom from sexual discrimination.

Mainstreaming gender into an already patriarchal system of production cannot be the solution. Women have rights. Adopting a rights-based approach is the appropriate way to rethink policies so that they eradicate hunger and poverty and adequately address gender in the process.

3. CONSIDERING A RIGHTS-BASED APPROACH

It is not easy to frame economic policies within a human rights framework. First, governments have favored economic policies over human rights law by establishing rules such as the dispute settlement body at the WTO and the investor to state provision in bilateral investment treaties. Second, human rights law and its interpretations do not specify the measures for implementation (Bill and Melinda Gates Foundation 2008). Governments are free to choose their economic policy, so long as it is supportive of positive outcomes for human rights. Third, many human rights abuses stem from transnational processes that favor corporate rights over national sovereignty and undermine governments' responsibility and capacity.

Nonetheless, human rights law and its implementation should frame policies being reviewed and developed for some of these reasons:

- 1) human rights are universal, indivisible and interdependent;
- 2) they are legally binding;
- 3) they emphasize equality and non-discrimination, with particular attention given to the most vulnerable;
- 4) they are based on participation, accountability and transparency; and
- 5) they are linked with international and extra-territorial obligations (Smaller and Murphy 2008).

The UN Human Rights Declaration³ is groundbreaking, but is not ratified by member states. In this sense, the International Covenant on Economic, Social and Cultural

Rights has a more legal standing in that 160 states have ratified this Covenant to date (although a number of countries have expressed reservations or different interpretations of its contents).

The ICESCR's Article 11 specifies that everyone has the fundamental right to be free from hunger. This includes improving methods of production, conservation and distribution of food as well as ensuring equitable distribution of food in relation to need.

General Comment 12 is generally considered to be the authoritative interpretation of the right to food, but not all member governments accept it. In it, the Committee on Economic, Social and Cultural Rights (CESCR) stresses the importance of guaranteeing full and equal access to economic resources, particularly for women, including the right to inheritance and ownership of land and other property, credit, natural resources and appropriate technology; measures to respect and protect self-employment and work which provides a remuneration ensuring a decent living for wage earners and their families."⁴ Recognizing that land rights and access to resources and decent wages are major barriers for women, this language supports a more equitable distribution of resources.

It also says, "The core content of the right to adequate food implies: the availability of food in a quantity and the quality sufficient to satisfy the dietary needs of individuals free from adverse substances and acceptable within a given culture; the accessibility of such food in ways that are sustainable and that do not intervene with the enjoyment of other human rights."⁵ Cultural appropriateness and nutritious value of food cannot be delinked from women's knowledge as the providers of food.

Lastly, it says, "Fundamentally, the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food, inter alia because of poverty, by large segments of the world's population." While the G-8, the World Bank and private sector actors are proposing to increase food supply, the essential problem is related to poverty and access. These have worsened during this crisis, particularly for women.

The Convention on the Rights of the Child requires countries to recognize the rights of children to the highest attainable standard of health, including the provision of nutritious food. With the numbers of those hungry and with health problems growing the most rapidly among children, it is essential that they be safeguarded. As of December

2008, every country of the United Nations had ratified it except the U.S. and Somalia.

The Declaration on the Protection of Women and Children in Emergency and Armed Conflicts says, “women and children belonging to the civilian population and finding themselves in circumstances of emergency and armed conflict [...] shall not be deprived of shelter, food, medical aid, or other inalienable rights [...]”⁶ Because women are so particularly vulnerable to violent crimes in this food crisis, governments and institutions must ensure their protection and that of their children.

The International Covenant on Civil and Political Rights says, “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas.” In most societies, women more than men are left out of decision-making and/or their concerns are not fully taken into consideration. The discrimination ranges from discrimination in the provision of education (to block girls’ access to schools), denial of women’s right to vote or otherwise participate in public life. The International Covenant on Civil and Political Rights has been signed by 174 states; all but 8 of them have ratified the treaty.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) calls on governments to pay special attention to rural women’s needs, to eliminate discrimination in rural areas, and to provide access for women to health, social security, training and education, loans, technology, water, adequate living conditions, sanitation, housing, supply and transport.⁷ This language is important. However it is weak. Moreover, there is no reference to women’s right to food in CEDAW. Over ninety per cent of UN members are party to the convention.

The Beijing Platform for Action (BPFA) requires governments to ensure that trade would not have an adverse impact on women’s economic activities (both new and traditional), to make legislative reforms to give women equal rights to economic resources, to measure unpaid work on family farms, and to recognize women’s role in food security and as producers and to support indigenous women and traditional knowledge.⁸ As with CEDAW, the BPFA’s language on the global economy is weak, equally so with regard to global food and agricultural markets.

Human rights language could guide policy reform of food and agriculture from a gender perspective. Yet existing language is not strong enough and women’s rights advocates have been not been central players in the international

debates around food and agricultural policy directions. As the FAO writes, “a lack of clarity remains with regard to the understanding of women’s rights and especially women’s right to food” (Rae 2008). This needs to be reversed.

4. ENGAGING WOMEN, CONSCIOUSLY SUPPORTING WOMEN’S RIGHTS

New directions for food and agriculture must support the right to food and women’s rights. This is a challenge for all the known reasons: lack of political will, lack of support for the right to food, limited knowledge about what gender means, lack of data, diminished resources, women’s limited political voice, etc. At the very least, women should be in charge of developing and promoting programs that affect their lives.

The Gender in Agriculture Sourcebook (World Bank, IFAD and FAO 2009) published by the World Bank, IFAD and the FAO provides some examples of some successful projects that are useful for understanding what is needed in terms of hands-on approaches that also build on women’s knowledge and leadership. Out of many provided, here are a few:

Credit – “A project in Niger (Project de Promotion de L’Utilization des Intrants Agricoles par les Organisations Paysannes) introduced an inventory credit approach that enables women and men to store their harvest in a warehouse until prices rise. The warehoused crops act as a guarantee, allowing farmers to access financial resources before their annual production is sold, or even without selling it. In this project, household well-being has improved in terms of the quantity of food consumption. The project has particularly benefited middle-aged women as social norms prevent younger women from engaging in activities that require movement within or outside the village.” (Box 5.6)

Self-Help Groups (SHGs) – In India the IFAD’s North Eastern Region Community Resource Management Project for Upland Areas have used SHGs to achieve a wide array of benefits. Women members make weekly savings used for income earning, health, and education needs of the village. The group acquired a rice and maize de-husking mill to save labor and effort on the part of villagers who had to travel long distances for this. Additionally, the group has revived the local market in Nonglang, which previously opened once a week. Now it opens daily, making the procurement of food and other items much easier for all in the village. (Box 15.5)

Homestead production – In the Sauria region of Bangladesh, credit and training were provided for women to grow vegetables on small plots on or near their household compounds. Because the vegetables were cultivated on homestead land, it was easier for landless and land-poor households to participate, and their vegetable consumption increased. Women could coordinate vegetable cultivation relatively easily and flexibly with their many other household tasks and without risking the harassment and loss of reputation they would suffer from working outside it. (Box 12.8)

Rural Infrastructure – The Bangladesh Second Rural Roads and Market Project (1996 2003) provided women the opportunity to access labor, product, and financial markets for their own economic empowerment. A social and gender assessment revealed a demand for mechanisms to provide women access to labor and product markets, equal wages, participation, and decision making. In response, the project reserved 30 percent of the road construction jobs, 30 percent of the market management committee positions, 30 percent of the shops, and 100 percent of the tree plantation and maintenance work for women. The project also facilitated the formation of women's contracting societies, traders' associations, self-help groups with savings and revolving loan funds, and microenterprises for road rehabilitation. Gender was also mainstreamed in the government agency to ensure sustainability after the completion of the project and to scale up the approach in other sectors, such as water management, urban development, and flood protection. There was a 50 percent increase in women's employment and equal wages. Girls' and boys' enrollment in schools has increased dramatically as well. (Box 9.3)

In terms of legal approaches to realize the right to food, there are other important approaches. Perhaps the most important are the FAO Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food, which were adopted in 2004 (FAO 2005). These guidelines provide more of a basis for countries meet their right to food obligations. They can do so by creating and implementing domestic laws to protect the most vulnerable: women, children and indigenous communities, landless, smallholder producers and waged workers in the food system. Examples include land redistribution laws and entitlement programs such as joint adjudication of land in Latin American countries and affirmative action targeting women landowners in South Africa (FIAN International 2002). As well, countries would need to challenge patriarchal practices that discriminate against women having control over resources.

Countries should also review and revise international trade and investment rules based on whether they contribute or hinder the realization of the right to food from a gender perspective. Women's groups could be part of monitoring country-level progress and proposing policy solutions. For example, women small-scale producers, including indigenous women, consumer rights advocates, economists and legislators need to be brought into these international debates (their current absence is noted) and become agents in the restructuring process.

In late 2008, the UN General Assembly adopted the optional protocol to the ICESCR. It now needs to be ratified by governments. It essentially creates an international mechanism for filing complaints with regards to right to food violations. It could also be a means of recourse for women who are marginalized and are experiencing discrimination in the food system.

5. GENDER AND GLOBAL GOVERNANCE

The UN Special Rapporteur on the right to food, Olivier de Schutter, supports using the Right to Food as a compass to reform international responses to the food crisis.⁹ He recommends actions that are helpful and that could be defined and promoted by women leaders.

One is to tackle volatility in international agricultural markets by measures such as establishing food reserves. While much still needs to be sorted out regarding the nature of reserves that are developed, including the level at which they should operate and the best means for their implementation, they are important for stabilizing price fluctuations in markets and for promoting food security. Volatile markets and food insecurity have been crippling for importing countries. Establishing reserves is an important pillar of reform and should be supported as one tool to regulate markets that could also support women's rights. Reserves could replace inappropriate food aid programs that have contributed to dumping and have undermined small-scale farmers. A fair return to farmers for their produce would lift women producers out of poverty and contribute to food security.

Another is for countries to build and implement social protection schemes for the most vulnerable. Of course, this area is one where women's concerns tend to have priority, and not without reason. As the providers of social services, even more so in times of crisis, women need the proper support from their governments and international institutions to design and implement needed programs that will

ensure access and distribution of food as well as other basic needs. To be clear, social protections are not just about need. They are basic human rights.

If the food crisis has taught the world community something, it is that things can no longer be business as usual. Macroeconomic policy should support a variety of measures that will help to achieve the right to food. These include, but are not limited to, tariffs and measures to block import dumping, reserves, commodity exchange regulations, and extraterritorial obligations on all states to regulate external activities of transnational corporations such as do no harm policies and mandatory codes of conduct for international investment.

Finally, stronger and more effective institutions should be working together to support a model for food and agriculture that strengthens human rights. A strengthened UN working with other institutions, governments and civil society is best equipped to lead global governance reform in food and agriculture in support of women's rights.

6. CONCLUSION

It is to be hoped that what emerges out of this crisis is overarching reform that builds on the positive role of women in food and agriculture but also builds on their struggles to realize their human rights. It is an obvious, common sense response to the global food challenge. Without doubt, women's rights must be the center of any long-lasting reform.

¹ A gender analysis is not just about women but focuses on the social, cultural, economic and political structures that are shaped by different roles played by women and men in the family and the community. Because of the particular challenges that women face due to their social status, the analysis in this paper focuses on women more particularly.

² Gender and Food Security. FAO <http://www.fao.org/Gender/en/agri-e.htm>

³ Note: This list is not exhaustive.

⁴ General Comment 12 on the Right to Adequate Food. <http://www.unhcr.ch/tbs/doc.nsf/0/3d02758c707031d58025677f003b73b9>

⁵ Ibid.

⁶ <http://www2.ohchr.org/english/law/pdf/protectionwomen.pdf>

⁷ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), United Nations, 1979. <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>

⁸ Beijing Platform for Action. "Women and Poverty" chapter from Beijing Platform for Action, United Nations Division on the Advancement of Women (DAW), 1995.

⁹ Webpress.com blog. The Food Crisis Is Not Over Our Obligations Go Beyond Fixing the Financial System. Posted June 30, 2009.

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C. NEW CHALLENGES AND THREATS

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VI. The Role of Speculation in the 2008 Food Price Bubble

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Climate change, food security and the right to food

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VI. THE ROLE OF SPECULATION IN THE 2008 FOOD PRICE BUBBLE

"Speculators create the bubble which lies above everything. They increase prices with their expectations, with their bets on the future, and their activities distort prices, especially in the commodities sector. And that is just like secretly hoarding food during a hunger crisis in order to make profits from increasing prices."

George Soros

1. INTRODUCTION

"Hunger revolt in Haiti!" "Bread rebellion in Cameroon!" These and similar headlines shook the media in the spring of 2008. What happened? The food prices increased drastically worldwide (see Figure 1). The FAO food price index, which covers the prices of the most important food commodities, showed a price increase of 71 percent during the 15 months between the end of 2006 and March 2008. The increase was particularly dramatic for rice and cereals: prices hit a peak of 126 percent over 2006 in the same 15-month period.

The poor are affected the most. In an industrial country, the proportion of expenditure for food in a typical household budget amounts between 10 and 20 percent, whereas it is between 60 and 80 percent in the low-income countries (FAO 2008). According to a U.S. Department of Agriculture calculation, a 50 percent price increase on basic food leads to a mere 6 percent rise in expenditure for a high-income country, but it amounts to 21 percent for a low-income, food-importing country (USDA 2008, 25).

Apart from the misery they cause to individuals, food price increases also have negative macroeconomic effects, particularly for the balance of payments in food importing countries. The FAO estimates that food costs of the LDCs in 2008 have increased by 37 to 40 percent, after having risen by 30 to 37 percent in 2007. This trend will persist in 2009: "An analysis of domestic food prices for 58 developing countries shows that in around 80 percent of the cases food prices are higher than 12 months ago, and in around 40 percent higher than three months ago. In 17 percent of the cases, the latest price quotations are the highest on record." (FAO 2009) The danger of debt is also increased again. Additionally, the increases in food prices stimulate inflation. According to UN estimates, the rise in food prices accounts for be-

tween one-third to more than half of the nominal rate of inflation in developing countries, particularly in Asia.

Behind the macroeconomic indicators there is a horrible human tragedy. The price excesses are a threat to millions of human lives. They undermine the basic human right to freedom from hunger and malnutrition. As a result of the food price crisis and the global economic crash, the number of people threatened by hunger has reached more than one billion. In 1990 the figure was 822 million. According to the Millennium Development Goals (MDGs), the figure should go down to 412 million by 2015. Everyone who is dealing seriously with this issue knows this target will not be reached.

But there are also those who profit from this misery. Thus, in May 2008, one could read the following advertisement on the bread roll bags of Frankfurt bakers: "Are you happy with increasing prices? The whole world is talking about resources – the Agriculture Euro Fund offers you the possibility of participating in the growth of seven of the most important agricultural commodities." The offer was made by the Deutsche Bank in an effort to gain customers for one of its investment funds. And how does participation in the "growth" of commodities work? Speculation.

2. SPECULATION, THE MAIN CAUSE OF THE SHARP INCREASE IN PRICES

The factors governing the pricing of agricultural commodities are complex. No single factor alone determines the price.

Firstly, one must distinguish between long-term and short-term factors.

The long-term factors include:

- a. Increasing demand, predominantly through the economic rise of emerging economies, especially through the adoption of western consumption habits by the middle classes. The Chinese, for example, are increasingly consuming dairy and meat products;
- b. Agricultural productivity. The trend in productivity is stagnating in many developing countries. This is due to under-investment and structural adjustment programs, which gave priority to export production rather than to national food security. The pressure to liberalize markets under WTO and bilateral trade agreements has also contributed to a decline in interest in local food production, as has the drop by half in the official

development aid (ODA) available for agricultural promotion since the 1980s (World Bank 2008b, 41).

- c. The production of agrofuels. Over the last ten years, the U.S. and the EU, but also Brazil, have started to cultivate renewable agricultural commodities (among others, rape (also known as canola), sugar cane and maize) to produce ethanol and bio-diesel on a large scale in the search for alternatives to oil. The cultivation of agrofuels requires agriculturally productive land, which is finite and expensive to develop from virgin land, and thus comes at the expense of crops produced for food and feed.
- d. The reduction of food stocks, particularly in the EU and the United States.

The short-term factors include:

- e. The increase in oil prices in 2007-08, as well as in fertilizer prices;
- f. Bad harvests, particularly for wheat, in 2006 and 2007 in Australia and some other food exporting countries, – one of the world's biggest grain exporters – and other key grain exporters;
- g. Fluctuations in the U.S. dollar (USD) exchange rate (the USD is the lead currency in international trade) as well as changes in the value of national currencies, such as the temporary decrease vis à vis the dollar as a result of the financial crisis;
- h. Export restrictions on food by governments that want to guarantee food self-sufficiency for their own countries due to the explosion in food prices (or to take advantage of the higher prices to increase government tax returns, as was the case in Argentina). Such measures contributed to the shortage of food on the world market and consequently increased prices
- i. And, finally, speculation.

When food prices sky-rocketed in 2007, the role of speculation was mentioned as an afterthought or completely ignored by mainstream economists. Instead, mainly long-term factors such as the increase in demand and the production of agrofuels were blamed for the drastic price increases. A World Bank study even claimed that agrofuels contributed as much as 70 percent to the food price increase (World Bank 2008a).

In a study on the food crisis, even before the food price reversal, UNCTAD pointed out that agrofuels could not be so important that prices more than doubled in such a short time period. For example, the price of rice increased by 165 percent between April 2007 and April 2008, but rice cannot be used for agrofuels, and there

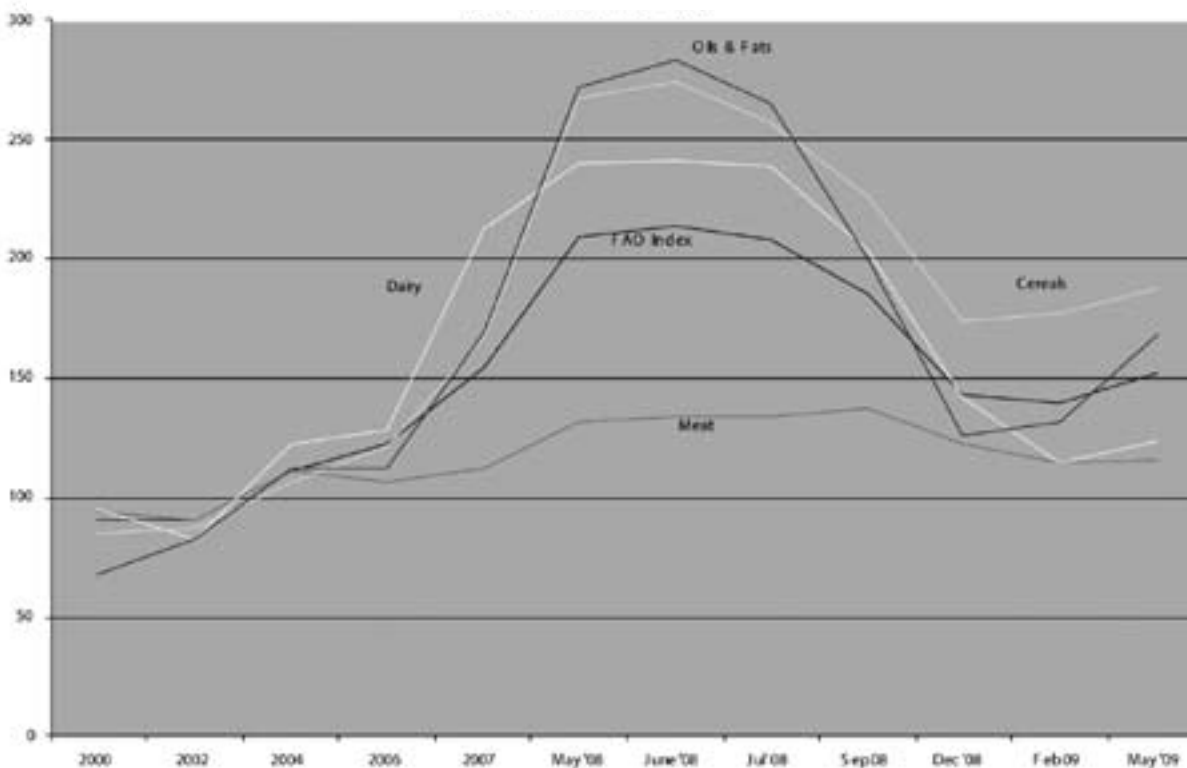
is little substitution of acreage in the countries where it is grown (that is, rice paddy was not converted to the production of agrofuel feedstock, as was the case in the U.S. with the conversion of soy bean acres to maize).

It has become incontestably clear since the decrease in food prices (more or less from July 2008 or a little sooner) that neither increasing demand in the emerging econo-

mies nor agrofuel production were the major roots of the food price trend. It cannot be that the Chinese suddenly started to eat much more yogurt only to stop again just a few months later. Neither has agrofuel cultivation risen so sharply only to decrease again just as abruptly. Short term factors, such as poor harvests, did not play a major role in the price upswing either.

Figure 1: FOOD PRICES 2000 – MAY 2009

(average 1998–2000=100)



Source: FAO

In accounting for the very sharp, short-lived spike in agricultural commodity prices it is speculation in connection with the financial crisis that is the decisive factor. We are dealing with a classic case of a speculative bubble – visible graphically in the figure above – which built up in the second half of 2007 and burst in the middle of 2008. The crisis in the mortgage sector in the U.S., which was also the result of a huge speculative bubble, started to spread across the whole financial sector. People in the financial market sought alternatives in the commodity sector and the bubble started to form. It reached its maximum in the summer of 2008 and then burst (see the more detailed section 4.1.2.).

Mainstream economists no longer deny that speculation at least contributed to this bubble. Thus, the German

Ministry of Development describes speculation as early as in April 2008 as one of the reasons for high food prices, “the international capital markets have become aware of the agricultural markets again in their search for lucrative and relatively safe investment areas of the future. This causes more volatility, especially when participants act in a strongly speculative way.” (BMZ 2008) UNCTAD also identified speculation as a factor behind the agricultural commodities price bubble early on (UNCTAD 2008a). In the meantime, the World Bank acknowledges that speculation played a role in the price increases even if it considers speculation to have been a subordinate factor (World Bank 2008a). The IMF added its voice to the chorus, albeit in vague terms, writing, “pure financial factors, including the mood of the markets, can have short term effects on the price of oil and other commodities” (IMF 2008).

The U.S. supervisory authority very clearly speaks out against the trade in commodity derivatives. The Commodity Futures Trading Commission (CFTC) probably possesses the best expertise with respect to U.S. markets, and observes, “the commodity markets have begun to set the price of commodities as an asset instead of setting the price solely according to factors of supply and demand. They have therefore created price distortions, or possibly even a speculative bubble.”

In plain language:

- j. The commodity market has detached itself from the fundamental data of the economy;
- k. Commodity prices, as can be seen in the futures market, have become a source of accumulation of financial assets;
- l. Prices have thus become a target of speculation; and,
- m. This led to a bubble, in the form of excessive food commodity prices, i.e. speculation has added a price bubble on top of the price increases resulting from factors in the real economy.

A complex package of countermeasures is therefore necessary. The price increases led directly to increased hunger and threatened the well-being of hundreds of millions of people who could no longer afford their daily bread. The package should deal with all the factors causing the price increases. The industrial countries carry a special responsibility for measures to counter speculation. Whereas the solutions to the challenges posed by the cultivation of agrofuels in Brazil or the long-term increasing demand for meat and dairy products are complicated and will take time to take effect-swift and direct measures can be taken against speculation. Speculation takes place in the commodity markets of industrial countries and the instruments

for regulation exist there as well. For example, on September 18, 2008, both the U.K. and the U.S. banned a certain type of speculative business, so-called short selling (see details below). This was part of the crisis management in view of the financial crash. If the financial crisis is a reason to use this set of instruments, then the threat to the livelihoods of millions of people in the developing countries is surely at least a strong reason for governments to act.

3. WHAT IS SPECULATION?

Speculation has always existed in capitalist economies and probably even before. When we deal with speculation, we don’t do it from an ethical point of view, although this is a legitimate perspective. Our focus is on the economic impact of speculation. There are different types of speculation, each having a different effect. For instance, hedging in agriculture with the help of futures has an economically useful function, although this effect could also be reached through other mechanisms (see chapter 4). In this case speculation serves as a kind of insurance for producers against price risks. Of course, hedging increases prices to a certain extent, but this is justified by the positive effect of risk management and price increases are not excessive.

However, if speculation leads to excessive increases in prices – in other words, if it produces prices that have lost any relation to the real economy, or if it becomes the dominant type of business – it creates economic imbalances and leads inevitably to crises and has a destructive impact. As Keynes put it: “Speculators may do no harm as bubbles on a steady stream of enterprise. But the position is serious when enterprise becomes the bubble on a whirlpool of speculation. When the capital development of a country becomes a by-product of the activities of a casino, the job is likely to be ill-done.” (Keynes 1936, 159)

The concept of speculation does not occur in neo-classical theory in mainstream economics. At most, speculation is dismissed as an obsolete category, discussed in Keynesian, Marxist or other heterodox positions.

Instead, what neoclassical theories consider “speculation” to be “investment.” Any use of assets based on the expectation of a profit at a future date is considered to be an investment. Thus, for example, the neoliberal stock exchange dictionary of the Frankfurter Allgemeine Zeitung (the leading news paper in Germany) defines speculation as follows: “in the explicit meaning of the

word, an anticipatory action taken in relation to the future with the aim of forestalling future developments in one's own dispositions and achieving an (economic) profit."

The same dictionary entry continues, "expressions such as 'speculation' and 'speculator' etc. are used rather in a negative sense and speculation is not recognised as one of the most decisive incitements behind economic behaviour."

Thus, according to this definition, there is no difference at all between building a factory, a farm or starting up a trading or services business – that is, everything that is considered as part of the real economy – and the design and sale of a Collateral Debt Obligation (CDO), one of those toxic derivatives which played an essential role in the financial crash. To the neoliberals, everything is an investment.

However, there is a fundamental difference between investment and speculation. Although a future expectation applies to both as a starting point, their respective logics diverge. Added value is made possible with a real economic investment. A business is established (or an existing one is expanded), and with a successful investment it is capable of extended reproduction through its own means, it is self-supporting and sustainable. The corporate profits are then nurtured by the permanent appropriation of the surplus value.

The objective of speculation, however, is to profit from a future difference in the prices of assets. Speculation can occur with commodities as well as with businesses and financial assets. If, for example, a farmer does not place his potato crop on the market as soon as it is harvested, but hoards it for a couple of weeks because he expects that the price will be higher, this is speculation. No real, additional value is created, there is merely speculation on a higher price. If a lot of potato farmers do this simultaneously, a speculative bubble is formed, i.e., the potato price increases during six weeks because the hoarding causes supply shortages.

Speculation can occur with all kinds of goods. There are, of course, differences in extent depending on the characteristics of the object of speculation. After a couple of months, potatoes turn bad and cannot be sold. There are no such limitations on gold, or even black gold (crude oil), for instance.

Speculation with companies occurs via the Private Equity Fund (PEF) business model as well as partially through

mergers of companies and takeovers. PEFs buy a company and restructure it in order to then sell it for a profit after a maximum of five years. There is no interest in the long-term future of the company such as expanding market shares, technological innovation, employment, etc.

The economically most important form of speculation has developed in the financial sector during the past two decades. Bets are made on the future development of price differences in strategic areas such as interest rates and exchange rates or the price trends of securities (shares, private and public bonds, derivatives etc.).

Among institutional investors – strictly speaking, they should be referred to as "institutional speculators" just as it should be "speculation banking" instead of investment banking – the search for such price differences has become extremely sophisticated and specialized: computer programs facilitate completely automatic searches every second to detect possibilities of profiting from price differences, even by thousandths of a unit. By investing huge sums, as the "institutional speculators" do, exorbitant profits – or losses – can result.

Another important feature of speculation is that profits are not only possible with rising prices and rates but also when they decrease (see section 4.4).

Speculation creates no added value. In contrast to the real economy, gains are not sustainable or self-supporting, but can only be repetitively achieved through new speculation activities.

Investment and speculation are also fundamentally different when they fail. When a company goes bankrupt, the fixed assets, the machines, the production procedures, etc., remain and can be used for further wealth creation. When a speculation fails, the assets dissolve into nothing.

This is the greatest problem with speculation: the macro-economic consequences for stability. When speculation has become an important part of wealth accumulation the system will be highly unstable. Even in times when there is no crisis, volatility has a structural impact.

4. HOW DOES FOOD SPECULATION WORK?

Speculation on the food markets is not new. In the 17th century, already, speculators bought the harvests of Japanese rice farmers even before they were harvested. The original motive was safeguarding, virtually an

insurance (“hedging”). The logic was as follows: a farmer negotiates with a speculator in January that the speculator will buy the harvest at a fixed price in August. The arrangement is fixed by a contract. Such contracts are called derivatives (from the Latin word “derived”). And since the contract concerns a future business arrangement, this derivative is called a “future.” Insiders call this kind of speculation “commercial trading.” The most important stock exchanges for commercial trading are in Chicago, New York, Kansas and London.

For the farmer, the advantage of futures lies in the security provided by the fixed price. He has transferred the risk to the speculator. However, security is not available for free. On the one hand, the farmer must pay a fee for the derivative. On the other hand, the derivatives trader will also try to sell a corresponding future to the miller who buys the harvest in August to mill flour. This also creates planning reliability for the miller.

The final price of the harvested grain is thus higher than it would have been if the farmer had sold directly to the miller, given the same conditions, because the derivatives trader’s risk premium has influenced the price twice.

However, without the futures, the farmer would have had to bear the risk of price fluctuation himself. If the harvest is good, the supply is huge and the prices fall. The farmer would receive less than he would have obtained with futures. The derivative trader then takes the loss. In the reverse situation, the farmer would have received more without the futures and would have benefited from supply scarcity (and higher prices). In this event, the profit goes to the speculator.

Usually, the commercial trader doesn’t physically receive the product when the futures are due. He has negotiated the contract with the miller that he redeems as a countertrade with the farmer (called “evening up”). The harvest physically goes directly from the farmer to the miller. The profit (or loss) of the commercial trader (apart from the fees) arises from the price difference when the contract is made and the market price when the futures are due.

At the same time, countertrade reduces risk for the speculator. Since the miller is contracted to buy the harvest at a fixed price, the risk is confined to the price difference between the two futures.

This system is rational under the conditions of a market economy and its unknowns. Especially when the speculators know the markets well and can more or less estimate

the risks involved. The prices of futures lie slightly above those of direct trade (described as a “cash” or “spot” market), but in general they are stable unless something unusual happens (such as a catastrophic harvest). The profits or losses achieved by the speculators are kept within limits. For all these reasons, commercial trading is often described as “good” or “useful” speculation. The CFTC describes these traders as “hedgers”, as opposed to “speculators” (see below).

This does not mean that there is no alternative to this kind of speculation. The insurance function and the reliability can also be achieved with other instruments, for example, producer and/or consumer insurance (mutual insurance) or price guarantees by the state. If these options work, they are also more efficient than derivative trade. Commercial trading has enabled other forms of speculation which have had an extremely negative effect on food prices, as described in the following sections.

4.1. HOW THE BUBBLE EVOLVED

The spot market and the “good” speculation described as “commercial trading” above, have been daily business on the food markets since the 19th century. The traders are well-established experts in the market. They possess expertise and information systems with which they can provide relatively reliable forecasts on price trends. Commercial trade is quite closely linked to the fundamentals of these markets.

The costs of their activities influence pricing and thus increase the price. In general, however, the price is largely determined by the fundamentals of the real economy, e.g., product quality, transport costs and availability of supplies.

4.1.1. The role of index funds

On the other hand, there is a category of speculators who for some years have played an increasingly large role in speculation on resources: the commodity “index funds.” Such funds speculate on a basket of up to 20 or more commodities, primarily oil and metals (ores), but also agricultural commodities. Agricultural commodities usually account for 10 to 20 percent of the index.

A study by the Lehman Brothers investment bank, which has since gone bankrupt, shows that the volume of index fund speculation increased by 1,900 percent from January 2003 to March 2008 taking it from \$13 billion to \$260 billion U.S. dollars. As can be seen in Figure 1, prices actually

start to increase in 2003, even if only moderately compared to the price explosion of 2007.

In contrast to commercial trade speculation, index fund speculation is no longer linked to the fundamentals of the food markets. They exclusively follow the trends of the stock exchange indices and their strategies are based on these trends. Trade is largely automated, so that low transaction costs are incurred. Therefore, the investment or speculation behavior of the funds is extremely pro-cyclical. Consequently, the contribution of the index funds to the food markets price bubble is not restricted to the period from 2003 to 2007, but also contributed to the rapid increase in 2007. However, as UNCTAD has shown, the 2007 spike can only be fully explained with the addition of another factor: the flight of institutional investors in hedge funds and other instruments from the crisis-ridden financial markets into the commodity markets. According to the Trade and Development Report 2009, the 2008 food price bubble is part of a general trend, which UNCTAD calls “financialisation of commodity markets” (UNCTAD 2009, 57).

4.1.2. Speculation by hedge funds and other institutional investors

The curve in Figure 1 displays a sharp increase in prices over the last quarter of 2007. This was also the moment when the subprime crisis in the U.S. turned into a credit crisis. Whole market segments collapsed, such as, the so-called structured products or certificates – e.g., the Collateral Debt Obligations (CDOs) – and the first bankruptcies occurred. Whoever had purchased large quantities of these derivatives now faced problems.

Many hedge funds, as well as pension funds and insurance companies, had also speculated in CDOs and other derivatives, especially in categories containing high proportions of subprime securities. These were extremely risky, but also yielded especially high returns. Possible profits for the funds were lost when these markets collapsed.

The crisis situation was aggravated by the general credit and bank crisis, which is what the mortgage crisis had become. Hedge funds were affected to a large extent, since high leverage is a basic element of their business model. This means that they acquire borrowed capital for their operations that exceeded their equity by 30 or 40 times. When credit resources dried up, the possibilities for leveraged speculation diminished.

Since speculative business in the financial sector increasingly became more difficult or even impossible, the in-

stitutional investors desperately looked for new markets. They now entered the commodity markets, primarily oil and minerals, but also agricultural commodities. This is where the above mentioned advertisement on the bread roll bag comes in. The “possibility of participating in the growth of seven of the most important agricultural commodities” relates to the Deutsche Bank fund investing in food speculation. Agrofutures were created and sold in the expectation of continually increasing prices, so that they could be sold later at a profit.

When institutional investors turned to the commodity markets, this affected the price trends. The demand for futures suddenly increased. The established commodity market traders and index funds who were dealing with commodity derivatives were now joined by hedge funds and other institutional investors seeking high yields.

In 2007, the trade in agricultural futures and options warrants increased by 28.6 percent for energy and by 29.7 percent for industrial metals. The strongest rise occurred in agricultural derivatives, however, where the increase amounted to just under a third at 32 percent (UNCTAD 2008b, 21). At the same time, the value of over-the-counter (OTC)¹ commodity derivatives increased by almost 160 percent between June 2005 and June 2007. From October 2007 until the end of March 2008, the number of contracts at the Chicago Mercantile Exchange (CME) increased by 65 percent without any real production increase.

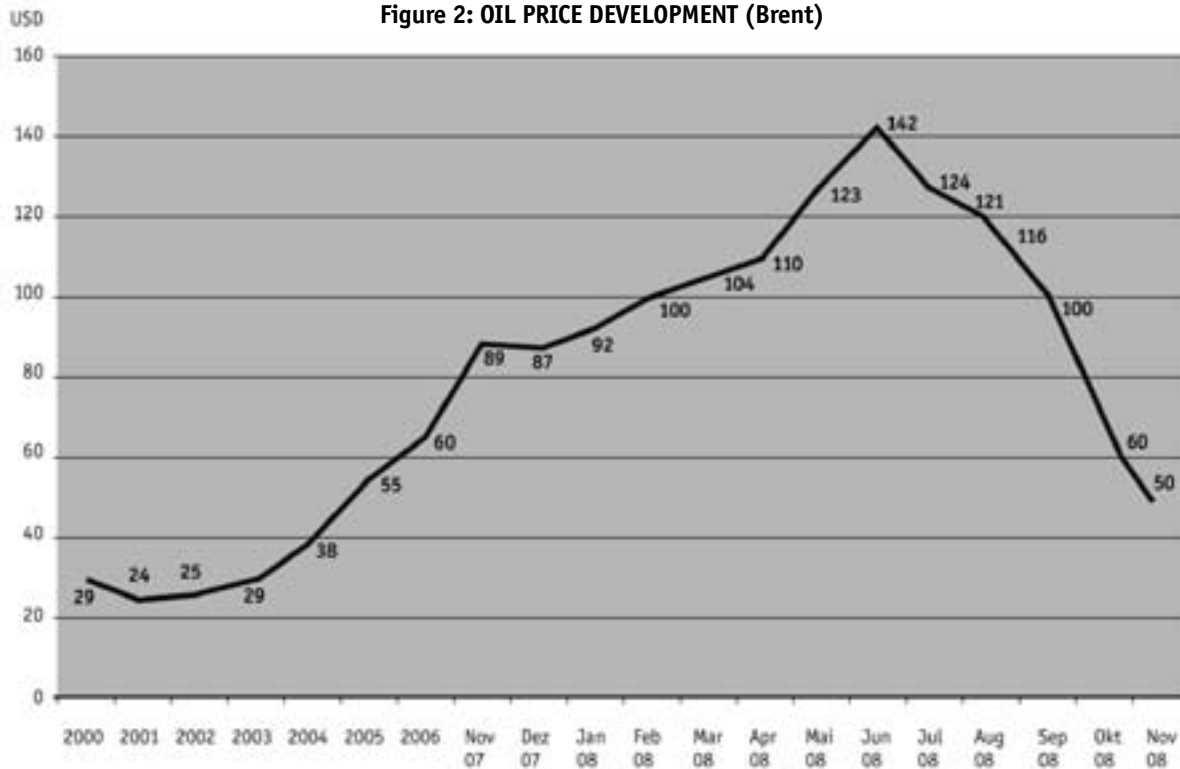
A speculative bubble started to emerge. Prices increased, again uninfluenced by the fundamentals, because institutional investors were entering the market.

The price increase in derivatives caused a rise in the spot prices. On the one hand, buyers on the spot markets bought more ahead to put in stock for fear of further price increases. This increased demand and caused an upward pressure on prices. On the other hand, sellers delayed sales in anticipation of higher prices, and caused supply shortages. Speculation by hedge funds and others set in motion a whole chain of speculative behaviour by other participants.

The prices then started to decline drastically in July 2008. This can also be attributed to the financial crisis which, in turn, experienced further aggravation in this period. Speculation in commodities became too risky for hedge funds and other institutional investors, and a renewed flight was initiated, this time into U.S. Treasury bonds, virtually the last safe haven to which capital could flee.

4.2. THE INFLUENCE OF OIL PRICE SPECULATION ON FOOD PRICES

Figure 2: OIL PRICE DEVELOPMENT (Brent)



Source: BP 2008

Speculation has its effects not only on the food stock markets directly, but also indirectly through oil price speculation. The oil price is a strategic price since it influences the prices of all other products where oil is involved as fuel in production and distribution. This also applies to agricultural commodities. The production of these goods requires tractors and other machines that need petrol, and petrol is also needed to transport them to the consumer. Similarly, fertilizers also need oil.

Until July of 2008, the high oil price was explained by commentators as the result of the huge petrol demand of the Chinese economy and other emerging economies as well as by the Peak Oil thesis (that as oil supplies begin to run dry, prices will go very high). But a drop from almost \$150 to \$45 U.S. dollars per barrel showed that general speculation and capital flight from financial markets to commodity markets was an important fact as well. Such an extreme fluctuation can only be explained as a result of a speculative bubble. From the third quarter of 2008, the expectation of a worldwide recession with a corresponding drop in demand for oil also played an important role. There is a strong resemblance between the course of the oil price trend and food prices. There is also a sharp

increase in the first half year of 2008 followed by an equally sharp fall. The second capital flight which started with the aggravation of the financial crisis is also evident. The oil speculators also turned to U.S. treasury bonds at that point.

4.3. THE EXTENT OF PRICE INCREASES CAUSED BY SPECULATION

For several reasons, the exact extent of the effect of speculation on price increases is impossible to determine. This also applies to the other factors involved in pricing. For example, statistics do not distinguish between established traders and new speculators. Hedge funds operate in a completely non-transparent way, and are generally located in offshore centers and tax havens where there is no supervision. The over-the-counter traded derivatives are an incalculable factor, as the investment banking crash in September 2008 has shown. Food pricing is also affected indirectly by the oil price and the price increases caused by the decline in the dollar exchange rate.

When prices have fallen again, this provides a certain ex post (e.g., after the fact) indication of the quantitative

contribution of speculation. This has recurred with almost all commodities, including oil and food, after the peak of July 2008. Long-term factors, such as Peak Oil, increasing demand by emerging markets, and agrofuel, cannot have this kind of effect. Analyzing the 2008 bubble, when prices virtually doubled at first and then fell to about half the price, leads to the conclusion that the lion's share of the price increase 2008 was due to direct and indirect speculation.

Note that bets are not only made on rising prices, but also on declining prices.

4.4. SPECULATION ON FALLING PRICES

How does this work?

First phase: On September 1, I complete an over-the-counter contract (forward) obtain the right to sell ten thousand tons of rice at the current daily price of \$1,000 dollars per ton one month later (October 1). The fee for the forward contract amounts to 0.1 percent of the face value of the underlying business, i.e., \$100,000 dollars.

Second phase: In September the price of rice declines by 20 percent.

Third phase: On October 1, I purchase ten thousand tons of rice (on the spot market or, usually, with another derivative) at the current daily price. (i.e., 800 dollars per ton.) Total cost: \$8 million dollars.

Fourth step: I then transfer the thousand tons I acquired at a cheaper rate to the trader from whom I bought the forward contract the previous month, and receive the agreed price of \$10 million dollars. Gross profit: \$1.9 million dollars.

This form of speculation is called short selling, since I do not yet possess the product at the time of sale. I speculate that I can acquire the product at a cheaper rate when it is due. A variant of short selling with shares consists of borrowing the shares that are expected to decline and then putting them on the market. If this occurs on a massive scale, a decline in share prices will occur. Then the borrowed shares can be bought back at a cheaper rate.

Whereas hedge funds in general made a loss of 3.55 percent in 2008 (on average), short selling averaged a profit of 10 percent.

Some could argue that speculation is good and useful in causing prices to decline. However, the problem is that speculation on falling prices is detached from the real economic data and leads to an exaggerated decline in prices. This then leads to losses on the supply side, i.e., primarily for the producer; practically the opposite of a bubble a slump.

Exaggerated price declines contributed to the downfall of the large investment banks (Lehman Brothers, Merrill Lynch, etc.). Hedge funds speculated on falling share prices of these banks when they perceived the first difficulties of the banks. This reinforced and accelerated the share price collapse to such an extent that the supervisory authorities of Great Britain and the U.S. decided to prohibit short selling.

This will not work over the long term, and encourages speculators to again speculate on rising prices. In this interplay of imbalances and distortions, volatility and instability is not only the breeding ground that enables speculation to prosper, but speculation itself increases and exaggerates the already existing factors of uncertainty. Short selling is therefore part of the overall problem. Therefore speculation distorts prices whether they are falling or increasing. It reinforces instability and causes additional costs, consequently increasing market inefficiency and periodically leading to the formation of bubbles. Therefore policies are now, more than ever, necessary against speculation, especially if speculation contributes to endangering the livelihoods of millions of people in developing countries.

5. ALTERNATIVES

As shown above, price hikes in 2007 and 2008 have caused a historical increase in the number of hungry people. As speculation is identified as the main factor for these price hikes, it has contributed to the violation of the right to adequate food of at least 100 million people worldwide. The responsibility for this lies with the speculators themselves, of course, but more notably with the states which had deregulated financial and commodity markets and thereby opened the door for excessive speculation. From a human rights perspective the same states have not only a responsibility but a legal obligation to take decisive measures to prevent such speculation and reduce the volatility of agricultural commodity prices. The formation of speculative bubbles linked to food prices can be prevented by the combination of two relatively simple measures:

- a. the introduction of a trade register at the stock exchanges, and
- b. corresponding regulation of authorized traders.

All those who trade in food on the spot or derivative markets would need to be registered. Only those traders who enable hedging, know the market and are subject to stock exchange supervision would be permitted. Hedge funds and other speculative business models would not be admitted. Highly speculative activities such as short selling, dealing in OTC derivatives and index derivatives would have to be prevented. As the most important stock exchanges for food are in Chicago, New York, Dallas and London the governments of the U.S. and the U.K. bear a special responsibility.

Speculation would then be restricted to its security function (hedging) for buyers and sellers, and the formation of speculation bubbles would be prevented. Political will is decisive if this is to be achieved. The chances are not too illusory. The present crash has shaken the financial markets so that the casino-capitalism which has emerged since the end of the Bretton Woods system has been discredited to an unprecedented extent. New political regulations, especially emanating from the U.S., are not out of reach any more.

This offers a unique opportunity to civil society, especially to the development NGO community, to exert corresponding political pressure and present proposals on a development-friendly restructuring of the financial system. Civil society should not just suggest reforms in line with the market. This crash of financial-market capitalism which has spread rapidly across the whole globe since Bretton Woods requires a more far-reaching answer. The ideology that the markets are best left to regulate themselves has finally completely disgraced itself before history. Now, this is no longer a question of making the casino safer for the players but of closing it down.

¹ Over the Counter means that trade is effectuated outside of any exchange or other central counterpart. Therefore, such transactions are particularly intransparent and cannot be controlled effectively by supervision.

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VII. DEEPENING THE FOOD CRISIS? CLIMATE CHANGE, FOOD SECURITY AND THE RIGHT TO FOOD

Climate change threatens to worsen the already critical situation of global food security. The Fourth Assessment Report (FAR) of the Intergovernmental Panel on Climate Change (IPCC) has made a critical assessment of the possible impacts of climate change on agriculture, livestock and fishing. Poor and vulnerable people in developing countries who are already threatened by or suffering from hunger and malnutrition will be worst hit, as numerous studies and first hand experience show.

The steep and scandalous increase of the number of hungry people in the world from 852 million up to at least 1.02 billion people, which has been reported by the UN Food and Agriculture Organization (FAO) and various other UN agencies for the years 2007 to 2009, is extremely alarming. It needs to be countered by fast and effective corrective action at the local, national and international level. Sufficient food is still available. Overcoming hunger is not so much a question of increasing production (yet), but rather a question of political will to address hungry people's lack of access to food, primarily because they cannot afford to buy it. Climate change risks worsening poor people's access to food and water by leading to new price hikes. If the current trends of increasing global temperature, changing rainfall patterns, glacier melting, rising sea levels and more frequent and intense meteorological disasters such as droughts, floods and storms continue, global food production will be severely threatened in the years and decades to come. While negative effects have already become increasingly visible in tropical and subtropical areas, in particular in Central, South and Southeast Asia as well as in drought and flood prone areas in sub-Saharan Africa, many more agricultural regions, including temperate climates, might come under pressure in the near future.

From the food security perspective, climate change comes on top of long-standing problems regarding food security in many world regions. It bears a huge potential to deepen the marginalization of vulnerable populations and to make hunger persistent instead of overcoming it step by step as projected by the UN Millennium Development Goals (MDGs). Thus, climate change poses a big challenge to global, national and local food security. What is needed – technically, economically and politically – to ensure the realization of the fundamental human right to adequate food and water today and tomorrow? How can agriculture adapt to changing climate conditions? How can the resilience of local and regional food production systems be improved?

In 2006, Brot für die Welt (Bread for the World) together with Diakonie Katastrophenhilfe (DKH, Humanitarian Aid Germany) and Germanwatch have initiated an intensive study process on the impacts of climate change on food security. As a result, a comprehensive study was published in 2008. The study focused on the particular risks for those persons and groups who are malnourished. It systematized how the global mega-trend of climate change might impact on these marginalized groups. For this purpose a cover study and regional studies in Africa, Asia and Latin America were carried out. This paper presents an updated version of the conclusions from these studies.

Since the publication of the main study, the issues of climate change and food security have gained increased attention within the climate negotiations under the United Nations Framework Convention on Climate Change (UNFCCC), but also within other UN agencies. The Food and Agriculture Organization of the United Nations (FAO) warns about the negative consequences, in particular for small-holder subsistence farmers in what are already marginalized regions of Africa, Asia and Latin America. In recent submissions to the UNFCCC, FAO stresses the importance of the agricultural sector in combating climate change, but also the necessity of climate change mitigation and adaptation for achieving food security.

The impacts of climate change on human rights, and the relevance that human rights have for a future climate treaty, have long been neglected by the climate negotiations. At the climate change conference in Poznan (Poland) in December 2008, Brot für die Welt, Germanwatch and Care International presented a submission on a human rights-based approach to adaptation at a time where such an approach did not feature within the negotiations. Since then, especially non-governmental organizations (NGOs) have picked up on the idea and have started to integrate human rights as a principle that should guide a post-2012 climate treaty to be agreed upon at the climate change conference in Copenhagen in December 2009. In view of the threat of more famine, the UN Human Rights Council (HRC) also discussed human rights and climate change at its tenth session in March 2009, based on a study that will be presented in Copenhagen. In June 2009, a panel discussion was held on this issue, the results of which will also feed into the UN climate negotiations.

However, to date these discussions remain largely separate, and integration and cooperation have hardly begun. As a next step the different strands and actors

need to be brought together and should continue their discussions. Coherence between policies on adaptation, food security and human rights needs to be improved and should incorporate the rapidly growing knowledge on agriculture and climate change.

1. CHANGING CLIMATE CONDITIONS

The impacts of climate change are relevant for food security at the global, national and local levels. The IPCC Fourth Assessment Report (FAR) Working Group II summarized some major trends which show that many natural systems are affected by similar processes of climate change, particularly those related to temperature increase (IPCC 2007):

- (1) There is strong evidence that natural systems are affected on all continents by changes in snow, ice, and frozen ground, including permafrost. This conclusion includes the enlargement and increase of glacial lakes, increasing ground instability in permafrost regions, rock avalanches in mountain areas, as well as substantial changes in Arctic and Antarctic ecosystems.
- (2) With regard to hydrological systems, there is strong evidence, that many glacier- and snow-fed-rivers will experience increased run-off and earlier spring peak discharge. A warming of lakes and rivers in many regions is projected.
- (3) There is also strong evidence that recent warming is greatly affecting terrestrial biological systems, with effects such as earlier timing of spring events, including leaf unfolding, bird migration, and egg-laying.
- (4) Substantive new studies have shown that rising water temperatures will impact marine and freshwater biological systems. It will lead to range changes and earlier migrations of fish in rivers, and it will contribute to shifts in ranges and changes in algal, plankton and fish abundance in high-latitude oceans and high-altitude lakes.
- (5) Climate zones will be move towards the poles. Linear trends can go hand in hand with the quickly growing possibility of non-linear – and potentially catastrophic – changes. The relationship between the earth's climate and the earth's ecosystems is a complex one, particularly due to the fact that climate and non-climate drivers are interrelated. Additionally, non-linear processes include several feedback

loops, and these loops are very difficult to predict. The history of the earth shows that non-linear processes have happened quite often, particularly in the Holocene epoch (e.g., the most recent 10,000 years). Ocean streams have frequently stalled abruptly, ice shields have suddenly melted, or monsoon systems have unexpectedly collapsed. Often small disruptions are sufficient to entail fundamental changes. Simulations based on the knowledge of abrupt climate change in the past and the scientific school of analyzing highly complex processes that was established in the 1970s support the finding that the earth's climate and ecological systems might react very strongly to the increasing temperature from anthropogenic climate change.

The main driver for climate change is the increase in surface temperatures, which in turn influences most other factors contributing to changing climate conditions such as precipitation, water availability and weather extremes. As can be seen in figure 1, climate change will have major effects on food security through the increase of variability of weather patterns, particularly the expected increase in extreme weather events.

The impact of climate change can be summarized in the following way: Countries and groups of countries will be affected differently. Many studies indicate that the impacts of climate change will fall disproportionately upon developing countries and the poor persons within all countries. Populations in developing countries are generally exposed to relatively high risks of adverse impacts from climate change (IPCC 2001, 12). It is anticipated that this will lead to higher levels of food insecurity in many vulnerable, developing countries. They will need support to cope with and finance the necessary adaptation measures.

The study of *Brot für die Welt* and partners is therefore based on the assumption that a two-dimensional response to climate change is necessary: Avoiding the unmanageable and managing the unavoidable. Avoiding the unmanageable means mitigating the impact of climate change and avoiding dangerous climate change from happening. An emerging consensus among scientists states that global warming must be limited to a temperature increase well below 2°C compared to pre-industrial levels. In order to reach that goal, industrialized countries need to take the lead in drastic emissions reductions. Globally a 50 to 85 percent reduction of emissions by 2050 is necessary and actual CO₂ emissions should start to decrease, at the latest,

by 2017. Managing the unavoidable means that sound adaptation policies are needed to deal with the inevitable consequences of climate change, some of which are already visible and immense.

2. THE IMPACT OF CLIMATE CHANGE ON FOOD SECURITY, AND HOW TO ADAPT TO IT

The impact of climate change will be particularly substantial for smallholder and subsistence farmers, who represent the majority of the people suffering from hunger. Their livelihood systems, particularly in low latitudes around the equator, will be affected by major changes due to climate change. The farming system will be affected by changes in temperature and precipitation as well as elevation of CO₂ with impacts on yields of both food and cash crops. The productivity of livestock and fishery systems will also be affected, as well as potential income gained from collecting activities in forests. Figure 2 summarizes the relationship between climate change impacts and food security for the rural poor.

Figure 1: CLIMATE CHANGE AND FOOD SECURITY



Source: based on Boko et al. 2007, 455

The impact of climate change on food security will be substantive, and better regional and local assessments will further clarify these impacts at scales and scopes that are suitable for developing coping mechanisms and adaptation strategies. So far, the debate has been biased towards global food security concerns, i.e., the global balance of how much and where food can be produced. However, it is of the utmost importance that household effects are taken into consideration when predicting the impacts on hunger and malnutrition. Climate change will affect people and groups already vulnerable to food insecurity, but new groups will also be affected by climate change.

Regional impacts of climate change on food security 1

In Asia a 2.0 to 4.5°C net global average surface warming is expected by the end of the present century. Increases in the amount of precipitation are very likely in high-latitudes, while decreases are likely in most subtropical land regions (Christensen et al. 2007). Glaciers in Central Asia, western Mongolia, northwest China, and the Tibetan Plateau are reportedly melting faster in recent years than ever before (Pu et al. 2004). Changes have also been observed in extreme climate events like the frequent occurrence of more intense rainfall, increasing frequency and intensity of floods, drought, and tropical cyclones.

The FAR (fourth assessment report) of the IPCC projects an increased risk of hunger in South Asia due to a 30 percent decline in cereal yields. That might lead to 266 million Asians facing the risk of hunger in 2080. A decline of the net productivity of grassland and milk yields is predicted. The agricultural water demand will increase between 6 and 10 percent per 1°C rise in temperature. The water system might be strongly affected. Overall, a decline in water availability is expected. Close to 1 billion people will be affected by this reduction in India and South Asia. The melting of the Himalaya glaciers will change the pattern of river runoff in the region. In coastal areas, the water quality might suffer from the intrusion of salt water, which might then also affect fish larvae abundance. Bangladesh (3), Vietnam (4) and India (7) are among the 10 most affected countries by extreme weather effects in the decadal Climate Risk Index (CRI) for 1997–2006 (Harmeling 2007). In the future, food scarcity projections show that South and Southeast Asia are highly vulnerable with strong evidence, while East Asia is highly vulnerable with a very high degree of confidence. The densely populated mega deltas of Asia and relevant mega cities (e.g., Bangkok, Shanghai,

Tianjin) are vulnerable to both direct effects of climate change and sea-level rise. 2,500 km² of mangroves in Asia are likely to be lost with 1 meter of sea-level rise. Approximately 1,000 km² of cultivated land and sea product culturing area in Bangladesh are likely to become salt marsh (Cruz et al. 2007).

Adaptation requires substantive investment in infrastructure such as dams, flood-resistant storage facilities, and techniques for reducing water loss in distribution systems, etc. It requires monitoring weather extremes and developing disaster preparedness strategies. Higher prices for energy, agricultural inputs, water, and food imports must be expected. Capacity building in communities particularly at risk, as well as in national, regional, and local administrations is of utmost importance and will require resources. Considerable additional costs will be required for appropriate adaptation in developing countries. Cost estimates in the year 2007 ranged from at least \$50 billion USD (Oxfam) to \$28 to 67 billion USD by 2030 (UNFCCC) and even \$86 billion USD by 2015 (UNDP) (for details see Bals, Harmeling and Windfuhr 2008).

Regional impacts of climate change on food security 2

In summarizing the Africa-related conclusions of the FAR, it becomes obvious that climate change has the potential to compromise the ability of many African societies to achieve the different MDGs and to improve food security. The IPCC expects that the area suitable for agriculture and the length of growing seasons and yield potential, particularly along the margins of semi-arid and arid areas, will decrease. The yields from rain-fed agriculture are expected to decrease by up to 50 percent in some countries already by 2020 (IPCC 2007, 13). Also, the number of people under increased water stress will significantly increase from 75 to 250 million people in the next 15 years (with a further increase until 2050). This will primarily take place in southern and northern Africa. In addition, analysts predict that local food supplies will be negatively affected by decreasing fishery resources in large lakes. This result is due to rising water temperatures, which may be exacerbated by continued over-fishing.

In addition to the direct impacts of climate change on food security and the MDGs, recent research pays increasing attention to the role that water scarcity or reduced food availability play in the emergence of conflicts, often through increased competition over scarce resources. These may further aggravate the livelihoods

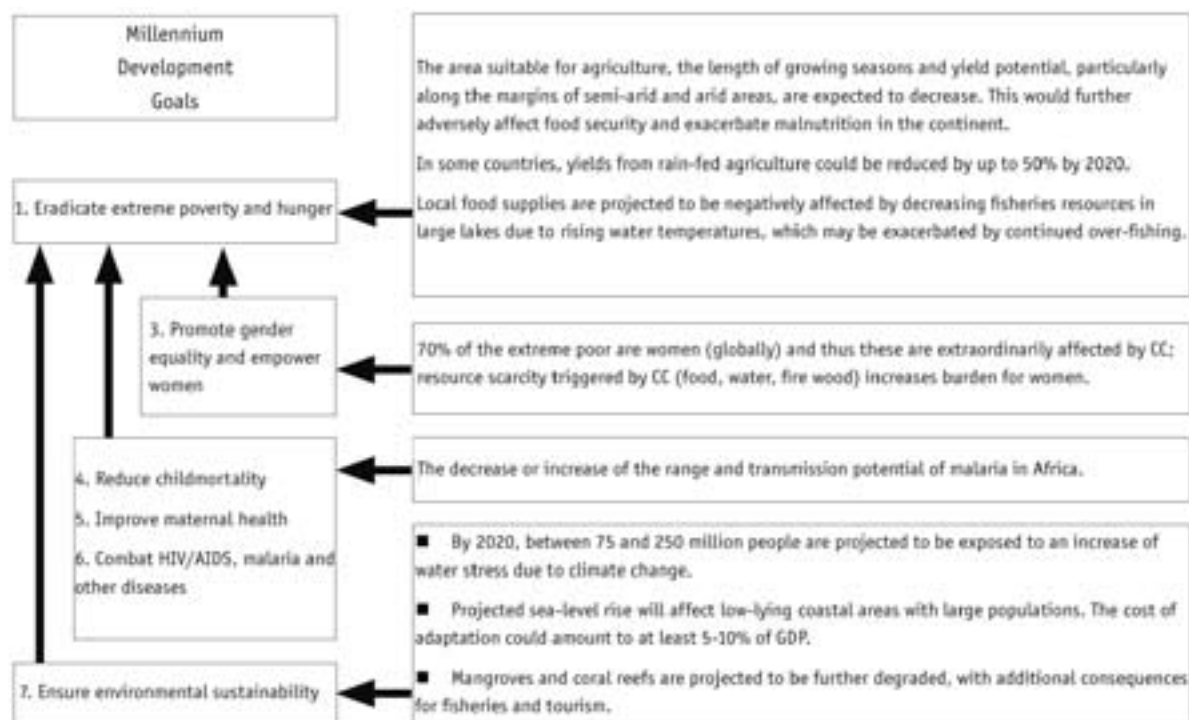
of people. Climate change already represents an important cause for existing conflicts, as several experts have concluded is the case in the Darfur conflict, where a long-term decline in rainfall significantly contributed to the scarcity of available fresh water (Ban Ki-moon 2007). In the southern part of Africa, climate change is expected to further weaken the agricultural potentials of countries belonging to the poorest societies in the world. This would worsen the state of human security and strain the governments' capabilities.

The most vulnerable groups include smallholder farmers who rely on rain-fed agriculture, pastoralists, and the fishing communities. Communities across the continent have developed ways of dealing with impacts of climate-related events over time. Drought and floods are not new to many communities in Africa. However, the increasing frequency and intensity of these events are rendering some of the strategies that have served communities well in the past inadequate. For farmers, mixed cropping served as insurance against total crop failure; rotational cropping allowed for the rejuvenation of soils sustaining production at reasonable levels.

Pastoralists migrated to better areas in times of drought, traded animals for cereals and other products from neighboring communities, and kept animals with friends and relatives elsewhere as a form of insurance. With the rapid changes in climate in the recent past, some of the strategies are no longer viable; others might become ineffective in a quickly changing climate. And there is evidence of the erosion of coping and adaptive strategies as a result of land-use changes and socio-political and cultural stresses.

Due to climate change impacts and the resources required to adapt to them, resources that would have otherwise been available to realize the MDGs are at risk for diversion to adaptation measures instead. The realization of the MDGs might further be affected by the direct impact of climate change on food, water and health. "How the world deals with climate change today will have a direct bearing on the human development prospects of a large section of humanity" (UNDP 2007, 8; see Figure 3).

Figure 2: CLIMATE CHANGE IMPACTS AND THE MILLENNIUM DEVELOPMENT GOALS IN AFRICA



Source: Germanwatch illustration based on IPCC 2007b

The recent rounds of climate negotiations have shown that the costs of adaptation and the present underfunding by the perpetrators of climate change remain a key contentious issue. This is true despite the goodwill of many developing and some developed countries to work jointly on developing a new climate regime. However, in the negotiations in Poznan in December 2008 and in Bonn in March and June 2009, the most developed countries – and among them the European Union (EU) – have not been willing to agree on concrete action for scaling up the financing for adaptation as well as support for technology transfer and climate change mitigation in developing countries. At the same time there are encouraging examples from developing countries that show their willingness to take national action on combating climate change. South Africa was the first rapidly developing country to accept that their emissions have to peak between 2020 and 2035. In December 2008, Mexico announced a national target to reduce its emissions to 50 percent below 2002 levels by 2050.

Regional impacts of climate change on food security 3

As in the other continents, crop yields in Latin America are expected to increase in the temperate climates, while in dryer regions it is expected that climate change will lead to processes of salination and a loss of arable land for cultivation and grazing (Magrin et al. 2007). Land use changes have occurred during the last years and have intensified the use of natural resources and exacerbated many of the processes of land degradation. The IPCC reports that almost three-quarters of the dry lands are moderately or severely affected by degradation processes.

Climate variability and extreme weather events have severely affected Latin America. The number of extreme events, be it hurricanes, flooding, or the Amazonian drought (2005), has been high during the past few years. But regular parameters are also changing.

Increases in rainfall have been observed in southeastern Brazil, Uruguay, the Argentinean Pampa, and some parts of Bolivia. While this has increased the frequency of floods, it has also positively impacted upon crop yields. On the other hand, a declining trend in precipitation has been observed in southern Chile, southwestern Argentina, southern Peru, and western Central America. As a consequence of temperature increase, the IPCC notes that the trend in glacial retreat is accelerating, with the exception of the southern Andean region. This issue is critical for Peru, Bolivia, Colombia, and Ecuador, where water avail-

ability has already been compromised due to both consumption and hydro-power generation. It is expected that the net increase of people experiencing water stress due to climate change is likely to increase from 7 to 77 million (Magrin et al. 2007).

Climate change increases the risk that major parts of the Amazon could change from tropical rain forests to savannas in coming decades. This risk is higher in the eastern Amazon and in the tropical forests of central and southern Mexico. It could go hand in hand with the replacement of semi-arid vegetation by arid vegetation in parts of north-east Brazil and most of central and northern Mexico.

3. CLIMATE CHANGE, THE RIGHT TO ADEQUATE FOOD AND HOW TO ASSESS VULNERABILITY

The concept of “food security” is a key concept in the United Nations to measure the food and nutrition situation of people and groups. The latest standard definition used in the FAO reads as follows: “food security exists when 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. To achieve food security, all four of its components must be adequate. These are: availability, stability, accessibility, and utilization” (FAO 2007, 6).

The study of Brot für die Welt and partners uses three levels of food security to describe groups and people that are vulnerable to the effects of climate change.

- (1) Food security on a global scale: This is the level to analyze overall trends and to understand which effects climate change might have on agricultural production, fisheries and livestock production at the global level. It is important because these trends will translate into agricultural prices and will influence decisions of producers worldwide.
- (2) Food security on a national level: This is where most agricultural policy decisions are made. It is at this level that governments decide if food security concerns are covered by imports and how much financial resources are made available for national agricultural policies. Central elements of adaptation policies will be defined at the national level.
- (3) Food security on a household level: Without a detailed look at the impacts on the household level, the analysis would lack an understanding of the difficulties and specific necessities each person faces with

regard to food security. This knowledge is crucial in designing adequate adaptation policies that support those groups – particularly marginal producers and vulnerable consumers – which are most likely to become food insecure.

Around 80 percent of the hungry live in rural areas; half of them are smallholder peasants (see Table 1). This situation is expected to persist. While the urban poor are the fastest growing group of food insecure people, more than 50 percent of the hungry are projected to live in rural areas in 2050. The majority of these groups live

in extremely marginal conditions. They often live in remote geographical locations, in ecologically vulnerable areas, or on slopes or drought-prone areas/rainforests, etc. They have difficulties in accessing transportation infrastructure, such as roads, and thus access to markets where they can sell their goods. Most have limited to no adequate access to extension services, credits, or insurance mechanisms. Governments' failure to implement land reform forces poor and marginal farming households to use land that is prone to catastrophes such as floods or droughts. Usually, they are also politically marginalized, without a voice in local or national politics.

Table 1: TYPOLOGY OF HUNGER

Food-producing households in higher-risk environments and remote areas	Roughly 50% of the hungry
Non-farm rural households	22% of the hungry
Poor urban households	20% of the hungry
Herders, fishers and forest-dependent households	8% of the hungry
Vulnerable Individuals	Vulnerable pregnant and nursing women and their infants, pre-school children, chronically ill or disabled
Affected people of extreme events	Approx. 60 million
HIV-related food insecurity	Number of food-insecure households with adults or children affected by HIV: ca. 150 million

Source: UN Millennium Project/UNDP 2003

To deal adequately with the impact of climate change on food security, work has to start with a good analysis of those groups that are already particularly marginal today. Given the crucial role of marginalization in the food security debate, it is clear that agricultural and food production problems cannot be merely tackled at the technical level. The situation of the rural poor has been aggravated by the fact that rural areas have been neglected in regional, national, and international policy making. For a long time, the policy focus was on investments in industry and urban infrastructure, causing budget allocations for rural areas to be substantially reduced – often by more than 50 per cent. The same happened with bilateral and multilateral aid budgets.

A recent study by the FAO and the Organization for Economic Cooperation and Development (OECD) highlighted that food prices should decline from their recent peak, yet they will remain above the average of the past decade (OECD/FAO 2008). The study summarized all of the factors that are contributing to a long term scenario where increasing demand goes hand in hand with limits in food producing resources – particularly soil and water. While this scenario does not necessarily lead to scarcity of food in the coming years, it is an indication that prices for agricultural products will not decrease to the levels that prevailed during the last decades. Climate change will affect several factors that influence the supply side. Governments have to deal with this challenge when designing policies to adapt to climate change and implementing the right to adequate food.

The human right to adequate food is part of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee on Economic, Social and Cultural Rights defines as follows: “The right to adequate food is realized when every man, women and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement.”¹ It was further elaborated in the “Voluntary guidelines on the implementation of the right to adequate food in the context of national food security” developed in November 2004 by the FAO-Council (FAO 2004). Under the human rights conventions, governments have the obligation to respect, protect, and fulfill the right to adequate food, particularly for the most vulnerable groups. In addition it includes criteria for transparency and non-discrimination as well as recourse mechanisms.

It is important to clarify the relationship between the term food security, the right to adequate food and the food sovereignty concept. While food security describes a

goal, the right to adequate food obliges governments to respond to the problem of hunger and malnutrition. Human rights-based monitoring systems measure the level of fulfillment of the human rights obligations through governments. It also analyzes whether governments use their respective resources adequately and most reasonably to fully guarantee these rights while a food security monitoring system analyzes how many and to what degree people are malnourished. A third term gaining prominence within debates of civil society organizations dealing with issues such as hunger, malnutrition, and rural development is food sovereignty. Food sovereignty is a political concept primarily developed in the context of La Via Campesina, a global small farmers’ movement. Food sovereignty has been developed as a concept to protest against the neglect of rural areas and rural development in national and international policies.

Agriculture, forestry and fisheries are all sensitive to climatic conditions. Climate change will thus affect the income of vulnerable groups that depend on resources and products derived from these sectors. The scale of the direct adverse and positive effects varies with the specific geographical situation. Macro-level projections, however, are not sufficient to identify the most vulnerable groups within regions or countries. Vulnerability assessments on the national and community levels are crucial for developing adequate responses to food insecurity. Assessing the vulnerability of a region or a community with regard to non-climate stressors is the necessary first step; the assessment must then be widened to consider vulnerabilities to climate-related factors. This will result in general assessments of vulnerability to climate change, but may also be translated into sector-specific climate change risk assessments, for example with regard to food security.

Climate change will impact groups that are already at risk for food insecurity, but it will also make new groups vulnerable to food insecurity due to changing climate conditions in their region. Many vulnerable groups have already developed traditional strategies to increase resilience, but their ability to adapt to climate change is often restricted because of their extremely limited coping capacities.

4. RESILIENCE AND RESPONSE CAPACITIES IN DEVELOPING COUNTRIES

Adapting to climate change is a huge challenge for developing countries. The IPCC report shows that poorer countries are most vulnerable to climate change. Their limited resilience and response capacities are one important rea-

son for this particular affectedness. Adaptation covers very different fields such as meteorological services, early warning systems, disaster risk management, extension services, infrastructure and many others. Adaptation in agriculture is another important area, covering necessary changes in the use of agricultural crops and varieties, irrigation and watershed management, soil protection, pest control and land use techniques. Poor smallholder farmers in particular need to improve their capacity to cope with change. It is thus important to differentiate adaptation at the different levels and define what can be done at the household level, locally, by national governments, or with international support.

Analytically, the IPCC further differentiates between two categories of adaptation: “autonomous adaptation, which is the ongoing implementation of existing knowledge and technology in response to the changes in climate experienced, and planned adaptation, which is the increase in adaptive capacity by mobilizing institutions and policies to establish or strengthen conditions favourable for effective adaptation and investment in new technologies and infrastructure” (Easterling et al. 2007, 294). The advantage of this IPCC differentiation is that it looks into the coping strategies and capacities available locally to adjust to the changing circumstances without any government interference. This perspective helps to also identify the need for planned interventions as the available coping capacities might be very limited.

Reflecting knowledge on projected impacts of climate change on different sectors enables the identification of likely priority actions for adaptation from a top-down perspective. Initiated and supported by the UNFCCC process, least developed countries (LDCs) have started or even finished elaborating National Adaptation Programs of Action (NAPAs). The guidelines agreed upon under the UNFCCC specifically underline the objective to identify and address the most urgent adaptation needs and priority projects. In principle, these should be developed in a participatory process.² However, these guidelines are much less concrete than the procedural elements from the FAO voluntary guidelines on the implementation of the right to adequate food. Nevertheless, these NAPAs serve as the best and most recent starting point when looking at adaptation priorities. They also provide a reference when assessing likely costs of adaptation, although they only concern the most urgent adaptation needs. Developing countries also highlight some adaptation measures in key vulnerable sectors in their national communications to the UNFCCC (for agriculture see Table 2).

Weather risks destabilize households and countries and create food insecurity. Floods, cyclones, and droughts have been a major cause of hunger affecting more than 30 million people since 2000 in the Southern African Development Community (SADC). Governments and donors only react to these shocks rather than proactively manage the risks. These emergency reactions have been criticized for being ad hoc and, at times, untimely. They are even credited with destabilizing local food markets. Similarly, many highly exposed developing country governments do not have the means to finance the recovery costs of catastrophic disasters. Least-developed countries can hardly afford the technical analyses and other start-up costs for insurance systems. Scaling up will prove costly, especially since disaster risks, unlike health or accident, affect whole regions simultaneously and thus require spatial diversification, reinsurance and/or large capital reserves. Thus, it is very important that risk management mechanisms – including innovative insurance mechanisms – play a role in the UNFCCC negotiations.

5. RESPONSE CAPACITY AT THE LOCAL AND COMMUNITY LEVEL

Impact analyses underline the importance of studying specific family situations, because livelihood systems are typically complex and include a number of interfering factors. For example, several crops and livestock species are involved in intercropping systems, and many smallholder livelihoods are comprised of a variety of income sources such as the use of wild resources from forests, remittances, and other non-agricultural income strategies. Government support can also play a role, but so far many of the smallholder farmers are faced with a marginalization process in national and international agricultural policies. Therefore, support is often unavailable or insufficient. Effective adaptation policies should start here and support coping and adaptation strategies of poorer groups in rural and urban environments.

The literature on local and community-based adaptation policies is increasing, and several studies are available which provide a good overview of policy options for adaptation at the local level. One example is a case study carried out in Bangladesh. It has developed a useful typology to describe different policy measures and policy areas that need to be involved in local adaptation measures against climate change (FAO and ADPC 2006, 66f; see also Table 3). The authors show that successful local adaptation to climate variability and change is not an easy task. Rather, it requires multiple pathways with well-planned and inter-

related short- and long-term measures. The task ahead in designing meaningful adaptation policies at local levels is the need to find the right combination of these factors. This should give answers to the expected changes in the “geo-physical settings” as well as the necessary adjustments in the “livelihood systems.”

Table 2: POLICY OPTIONS FOR THE DESIGN OF LOCAL ADAPTATION POLICIES

TYPE OF MEASURES	EXAMPLES
Adopting physical adaptive measures	Excavation, re-excavation of canals, miniponds, irrigation, storage facilities for retaining rain water
Adjusting existing agricultural practices	Adjustment of cropping patterns, selection of drought-tolerant crop varieties; better storage of seeds and food; dry seedbeds, or adopting alternative, cash crops such as mango and jujube
Adjusting socio-economic activities	Livelihood diversification, market facilitation, small-scale cottage industries, integration of traditional knowledge
Strengthening local institutions	Self-help programs, capacity building and awareness raising for local institutions
Strengthening formal institutional structures	Local disaster management committees and financing institutions; formulating policy to catalyze enhancement of adaptive livelihood opportunities
Creating awareness and advocacy	
Supporting better research	Farm links to new or improved crops including drought tolerant varieties, and other conducive and adaptive technologies

Source: FAO and ADPC 2006

Adaptation policies need to be embedded appropriately in the local context and should be oriented towards the most vulnerable groups. One of the strengths of using a rights-based approach in the design of adaptation policies is that it helps to set up procedural guarantees for the affected communities and people to ensure participation including access to relevant information (transparency) and the right to complain. The second strength is that a rights-based approach requests a specific outcome. Governments have to prove that their policy and budget decisions are focused towards the most vulnerable groups and that no group is excluded. Governments must prove that their own adaptation policies do no harm, i.e., deprive people of access to food or water.

6. RESPONSE CAPACITY AT THE INTERNATIONAL LEVEL

A particular priority focus and massive support schemes for the long neglected and marginalized majority of agricultural producers – smallholder peasants – are need-

ed now and even more in the future, when the accelerating climate change will hit more and more regions. Support must be directed towards them in a sensitive, coherent and meaningful way, combined with micro-credits, extension services and trainings aiming at improving the production system, securing livelihoods, fostering climate resilience and leading out of poverty.

Development cooperation has a crucial role to play in all stages of adaptation policies. Bi- and multilateral development cooperation can help to integrate adaptation into policy development. Capacity must be built at all stages of the adaptation process in developing countries, from disaster preparation and early warning to insurance schemes and policy design issues. Other stakeholders, such as the scientific community and NGOs, should become integral parts of adaptation planning. Each of these institutions can help to best design adaptation policies. NGOs are often those who reach out to vulnerable groups much better than governmental or international institutions. Hence they can contribute by using their experience in project management and implementation and also by mobilizing knowledge.

The financing of adaptation measures will also need adequate international support. A clear recommendation from this study is that a reliable financial-based mechanism must be created within the UN-climate negotiations if the unavoidable impacts of climate change are to be managed. Substantial additional financial resources are needed to cope with the expected adaptation needs for developing countries. However, more aid does not necessarily mean that more funds will reach the most vulnerable groups. This is one reason why the UNFCCC negotiations must discuss which international and national frameworks are most appropriate for targeted adaptation. Adaptation measures need to be properly designed and focus on particularly vulnerable groups. The rights-based framework is one very promising option to help measure progress, review government activities, and to generate resources.

A rights-based approach to adaptation

This paper has discussed the impact of climate change on the enjoyment of human rights related to food security, particularly the right to adequate food. What are the core elements of a rights-based strategy to adaptation policies that can be drawn from the results?

- (1) *A human rights-based approach has to cover both sets of human rights: civil and political (CP-rights) and economic, social, and cultural rights (ESC-rights).*
- (2) *Human rights create entitlements of persons vis-à-vis their government. These entitlements can be legally claimed, and are a good tool in holding governments accountable. Complaint procedures need to be accessible for everyone.*
- (3) *A rights-based framework better describes government obligations and develops criteria for designing and evaluating policy processes, including on adaptation. It requires governments to follow standards at all different levels of activities.*
- (4) *Not everyone suffering from hunger is automatically a victim of human rights violations due to government policies. The impact of climate change might be so monumental in one country or region that the government will not have the means to adequately help all affected persons to adapt. Therefore, hunger, as a result of natural disasters cannot automatically be judged as a violation of the right to adequate food.*

A violation can only be identified when hunger is caused because of the government's failure to develop a minimum response system for disaster-preparedness, when the adaptation measures are not oriented towards those most in need, or when the government is not using the available resources.

- (5) *A rights-based assessment and framework must not only look into the obligations and responsibilities of national governments, but should also assess the potential impact of government policy on persons living in another country. International support is required for poor countries in the implementation of national adaptation measures, because poorer countries will suffer substantially from climate change and must cope with a high burden of adaptation needs.*
- (6) *Human rights are individual entitlements. They set limits on the restrictions and deprivations that individuals can permissibly bear. Adaptation policies should be designed in a way that at least the core content of human rights is being realized.*
- (7) *A rights-based framework can be a helpful tool to complement climate change adaptation policies. It can help to assess resulting risks of climate change and their possible impact on the fulfillment of human rights of those people who are affected by climate change. A rights-based framework can give orientation in designing adaptation policies in a way that human rights are promoted and protected. It allows individual rights holders to make a rights-based assessment of (adaptation) policy measures and to judge if these policies had a positive, negative or no impact on them and their adaptation needs towards climate change. If used properly, a rights-based approach has a good potential to ensure and improve the quality of adaptation policies.*

7. CONCLUSIONS AND RECOMMENDATIONS

Most likely the impacts of climate change will increase hunger and hinder poverty reduction policies, through changes in precipitation, water availability, the spread of diseases and the increase in extreme weather events. Food security and the human right to food will thus be heavily affected by climate change. Most vulnerable to the impacts will be developing countries in general and in sub-Saharan Africa, South and Southeast Asia, and the South Pacific region in particular. Within these and other affected countries it is the poor people in particular who are most vulnerable towards climate change, e.g., the rural poor, indigenous communities, outcasts, women, children and the elderly. For many of these smallholder and subsistence farmers, landless workers, women, people living with HIV/AIDS, indigenous people and the urban poor, climate change comes as additional stress on top of a variety of other poverty factors. Accordingly, climate change bears the risk to further deepen rather than overcome geographical, societal, economic and political marginalization. It is therefore of the utmost importance to design adaptation policies, frameworks and programs in a way that the priority focus is put on the needs of the most vulnerable people. This includes important aspects such as stakeholder participation, community-based bottom up approaches and cultural appropriateness.

Adaptation policies related to food security need to be tackled at the global, national and local level. Developing countries need broad international support to adequately implement adaptation policies, covering a broad range from infrastructural measures to raising awareness and elaborating and disseminating climate-related information. Industrialized countries need to make financial commitments in compensation for the damage caused by climate change. This should happen through international funds governed under the UNFCCC umbrella, especially the UN Adaptation Fund, but also new instruments such as insurance schemes. National governments need to mainstream adaptation into all government policies. They also need to make sure that the most vulnerable groups within their country are identified and supported in their adaptation.

The UNFCCC should make a strong reference to human rights and especially the right to food as guiding principles for a new climate treaty. It would partly shift the focus of adaptation policies from national states to the individual people who are threatened by climate change in a way that might become existential. The human

rights approach establishes procedural standards for government policies. It also supports vulnerable groups and individuals in holding their government accountable to fulfill their respective obligations towards the people who have individual rights to adequate food, water, health, housing etc. In conclusion, rights-based adaptation policies are one good tool to ensure that money earmarked for adaptation is spent reasonably. The Office of the High Commissioner for Human Rights, the Food and Agriculture organization and the UNFCCC should cooperate more closely and develop a guideline, which helps governments to design adaptation policies accordingly.

¹ CESCR. 2002. General Comment No. 15: The right to water. UN-Doc. E/C.12/GC/15. Geneva.

² UNFCCC. 2001. Guidelines for the preparation of national adaptation programmes of action. Decision 28/CP.7

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D. HUMAN RIGHTS BASED ALTERNATIVES AND TOOLS

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VIII. AN OVERVIEW OF HUMAN RIGHTS INSTRUMENTS TO RAISE CONCERNS ABOUT TRADE AND INVESTMENT POLICIES

1. INTRODUCTION

The promise of human rights posits the legal recognition of the de facto and de jure equality of every individual human being, irrespective of their gender, race, ethnicity or other personal or group identifiers. This simple idea was premised on the need to ensure respect for communities by protecting their rights against encroachment, and in seeking ways to promote their different identities should there be agreement to seek such protection within the group. The location of the discourse of human rights within the discipline of law was important: it articulated the need for justice over order and suggested the need for a fulcrum of a legal formulation of equality and non-discrimination. Sixty years after the passage of the Universal Declaration for Human Rights the realization of this dream of equality remains distant, which could be attributed to an overt emphasis on the civil and political components of human rights rather than an all-encompassing indivisible approach that focuses on the economic, social and cultural alongside the civil and political aspects. At the international level, human rights have an added value: they are the axiological horizon of rules governing relationships between international subjects. The lack of global solidarity towards their general realization is reflected in the paucity of structures and political will to effectively combat global inequalities, fight extreme poverty and set up a fairer international economic order. Only the international regime of human rights offers some binding international standards to infuse ethical values in the relationships regulated by international law.

The impact of trade on the enjoyment of human rights has progressively gained the attention of non-governmental and governmental actors involved with the promotion and protection of human rights. However, any human rights approach to trade faces, *inter alia*, the challenge of adapting rights-oriented/legal concepts, methods, discourses and techniques to the evolution of the economy. Long-established legal tools and techniques used to promote and protect human rights are poorly equipped to deal with issues traditionally addressed by disciplines and methodologies unfamiliar to jurists and human rights experts.

The universal and regional human rights regimes created in the aftermath of the Second World War were designed on a model based on the strategy of “naming and shaming” states that were allegedly violating (civil and political) human rights of citizens under their jurisdiction. For decades, this approach has kept international human rights mechanisms focused on the promotion and protection of civil and political rights, the fight against impunity

and the delimitation of the elements that determine the responsibility of states for human rights violations. In addition, the “judicialization” of their mechanisms has been seen for many years as a natural legal route to progression in advancing the cause of human rights.

Today the relationship between trade and human rights makes news and drives much of the work of human rights and development advocates. This happens in the context of a general shift in the focus of human rights mechanisms towards efficiency on the ground. Human rights instruments and bodies can no longer ignore the effects of poverty and inequality in the enjoyment of human rights, and therefore are increasingly addressing economic, social and cultural rights, as well as the relationship between human rights, development and security.

Important efforts have been dedicated to analyzing the relationship between trade, investment policies and human rights. It is generally acknowledged that due to the different objectives pursued by the multilateral trading system and international human rights standards, trade and investment policies may have a negative impact on the enjoyment of human rights. However there is no general rule on how the relationship between these variables operates, i.e., there is no uniform rule determining that enhanced human rights protections lead to increased trade, or that increased trade leads governments to do more to protect human rights (Aaronson 2008). The same appears true of the relationship between human rights and investments.² The effects of trade and investment on the enjoyment of human rights are not uniform and will depend on the concrete circumstances where that trade and investment operate, the kind of trade and investment concerned or the actors and countries affected (Aaronson and Zimmerman 2008, 194-197).

Several human rights initiatives have resulted in policies and regulations linking human rights standards and trade agreements at regional and domestic levels. This is the case, for instance, of some incentive clauses introduced by the European Union in agreements adopted with countries complying with International Labour Organization standards (Polasky 2006, 36-38). This brief submission will not address these regional and domestic initiatives, but will analyze the human rights instruments that have so far dealt with the issue of trade and investment at the UN level. The first part is devoted to exploring the different strategies used to scrutinize the relationship between human rights, trade and investment policies as well as the efforts to develop normative standards in this area. The second part will focus on how UN conventional and charter-based

human rights mechanisms have gradually incorporated the question of trade and investment policies into the scope of their competence and activities. The paper concludes with a brief exposé of future avenues that are available for furthering issues concerned with trade and investment and their impact on human rights.

2. STANDARD SETTING: RELATIONSHIP BETWEEN TRADE, INVESTMENT POLICIES AND HUMAN RIGHTS

2.1. MAINSTREAMING HUMAN RIGHTS

At the UN level, a common strategy to combat the isolation in which human rights and other issues that affect human rights operate has been to recognize the transversal nature of rights and seek their mainstreaming within UN structures, in keeping with the organizational reforms of 1997. This has resulted in limited change, with its impact restricted to the secretariat of the Organization of the UN, i.e., it did not change how political decisions were made.³ Nonetheless the Office of the High Commissioner for Human Rights (OHCHR) has participated in open forums including the High-level Task Force and Open-ended Working Group on the Right to Development with Bretton Woods Institutions and the World Trade Organization in its efforts to instigate the integration of human rights considerations in their activities (OHCHR 2007a, 23).

Besides this general trend, specific efforts have been deployed aimed at understanding – and addressing accordingly – the impact of trade and investment policies on the enjoyment on human rights.

2.2. UNDERSTANDING THE IMPACT OF TRADE AND INVESTMENT POLICIES ON HUMAN RIGHTS

Several studies have been commissioned by bodies of experts on human rights to analyze and extrapolate the effects of the relationship between trade, investment policies and human rights from different perspectives. The OHCHR has identified seven relevant areas of action that would promote fairer trade to improve the enjoyment of human rights: agriculture, government procurement, intellectual property protection, investment, services, social labeling for fair trade, and public morals and general exceptions to trade and investment rules. In addition it has also identified equality and non-discrimination, participation, accountability and international cooperation as the human rights principles of particular relevance to trade. Accordingly, the OHCHR has prepared a series of reports address-

ing subjects such as trade and investment liberalization, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), agricultural trade or the liberalization of trade in services.⁴ It has also conducted research and has disseminated several publications on the question of trade and human rights (OHCHR 2007b, 40). Each of these studies includes recommendations aimed at harmonizing trade and human rights goals. Among the general recommendations and proposals within this objective is the study of the OHCHR on the use of general exception clauses in WTO agreements as a means of ensuring that trade agreements maintain the flexibility needed for WTO members to meet their human rights obligations (OHCHR 2005).

Other UN human rights bodies have addressed the impact of trade on human rights focusing on specific areas under their competence. For instance, Paul Hunt (former UN Special Rapporteur on the right to everyone to the highest attainable standard of physical and mental health) published a report focusing on some of the technical issues that lie at the intersection of trade and the right to health, focusing on WTO member states and specific trade agreements relevant to the right to health such as: the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS); the General Agreement on Trade in Services (GATS); or the Trade Policy Review Mechanism (TPRM).⁵ As part of this study he highlighted ways through which trade policies can deliver positive rights to health outcomes.

2.3. SETTING HUMAN RIGHTS STANDARDS

The duty of states to take appropriate legislative, administrative, budgetary, judicial and other measures to guarantee the enjoyment of human rights is well established in human rights law. In particular, states have the duty to take measures to ensure the fulfillment of basic socio-economic rights by the population under their jurisdiction. The Committee on Economic, Social and Cultural Rights (CESCR) has closely analyzed this obligation. Therefore, while human rights law does not specifically address trade agreements or investment policies, it has had to address it when these have had the impact of, or have played a role in, destroying persons' basic livelihood.

Many advocates of human rights have proposed guidelines to adopt a specific normative framework to ensure a harmonious co-existence of trade and human rights. The effort has not borne much fruit of this effort are few, however, and reduced to non-legally binding standards

developed by a few intergovernmental organizations and private bodies or NGOs, that mainly address the responsibility of multinational enterprises and transnational corporations instead of trade policies as such. The following are some of those instruments:

- The Draft UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights;⁶
- International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policies;⁷
- The UN Global Compact comprising ten principles in the areas of human rights, labor, environment and anti-corruption;⁸
- The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises.⁹ Although dependent on the will of individual companies and not legally binding, the guidelines require that National Contact Points performing monitoring functions be established in each adhering country.
- The "Equator Principles": A financial industry benchmark for determining, assessing and managing social and environmental risk in project financing. Through this initiative many commercial banks around the world have agreed to adopt and follow International Finance Corporation (IFC) social and environmental policies (Watchman 2006, 15-18).

Not even the universally accepted *ius cogens* norm that prohibits torture has been supported in connection with proposals for codifying limitations to trade in goods used for torture or other cruel, inhuman or degrading treatment or punishment. The UN Special Rapporteur on torture has submitted studies on "the situation of trade in and production of equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment, its origin, destinations and forms."¹⁰ It is only recently that trade regulations have been introduced in this field, and even these are restricted to the European Union region.¹¹

3. USING HUMAN RIGHTS BODIES AND PROCEDURES TO RAISE TRADE CONCERNS

This section will outline the main UN human rights treaty-based and charter-based bodies that have used their competence and procedures to raise trade concerns.

The organs of experts (Committees) established by the "Core International Human Rights Instruments" are known

in UN terminology as “treaty-based” mechanisms, or procedures or institutions (or conventional mechanisms/procedures/institutions) since they were established and operate under the framework of a particular treaty. Conversely, other human rights monitoring mechanisms established by the decision of an organ of the UN are known as “charter-based” procedures. This includes the High Commissioner of Human Rights, the Human Rights Council and its subsidiary organs such as public special procedures including the rapporteurs mentioned above, the Expert Mechanism on the Rights of Indigenous Peoples and the Advisory Committee to the Human Rights Council.

3.1. UN HIGH COMMISSIONER FOR HUMAN RIGHTS

The High Commissioner for Human Rights and its office have a broad mandate that includes activities in the field, and the provision of technical cooperation and advisory services to countries in the field of human rights. The office is incorporating the trade dimension to the area of its activities and is encouraging some states to undertake human rights impact assessment of trade rules and policies following public and participatory process.

3.2. UN TREATY BODIES

Each of the “Core International Human Rights Instruments,” open for membership to all states, have established committees of experts to monitor the implementation of the treaty provisions by its states parties. The treaties in question are: the Covenant on Civil and Political Rights,¹² the Covenant on Economic, Social and Cultural Rights,¹³ the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁴ the Convention on the Elimination of All Forms of Discrimination against Women,¹⁵ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁶ the Convention on the Rights of the Child,¹⁷ the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,¹⁸ the Convention on the Rights of Persons with Disabilities (and its Optional Protocol)¹⁹ and the International Convention for the Protection of All Persons against Enforced Disappearances.²⁰

By ratifying or accessing the core treaties named above, states agree to be bound by a range of monitoring systems. The committees of experts have competence mainly to: 1) Consider periodic reports to be submitted regularly by state parties detailing their implementation of

the treaty provisions; 2) Consider interstate complaints and issue decisions on possible treaty violations (only available under certain treaties);²¹ 3) Accept individual complaints and issue decisions on possible violations of any of the rights set forth in the treaties each committee monitors (available under all core treaties except the CESC²² and the Committee on the Rights of the Child (CRC); and 4) Undertake confidential queries to investigate systematic violations of the provisions, as set forth by the Convention on the Elimination of Discrimination against Women (Optional Protocol, arts. 8-11); the Convention Against Torture (art. 20) and the Convention on the Rights of Persons with Disabilities (Optional Protocol, arts. 6-7). Some Committees have developed follow-up of their recommendations and early warning mechanisms (particularly the Committee on the Elimination of Racial Discrimination (CERD)).

Some of these procedures have been used to raise human rights concerns in connection with trade and investment policies. The CESC has been a pioneer and the most active treaty-body in this regard. This Committee and the former Sub-Commission for the Promotion and Protection of Human Rights were among the first human rights voices to join protest from civil society against Multilateral Agreement on Investments (MAI), free trade and the WTO, calling for the recognition of human rights as a primary objective of trade, investment and financial policy (Dommen 2005). The CESC has included specific comments and recommendations about effects of trade agreements on the enjoyment of economic, social and cultural rights, in many of its discussions with states, and in Concluding Observations to periodic reports.²³ Other Committees are progressively engaging with trade related issues affecting human rights under their monitoring competence. For instance, the CRC and the Human Rights Committee (HRC) have addressed the issue of access to medicines in relation with the right to health and the intellectual property agreements involved (3D 2007). The Committee on the Elimination of Discrimination Against Women (CEDAW) has recommended states Parties to consider the adverse impact that free trade agreements may have on living and working conditions of women and to undertake the appropriate impact assessments. Another issue increasingly present in the Committees’ consideration is the participation of possible victims of human rights violations in trade decision-making.²⁴ Accordingly, there is an increased use by NGOs of “shadow reports” to raise concerns on trade before CESC and other Committees.²⁵

The day of general discussion on a theme designated by CESC is an important forum for engaging in exchanges

of views regarding trade-related issues and their impact on human rights. The issue of trade has already been addressed in the following General Discussion Days: a) Globalization and its impact on the enjoyment of economic and social rights;²⁶ and b) The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.²⁷ The CESCR has called for further efforts by institutions such as the World Bank, regional development banks, the International Monetary Fund and the WTO to consider the impact of their activities on the full enjoyment of human rights, through its General Comments.²⁸

In addition CERD has developed its own early warning and urgent action mechanisms which are being targeted by indigenous peoples interested in highlighting the potential violation of their rights in relation to the activities of multi-national companies operating in their territories.²⁹

3.3. HUMAN RIGHTS COUNCIL

The Human Rights Council is the only intergovernmental body of the UN system devoted exclusively to the promotion and protection of human rights. This political body, consisting of representatives of 47 countries, is a subsidiary organ of the General Assembly and was created on March 15, 2006³⁰ to replace the main organ of the UN addressing human rights issues in the past: the UN Commission on Human Rights.³¹ The Human Rights Council has inherited the main mechanisms for monitoring human rights performance among the charter-based institutions from its predecessor, i.e., the public special procedures along with a confidential complaint procedure, and subsidiary bodies focused on standard-setting or specific thematic issues such as the development or effective implementation of the Durban Declaration and Programme of Action.

The Human Rights Council mandate includes promotional and protective human rights powers. Its meetings are public³² and any state members, observers and NGOs with consultative status can participate in the discussions. Some of the activities performed by this organ and its subsidiary bodies are directly relevant to trade related issues and their impact on human rights. Since the Human Rights Council is open to the contributions of civil society and any human rights-related issue falls under the scope of competence, this organ is a privileged forum to further develop the nexus between trade, investment policies and human rights.

3.3.1. Public Special Procedures

Public Special Procedures are monitoring mechanisms of human rights endorsed to individual experts (Special Rapporteurs, Special Representatives and Independent Experts) since 1967, whose common mandate is the investigation and reporting of human rights situations either in a specific territory (country mandates) or with regard to a phenomenon of violations (thematic mandates).³³ These procedures owe their existence to resolutions adopted by majority in the Human Rights Council and are thus not subject to specific consent of any state. The scope of their action is truly universal: all the states of the world are monitored by these bodies and they cover civil, political, economic, social and cultural rights as well as rights of solidarity such as issues related to development and the environment. Individual as well as collective rights are under scrutiny. Mandate holders have developed flexible methods of work and their activities go beyond reporting on activities and findings. Most accept complaints on human rights violations to which they can react expeditiously thorough urgent appeals. Mandate holders also carry out country visits to investigate the situation of human rights in specific domestic contexts. Access to special procedures is also characterized by the lack of formal requirements, enabling swiftness and flexibility.³⁴

Due to the direct connection between their mandates and trade-related issues, some rapporteurs have been particularly engaged in the analysis of the impact of trade and investment policies on human rights. This is the case of:

- a) The Independent Expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of human rights, particularly economic, social and cultural rights. The Expert has been expressly given a mandate to explore further [...] the links to trade and other issues, including HIV/AIDS, when examining the effects of foreign debt and other related international financial obligations of states, and also to contribute, to the process entrusted with the follow-up to the International Conference on Financing for Development, with a view to bringing to its attention the broad scope of his/her mandate.³⁵
- b) The Special Representative of the Secretary General on human rights and transnational corporations. The mandate of this Expert includes identifying and clarifying standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights. Professor Ruggie has highlighted

issues pertaining to the subordination of the human rights obligations of states to the promotion of the interests of transnational corporations. This bias in favor of transnational corporations has been generally justified on the basis that the ensuing increased trade and investment is beneficial for economic growth. Ruggie points to the 2,500 bilateral agreements, which provide protection for investors. These protections include access to international arbitration enabling companies to challenge the enactment of any legalization impacting them, even if this legislation is being enacted on the basis of the state's human rights obligations. He describes the result of this interplay between human rights obligations and investor protection as a skewed balance in favor of the latter.³⁶ While this mandate steers clear of tackling what many regard as a fundamental requirement for ensuring responsibility for corporate actions, namely the adoption of legally binding obligations on corporations, it does provide a potential avenue for exposing the extent to which non-transparent bilateral and multilateral trade agreements derogate from the human rights obligations of states that enter into them.

Other mandates have devoted attention to the nexus between investment policies, liberalization of trade and the impact on human rights and have recommended actions to the concerned stakeholders. We have already mentioned some contributions by the Special Rapporteur on the right to health and the Special Rapporteur on torture. The following examples are also illustrative of this trend impregnating all the spheres of activities of Special Rapporteurs (standard-setting, research based studies, monitoring of the compliance of human rights standards, country visits, individual complaints, etc.).

a) The Basic Principles and Guidelines on Development-Based Evictions and Displacement drafted by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living include specific guidelines requesting the integration of binding human rights standards in international relations, including through trade and investment to avoid unlawful evictions.³⁷

b) The Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights has identified and analyzed the emergence of the new phenomena of export of contaminated vessels to developing countries for ship-breaking, trade in electronic waste and other movements of hazardous wastes facilitated by trade liberalization, deregulation of international markets and the creation of new free trade zones.³⁸

c) Mandate holders of public special procedures are introducing recommendations on the impact of trade and investment policies on the enjoyment of human rights in the reports resulting from their country missions. For instance, the former Special Rapporteur on the right to food who decided to address the impact of trade negotiations at WTO on the right to food as part of his mandate recommended to the Guatemalan authorities that they study the potential impact of the Central American Free Trade Agreement to ensure that the obligations entered by means of this agreement were consistent with human rights.³⁹

d) The Special Rapporteur on torture has made a commitment to examine the situation of trade in instruments used for torture in the course of country visits and to transmit communications to governments concerning allegations of trade in security and law enforcement technology used for torture. In addition, this Rapporteur called upon the Committee against Torture to examine this question when considering states' periodic reports.⁴⁰

3.3.2. Special Session on the Right to Food

The Human Rights Council has recently raised concerns on the impact of trade and investment policies on human rights in a rather unexpected forum: its special session. The Human Rights Council can hold Special sessions when the urgency of the situation requires it. While these sessions (also celebrated by the former UN Commission on Human Rights) have traditionally addressed country situations in the context of armed conflicts,⁴¹ the 7th special session, held in May 2008, was the first to address a thematic issue: The Negative Impact on the Realization of the Right to Food of the Worsening of the World Food Crisis, caused *Inter Alia* by the Soaring Food Prices. This represents a remarkable milestone for the advancement of economic, social and cultural rights and the understanding of human rights emergencies beyond potential or actual armed conflicts.⁴² Moreover, many governmental representatives and NGOs took the floor to underline the relationship between the food crisis, the privatization and liberalization of markets, and the policies imposed by Bretton Woods institutions and trade agreements.⁴³ During the special session, the CESCR issued a statement urging states to revise the global trade regime under WTO to ensure that global agricultural trade rules promote the right to food.⁴⁴ The Special Rapporteur on the right to food, Olivier De Schutter, responsible for the background paper of that session, also highlighted the role played in the food crisis by both speculative investment and trade liberalization particularly within net food-importing countries (De Schutter 2008).

3.3.3. Human Rights Council Advisory Committee

Following its first session in August 2008 this body, successor of the former Sub-Commission on the Promotion and Protection of Human Rights, proposed to conduct a study on the right to food addressing the questions of state obligations and the rights of peasants as well as the causes and consequences of the current global food crisis (citing among others: speculation, financial measures made by international financial agencies and agricultural export subsidies).⁴⁵

3.3.4. Universal Periodic Review

The only substantial change introduced in the mandate of the Human Rights Council from that of its predecessor is the existence of a periodic review mechanism to evaluate the fulfillment of human rights obligations by all states: the so-called Universal Periodic Review (UPR). All countries are required to be reviewed under the UPR. Since four years is the established periodicity for the first cycle of the review, 48 states per year will be reviewed during three sessions of the working group lasting two weeks each.

The standards used as a basis for the review include voluntary pledges and commitments made by states, including those undertaken when presenting their candidatures for election to the HRC. Human rights advocates can use the mechanism to ensure that states include, among their voluntary pledges and commitment, issues regarding trade agreements and policies that may impact the enjoyment of human rights. In addition there is an open channel for introducing trade concerns in the three documents issued before the working group of the UPR, as basis for interactive dialogue, namely:

- 1) the national report or written presentation of the state under Review;
- 2) the compilation prepared by the OHCHR of information contained in the reports of treaty bodies, special procedures and other relevant UN official documents; and
- 3) the summary prepared by the OHCHR of other reliable information provided by relevant stakeholders (mainly NGOs, National Human Rights Institutions and regional intergovernmental organizations).

Apart from providing input via the aforementioned reports, civil society participation at the UPR mechanism is limited. Therefore if the issue of trade and investment policies is to be introduced on the agenda it will be

essential that NGOs target governments, particularly those of the Troika, willing to raise the question during the interactive dialogue among states.

3.3.5. Expert Mechanism on Indigenous Peoples

This new body created in December 2007⁴⁶ consists of five independent experts and is mandated to provide thematic expertise on the rights of indigenous peoples, focusing mainly on studies and research-based advice, and to suggest proposals to the Council for its consideration and approval.

The thematic nature of the work to be conducted by the expert mechanism places emphasis on self-determination, participation and free prior informed consent in decision-making. This provides significant scope for the conduct of research and the development of recommendations addressing the impact of trade and investment policies on the rights of indigenous peoples. Given that indigenous peoples are among those most impacted by trade and investment policies globally, and that they have, in the past, been vocal regarding their exclusion from decision making processes in relation to these policies, a thematic focus on the linkages between these policies and indigenous peoples rights may be an area of interest to the expert mechanism in future sessions.

4. POTENTIAL FUTURE AVENUES FOR ENGAGEMENT WITH THE ISSUE OF TRADE AND INVESTMENT POLICIES AND HUMAN RIGHTS

The recent increase in the number of trade agreements pertaining to biofuels (as a result of policies designed to decrease dependency on oil) and the increased emphasis placed on foreign direct investment in the extractive sector by the UN Conference on Trade and Development (UNCTAD) among others, are but two examples of current trends in trade and investment policies that have significant impact on the realization of human rights for many communities and individuals. In light of the increasing pervasiveness of the impact of trade and investment on human rights, a more proactive and creative engagement is clearly required on behalf of the human rights regime to address the skewed nature of the protection afforded to investors vis-à-vis human rights holders.

The following are some provisional suggestions on possible avenues that could be pursued within the existing human rights machinery to advocate for a more balanced approach to trade, investment and human rights:

a) Examine options for thematic discussions within the Treaty Bodies on the nexus of human rights obligations and trade and investment policies. This could be done with a view to encouraging and providing input into the elaboration of a general recommendation addressing the issue from the perspective of the bodies.⁴⁷ The CE-SCR would appear most appropriately placed to address this subject having addressed related issues in its general recommendation on the right to water. Thematic discussions could address the human rights obligation of states under Article 2(1) and its implications for multilateral and bilateral trade agreements. Another example in the context of ICERD is a session examining the extent of de facto discrimination against indigenous peoples resulting from trade agreements or the encouragement of foreign direct investment in indigenous territories.

b) Seek clarification from the ICJ in relation to legal lacuna regarding trade agreements and human rights obligations. There is a lack of legal clarity pertaining to implications of states' human rights obligations under international human rights treaties vis-à-vis their trade and investment policies. In fact the tendency in recent years has been to favor the rights of investors over the obligations of states to uphold human rights. An advisory opinion or ruling by the ICJ on this matter, or an aspect of it such as conditioning trade agreements and associated arbitration mechanism (which generally lack transparency) on human rights obligation, could address this lacuna in international law. UN agencies whose mandates are directly impacted could potentially request an advisory opinion from the ICJ on related questions of law impacting their work and ability to fulfill their mandates. Likewise, states that are considering revising legislation to reflect the evolving human rights normative framework, but which are constrained by multilateral or bilateral trade agreements or arbitration mechanisms, could take a case to the ICJ to clarify their margin of appreciation in relation to human right obligations and trade and investment priorities. Any emerging decisions or advisory opinions may have implications for WTO agreements and dispute resolution mechanisms.

c) Taking complaints under ILO Conventions, such as ILO Convention 111 on Discrimination in Employment and Occupation, could also be used as an avenue to challenge trade and investment policies. Potential examples include cases where traditional livelihoods of indigenous peoples are rendered impossible as a result of these policies, thereby constituting de facto discrimination against them on the basis of encouraging investment in particular sectors that require access to their lands and resources.

d) Informing the work of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to ensure that adequate attention is paid in the development of his proposed protect, respect and remedy framework to the role of human rights in the formulation of trade and investment policies and the associated protections afforded to transnational corporations and other businesses.

e) Increased focus in human rights submissions on the correlation between violations of human rights and the trade and investment policies that are determinant in the contexts in which these violations occur. Doing so could facilitate on-going cross-departmental governmental dialogues within and among states, and address the existing dichotomy between human rights issues and trade and investment policies that is at the root of many of the inconsistencies in the existing international regimes.

¹ The authors would like to thank Cathal Doyle for his comments and contribution to this paper.

² Human rights, trade and investment. Report of the High Commissioner for Human Rights. Fifty-fifth session of the Sub-Commission on the Promotion and Protection of Human Rights, UN doc. E/CN.4/Sub.2/2003/9 (2003) paragraphs 5-19.

³ All UN Departments, Offices, Funds and Programmes were divided in five sectoral areas, namely: 1) Peace and Security; 2) Economic and Social Affairs, 3) Development Cooperation, 4) Humanitarian Affairs; and 5) Human rights. An Executive Committee was established for the first four areas while human rights was designated as a cross-cutting issue with participation in each of the other four sectors. Therefore, ostensibly human rights are since incorporated into all the institutional structures of the UN. See UN docs. A/51/829, sec. A, Strengthening of the United Nations System Programme Budget for the Biennium 1996-1997 (17 March 1997), and A/52/584, para. 26, United Nations Reform: Measures and Proposals (10 November 1997).

⁴ See Human rights as the primary objective of international trade, investment and finance policy and practice, Working Paper submitted by J. Oloka-Onyango and Deepika Udagama in accordance with Sub-Commission resolution 1998/12, UN doc. E/CN.4/Sub.2/1999/11 (1999); Preliminary study of the independent expert on the right to development, Mr. Arjun Sengupta, on the impact of international economic and financial issues on the enjoyment of human rights, UN doc. E/CN.4/2003/WG.18/2 (2002); Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, UN doc. A/HRC/8/5 (2008); Report of the High Commissioner on Human Rights Agreement on Trade-Related Aspects of Intellectual Property Rights, UN doc. E/CN.4/Sub.2/2001/13 (2001); Report of the High Commissioner on Human Rights on the liberalization of trade in services and human rights, UN doc. E/CN.4/Sub.2/2002/9 (2002); or the Report of the High Commissioner for Human Rights on human rights,

trade and investment, UN doc. E/CN.4/Sub.2/2003/9 (2003); Human Rights on the fundamental principle of non-discrimination in the context of Globalization, UN doc. E/CN.4/2004/40 (2004); Analytical study of the High Commissioner for Human rights on the fundamental principle of participation and its application in the context of globalization, UN doc. E/CN.4/2005/41 (2005).

⁵ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, on his mission to the World Trade Organization, UN doc. E/CN.4/2004/49/Add.1 (2004).

⁶ Drafted by the former Sub-Commission on the Promotion and Protection of Human Rights, UN doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). The lack of support of this initiative was clearly shown by the UN Commission on Human Rights that felt compelled to affirm that the draft proposal had no legal standing and therefore the Sub-Commission should not perform monitoring function in this field, UN Commission on Human Rights Decision 2004/116 of 20 April 2004, paragraph c).

⁷ Adopted by the Governing Body of the International Labour Office in November 1977 and amended in November 2000.

⁸ Launched by the UN Secretary General in 1999 consisting of nine principles and revised in 2004 to introduce a tenth principle.

⁹ Adopted in 1976 and revised in 2000.

¹⁰ UN docs. E/CN.4/2005/62 (2005), paragraphs 12-39; E/CN.4/2004/56 (2004), paragraphs 66-68; A/58/120, paragraphs 22-28; and E/CN.4/2003/69 (2003).

¹¹ On 31 July 2006 the "European Commission brought into force the European Trade Regulations No. 1236/2005 concerning trade in goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment". Flaws in this regulation have been criticized by Amnesty International: EU: Torture instruments trade regulations flawed and inadequate.

¹² Adopted on 16 December 1966, entry into force 23 March 1976. Its first additional Protocol establishing the competence of the Human Rights Committee to deal with individual petitions was adopted and entered into force at the same time as the Covenant. A Second additional protocol aiming at the abolition of the death penalty was adopted on 15 December 1989 (entry into force 11 July 1991).

¹³ Adopted on 16 December 1966, entry into force 3 January 1976. An additional Protocol opening an international channel through which victims could complain about the violation on economic, social and cultural rights was adopted by the Human Rights Council on 18 June and it is expecting its final adoption by the UN General Assembly by the end of 2008.

¹⁴ Adopted 21 December 1965, entry into force 4 January 1969.

¹⁵ Adopted on 18 December 1979, entry into force 3 September 1981. Its Optional Protocol conferring to the Committee monitoring this treaty competence to deal with individual complaints was adopted on 10 December 1999 (entered into force 22 December 2000).

¹⁶ Adopted on 10 December 1984, entry into force 26 June 1987. Its Optional Protocol was adopted on 18 December 2002 (entry into force 22 June 2006) establishing a system of preventive visits.

¹⁷ Adopted on 20 November 1989 (entry into force 2 September 1990) Two additional Protocols to this Convention were adopted on 25 May

2000 on the rights on the sale of children, child prostitution and child pornography; and on the involvement of children in armed conflict. Both Protocols entered into force in 2002.

¹⁸ Adopted on 18 December 1990 (entered into force 1 July 2003).

¹⁹ Adopted on 13 December 2006 (entered into force 12 May 2008).

²⁰ Adopted on 20 December 2006 (not yet in force).

²¹ Covenant on Elimination of All Forms of Racial Discrimination (articles 11-13); International Covenant on Civil and Political Rights [Art 41 (1)]; Convention Against Torture (Art. 21). All the other treaties setting up this procedure require the specific consent of the State Parties: the International Covenant on Civil and Political Rights [Art 41(1)]; the Convention Against Torture [Art 21] and the International Convention on Migrant Workers [Art 75]. Although states remain reluctant to denounce other states for human rights violations before the Committees, it seems they are increasingly willing to take cases against other states for the violation of provisions of human rights treaties in other fora, particularly, the International Court of Justice. See Armed Activities on the Territory of the Congo: New Application. Democratic Republic of Congo v Rwanda, Judgment of 3 February 2006, ICJ Reports 2006, No. 126. Also, the pending case instigated by Republic of Georgia on 12 August 2008 against the Russian Federation for its actions in breach of the International Convention on the Elimination of All Forms of Racial Discrimination.

²² As stated above, the adoption by the General Assembly of the Protocol to this treaty (and its subsequent ratification by states) will also open this channel for the Covenant on Economic, Social and Cultural Rights.

²³ A compilation of the CESCR's reference to trade-related issues in its examination of State Reports between 2002 and May 2005, can be found in Fabre 2006.

²⁴ See for instance UN docs CEDAW/C/NER/CO/2 (2007, Niger), paragraphs 35 and 36, and CEDAW/C/GUA/CO/6 (2006, Guatemala), paragraphs 31 and 32.

²⁵ For instance, the NGO 3D presented, among many other similar submissions, a paper on The Impact of Liberalization in Services on the Right of the Child to the Highest Attainable Standard of Health to the NGO Group for the CRC Sub-group on health, on 19 March 2004 (all available at: <http://www.3dthree.org>).

²⁶ UN doc. E/C.12/1998/8 (1998).

²⁷ Organized in cooperation with the World Intellectual Property Organization (WIPO), May 2008 (report not available at the time of writing this paper).

²⁸ See CESCR General Comment 14 on the Right to Health, UN doc. E/C.12/2000/4, paragraph 64.

²⁹ For more on these decisions see <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm> (accessed October 12, 2008).

³⁰ General Assembly Resolution 60/251 of 3 April 2006.

³¹ Created in 1946 as a subsidiary body of the Economic and Social Council (ECOSOC) it consisted of representatives of 53 states and used to meet publicly once a year.

³² That can also be followed by Webcast connecting to <http://www.un.org/webcast/unhrc/index.asp> (accessed October 13, 2008).

³³ The list of existing special procedures is available at: <http://www2.ohchr.org/english/bodies/chr/special/index.htm> (accessed October 13, 2008).

³⁴ For an overview of the work of special procedures see, Draft Manual of the

United Nations Special Procedures, 2006 available at <http://www2.ohchr.org/english/bodies/chr/special/index.htm> (accessed October 13, 2008).

³⁵ Human Rights Council Resolution 7/4, 27 March 2008. The latest contribution on this issue by this Expert can be found in his annual report A/HRC/7/9 (2008), particularly paragraphs 30, 35 and 36; and his report on the mission to Burkina Faso, A/HRC/7/9/Add.1 (2008), paragraph 60.

³⁶ Report of the Special Representative on the issue of human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: A framework for Business and Human Rights, UN doc. A/HRC/8/5 (2008) paragraphs 33 and 34.

³⁷ Annex 1 of the Report of the Special Rapporteur on adequate housing, UN doc. A/HRC/4/18, para. 27 and 71.

³⁸ UN doc. E/CN.4/2004/46 (2004).

³⁹ UN doc. E/CN.4/2006/44/Add.1 (2006, mission to Guatemala), para. 58.

⁴⁰ UN doc. E/CN.4/2005/62 (2005), para. 38 and 39.

⁴¹ By 30 August 2008, 7th Special Sessions had been held on the situation of the following territories: occupied Palestinian territories, Lebanon, Myanmar and Darfur.

⁴² A summary and commentary on the session can be found in Council Monitor 2008.

⁴³ Among them, the representatives of Egypt (speaking on behalf of the African Group), Brazil, Bolivia, Chile, Cuba, Colombia, Ecuador, India, Indonesia, Mauritius, Nigeria, Peru, Philippines and Sri Lanka. See also statements of NGOs such as North and South XXI and the International Centre for Human Rights and Democratic Development. Live Webcast archives of the session are available at: <http://www.un.org/webcast/unhrc/archive.asp?go=017> (accessed October 13, 2008).

⁴⁴ UN doc. E/C.12/2008/1 (2008), paragraph 13.

⁴⁵ Advisory Committee Resolution 1/8, 14 August 2008.

⁴⁶ Human Rights Council Resolution 6/36 14 December 2007.

⁴⁷ CERD conducted such a session at its 73rd Session addressing the topic of Special Measures with a view to the future elaboration of a general recommendation on the topic.

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IX. TOWARDS A CONVENTION ON THE RIGHTS OF PEASANTS¹

1. INTRODUCTION

Peasants have always been among the first victims of hunger and multiple violations of human rights all over the world. For hundreds of years they have been forcibly evicted from their lands. Their claims have been met by violent repression. Every year thousands of peasants are killed defending their rights to land, water, seeds and other productive resources. For centuries, such violations were committed in the name of the civilizing mission of colonialism; in recent decades, it has been done in the name of neo-liberal free-market policies, which favor highly mechanized, export-oriented agricultural production and the interests of multinational corporations.

Violations of the rights of peasants include the discrimination experienced by peasant families in the exercise of their rights to food, water, healthcare, education, work and social security and the states' failure to implement land reforms and rural development policies which would help to remedy this situation. They also include the exclusion of peasant farmers from their local markets, due to both market deregulation in their countries and cheap imports coming from the global north as a result of dumping practices. They include forced evictions and displacement of peasant families and the confiscation of seeds by transnational corporations who own the patents. Moreover, when peasants try to organize themselves against these violations, they are often criminalized, arbitrarily arrested and detained or physically attacked by private or state police forces (Golay 2009a).²

To address the problem, La Vía Campesina, the international peasant movement founded in 1993, has spent more than ten years denouncing these violations of the rights of peasants to the United Nations. These denunciations, taken up by CETIM at the end of the 1990s, were then presented, in the form of annual reports, at parallel events to the Human Rights Commission, in collaboration with another NGO, FIAN International. At the same time, La Vía Campesina was engaged in a lengthy process of drawing up a comprehensive definition of the rights of peasants until, in June 2008, after seven years of internal discussion and consultation with its member organizations, it finally adopted The Declaration of the Rights of Peasants – Men and Women.³

It took the United Nations a long time to understand La Vía Campesina's demands. It was only with the creation of the Human Rights Council in June 2006, and the work of its Special Rapporteur on the right to food

and its advisory committee in response to the global food crisis, that the rights of peasants were discussed by the United Nations for the first time. In 2009, La Vía Campesina was also invited to the UN General Assembly to give its view on the world food crisis and the possible solutions to overcome it. One of the solutions it offered was The Declaration of the Rights of Peasants – Men and Women.⁴

This article is divided into three parts. The first part deals with the recognition currently given to the rights of peasants in international human rights law (2). The second part looks at La Vía Campesina's Declaration of the Rights of Peasants – Women and Men (3). The third part examines the current state of discussions on the rights of peasants within the United Nations (4).

2. CURRENT RECOGNITION OF THE RIGHTS OF PEASANTS IN INTERNATIONAL HUMAN RIGHTS LAW

The rights of peasants are not subject to any specific protection under international law. However, peasants, like all human beings, benefit from the protection of the rights enshrined in the universal instruments for the protection of human rights, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR) (2.1) and the International Covenant on Civil and Political Rights (ICCPR) (2.2). As a complement to this universal protection, women peasants and indigenous peasants also benefit from the protection granted by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and by the United Nations Declaration on the Rights of Indigenous Peoples (2.3).

2.1. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Many of the economic, social and cultural rights enshrined in the ICESCR have been interpreted by UN experts as offering significant protection for peasants' rights. Of these, the most important are the right to food, the right to adequate housing and the right to health.

The right to food

The right to food is enshrined in Article 25 of the Universal Declaration of Human Rights and in Article 11 of the ICESCR (Golay 2009b). In a number of UN documents, it has been interpreted as the right of all people to "be able to feed themselves, by their own means, with dignity."⁵

It has also been interpreted as "the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear."⁶

According to the Right to Food Guidelines, adopted unanimously by the member states of the UN Food and Agriculture Organization (FAO) in November 2004, the right to food protects the right of peasants to have access to productive resources or the means of production, including land, water, seeds, microcredit, forests, fish and livestock.⁷ In the same guidelines, states recommended the following:

"States should pursue inclusive, non-discriminatory and sound economic, agriculture, fisheries, forestry, land use, and, as appropriate, land reform policies, all of which will permit farmers, fishers, foresters and other food producers, particularly women, to earn a fair return from their labour, capital and management, and encourage conservation and sustainable management of natural resources, including in marginal areas."⁸

The states also unanimously accepted their obligation to respect, protect and fulfill the right to food in the following way:

"States should respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination. Where necessary and appropriate, States should carry out land reforms and other policy reforms consistent with their human rights obligations and in accordance with the rule of law in order to secure efficient and equitable access to land and to strengthen pro-poor growth. [...] States should also provide women with secure and equal access to, control over, and benefits from productive resources, including credit, land, water and appropriate technologies."⁹

This interpretation of the right to food already offered significant protection to the rights of peasants, but the Committee on Economic, Social and Cultural Rights (CESCR) took it further by pointing out that on the basis of the ICESCR, member states were under an obligation to ensure sustainable access to water for agriculture in order to implement the right to food, and that they should ensure that the most disadvantaged and marginalized workers, including women, had access, on an equal basis, to water and water management, and especially to sustainable techniques for gathering rain water and for irrigation.¹⁰

Furthermore, in several of its concluding observations, the committee set out the need to protect peasant families' access to seed. In its concluding observations addressed to India, for example, it urged the state to, "provide state subsidies to enable farmers to purchase generic seeds which they are able to re-use, with a view to eliminating their dependency on multinational corporations."¹¹

The right to adequate housing

The right to adequate housing, like the right to food, is enshrined in Article 25 of the Universal Declaration of Human Rights and Article 11 of the ICESCR (Golay and Özden 2007). In its General Comment 4, the Committee on Economic, Social and Cultural Rights states that the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head. Rather, it should be seen as "the right to live somewhere in security, peace and dignity."¹² The former UN Special Rapporteur on the right to adequate housing defined it like this: "The human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity."¹³

On the basis of the ICESCR, every person – including peasants – has a right to housing which guarantees, at all times, the following minimum conditions:

- legal security of tenure, including protection against forced eviction;
- availability of essential services, materials, facilities and infrastructure, including access to safe drinking water and sanitation;
- affordability, including for the poorest, through housing subsidies, protection against unreasonable rent levels or rent increases;
- habitability, including protection from cold, damp, heat, rain, wind or other threats to health;
- accessibility for disadvantaged groups, including the elderly, children, the physically disabled and victims of natural disasters;
- a suitable location, which means removed from sources of pollution while being close to schools and healthcare services.¹⁴

The Committee on Economic, Social and Cultural Rights provided that states must put an end to forced evictions, defined as: "the permanent or temporary removal against their will of individuals, families and/or commu-

nities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."¹⁵ These forced evictions are *prima facie* incompatible with the states' obligations under the ICESCR and "notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."¹⁶

In a number of reports, the former Special Rapporteur on the right to adequate housing has also emphasized the need to put an end to forced evictions and he has produced the Basic Principles and Guidelines on Development-Based Evictions and Displacement.¹⁷ According to these guidelines, it is, for example, a violation of the right to adequate housing when a government evicts peasant families from their land without ensuring that the families concerned have been adequately consulted and re-housed in equivalent conditions or have received adequate compensation.

The right to health

The right to health is enshrined in Article 25 of the Universal Declaration of Human Rights and Article 12 of the ICESCR (Özden 2006). In its General Comment 14, the Committee on Economic, Social and Cultural Rights defined it as "the right to enjoy the highest attainable standard of health conducive to living a life in dignity."¹⁸

The right to health includes the provision of adequate health care but also: "the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels."¹⁹

According to the ICESCR, states are required to ensure that medical services and the underlying determinants of health are available to all, including those living in rural areas.²⁰ States have a minimum core obligation to provide, as a minimum and at all times, the following:

- The right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- Access to basic shelter, housing and sanitation, and an adequate supply of safe drinking water;

- Essential drugs, as periodically defined under the WHO Action Programme on Essential Drugs.²¹

2.2. CIVIL AND POLITICAL RIGHTS

The International Covenant on Civil and Political Rights (ICCPR) protects peasants, as it protects all human beings. In particular the right to life, the right to be free from arbitrary detention, the right to a fair trial, and the rights to freedom of expression and freedom of association are fundamental rights of all peasants.

The Human Rights Committee, which oversees the implementation of the ICCPR, stressed the fundamental importance of the right to life in its General Comment no 6. According to the HRC:

“The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity.”²²

On the basis of the ICCPR, all human beings also have the right not to be arbitrarily arrested or detained and the right to have access to a judge and a fair trial if they are arrested (Articles 9 & 14). Anyone deprived of his or her liberty has the right to be treated humanely and with respect (Article 10). All people similarly have the right to freedom of expression, the right of free association with others, including the right to form and join trade unions for the protection of their interests, and the right to peaceful assembly (Articles 19, 21 and 22).

Arbitrary arrests, detentions and extrajudicial executions of peasant leaders are therefore serious violations of the ICCPR, as are infringements on their freedom of expression, freedom of association and the right to peaceful assembly by peasant movements.

2.3. THE RIGHTS OF WOMEN AND INDIGENOUS PEOPLES

A major aim of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is to put an end to discrimination against women in rural areas. Article 14 of the convention specifically pro-

tections the rights of women living in rural areas against discrimination in their access to resources, including land, and in their access to work, adequate housing and programs for social security, health and education. According to this article:

“1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.”

“2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

- (a) To participate in the elaboration and implementation of development planning at all levels;
- (b) To have access to adequate health care facilities, including information, counselling and services in family planning;
- (c) To benefit directly from social security programmes;
- (d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
- (e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;
- (f) To participate in all community activities;
- (g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes;
- (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”

In several of its concluding observations, the Committee on the Elimination of Discrimination against Women, which oversees the implementation of the convention by states parties, required that women in rural areas should be given priority in development programs and that the state should appeal, if necessary, for international assistance and cooperation.²³ In other concluding observations, it recommends that the state party should protect women’s access to land against the activities of

private business and against forced evictions.²⁴ In its concluding observations addressed to India for example, it makes the following recommendation:

“The Committee urges the State party to study the impact of megaprojects on tribal and rural women and to institute safeguards against their displacement and violation of their human rights. It also urges the State party to ensure that surplus land given to displaced rural and tribal women is cultivable. Moreover, the Committee recommends that efforts be made to ensure that tribal and rural women have individual rights to inherit and own land and property.”²⁵

CEDAW and its monitoring body offer, therefore, significant protection for the rights of women peasants.

Indigenous peasants possibly suffer even more than other groups from forced evictions and displacements. Until recently, the only international instrument that offered them any specific protection was the ILO C169 Indigenous and Tribal Peoples Convention of 1989, ratified by 20 states. This ILO Convention protects a large number of civil, political, economic, social and cultural rights. In particular, Articles 13 to 17 enshrine the rights of indigenous people to their land, their territories, and their right to participate in the use, management and conservation of these resources. It also enshrines the right of indigenous peoples to participation and consultation regarding all uses of resources on their lands, and the prohibition of their eviction from their lands and territories.

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the Human Rights Council in June 2006, and by the General Assembly in December 2008, represented therefore a major step forward in the protection of the rights of indigenous peasants.²⁶ The declaration begins by recognizing that indigenous peoples, both individually and collectively, have the right to the full enjoyment of all human rights and all fundamental liberties recognized in the United Nations Charter, the Universal Declaration of Human Rights and in international human rights law. It then goes even further than the ILO Convention, in recognizing that indigenous people also have the right of self-determination and the right to land and productive resources. It refers to the injustices that occurred as a result of colonialism and highlights the threat that globalization currently poses. It recognizes the importance of traditional knowledge, biodiversity and the safeguarding of genetic resources and calls for limits on activities that third parties can carry out on the lands belonging to indigenous communities.

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples represents a major step forward in safeguarding the right of indigenous peasant populations, which goes far beyond the rights enshrined in the ICCPR and the ICESCR. The fact that the declaration has already been taken up by certain countries, such as Bolivia, and adopted into their national law, enshrines these rights at the national level and should allow indigenous populations to demand legal remedies in the case of violations.

3. THE ADOPTION OF THE DECLARATION OF THE RIGHTS OF PEASANTS BY LA VÍA CAMPESINA

La Vía Campesina is the largest group of peasant organizations that has ever been created. It came into being in 1993, two years before the creation of the World Trade Organization (WTO), to defend the life, land and dignity of peasant families all over the world. La Vía Campesina’s main concern and policy framework has always been food sovereignty (CETIM 2002). However, for more than ten years now, it has also worked on the promotion and protection of the rights of peasants. As already stated, La Vía Campesina, in collaboration with the NGO FIAN International, has published annual reports in 2004, 2005 and 2006, detailing violations of the rights of peasants worldwide. In June 2008, after several years of internal discussion and consultation, it adopted the Declaration of the Rights of Peasants – Women and Men.²⁷

After describing the process leading up to the adoption of the Declaration of the Rights of Peasants – Women and Men by La Vía Campesina in June 2008 (3.1), we will look at the contents of the declaration (3.2) and La Vía Campesina’s call to action (3.3).

3.1. THE ADOPTION OF THE DECLARATION OF THE RIGHTS OF PEASANTS – MEN AND WOMEN AT THE LA VÍA CAMPESINA CONFERENCE ON THE RIGHTS OF PEASANTS, IN JAKARTA, JUNE 2008.

After a consultation process that lasted seven years, and involved its member groups, La Vía Campesina adopted the Declaration of the Rights of Peasants – Men and Women at the International Conference on Peasants’ Rights in Jakarta in June 2008. The conference brought together about a hundred delegates drawn from 26 countries and representing the various peasant groups that make up La Vía Campesina.

The adoption of the declaration was the final stage of a long process of drafting and consultation. The first draft of the declaration on the rights of peasants was presented to La Vía Campesina's Regional Conference on the Rights of Peasants, which was held in Jakarta in April 2002, following various conferences and events in 2000 and 2001 (Saragih 2005). The wording of the Declaration was discussed by individual member organizations and was finalized at the International Conference on the Rights of Peasants in 2008. The International Co-ordination Committee of La Vía Campesina ratified the final text in Seoul in March 2009.

The fact that La Vía Campesina is made up of more than 140 peasant organizations from nearly 70 different countries and represents more than 200 million peasants, and the fact that their declaration was adopted after a long process of internal discussion, gives the Declaration of the Rights of Peasants – Men and Women a great deal of authority.

3.2. THE CONTENTS OF THE DECLARATION OF THE RIGHTS OF PEASANTS – MEN AND WOMEN

La Vía Campesina's declaration follows the same structure as the United Nations Declaration on the Rights of Indigenous Peoples. It begins with a long introduction which recalls the large number of peasants all over the world who have fought throughout history for the recognition of peasants' rights, and for free and just societies, and concludes with the hope that this declaration represents a major step forward in the recognition, promotion and protection of the rights and liberties of peasants.

The first Article of the Declaration of the Rights of Peasants gives a definition of who peasants are, according to which:

"A peasant is a man or woman of the land, who has a direct and special relationship with the land and nature through the production of food and/or other agricultural products. Peasants work the land themselves, rely above all on family labour and other small-scale forms of organizing labour. Peasants are traditionally embedded in their local communities and they take care of local landscapes and of agro-ecological systems. The term peasant can apply to any person engaged in agriculture, cattle-raising, pastoralism, handicrafts-related to agriculture or a related occupation in a rural area."

"The term peasant also applies to landless peasants. According to the UN Food and Agriculture Organization (FAO 1984) definition [1], the following categories of people are considered to be landless and are likely to face difficulties in ensuring their livelihood: 1. Agricultural labour households with little or no land; 2. Non-agricultural households in rural areas, with little or no land, whose members are engaged in various activities such as fishing, making crafts for the local market, or providing services; 3. Other rural households of pastoralists, nomads, peasants practising shifting cultivation, hunters and gatherers, and people with similar livelihoods."

In Article 2, the Declaration reaffirms that women peasants have equal rights to men and that all peasants have the right to the full enjoyment, collectively or as individuals, of all those human rights and fundamental freedoms that are recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law (Article 2, para 1 & 2). It also states that peasants (women and men) are free and equal to all other people and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular to be free from discriminations based on their economic, social and cultural status (Article 2, para 3). It then declares that peasants (women and men) have the right to actively participate in policy design, decision making, implementation, and monitoring of any project, program or policy affecting their territories (Article 2, para 4).

Following the model of the United Nations Declaration on the Rights of Indigenous Peoples, the Declaration of the Rights of Peasants – Men and Women reaffirms the existing civil, political, economic, social and cultural rights of peasants, and reinforces them by incorporating new rights, such as the right to land, the right to seeds and the right to the means of agricultural production. These new rights are aimed at giving full protection to peasant families and forcing states to put an end to the types of discrimination from which peasants suffer.

The declaration adopted by La Vía Campesina reaffirms the right to life and to an adequate standard of living (article 3); the right to freedoms of association, opinion and expression (article 12); right to have access to justice (article 13). In addition, it also recognizes the following new fundamental rights: the right to land and territory (article 4); the right to seeds and traditional agricultural knowledge and practice (article 5); the right to the means of agricultural production (article 6);

the right to information and agricultural technology (article 7); the freedom to determine price and market for agricultural production (article 8); the right to the protection of local agricultural values (article 9); the right to biological diversity (article 10); and the right to preserve the environment (article 11).

3.3. VÍA CAMPESINA'S CALL TO ACTION

For La Vía Campesina, the adoption of the Declaration of the Rights of Peasants is only a first step that needs to be followed by the drawing up of an International Convention on the Rights of Peasants by the United Nations, with the full participation of La Vía Campesina and other representatives of civil society.²⁸ To this end, La Vía Campesina is hoping to receive “the support of the people who are concerned with the peasants’ struggle and the promotion and protection of the rights of peasants.”²⁹

On several occasions, La Vía Campesina has called for regional, national and international action to mobilize support for the recognition of the rights of peasants. On June 21, 2008, in the Final Declaration of the International Conference on the Rights of Peasants, La Vía Campesina declared:

“A future Convention on Peasant Rights will contain the values of the rights of peasants – and should particularly strengthen the rights of women peasants – which will have to be respected, protected and fulfilled by governments and international institutions.”

“For that purpose, we commit ourselves to develop a multi-level strategy working simultaneously at the national, regional and international level for raising awareness, mobilizing support and building alliances with not only peasants, but rural workers, migrant workers, pastoralists, indigenous peoples, fisher folks, environmentalists, women, legal experts, human rights, youth, faith-based, urban and consumers organizations [...]”

“We will also seek the support of governments, parliaments and human rights institutions for developing the convention on peasant rights. We call on FAO and IFAD to uphold their mandates by contributing to the protection of peasant rights. We ask FAO’s department of legal affairs to compile all FAO instruments protecting peasant rights as a first step towards this purpose. We will bring our declaration on peasant rights to the UN Human Rights Council.”³⁰

4. THE CURRENT STATE OF DISCUSSIONS ON THE RIGHTS OF PEASANTS WITHIN THE UNITED NATIONS

The United Nations was slow to respond to the demands of La Vía Campesina. For several years, CETIM denounced violations of peasants’ rights in meetings with the United Nations Commission on Human Rights (UNCHR), before the annual reports of La Vía Campesina and FIAN were presented at parallel events, to a relatively small audience. The Human Rights Council was created in June 2006 and it was only with the work of its Special Rapporteur on the right to food and its advisory committee in response to the global food crisis, that peasants’ rights were really discussed by the United Nations. In 2009 La Vía Campesina was invited by the Human Rights Council and the UN General Assembly to give its point of view on the food crisis and the way in which it might be remedied. It was at this point that La Vía Campesina presented its Declaration on the Rights of Peasants as one of the solutions to the food crisis.³¹

Since his appointment as UN Special Rapporteur on the right to food in May 2008, Olivier De Schutter has made significant contributions to the debate about the food crisis and the right to food and has highlighted very clearly the need to restore the role of small-scale peasant farmers and agricultural workers in the fight against hunger.

In May 2008, Olivier De Schutter called on the Human Rights Council to hold a special session on the food crisis and its impact on the right to food.³² The first thematic special session in the history of the Human Rights Council was held on May 22, on the food crisis and the right to food, and a resolution entitled “The negative impact of the worsening of the world food crisis on the realization of the right to food for all” was adopted unanimously.³³

In a very interesting passage from this resolution, the Human Rights Council called upon “States, individually and through international cooperation and assistance, relevant multilateral institutions and other relevant stakeholders [...] to consider reviewing any policy or measure which could have a negative impact on the realization of the right to food, particularly the right of everyone to be free from hunger, before instituting such a policy or measure.”³⁴ According to this resolution, the production of agrofuels, financial speculation and the free-market liberalization of agriculture should be assessed according to the impact they have on the right to food, particularly for peasants’ families.

Following this special session, the Special Rapporteur on the right to food presented a number of reports on the food crisis in 2008 and 2009, in which he stressed the need to protect small peasants. In his most recent report, presented to the General Assembly in October 2009, he lays particular emphasis on the need to protect peasant families' access to seeds.³⁵

The Advisory Committee of the Human Rights Council was created at the same time as the Human Rights Council itself in June 2006 (Özden 2008). In a report presented to the Human Rights Council in March 2009, the Advisory Committee analyzed the effects of the food crisis on the plight of peasants and recommended to the Human Rights Council that it carry out a study on the "The Current Food Crisis, the Right to Food and Peasants' Rights."³⁶

The Human Rights Council did not endorse this recommendation. But the council, in its resolution on the right to food adopted on March 20, 2009, requested the advisory committee to undertake a study on "discrimination in the context of the right to food, including identification of good practices of anti-discriminatory policies and strategies" (para. 36).

The study on discrimination in the context of the right to food is due to be presented to the Human Rights Council in March 2010. In preparation, Jean Ziegler has produced a working document entitled "Peasant Farmers and the Right to Food: a History of Discrimination and Exploitation," in which he describes the different kind of peasant farmers and the many forms of discrimination that they have suffered over the centuries.³⁷

In 2009, representatives of La Vía Campesina were also invited at the Human Rights Council and at the UN General Assembly. At the Human Rights Council, on March 9, 2009, a representative of La Vía Campesina discussed solutions to the food crisis in a debate organized by the Human Rights Council with the High Commissioner for Human Rights, N. Pillay, D. Nabarro, Coordinator of the UN Task Force on the Global Food Security Crisis, the Special Rapporteur on the right to food, Olivier De Schutter, and Jean Ziegler, member of the Advisory Committee. A month later, another representative of La Vía Campesina was invited to take part in an interactive thematic dialogue of the UN General Assembly on April 6, 2009, devoted to the food crisis and the right to food.

Paul Nicholson represented La Vía Campesina at the Human Rights Council on March 9, 2009, and Henry Sara-

gih was their representative at the General Assembly on the April 6, 2009. In their opening speeches and in the debates that followed, the two representatives of La Vía Campesina put particular emphasis on the violations of peasants' rights, which have further increased during the food crisis. They then put forward their view that the Declaration of the Rights of Peasants – Men and Women and the adoption of a UN Convention on the Rights of Peasants could form the basis of a solution to both the discrimination against peasants and the food crisis.³⁸

5. CONCLUSION

Throughout ancient and recent history, peasants have always been among the first victims of hunger and many forms of discrimination. Massive violations of human rights, including the right to food, have been reported by La Vía Campesina and most have been committed with impunity. This situation has been aggravated by the outbreak of the food crisis in 2007 and 2008, and some of the measures chosen by states to remedy the situation, such as the purchase of foreign land, will undoubtedly lead to new violations of peasants' rights.

In order to put an end to the repeated violations of peasants' rights, La Vía Campesina adopted the Declaration of the Rights of Peasants – Men and Women in June 2008. At the same time, it made the recognition, understanding and protection of peasants' rights among its primary objectives.

The rights of peasants are already partly recognized within the international instruments that protect human rights, such as the ICESCR and ICCPR, CEDAW and the UN Declaration on the Rights of Indigenous Peoples. These provisions have been supported by a progressive interpretation of the rights that they protect by monitoring bodies and experts at the United Nations Human Rights Council. In the Voluntary Guidelines on the Right to Food adopted in November 2004, states have also accepted this progressive interpretation and have taken a commitment to respect, protect and fulfill peasants' rights.

However, the need to recognize the rights of peasants within the United Nations, as conceived by La Vía Campesina, seems to be both useful and necessary. It would be useful to recognize in a single document the numerous rights of peasants that have already been recognized in other international instruments, to give coherence and visibility. But it would also be necessary,

at least for two reasons: first, because the current recognition of the rights of peasants is not providing sufficient protection to peasant families, in particular against the growing control over food and productive resources exercised by multinationals; second, because it will force states to take action against the discrimination faced by peasants. It must be backed up by the recognition of new rights for peasants, such as the right to land, to seed and to the means of production.

Since 2007, states have made several commitments to re-invest in rural development policies and sustainable local food production to cope with the food crisis.³⁹ But the same commitments were already made in 1974 and 1996, after similar food crises, without real effects. These promises were never kept and the number of hungry people continued to increase before exploding in 2008 and 2009. The recognition of the rights of peasants within the United Nations would be an important step to guarantee that the current commitments are not an idle dream.

¹ This article is based on a paper written by the author and published by the CETIM in Geneva in September 2009. The original paper on Golay 2009a is available online, in English, Spanish and French, at http://www.cetim.ch/fr/publications_cahiers.php. The author thanks the CETIM for its permission to publish this article.

² See working paper by J. Ziegler, member of the UN Human Rights Council Advisory Committee, Peasant Farmers and the Right to Food: a History of Discrimination and Exploitation, A/HRC/AC/3/CRP.5, 4th August 2009.

³ Via Campesina, Declaration of the Rights of Peasants Women and Men, adopted by the International Conference on the Rights of Peasants in Jakarta in June 2008, available online at <http://viacampesina.net/downloads/PDF/EN-3.pdf>.

⁴ Via Campesina's Statement to the UN General Assembly, 6th April 2009, available online at www.viacampesina.org.

⁵ See Human Rights Council, Report of the Special Rapporteur on the right to food, Jean Ziegler, A/HRC/7/5, 10th January 2008, § 18.

⁶ See Human Rights Commission, The right to food. Report by Mr. Jean Ziegler the Special Rapporteur on the right to food, E/CN.4/2001/53, 7th February 2001, § 14.

⁷ Right to Food Guideline No 8 (FAO 2005).

⁸ Right to Food Guideline No 2.5 (FAO 2005).

⁹ Right to Food Guidelines No 8.1 & 8.6 (FAO 2005).

¹⁰ General Comment No. 15: The Right to Water (Articles. 11 and 12), E/C.12/2002/11, § 7, adopted on 20 January 2003.

¹¹ Committee on Economic, Social and Cultural Rights, Concluding Observations, India, May 2008 E/C.12/IND/CO/5, § 69. See also General Assembly, Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation, Report of the Special Rapporteur on the right to

food, Olivier De Schutter, A/64/170, 23 July 2009, § 5.

¹² General Comment 4, The right to adequate housing (Art. 11, para. 1), § 7, adopted on 13 December 1991.

¹³ See the report of the Special Rapporteur on the right to adequate housing presented at the Fifty-seventh session of the Commission on Human Rights, E/CN.4/2001/51, 25th January 2001, § 8.

¹⁴ General Comment 4, The right to adequate housing (Art. 11, para. 1), § 8, 13 December 1991.

¹⁵ General Comment No 7, The right to adequate housing (art. 11 para 1): forced evictions, § 3, 20th May 1997.

¹⁶ General Comment No 7, The right to adequate housing (art. 11 para 1): forced evictions, § 3, 20th May 1997.

¹⁷ See Human Rights Council, report by the Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, 5th February 2007, A/HRC/4/18, Annexe 1.

¹⁸ General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), § 1, 11th May 2000.

¹⁹ General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), § 1, 11th May 2000, § 4.

²⁰ General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), § 1, 11th May 2000, §§ 12 et 36.

²¹ General Comment No. 14, The Right to the Highest Attainable Standard of Health (Art. 12), § 1, 11th May 2000, § 43.

²² Human Rights Committee, General Comment No 6, The Right to Life (article 6), § 3, adopted in 1982.

²³ See, for example, CEDAW, Concluding Observations. Gabon, 28th January 2005, A/60/38, Part. I, par. 247-248.

²⁴ See, for example, CEDAW, Concluding Observations. Cambodia, 25th January 2005, A/60/38, A/61/38, Part. I, par. 49.

²⁵ See, for example, CEDAW, Concluding Observations. India, 20th February 2007, A/62/38, Part. I, par. 184.

²⁶ See General Assembly, Report by the Special Rapporteur on the right to food, Jean Ziegler, A/61/306, 1st September 2006, § 41-44.

²⁷ Via Campesina, Declaration of the Rights of Peasants Women and Men, adopted by the International Conference on the Rights of Peasants in Jakarta in June 2008, available online at <http://viacampesina.net/downloads/PDF/EN-3.pdf>.

²⁸ See Via Campesina, Introduction to the Declaration of the Rights of Peasants Men and Women.

²⁹ See Via Campesina, Introduction to the Declaration of the Rights of Peasants Men and Women.

³⁰ Final Declaration of the International Conference on Peasants' Rights, Jakarta, 24th June 2008, available online at http://www.viacampesina.org/main_en/index.php?option=com_content&task=view&id=572&Itemid=1.

³¹ See La Via Campesina Statement at the UN General Assembly, 6th April 2009, available online at www.viacampesina.org.

³² See De Schutter, O, Background Note: Analysis of the World Food Crisis by the U.N. Special Rapporteur on the right to food, 2 May 2008, p. 14.

³³ Human Rights Council, The negative impact of the worsening of the world food crisis on the realization of the right to food for all, A/HRC/S-7/1, 22nd May 2008.

³⁴ Human Rights Council, The negative impact of the worsening of the world food crisis on the realization of the right to food for all, A/HRC/S-7/1, 22nd May 2008, para. 3.

³⁵ See General Assembly, Seed policies and the right to food: enhancing agrobiodiversity and encouraging innovation., report of the Special Rapporteur on the right to food, Olivier De Schutter, A/64/170, 23 July 2009.

³⁶ See Human Rights Council, Report of the Advisory Committee on its second session, Geneva 26th-30th January 2009, A/HRC/10/68.

³⁷ Working paper by J. Ziegler, member of the UN Human Rights Council Advisory Committee, Peasant Farmers and the Right to Food: a History of Discrimination and Exploitation, A/HRC/AC/3/CRP.5, 4th August 2009.

³⁸ See Vía Campesina Statement to the UN General Assembly, 6th April 2009, available online at www.viacampesina.org and the statement by P. Nicholson to the UN Human Rights Council, 9th March 2009, available online at: [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/83A0C5C3CFF6B0B8C12575740043C2BB?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/83A0C5C3CFF6B0B8C12575740043C2BB?OpenDocument).

³⁹ See Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier de Schutter, A/HRC/12/31, 21st July 2009, § 13-25.

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X. BRIDGING THE DIVIDE: A HUMAN RIGHTS VISION FOR GLOBAL FOOD TRADE

1. INTRODUCTION

Global food and agricultural systems are in crisis. An already simmering hunger crisis exploded early in 2008. At the same time, predictions on how climate change will undermine food security in already poor regions, especially Sub-Saharan Africa and small island states, are alarming (IPCC 2007). Over one billion people live with extreme hunger today. Climate change is not just affecting agriculture but is also affected by agriculture: as a sector, agriculture is estimated to be the second largest contributor to global greenhouse gas emissions.

Meanwhile, a large influx of speculative investment on commodity markets exacerbated the food price crisis earlier in 2008. Farmers and commodity processors alike complained that the tools they rely on to finance their production were no longer working, distorted by the flood of speculative capital. With the financial crisis now crippling banks' role as lenders and borrowers, credit for farmers, traders and food distributors will be much harder to obtain in the future.

This year all eyes turned to the food crisis. A summit of world leaders, a special UN taskforce, emergency sessions at the UN General Assembly, and G-8 pledges for increased aid were all part of the global response to the food crisis. The human rights community responded with a special session at the Human Rights Council and a report by the newly appointed Special Rapporteur on the right to food. The message is clear: It is time for a new vision for food and agriculture.

Eradicating hunger is an obligation that governments must fulfill as part of their international human rights treaty obligations. The human rights framework provides many of the guidelines needed for undertaking this mammoth task and for ensuring that governments and international organizations respond with policies that put people at the center. Importantly, human rights require governments to prioritize the most vulnerable groups, ensure no discrimination and pay attention to the outcomes of policies. To date, governments have failed to consider human rights obligations when they negotiate trade agreements.

This paper explains the importance of using human rights to build a global trading system. It explains why existing trade rules undermine human rights and makes proposals for a trading system that would instead support food systems that protect, promote and fulfill human rights. The paper focuses on the universal human right to food,

as one of an indivisible body of human rights, encompassing civil, political, economic, social and cultural rights.

2. HUMAN RIGHTS: A BASIS FOR BETTER TRADE RULES

“Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing and medical care.”

Universal Declaration of Human Rights

A human rights framework offers a powerful basis for making policies and laws that improve human welfare. There are six dimensions of the framework that are worth underlining in relation to global trade rules:

- a) Human rights are universal, indivisible and interdependent. Human rights belong equally to everyone. Human rights cannot be realized in isolation from one another. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others (OHCHR 2009).
- b) Human rights are legally binding on all states. All states have ratified at least one of the international human rights treaties and are required to uphold and protect human rights. Some states include human rights in their national laws and constitutions (FAO 2006). Twenty-two countries mention aspects of the right to food in their constitutions (FAO website). This provides an important legal recourse in the event the right to food is violated.
- c) Human rights emphasize equality and non-discrimination. “All human beings are born free and equal in dignity and rights.”² They cannot be discriminated against on the basis of sex, race, color or religion. In practice, equality means that states have to pay particular attention to the needs of the most vulnerable; and non-discrimination means paying attention to outcomes, not just process. Applying the same rules to dissimilar populations can worsen the situation of the disadvantaged. This is not an acceptable outcome within a human rights framework. Governments’ overriding obligation is to improve the condition of excluded and marginalized groups.
- d) Human rights enshrine the principles of participation, accountability and transparency. Human rights start with people. The realization of human rights depends on people having a voice in public policy making. Without active citizenry, including social movements, trade unions and civil society organizations, human rights have little meaning.
- e) Human rights imply international and extraterritorial obligations. The question of whether states have an obligation to recognize and protect human rights outside their borders is an area of debate. In his recent report to the Human Rights Council, the UN Special Rapporteur on the right to food, Olivier De Schutter, says, “States should not only respect, protect and fulfill the right to adequate food on their national territories; they are also under an obligation to contribute to the realization of the right to food in other countries and to shape an international environment enabling national Governments to realize the right to food under their jurisdiction”.³ At a minimum, states should ensure that the policies and actions of the international organizations they belong to are consistent with the fulfillment of human rights. States are also required to meet their commitment to provide international assistance and cooperation “to the maximum of available resources.”⁴
- f) Human rights are not associated with one type of economic system. Human rights provide a framework for policymaking, law and action. But they do not dictate any one way of organizing markets or stimulating economic growth.

Governments have three kinds of obligations in relation to the realization of economic, social and cultural rights: to respect, protect and fulfill. Respect means ensuring no public policy, law or action interferes with people’s enjoyment of human rights. Protect means enforcing laws and public policy to prevent third parties, individuals or corporations from depriving individuals of their access to human rights. In recognition that governments may not have the means to immediately realize everyone’s economic, social and cultural rights, the International Covenant on Economic, Social and Cultural Rights, relies on the concept of “progressive realization.” This creates both immediate and ongoing obligations on governments to provide a legal and institutional framework that enables all people under their jurisdiction to enjoy their rights. This includes fulfilling human rights through the design and implementation of programs that target vulnerable groups who may need assistance in realizing their rights because of poverty, racism, sexism, disenfranchisement (as non-citizens or former convicts) or other sources of social and economic exclusion.

The human rights framework is not perfect. One of its weaknesses has been its undue reliance on governments and courts as the primary locus for action for rights. It is important that the human rights framework incorporate a central role for citizen action as the engine of the de-

velopment process and the means by which to hold the state accountable. Furthermore, human rights treaties and their interpretations do not provide all the answers on how to fulfill rights – how the market should be managed, how services must be delivered, which agricultural practices should be encouraged, and how to create jobs, is not the stuff of human rights obligations (Sreenivasan 2008). But human rights can provide the people-centered yardstick against which policies can be measured (Smaller 2005).

3. FOCUS ON THE RIGHT TO FOOD

“The core content of the right to adequate food implies: 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; the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”

General Comment 12, The right to adequate food.

The right to food is central to building food and agriculture systems. The content of the right to food is outlined by the Committee on Economic, Social and Cultural Rights in the form of General Comment Number 12. General Comments are guidelines for states on how to interpret the specific rights contained in the seven major UN human rights treaties.⁵ In 2004, the 188 member countries of the FAO adopted the Voluntary Guidelines on the Right to Food. The FAO’s voluntary guidelines on the right to food provide a further instrument for governments that want to make the right to food a reality in the context of their national food security strategies (FAO 2005). Some countries, like South Africa and Brazil, have enshrined the right to food in their national constitutions. Others like Uganda, Guatemala, and Indonesia have national legislation that creates a legal obligation to fulfill the right to food.

Other economic and social rights affected by the food system include the right to health, work and life. The General Comment on the right to health, for example, says “the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”

Importantly, the General Comment on the right to food states: “the roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food.” This is an important distinction. Free traders focus on supply, based on the assumption that the market will distribute supply according to demand. If food insecurity arises, the free trade response is to increase production. Governments that believe in this theory give considerable public resources to realizing this “natural” market response, by encouraging more land into cultivation or developing new technologies to raise yields or improving varieties of seeds, fertilizers and pesticides. Many governments are satisfied that food security is assured when there is enough food available to feed the population.

A rights approach goes much further, because the right to food makes explicit the requirement that the available food be affordable or otherwise accessible to every individual. The United States is food secure, but the government fails to protect its’ people’s right to food. The U.S. Department of Agriculture reports that some 11 percent of U.S. households (and 18 percent of U.S. children) lack access to adequate food at some point in the year. That statistic represents 12.6 million people. Yet, even after exports, the domestic supply of food in the U.S. could feed everyone in the country twice over (Murphy 2005).

Nepal is food insecure but the government is taking steps to realize the right to food. A new government, formed after the end of a decade of civil war, included the right to food sovereignty in their interim constitution. On September 25, 2008, the Supreme Court of Nepal, recognizing this right, ordered the Government of Nepal to immediately supply food to 32 food-short districts. The Court found immediate action necessary because over three million people were suffering from food scarcity as a result of soaring food prices. The Government also increased the budget to the Nepal Food Corporation, a state enterprise that supplies food to districts that need it most.

4. THE WTO: IN CONFLICT WITH HUMAN RIGHTS?

The multilateral trade system now in place depends on free market economics. It is in tension with a human rights framework in important ways.

- a) Discourages state intervention: For over two decades, the multilateral trade system has been driven

by a vision of the economy that reduces the role of the state in the market. The state is discouraged from intervening. Under the human rights framework, states are the duty-bearers of rights and cannot be relieved of these obligations. States are required to take legislative, administrative and budgetary measures to deliver economic, social and developmental outcomes that protect people's rights. Human rights law requires states to "take steps individually and through international assistance and cooperation," and to use "the maximum of their available resources."⁶ In some cases the state may be required to intervene in the market, even if this creates trade distortions, in order to protect human rights.

- b) Uses a trade yardstick: The WTO insists on all policy being minimally trade-distorting as if trade was some-how an end in itself – it isn't. Positively encouraging the realization of human rights would make a far more sensible basis on which to assess countries' policies.
- c) Ignores the most vulnerable groups: The goal of the multilateral trading system is economic growth, and growth in the overall volume of trade is often used as a proxy for improved welfare. This is inadequate from a human rights perspective. Human rights require states to implement policies that target specific groups who are not enjoying human rights, not just to improve overall welfare.
- d) Dictates one economic model: Twenty-five years of trade regulation have pushed a specific vision for economic development (based on open markets, deregulated capital movements and restrictive intellectual property rights). A human rights framework does not dictate what particular economic policies a government should follow. But it does require governments to pay attention to outcomes when they put policies into practice.
- e) Lacks participation and transparency: Despite some recent improvements, multilateral (and bilateral) trade negotiations fail to meet a minimal level of participation and inclusion from affected people. Indeed, WTO member negotiators, and even trade ministers, can find themselves excluded from key negotiations at various times. A human rights framework pays attention to process as well as outcomes: people must be able to express their preferences, and to debate and change policies and laws.

5. PUTTING TRADE IN THE RIGHT PLACE

"The right to adequate food is realized when 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."

General Comment 12, the Right to Adequate Food

Most food is consumed in the country where it is grown. Trade plays a relatively minor role in food and agricultural systems. Over the past three years, an average of 18 percent of wheat, 7 percent of rice and 12 percent of corn were traded internationally (USDA 2008b). Over the same period, an average of 5 percent of pork, 10 percent of poultry and 12 percent of beef and veal were traded internationally (USDA 2008a). The United States, one of the world's biggest exporters of food, exports just less than one third of its agricultural production. Most countries export far less. Despite its minority role, international trade and investment requirements dictate food and agricultural policies. Most smallholder producers must now compete with imported food in their local markets. These imports, often priced by factors that have no relationship to local conditions (supply, demand, input costs, consumer preferences, etc.), have a big impact on local prices.

For more than two decades, governments, international financial and trade institutions, and bilateral donors have used free trade theory to inform their food and agricultural policies. Both the World Bank and International Monetary Fund condition their loans to developing countries on the recipient government's reducing trade barriers, deregulating currency markets, implementing export-oriented development strategies and minimizing the role of the state. The UN has often provided nuance and caution, but rarely has its institutions (and more especially, its leadership) challenged the underlying assumption that globalization through free trade and capital flows is the only path to successful development.

Most developing country governments had little choice but to follow the Bank and IMF prescriptions. In so doing, they moved away from a development path rooted in agriculture, which for most countries would have helped to secure the right to adequate food. Instead, these governments expanded existing export strategies, either forsaking diversification to focus on one or two commodities (cocoa in Ghana, cotton in Burkina Faso, or bananas in Ecuador), or moving into new exports, such as shrimp (Bangladesh and Thailand), green beans (Kenya) or cut flowers (Uganda and Kenya). Most low-income countries

have paid too much attention to export crops and too little attention to domestic food crop sectors (Morrissey 2007). The cost is not just in the money spent on producing, processing and transporting exports, but also in the concomitant failure to invest in domestic food crops and to provide support to local markets (including roads, storage and processing facilities).

Since 1950, world food production has soared. More recently, barriers to food trade have been dismantled. Governments, and, more especially, transnational agribusinesses, have more access to global commodity markets than ever before, access that is secured not just in law (because WTO members are constrained in how they can limit food imports and exports) but also in technology: the equipment, the know-how, the communications and the transportation systems that make global trade work. And yet, the number of hungry people continues to increase, and the right to food has not been realized.

6. A NEW SYSTEM OF RULES FOR TRADE IN AGRICULTURE

Existing multilateral rules for food and agriculture are primarily contained in the WTO's Agreement on Agriculture. There are many rules in other WTO agreements that relate to food and agriculture including the General Agreement on Tariffs and Trade, the Agreement on the Application of Sanitary and Phytosanitary Measures, the Agreement on Subsidies and Countervailing Measures, the General Agreement on Trade in Services, and the Agreement on Trade-Related Aspects of Intellectual Property Rights. This paper is not exhaustive. It reviews the overarching question of governance (five principles, explored in the section "The Guiding Principles") and eight areas for trade regulation ("The Trade Toolkit"), in an attempt to create the building blocks for a trading system rooted in a human rights framework and the realization of the right to food.

6.1. THE GUIDING PRINCIPLES

"Good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all."

General Comment 12, the Right to Adequate Food

A human rights approach to governance emphasizes a number of core principles, including: coherence, flexibility, accountability, transparency, participation, monitoring, assessment, and access to effective judicial remedies.

6.1.1. Be Coherent

A first essential challenge for building trade rules on a human rights framework is establishing the priority of human rights over trade obligations. While the legal case is there, established by the Vienna Convention on the Law of Treaties, the reality is more complicated because political will and the possibilities for legal redress conspire to give the edge to trade rules. Under the human rights conventions and protocols, abuses can be documented, described and discussed. But there is no punishment for breaking the law. Under the WTO system, the dispute settlement system can enforce rules by threatening trade or financial penalties for failure to comply. As a result, trade agreements consistently trump human rights treaties. Most governments are more loyal to their trade commitments than they are to their human rights obligations.

The need to look at trade and finance in a broader context has been recognized by UN member states. For example, the continuing Financing for Development process, due to meet for a second high-level meeting in Doha at the end of November, is explicitly about measuring trade, investment and financial flows from a development perspective. But a lack of political will, particularly from industrialized countries, makes the forum ineffectual. Until governments are willing to use human rights language as a basis for their trade positions, it will be impossible to shift global trade rules to where they should go.

An alliance of forty-six developing countries⁷, known as the G-33, was the first to bring human rights into the WTO. In 2005 the group issued a Ministerial Communiqué that stated, "addressing the problem of food and livelihood security as well as rural development constitute a concrete expression of developing countries' right to development." Their goal was to introduce a special safeguard mechanism and a category of special products into the revised rules for the Agreement on Agriculture. It was a radical and strategic moment. First, the proponents openly promoted the measures on the grounds that they were necessary to meet social and developmental objectives (not commercial ones). Secondly, the group has been willing to fight for the right to be allowed to raise tariffs over existing bound levels so as to realize these objectives – a proposal that has met hard resistance from many WTO members (industrialized and developing alike). Winning such fights will be essential if trade talks are to move towards supporting a human rights framework.

A number of institutions other than the WTO play a role in trade policy and they too will have to change if they are to be supportive of a human rights framework. The Bretton Woods Institutions (the World Bank and International Monetary Fund) have both played a central role in shaping developing countries' trade policy through the conditions they impose on their loans and development grants. These institutions ignored mounting evidence that their economic prescriptions were leading to social and economic dislocation and distress – i.e., ignored human rights violations. The push to put trade on a more human rights appropriate footing will have to include changes to interventions by the Bretton Woods Institutions.

The trade system needs to learn to operate in a wider multilateral context. Governments allowed the WTO to isolate itself from other parts of the multilateral system, at the expense of coherence with vital areas of policy, including managing and abating climate change and biodiversity loss; enforcing international labor rights; ensuring universal access to affordable medicines; protecting endangered species; and, much, much more. Bringing trade back into the UN fold, rather than allowing it to affect all areas of policy from an isolated outpost, is an essential step in reform of the trade system.

6.1.2. Discipline Bad Trade Practices

Trade rules should focus on disciplining bad practices – dumping, excessive speculation, unchecked market power – rather than on promoting a particular vision of how trade should be structured. The WTO membership (over 150 countries and climbing) is vastly varied. Some countries are recovering from decades of civil war and misrule. Others industrialized a long time ago, but need considerable investment in their economies to modernize, replace failing infrastructure and train workers to use new technologies and systems.

The differences are not just material, though that matters – in some countries poverty affects a minority of people while in others a majority of their people live in, or uncomfortably close to, poverty. The differences are also cultural, social, ecological and physical. Some countries are mountainous, others land-locked or islands. Some countries have a tradition of collective land ownership; others continue to operate what is effectively a system of bonded labor in agriculture, locking in privilege for a small number of landowners at the expense of large population of disenfranchised and impoverished workers. In all of this, the potential for trade, and the context in which global trade rules work, varies from

country to country. These circumstances require a flexible system of trade rules. Human rights will help governments focus on how people are affected. A human rights analysis checks whether trade rules are impoverishing poorer countries or vulnerable populations within countries rather than being satisfied with conformity with a uniform set of rules that mask important differences within a population.

6.1.3. Establish Accountability, Transparency and Participation

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas.”

International Covenant on Civil and Political Rights

“Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.”

Universal Declaration of Human Rights

Governments are required to provide information to their people when they enter trade negotiations and sign trade agreements. After years of campaigning and public pressure by civil society organizations, transparency in international trade negotiations has improved. Some WTO member states make negotiating documents available to their constituencies and allow them on their delegations during negotiations. The WTO Secretariat has also taken important steps to improve transparency by publishing most negotiating documents on their website and opening some of their dispute panels to the public, but most of these efforts are informal and not guaranteed under WTO law. And governments are selective about what information they make publicly available. Access to information remains largely dependent on the good will of the holders of information. Furthermore, bilateral and regional trade negotiations, which have multiplied exponentially in the past ten years, remain highly secretive and closed to the public.

People have the right to participate in trade policymaking and raise concerns about the possible impact of trade agreements. Some governments have taken steps to realize this right. The governments of Uganda, South Africa and Brazil, for example, have set up consultations for national stakeholders on the Doha Agenda, which allow trade unions, farmers, business groups and other civil society organizations to input into their government's negotiating position. But the vast majority of people are still excluded from participating in decisions on their country's trade agenda.

6.1.4. Conduct Monitoring and Assessments

“State parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments.”

General Comment 12, the Right to Adequate Food

Existing human rights mechanisms require states to submit periodic reports on the measures taken to realize human rights. Human Rights monitoring and development is overseen by the regular meetings of the Human Rights Council, the Office of the High Commissioner for Human Rights (OHCHR), and a well-developed treaty-body system. Concerns about the impact of trade agreements or particular policies can be raised under these mechanisms. Human rights do not need to be brought into the WTO. Civil society organizations such as the NGO 3D -> Trade – Human Rights – Equitable Economy are active in this field. There have been a number of questions raised and recommendations made by different Human Rights Committees on the impact of trade agreements on the realization of human rights. 3D, for example, made a submission to the Committee on Economic, Social and Cultural Rights about the right to food in India. They were concerned with the Indian government’s trend towards stricter intellectual property protection and the negative impact on the right to food (Devaiah and Domen 2008).

The WTO also has a review mechanism called the Trade Policy Review Mechanism which monitors the implementation of WTO Agreements. To date, no government has raised human rights concerns under this mechanism. Civil society organizations do not have access to its procedures. The International Trade Union Confederation, however, prepares shadow reports to the Trade Policy Review Mechanisms to highlight concerns about the impact of trade agreements on labor conditions. Civil society organizations focused on food and agriculture could do the same.

At the national level, it is essential for governments to develop processes to ensure that their trade policies are coherent with their human rights obligations. Trade policies or trade agreements that are found to undermine human rights should change. Impact assessments should be undertaken before new agreements are signed. The European Union has started conducting Sustainability Impact Assessments for trade agreements. There are no human rights criteria for these impact assess-

ments. The Office of the High Commissioner for Human Rights has also been working on a methodology for human rights impact assessments but much more work and political will is needed to turn this into a reality.

6.1.5. Create Effective Judicial Remedies

“Any person or group who is a victim of a violation of the right to adequate food should have access to effective judicial or other appropriate remedies at both national and international levels.”

General Comment 12, the Right to Adequate Food

There are currently insufficient legal remedies at the national and international levels for the violation of human rights, including the right to food. At the international level, UN members recently approved the Optional Protocol on Economic, Social and Cultural Rights. The instrument will provide a complaints mechanism for individuals whose economic, social and cultural rights have been violated. This is an important mechanism to raise concerns about human rights violations and to name and shame governments at the international level. But the mechanism has no teeth and it will not be able to impose judicial remedies.

6.2. THE TRADE TOOLKIT

This section proposes a range of tools that could help governments to respect, protect and fulfill human rights. The tools to respect and protect human rights include border measures, international competition law, anti-dumping rules and managing volatility. The tools to fulfill human rights include subsidies, food stocks, food aid and state trading enterprises.

6.2.1. Border Measures

One of the explicit goals of the trade system is to ratchet tariffs down. This is one of the five foundational principles elaborated by the WTO to describe its mission on its website. WTO rules for agricultural tariffs require WTO members to bind and reduce tariffs and convert all border measures into ordinary customs duties.⁸ The rules also call for the substantial reduction of the overall level of tariffs, and encourage members to enter into periodic tariffs reduction negotiations.⁹ The rules give countries the flexibility to reduce or eliminate tariffs but not to increase them beyond the levels set when they joined the WTO, or agreed to under the Uruguay Round if they were already members in 1994.

The refusal to countenance tariff increases on principle is a mistake and is in tension with states' obligation to protect human rights. The WTO tariff provisions create a right for exporters to access foreign markets – there should be no such right. Many developing countries argue they bound tariffs at inappropriate levels in 1994 and they want the chance to revise those bindings. Others are arguing more generally that there are situations in which tariffs may need to rise to meet development priorities that are more important than satisfying the imperative to increase global trade volumes. To meet its obligations to protect the human right to food, the state needs to maintain some control over trade flows, including through tariffs.

Border measures can be used constructively for a number of goals. Tariffs can help keep domestic markets more stable, helping to manage external volatility that disrupts the supply and cost of food on local markets. For large integrated economies, such as the European Union or the United States, the use of tariffs has to be subject to multilateral disciplines, to ensure that any domestic problems that arise are not dumped on the outside world. For instance, both the E.U. and the U.S. have allowed (and even encouraged) their exporting firms to dump surplus agricultural commodities at less than cost of production prices on world markets, destroying agricultural output in developing countries. But for the majority of countries who neither buy nor sell enough in world markets to affect world prices, allowing tariff policy to maintain some local stability in prices can protect local capital investment, local jobs and local food production, all of which are necessary to realize the right to an adequate standard of living, including food, health and work.

Tariffs are not a magic solution to domestic economic problems. Tariffs can be abused, and their misapplication can cost economies dramatically in lost opportunities – either for new investment and innovation, or to keep domestic firms competitive and accountable. Nonetheless, tariffs play a central role in many developing country economies, and for their governments in particular – some states earn 50 percent or more of their revenues from tariffs.¹⁰ For countries with small economies and a small tax base, tariffs provide an essential revenue stream that can be important to progressively realize economic, social and cultural rights (Osakwe 2007).

6.2.2. International Competition Law

"Violations of the right to food can occur through direct action of States or other entities insufficiently regulated by States. These include, [...] failure to regulate

activities of individuals or groups so as to prevent them from violating the right to food of others, or the failure of the State to take into account international legal obligations regarding the right to food when entering into agreements with other States or with international organizations."

General Comment 12, the Right to Adequate Food

In an open market, prices provide signals to buyers (and sellers) about what price they should charge (or pay). Effective competition is a necessary attribute of a functioning market. Yet globalization along the lines set out by the WTO, the World Bank and the IMF have undermined some fundamental aspects of competition, while prioritizing a very narrow definition of competition that has given the concept a bad reputation. That agenda, first promoted (and effectively blocked by civil society protests) at the OECD, defined competition policy as allowing foreign firms to compete with domestic firms without discrimination. In practice, the dismantling of barriers to trade and capital flows has concentrated significant economic power in the hands of a small number of global firms; there is nothing fair, or competitive, about forcing developing country private sectors to compete with these giants, some of whom have sales worth more than whole national economies.

Even states with relatively strict domestic competition laws show remarkably little interest in holding accountable firms headquartered in their jurisdiction but operating abroad. At the same time, domestic markets vary enormously in size and economic might. National firms in the U.S. operate in an internal market of close to 300 million people, and are likely to dwarf even a monopoly in a small market such as Iceland or Canada (let alone in Mali or Niger). A practical solution to confronting giant private firms, in a globalized world, might be to maintain the monopoly, as dairy operators have in New Zealand and in Scandinavia. Yet without careful regulation, that solution might impose costs in local markets that are unacceptable, both for consumers and producers.

Governments have a responsibility to protect the positive dimensions of competition: they should provide open and universal access to information, work against collusion among firms, and provide disempowered groups (including farm workers and smallholder producers) with the tools and information they need to redress unequal market power. From a human rights perspective, states are responsible to ensure that competition policy and regulation respects, protects and supports the fulfillment of the right to food, work and health. There is

no equivalent right of transnational firms to compete in every local market.

6.2.3. Subsidies and Domestic Support

“State Parties [...] shall take, individually and through international cooperation, the measures, including specific programmes, which are need to improve methods of production, conservation and distribution of food.”

International Covenant on Economic, Social and Cultural Rights

Many agricultural subsidies are problematic, but not all subsidies result in unfairly traded exports. The subsidy classification system at the WTO is too politicized. Developed country negotiators have manipulated the different colored boxes to suit their domestic needs. Support is classified according to the degree to which it distorts trade. Governments need better criteria for disciplining agricultural subsidies and support that take into account human rights objectives.

Economists Dorward and Morrison argue that considerable evidence supports the contention that the state needs to play a significant role in stimulating the transformation of agriculture, especially in the early stage of agricultural development. They conducted a review of a number of countries to compare their agricultural development strategies and to provide lessons for the least developed countries (Dorward and Morrison 2000). They found the support from the government was in many cases essential for a good outcome.

Dorward and Morrison argue the problem is not public support to agriculture per se, but rather that many policies to support agricultural development are conceived as temporary but become permanent as lobbies emerge to fight to continue the level of support. Multilateral rules could support a good final outcome, by establishing criteria to guide governments on when public investment and support for agriculture contributes to realizing human rights and when it is time to eliminate programs that undermine human rights. The human rights treaty bodies could provide regular checks and balances on government policies to provide the impetus for change. Indeed, a multilateral system of rules offers a way to create a check on the entrenchment of too-powerful local interests. The right framework would allow rules to evolve. The General Comment on the Right to Adequate Food says “State parties shall develop and maintain mechanisms to monitor progress towards the realisation of the right to adequate food for all, to identify the factors and difficulties affecting the degree of implementa-

tion of their obligations, and to facilitate the adoption of corrective legislation and administrative measures, including measures to implement their obligations.”

Annex 3 of the Agreement on Agriculture, also known as the amber box, lists the forms of domestic support that are considered to be the most trade-distorting and that members are required to reduce. Market price supports are included in Annex 3. Yet price supports can be an important policy tool to ensure stable food prices for consumers and a decent return for producers. Price supports also offer a way to manage production (governments could guarantee the price at X, but only for Y quantity of production). For a food system that is reeling from too much of some commodities (especially sources of sugar and fat) and too little of others (sufficient variety of fruits and vegetables), this kind of control could be useful.

There are some important provisions in the existing system of categorizing subsidies that could support the realization of human rights. Article 6.2 of the WTO Agreement on Agriculture allows developing country members to provide investment subsidies for agriculture and input subsidies for low-income or resource-poor farmers to encourage agricultural and rural development. This support could improve both availability and accessibility of food to these particular groups where poverty is extremely prevalent.

6.2.4. Food Stocks

WTO rules allow developing country governments to establish public stockholding for food security purposes, on condition that food purchases and sales are made at prevailing market prices. The way food prices jumped early in 2008 shows the limitations of such demands; a government may not be able to afford a stock at prevailing prices, or may not believe those prices reflect market fundamentals (potential supply, real demand, the scope for substituting foods for one another, etc.) so much as temporary aberrations (excessive speculation, hoarding by traders, etc.). The provisions are too limiting. The withdrawal of the state from managing food stocks is one of the fundamental reasons that poor harvests and increased demand for specific crops triggered a global food crisis in 2008. Grain reserves protect world and local prices from market volatility in the face of cyclical supply shortfalls (de la Torre Ugarte and Murphy 2008).

In one of the most important policy changes of recent years, the U.S. government eliminated its program of

farmer-owned commodity reserves in 1996. The U.S. is a major grower of a number of agricultural commodities for world markets, and the shift in domestic policy had repercussions for producers around the world. Just twelve years later, the food price crisis has called into question that experiment to eliminate a basic area of public oversight of food and agriculture. Policy changes required under the conditionalities of structural adjustment programs (and then poverty reduction strategies) designed by the World Bank and IMF have pushed developing countries to abandon national and regional grain reserves as well.

A grain reserve is anathema to the processing and trading firms that rely on cheap commodities for their business. It is also anathema to free trade purists. However, political support for food reserves has sprung up in surprising corners in 2008. For instance, the heads of state of the G-8 countries wrote in a communiqué from their summit in July, We will explore options on a coordinated approach on stock management, including the pros and cons of building a 'virtual' internationally coordinated reserve system for humanitarian purposes. At the September session of the UN General Assembly in New York, Bangladesh called for the establishment of a global food bank, echoing a regional initiative agreed to by the SAARC countries (Afghanistan, India, Bangladesh, Sri Lanka, Pakistan, the Maldives, Bhutan and Nepal) in August (SUNS 2008). Even the World Bank recently advocated in favor of establishing international grain reserves (World Bank 2008).

Local ownership and control issues will still need to be addressed in such a global project. The recent report of the UN Special Rapporteur on the right to food to the Human Rights Council also called for [&] the constitution of strategic grain reserves at the national, or preferably at the local level, highlighting concerns among many social movements that food security starts with sovereign control over food production and distribution. In any event, such measures should be seen as strengthening the global trading system by building predictability and avoiding the peaks and troughs that are widely acknowledged by most commentators to exaggerate disparities in short-term supply and demand.

6.2.5. Manage Volatility

A food supply that guarantees access to food at all times needs to manage volatility. Between September 2006 and June 2008, average food prices on international markets increased by 73 percent. By September 2008 prices had plummeted to a nine-month-low (FAO food price indices,

accessed October 2008). Both producers and consumers are better off when prices are not too variable; prices should not be rigid, but farmers run considerable financial risks when they plant a crop, while poor consumers spend too much of their income on food to make it easy for them to absorb sharp price increases. The theory of building a single global market was to reduce volatility by giving every country access to a global supply. In practice, the effort to build a single market has had quite another effect: it has given the richest consumers access to that global supply, undermining the claims of those who are less well-off to keep a share of their land, water and agricultural productive capacity.

The volatility of global food and agricultural markets undermine local and national food systems. When world prices are low, cheap imports (often at dumped prices) flood into local markets destroying local production and the livelihoods of producers who are not able to find alternative sources of income. Food aid donations jump, though less food aid is needed. In times of high world prices, on the other hand, countries that depend on the world market to feed their people are unable to afford the increased food import bills and food aid contributions drop, sometimes dramatically. This is unacceptable under human rights law, which requires governments to take steps to ensure economic and physical access to adequate food at all times.

6.2.6. State Trading Enterprises

The availability of food refers to the possibilities [...] for well functioning distribution, processing and market systems that can move food from where it is needed in accordance with demand.

General Comment 12, the Right to Adequate Food

A number of countries have long histories of state-run enterprises in the agricultural sector. Most developing countries with large rural communities used state trading enterprises (STEs) including China, India, Indonesia, Kenya, the Philippines and Malaysia. Since the 1990s these enterprises have been subject to significant reform. In many poorer developing countries, STEs were dismantled under the structural adjustment programs of the World Bank and the IMF in the 1980s and 1990s. Among developing countries, significant STEs now only exist in Indonesia, Philippines and Malaysia although they are still used to varying degrees in other developing countries.

STEs have the potential to distort trade and more importantly from a human rights perspective, have been

regarded as highly corrupt and inefficient in many developing countries. Lamon Rutten from the UN Conference on Trade and Development (UNCTAD) provides an example of the Food Corporation of India as an STE that performed important functions but did so inefficiently. The presence of food mountains around its warehouses amidst hunger, and its burgeoning operational costs have been contentious, (Rutten 2007).

STEs can play an indispensable role, however, particularly in countries where hunger and poverty are widespread, by supporting rural communities, guaranteeing stable prices for the poor, trading of key staple crops, and ensuring proper food distribution to where it is needed. Rutten ultimately advocates for STEs in developing countries because of their role in ensuring food security, food self-sufficiency and market functions.¹¹ In Asia, for example, the public food distribution system has helped increase availability and affordability of rice and the proportion of undernourished people declined from almost 40 percent to 15 percent over a period of 40 years (FAO 2004).

Creating a role for the state in trading and distribution can be used to support the realization of the right to food. The broader human rights framework has to be used alongside to ensure the institutions remain legitimate, transparent and accountable to the people they are established to serve.

6.2.7. Anti-Dumping Rules

Current WTO rules tackle dumping by allowing countries to tax imports that are sold for less than the prices in the home market. The rules ignore the problem of dumping that starts at the farmgate, with farmers who are not paid a fair price in the domestic market. U.S. production of key export commodities, including corn, soybeans, rice and cotton, are consistently sold at less than the cost of production prices in domestic markets (Murphy et al. 2005). The Ecumenical Advocacy Alliance and the Foodfirst Information and Action Network (FIAN), conducted three cases studies (one each in Honduras, Ghana and Indonesia), to demonstrate how the dumping of rice on world markets has undermined the right to food (Paasch 2007). The research found that as a result of liberalization each country had experienced surges of rice imports. Farming communities lost income, many farmers quit farming, and their access to food was less secure than it had been in previous decades. The studies acknowledged that food is one of the last things that people will cut back on, but at the hungry times (before the next harvest, when stocks from

the last harvest are running low) people cut back on both the number of meals they ate and the nutritional content of the meals.

Among the issues contributing to this problem is chronic overproduction in developed countries that has made dumping endemic. Linked to overproduction is the overwhelming power of a small number of food processing and retail companies, whose interests are served by abundant and therefore cheap supplies of agricultural commodities. These firms have sufficient market power to dominate prices in a number of markets, particularly in their purchases from farmers.

WTO rules to address agricultural export dumping are inadequate. It is complicated and time consuming for countries to take action against dumping within the trade system. A country must have domestic anti-dumping laws in place to impose import duties on dumped products, a first hurdle that many developing countries fail to address. Then, the plaintiff must take their complaint to the WTO Dispute Settlement Body, a course that takes up to four years and hundreds of thousands of dollars in legal fees. There are very few quick remedies for governments prepared to act to protect human rights if livelihoods are lost: anti-dumping actions are slow and the outcome unsure.

WTO rules against dumping should be strengthened and simplified. They can be strengthened by reviewing the definition of dumping and ensuring that dumping margins are measured against production costs and not against domestic prices. Countries should also have access to stop-gap measures that allow the imposition of safeguard measures to prevent subsidized agricultural commodities from damaging local markets while investigations of reported damage are underway, as the Group of 33, an alliance of developing countries coordinating their positions on agriculture, has proposed in the Doha negotiations.

6.2.8. Food Aid

"Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries. Such aid should be based on the needs of the intended beneficiaries. Products included in international food trade or aid programs must be safe and culturally acceptable to the recipient population."

General Comment 12, the Right to Adequate Food

The inclusion of food aid disciplines as part of the negotiations on agriculture within the Doha Agenda has given the WTO a kind of first among equals status in multilateral food aid circles, despite the peripheral interest and experience of trade officials with food aid. Trade officials (especially from countries that export crops such as wheat) are worried that food aid (most especially U.S. food aid) is used as a tool to subsidize exports. This relatively minor concern has been allowed to dominate food aid negotiations in other arenas, including at the Food Aid Convention. Meanwhile, the few simple steps that could ensure food aid is not so easily used to displace local production continue to be rejected, first and foremost by the U.S. in concert with some of the recipients of food aid.

Food aid is not a strong human rights tool, but it does offer a tool to address the most immediate obligation on states with regard to the right to food: that people not starve in times of crisis. Food aid provides an important social safety net and if guided by proper targeting and timing requirements, as well as respect for cultural preferences, it plays an important role. Nonetheless, food aid can also be disruptive and even destructive of long-term food security by undermining local production and local markets. These effects have been well documented. Trade rules can contribute by insisting that food aid meet some relatively simple but essential criteria to avoid abuse or unintended damage to already-fragile food systems.

7. CONCLUSION

The world is ready for a new vision for food and agriculture. There is no shortage of ideas for how to charter this new path. The solutions will differ for each country depending on their particular circumstances and stage of development.

The challenge for each government, their citizens, and for the international organizations that have a say in food and agriculture policies, is to find the right mix of policies and regulations that serve the many and varied goals of the food system. The goals include: an end to hunger; improved access to healthy and affordable food for consumers; a decent wage for farm workers; fair and remunerative prices for farmers; a framework to encourage investment; innovation and the transfer of technology, and a more equitable distribution of wealth along the food chain.

The human rights framework provides an important set of guidelines to embark on this path. Human rights are indispensable to ensure a people-centered approach to food and agriculture. The production-centered approach has failed to ensure access to adequate food for all. The trade-centered approach stimulated growth in a handful of countries, but failed to alleviate poverty, or offer a viable development path for the poorest countries.

Furthermore, human rights law provide an important set of checks and balances to ensure that one policy targeted at one specific group, say urban settlers, will not negatively impact another group, say farm workers, or that one country's agricultural development strategy does not undermine another country's development strategy. The periodic review of each country's implementation of their human rights obligations provides an important space for governments to review and reform outdated policies that no longer serve the needs of the poorest and most vulnerable people.

A new vision for food and agriculture requires active citizens and responsive governments. It also requires a set of multilateral institutions that are capable of changing as new challenges arise, working together, and tackling global issues as a complex, overlapping, messy whole. Now is the time to be truly daring.

¹ The authors would like to thank Carole Samdup, Gauri Sreenivasan, Aftab Alam Khan, Alexandra Spielfoch, Anne-Laure Constantin and Ben Lilliston for their valuable comments to the paper. The authors would also like to thank the Canadian Council for International Co-operation (CCIC) for their generous contribution to the publication.

² Article 1, Universal Declaration of Human Rights.

³ Schutter, O. De. 2008. Building Resilience: a human rights framework for world food and nutrition security. Report of the UN Special Rapporteur on the right to food. A/HRC/9/23. September 8. Section IV. Para. 24.

⁴ Article 2, International Covenant on Economic, Social and Cultural Rights.

⁵ These include the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of Discrimination Against Women, the Convention Against Torture, the Convention on the Elimination of Racial Discrimination and the Convention on Migrant Workers. See www.ohchr.org

⁶ Article 2, International Covenant on Economic, Social and Cultural Rights.

⁷ Antigua and Barbuda, Barbados, Belize, Benin, Bolivia, Botswana, China, Congo, Côte d'Ivoire, Cuba, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, India, Indonesia, Jamaica, Kenya, Rep. Korea, Madagascar, Mauritius, Mongolia, Mozambique, Nicaragua, Nigeria, Pakistan, Panama, Peru, Philippines, St Kitts and Nevis,

St Lucia, St Vincent and the Grenadines, Senegal, Sri Lanka, Suriname, Tanzania, Trinidad and Tobago, Turkey, Uganda, Venezuela, Zambia, Zimbabwe.

⁸ Article 4 paragraphs 1 and 2, Agreement on Agriculture. Article 4.2 instructs countries to use ordinary customs duties and bans the use of other types of border measures including quantitative import restrictions, variable import levies, minimum import prices etc. ... except under special conditions laid out in Article 5 Annex 5.

⁹ Article 28bis, General Agreement on Tariffs and Trade (GATT), 1947.

¹⁰ Over the period 1985-1994, taxes from international trade represented 20 percent of total revenue in 26 out of 42 countries in sub-Saharan Africa. Over the period 2000-2003, trade taxes represented more the 50 percent of the total revenue for the Comoros, Gambia and Niger. In the same period, trade taxes represented more than 40 percent for Benin, Lesotho, Madagascar, Mali, Sierra Leone, Togo and Uganda.

¹¹ Rutten elaborates on the types of activities undertaken by STEs in developing countries. For food security this includes public distribution systems and welfare schemes, stocking food reserves and intervening in times of crisis. For food self-sufficiency this includes domestic purchases to incentivize production of crops critical for domestic security and providing an impetus for higher investment in agriculture. The market functions of STEs include providing a market and a price for producers, as investors, negotiators of prices with buyers, providing competitive loans, better freight rates, longer-term forward contracts, and robust agricultural infrastructure including warehouses, transportation and distribution.

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LIST OF ABBREVIATIONS

AA	Auswärtiges Amt (Foreign Office)	FAO	Food and Agriculture Organization
AAI	ActionAid International	FAR	Fourth Assessment Report
ACORD	Agency for Cooperation and Research in Development	FAS	Foreign Agricultural Service
ACP	African, Caribbean and Pacific Group of States	FDI	Foreign direct investment
ADB	African Development Bank	FIAN	FoodFirst Information and Action Network
AMS	Aggregate Measurement of Support	FIDH	International Federation for Human Rights
AoA	Agreement on Agriculture		
ASEAN	Association of Southeast Asian Nations		
		G8	Group of Eight
		GATS	General Agreement on Trade in Services
BIT	Bilateral investment treaty	GATT	General Agreement on Tariffs and Trade
BMWi	Bundesministerium für Wirtschaft und Technologie (Federal Ministry of Economics and Technology)	GFRP	Global Food Crisis Response Programme
BMZ	Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung (Federal Ministry of Economic Cooperation and Development)	GNP	Gross national product
BPFA	Beijing Platform for Action		
		HIV	Human immunodeficiency virus
		HLTF	High Level Task Force on the Global Food Security Crisis
		HRIA	Human Rights Impact Assessment
		HRC	Human Rights Council
CAN	Climate Action Network		
CAP	Common Agricultural Policy of the European Union	IAASTD	International Assessment of Agricultural Knowledge, Science and Technology for Development
CDO	Collateral Debt Obligation	IATP	Institute for Agriculture and Trade Policy
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women	IC	Industrialized country
CEPAL	Economic Commission for Latin America and the Caribbean	ICCPR	International Covenant on Civil and Political Rights
CERD	Committee on the Elimination of Racial Discrimination	ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights	ICESCR	International Covenant on Economic, Social and Cultural Rights
CETIM	Centre Europe - Tiers Monde	ICJ	International Court of Justice
CFA	Comprehensive Framework for Action	IFAD	International Fund for Agricultural Development
CFTC	Commodity Futures Trading Commission	IFC	International Finance Corporation
CME	Chicago Mercantile Exchange	IFI	International Financial Institution
CRC	Committee on the Rights of the Child	IGO	Intergovernmental organization
CRI	Climate Risk Index	IGTN	International Gender and Trade Network
		IIED	International Institute for Environment and Development
DC	Developing country	IISD	International Institute of Sustainable Development
DKH	Diakonie Katastrophenhilfe (Humanitarian Aid Germany)	ILC	International Law Commission
DR-CAFTA	Dominican Republic – Central America Free Trade Agreement	ILO	International Labour Organisation
		IMF	International Monetary Fund
EAA	Ecumenical Advocacy Alliance	IPCC	Intergovernmental Panel on Climate Change
EC	European Commission	ISFP	Initiative on Soaring Food Prices
ECOWAS	Economic Community of West African States	IUCN	International Union for Conservation of Nature
EED	Evangelischer Entwicklungsdienst (Church Development Service)		
EIA	Environmental impact assessment	LDC	Least developed country
EMCA	Environmental Management and Coordination Act	LFTZ	Lekki Free Trade Zone
EPA	Economic Partnership Agreement	LIFDC	Low-income, food-deficit country
ESAFF	East and Southern Africa Small Scale Farmers Forum	LWF	Lutheran World Federation
ESCR-Net	International Network for Economic, Social and Cultural Rights	LWIL	Lekki Worldwide Investment Limited
ETO	Extraterritorial obligation		
EU	European Union		

MAI	Multilateral Agreement on Investments	UNCTAD	UN Conference on Trade and Development
MDG	Millennium Development Goal	UNDP	United Nations Development Programme
		UNESCO	United Nations Educational, Scientific and Cultural Organization
		UNFCCC	United Nations Framework Convention on Climate Change
NAFTA	North American Free Trade Agreement	UNICEF	United Nations International Children's Emergency Fund
NAPA	National Adaptation Program of Action	UPR	Universal Periodic Review
NEMA	National Environment Management Authority	U. S.	United States
NGO	Non-governmental organization	USDA	US Department of Agriculture
NKG	Neumann Kaffee Gruppe		
		WB	World Bank
ODA	Overseas Development Aid	WEED	World Economy, Ecology & Development Association
OECD	Organisation for Economic Cooperation and Development	WFP	World Food Programme
OHCHR	Office of the High Commissioner for Human Rights	WHO	World Health Organization
OTC	Over-the-counter	WTO	World Trade Organization
PEAP	Poverty Eradication Action Plan	YMCA	Young Men's Christian Association
PEF	Private Equity Fund		
PMA	Plan for Modernization of Agriculture		
RAM	Recently Acceded Member		
RMC	Regional Member Country		
ROPPA	Network of Farmers' and Agricultural Producers' Organization of West Africa		
SAARC	South Asian Association for Regional Cooperation		
SAP	Structural Adjustment Program		
SADC	Southern African Development Community		
SDR	Special Drawing Right		
SERAC	Social and Economic Action Center		
SHG	Self-Help Group		
SIA	Sustainability Impact Assessment		
SP	Special Products		
SSG	Special Safeguard Clause		
SSM	Special Safeguard Mechanism		
STE	State Trading Enterprise		
SVE	Small and Vulnerable Economy		
TARDA	Tana and Athi River Development Authority		
TIP	Trade Information Project		
TNC	Transnational corporation		
TPRM	Trade Policy Review Mechanism		
TRIPS	Trade-Related Aspects of Intellectual Property Rights		
TWN	Third World Network		
UIA	Uganda Investment Authority		
UN	United Nations		

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Published by:

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Monbijoustrasse 29
Postfach 5521
CH-3001 Bern
Switzerland
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December 2009

Editors: Sophia Murphy (IATP) and
Armin Paasch (FIAN)
Proofreading: Andrew Ranallo, Ben Lilliston (IATP)
and Francisco Caro Hidalgo
Photos: Cover – Terrace rice fields in Yunnan province,
China; source: Wikimedia; author: Jialiang Gao,
www.peace-on-earth.org; authorisation:
GFDL/CC-by-sca-2.5. Page 13 *ibid.* Pages 39, 67 and 91:
Armin Paasch
Design: Georg Temme
ISBN 978-3-9813381-0-2
Printer: basis druck, Germany, on recycled paper

Financed by: Brot für Alle, Brot für die Welt, European
Commission (EC) and Heinrich Böll Stiftung.

Any opinions or points of view published herein are
directly from the contributing authors and do not
necessarily represent the viewpoints of the publishers
and the funders.

THE GLOBAL FOOD CHALLENGE

TOWARDS A HUMAN RIGHTS APPROACH TO TRADE AND INVESTMENT POLICIES

The number of undernourished people in the world has set a scandalous new record of one billion in 2009, in spite of a record grain harvest in 2008. This book argues that the “Global Food Challenge” requires a fundamental reshaping of international trade and investment policies and rules to put human rights, particularly the right to adequate food, at the centre of economic policy. The authors analyse the incoherence in international policy created by the separation of international human rights from trade and investment regimes. They analyse concrete cases of human rights violations of landless farm workers, smallholder farmers, pastoralists, indigenous peoples and slum dwellers; and, they look at the discrimination suffered by women in particular. All through misguided trade and investment policies, which have contributed as root causes of the global food crisis. The book also looks ahead to some of the new challenges confronting governments’ ability to realize the right to food, such as unregulated speculation and climate change. It finally proposes new and strengthened human rights instruments and new ways to integrate human rights principles into trade and investment policies.

