

Nadia C.S. Lambek · Priscilla Claeys
Adrienna Wong · Lea Brilmayer *Editors*

Rethinking Food Systems

Structural Challenges, New Strategies
and the Law

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Abbreviations

ACTA	Anti-Counterfeiting Trade Agreement
ALBA	Bolivarian Alliance of People of Our America
ANTA	National Association of Peasant Organizations (El Salvador)
AoA	Agreement on Agriculture
ATC	Rural Workers Union (Nicaragua)
BIT	Bilateral Investment Treaty
CELAC	Community of Latin American and Caribbean States
CESCR	Committee on Economic, Social and Cultural Rights
CFS	Committee on World Food Security
CNTC	National Council of Peasant Organizations (Nicaragua)
CoC	Code of Conduct
CONASSAN	National Commission for Food and Nutritional Sovereignty and Security (Nicaragua)
CONSEA	National Council for Food and Nutrition Security (Nicaragua)
CPI	Corruption Perception Index
CSM	Civil Society Mechanism
CSO	Civil Society Organisation
DR-CAFTA	Dominican Republic-Central America Free Trade Agreement
ECOSOC	United Nations Economic and Social Council
EFTA	European Free Trade Agreement
ENABAS	Nicaraguan Basic Food Company (Nicaragua)
ESIA	Environmental and Social Impact Assessment
FAO	Food and Agriculture Organization of the United Nations
FIAN	FoodFirst International Network
FPIC	Free, Prior, and Informed Consent
FSLN	Sandinista Party (Nicaragua)
G-8	Group of 8
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GHG	Anthropogenic Greenhouse Gas
GISSAN	Interest Group for Food and Nutritional Sovereignty and Security (Nicaragua)

GMO	Genetically Modified Organism
HLPE	High Level Panel of Experts
IAASTD	International Assessment of Agricultural Knowledge, Science and Technology for Development
IATP	Institute for Agriculture and Trade Policy
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICSID	International Centre for the Settlement of Investment Disputes
IDB	Inter-American Development Bank
IFAD	International Fund for Agricultural Development
IFPRI	International Food Policy Research Institute
IMF	International Monetary Fund
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
LRAN	Land Research and Action Network
MAAIF	Ministry of Agriculture, Animal Industry and Fisheries (Uganda)
MP	Member of Parliament
NAADS	National Agricultural Advisory Services (Uganda)
NAFTA	North American Free Trade Agreement
NDP	National Development Plan
NGO	Non-Governmental Organizations
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OPEC	Organization of Petroleum Exporting Countries
OTC	Over The Counter
PBR	Plant Breeders' Right
PMA	Plan for Modernization of Agriculture (Uganda)
PNSAN	Policy of Food and Nutritional Security and its Action Plan (Nicaragua)
RAI	Principles for Responsible Agricultural Investments
REDCASSAN	Central American Network for Food and Nutritional Sovereignty and Security
SINASSAN	National System of Food and Nutritional Sovereignty and Security (Nicaragua)
SMTA	Standard Material Transfer Agreement
SP	Special Product
SSAN	Law of Food and Nutritional Security and Sovereignty (Nicaragua)
SSM	Special Safeguard Mechanism
SUN	United Nations Scaling Up Nutrition
TBT Agreement	Agreement on Technical Barriers to Trade
TCP	People's Trade Treaty
TNC	Transnational Corporation
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights

UFNC	Uganda Food and Nutrition Council (Uganda)
UNAG	National Union of Small Farmers and Ranchers (Uganda)
UNAP	Uganda Nutrition Action Plan (Uganda)
UNAPA	National Union of Agricultural and Associated Producers (Nicaragua)
UNCITRAL	United Nations commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPOV Convention	International Convention for the Protection of New Varieties of Plants
USAID	United States Agency for Development
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WFP	World Food Programme
WFS	World Food Summit
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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Introduction: In Search of Better Options: Food Sovereignty, the Right to Food and Legal Tools for Transforming Food Systems

Priscilla Claeys and Nadia C.S. Lambek

Abstract The stakes for building better food systems are high. Our current path is leaving many behind, destroying the environment and entrenching inequality and systemic poverty. This introduction sets the scene to *Rethinking Food Systems* and provides an account of the legal and rights-based approaches taken throughout the book. It also begins a discussion on the benefits and limitations to using the law to address hunger and malnutrition. Further, by examining the arguments of the contributing authors and the crosscutting themes in their chapters, this introduction begins to explore the following questions: What are just, sustainable, and equitable food systems? What are the values on which they are built? What tools are available to push for change? What are the advantages and disadvantages of rights-based approaches? Should actors focus on the sub-national, national, regional or global level in their advocacy efforts? And should these actors push for new laws, focus instead on policies and programmes, or put efforts into developing alternative practices? How should they approach the challenge of large-scale land acquisitions in the Global South, intellectual property regimes imposed from above or the growing fragmentation in the international management of food systems? What is and what should be the role of the state in addressing issues of hunger and food insecurity and what role do and should international institutions, consumers and producers play?

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1 Introduction

The international spike in grain prices of early 2008 instigated a chain of events that commentators began to call the “Global Food Crisis.” Between 2008 and 2009, the number of malnourished across the globe increased by 100 million people.¹ Food riots broke out across the Globe²; Kenya appealed to the international community for dramatically increased food aid³; Russia imposed an export ban to counter the country’s severe wheat shortage⁴; and, China instituted a domestic cap on the skyrocketing price of food commodities.⁵ In Egypt and Tunisia, protests over each government’s failure to address the rising cost of basic food items foreshadowed the broader political upheaval that erupted in January 2011.⁶ By February 2011, the World Bank Group estimated that in the previous ten months alone, 44 million people were driven into poverty as food prices continued to rise.⁷

The dominant headlines in papers around the globe soon reactivated the Malthusian prophecy of demand outstripping supply⁸—of a growing population racing ahead of its productive capacity—a slogan further popularized by the planet’s population reaching 7 billion in October 2011.⁹ Questions were raised about the ability of the world to feed itself in the future. For the most part, the answers given emphasized increased productivity and agricultural yields, genetically modified seeds, fertilizers, giant farms and large-scale land acquisitions. Yet, other voices argued that hunger was not a problem of demand surpassing supply, but rather a structural problem—a result of social, political and economic powerlessness, and a variety of

¹ See U.N. FOOD & AGRICULTURE ORGANIZATION [FAO], *THE STATE OF FOOD INSECURITY IN THE WORLD 4* (2009). The FAO estimated that close to 1 billion people, or 1/6th of humanity, were hungry and undernourished in 2009. *Id.*

² Riots occurred in poorer countries like Haiti, emerging economies like Brazil and industrialized nations including the United States. See ERIC HOLT-GIMÉNEZ, RAJ PATEL & ANNIE SHATTUCK, *FOOD REBELLIONS! CRISES AND THE HUNGER FOR JUSTICE 1–4* (2009).

³ Anthony Kariuki, *Kenya Seeks \$32bn Food Aid*, DAILY NATION (Jan. 19, 2009).

⁴ *Russia to Impose Temporary Ban on Grain Exports*, BBC NEWS (Aug. 5, 2010). See also U.N. FOOD & AGRICULTURE ORGANIZATION [FAO], *INITIATIVE ON SOARING FOOD PRICES: COUNTRY RESPONSES TO THE FOOD SECURITY CRISIS: NATURE AND PRELIMINARY IMPLICATIONS OF THE POLICIES PURSUED 10* (2009).

⁵ See e.g., WORLD BANK, *CHINA QUARTERLY UPDATE 13* (Feb., 2008); Chuin-Wei Yap, *China Caps Prices of Cooking Oil to Ensure Supply*, WALL STREET J. (Dec. 2, 2010).

⁶ See CLEMENS BREISINGER ET AL., INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE [IFPRI], *BEYOND THE ARAB AWAKENING: POLICIES AND INVESTMENTS FOR POVERTY REDUCTION AND FOOD SECURITY viii* (2012). See also *Protests and the Pump: The Egypt Effect May be More Pronounced for Food than Oil*, THE ECONOMIST (Feb. 3, 2011).

⁷ Press Release, World Bank, *Food Price Hike Drives 44 Million People into Poverty*, Press Release No: 2011/333/PREM (Feb. 15, 2011).

⁸ See, e.g., Alex Renton, *How Will the World Feed Itself in 40 Years’ Time?*, THE GUARDIAN (Oct. 11, 2009); Donald G. McNeil Jr., *Malthus Redux: Is Doomsday Upon Us, Again?* NEW YORK TIMES (June 15, 2008); Justin Lahart, Patrick Barta & Andrew Batson, *New Limits to Growth Revive Malthusian Fears*, WALL STREET J. (Mar. 24, 2008).

⁹ Press Release, U.N. Population Fund [UNFPA], *World Population to Reach 7 Billion on 31 October* (May 3, 2011).

laws, policies and historical circumstances that continue to limit or interfere with the ability of so many to grow or purchase the food they need. To these voices, increasing the quantity of food produced, would not eliminate hunger.

The arguments presented by those who see hunger as a structural problem are not new, and certainly not products of the Global Food Crisis. Scholars such as Francis Moore Lappé, Susan George and Amartya Sen have argued for decades that hunger is a distributional issue. In the early 1970s, Lappé offered a critique of the grain-fed livestock industry, arguing that the production of meat was contributing to global hunger.¹⁰ The heart of her argument, was that hunger was manmade—that nature was not to blame for the hunger that existed in the world. In her 1977 book, *How the Other Half Dies*, George made the case that malnutrition and starvation were not the result of over-population, poor climate or lack of cultivatable land.¹¹ Rather, she argued, the multinational agribusiness corporations, Western governments' food aid policies and supposedly neutral multilateral development organizations shared responsibility for the fate of undeveloped countries. Sen, throughout the 1980s, defended the idea that it was relatively easy to exterminate famines if public support was well planned on a regular basis to protect the entitlements of vulnerable groups.¹² He advocated for “strategies of entitlement protection” based on employment creation, particularly in the form of public works programs.¹³ His “entitlement approach” sought to abolish the then-existing paradigm, which held that famines were caused by a general decline in the availability of food.¹⁴

Social movements and human rights activists have also long been advocating that hunger is a structural problem and that the answer to food insecurity is to be found in altering the underlying principles that shape the global food system. For human rights activists, improving food systems requires changing institutions and state structures, and ensuring that the processes by which laws are made are participatory. The primary target of human rights activists are states, though increasing efforts have been made to regulate and hold international institutions and transnational corporations accountable for human rights abuses and to promote the extra-territorial human rights obligations of states. FoodFirst Information and Action Network (FIAN), for example, an international organization that focuses on defending the “right to food”, has worked extensively with rural communities facing the threat of eviction from land they depend on for livelihood, often a direct result of state action.¹⁵ FIAN has encouraged the development of new laws and policies grounded in human rights, and has sought the enforcement of human rights standards and the provision of remedies for victims through judicial action.

¹⁰ FRANCIS MOORE LAPPÉ, *DIET FOR A SMALL PLANET* (1971).

¹¹ SUSAN GEORGE, *HOW THE OTHER HALF DIES* (1977).

¹² Jean Drèze & Amartya Kumar Sen, *Hunger and Public Action*, in THE AMARTYA SEN & JEAN DRÈZE OMNIBUS 258 (1989).

¹³ *Id.* at 264.

¹⁴ Amartya Sen, *Poverty and Famines*, in THE AMARTYA SEN & JEAN DRÈZE OMNIBUS, *supra* note 12, at 154.

¹⁵ For more information on FIAN, see <http://www.fian.org/>.

Transnational agrarian social movements such as *Vía Campesina* have been advocating since the early 1990s for a policy shift from a focus on increased production and “food security” to a focus on “food sovereignty”—a comprehensive structural vision of food production and distribution calling for democratic control over food systems. Like the human rights activists, peasant movements have argued strongly against responses to hunger and malnutrition that focus on increasing productivity through farm consolidation and the use of agro-chemical inputs. *Vía Campesina* has emphasized the necessity to rebuild national food economies, with a focus on giving priority to domestic food production and reducing the dependency on world markets.¹⁶ It has demanded increased investments in peasant and farmer based food production for the domestic market,¹⁷ and in diverse production systems that are labor intensive and sustainable in their resource use, such as agroecology.¹⁸

In the wake of the Global Food Crisis, policymakers, academics and journalists alike developed a new and heightened interest in international food systems. While it became clear that social movements, human rights activists and some academics had been correct about availability not ensuring accessibility of food, many people remained stumped as to the question of how it was that a crisis of access to food could coincide with record highs in agricultural production yields, as witnessed in 2008.¹⁹ Attempts to answer this question led analysts to consider several concurrent developments in the global market: the heightened focus on biofuels in agricultural production; waves of private land consolidation in developing countries; financial speculation in global food markets; and, the proliferation of bilateral trade agreements controlling the import and export of agricultural commodities. However, few observers highlighted that at the heart of the global system lie legal problems: issues of access to land and distribution of property rights over land; competing legal regimes and legal norms; conflicts between the protection of farmers’ rights, human rights and intellectual property rights; absent or non-enforced regulation of transnational corporations and transnational investments; unequal multilateral and bilateral trade agreements; failing public institutions and limited access to justice; and a lack of participatory decision making coupled with undemocratic political structures.

Interestingly, scholars from a variety of fields—such as political science, natural resource management, and anthropology—have recognized the centrality of the law in determining the ways that our food is grown, processed and sold. However, they

¹⁶ Press Release, *Vía Campesina*, An Answer to the Global Food Crisis: Peasants and Small Farmers Can Feed the World (Apr. 24, 2008).

¹⁷ Letter from Henry Saragih, *Vía Campesina*, to Jacques Diouf Secretary General of the U.N. Food & Agri. Org. [FAO], Yasuo Fukuda, Prime Minister of Japan and President of the G8, and John W. Ashe, Permanent U.N. representative, Antigua and Barbuda, and Chairman of the Group of 77, Concrete Measures are Needed to Strengthen Peasant and Farmer-based Food Production; the Food Price Crisis Exposes the Instability of Liberalized Agricultural Markets (Apr. 28, 2008).

¹⁸ Press Release, *Vía Campesina*, An Answer to the Global Food Crisis: Peasants and Small Farmers Can Feed the World (May 1, 2008).

¹⁹ See e.g. U.N. Food & Agri. Org. [FAO], *FAO Cereal Supply and Demand Brief*, available at <http://www.fao.org/worldfoodsituation/wfs-home/csdb/en/>; see also U.N. FOOD & AGRIC. ORG. [FAO], *CROP PROSPECTS AND FOOD SITUATION* (Dec. 2007).

have tended to shy away from a direct and thorough analysis of legal issues and processes.²⁰ Perhaps more surprisingly, the legal academy has yet to make a significant contribution to recent discussions regarding the mechanisms that may limit peoples' access to food, due in part to the fact that skepticism about the relevance of economic, social and cultural rights remains high.

This book aims to fill that gap by assembling a collection of pieces that analyze how law shapes the structural underpinnings of the global food system and its ongoing transformation. A number of changes have occurred over the last years, which make legal and institutional structures ever more relevant, and highlight their transformative potential. First, the conjunction of food, energy, environmental, financial and economic crises has pointed to the importance of developing a coordinated response to issues that are global in nature and need to be tackled through a new, shared framework. Second, the last years have seen the emergence of new global governance mechanisms at the international level, such as the reformed Committee on World Food Security (CFS). These mechanisms deserve to be studied in detail because they create new spaces for the meaningful participation of non-state actors in intergovernmental decision-making processes and provide for new ways of setting international norms. Third, substantial progress has been made in the last 20 years with the conceptual, institutional and political developments of rights-based alternatives to building more equitable and sustainable food systems, at the local, national, regional and global level, anchored in the right to food and food sovereignty.

Using the law—and examining the problems and potential solutions to our ailing food system through a legal lens—has a number of advantages. First, a legal approach requires identifying the various actors who interact with, influence or benefit from food systems. Second, a legal based approach requires examining the relationships between these actors, identifying who has obligations or responsibilities towards whom, the nature of those duties and where those duties come from. Third, law provides a means for examining what rules and structures shape, limit and influence actors, and whether and to what degree their behavior is shaped by new rules and structures. Finally, a legal based approach provides a means for examining the processes by which actions are taken, rules are designed and structures are formed. Rather than simply looking at outcomes, final results and impacts, a legal based approach requires examining how decisions are made and implemented and the norms and standards that govern these processes.

The stakes for building better food systems are high. Our current path is leaving many behind, destroying the environment and entrenching inequality and systemic

²⁰ This tendency may find its source in the widely shared mistrust in the potential of law and human rights as a tool for social change. Sociologists and anthropologists, for example, have been slow in engaging with the theory and practice of human rights, in part because they felt uncomfortable with the universalism attached to the human rights idea, because of the lasting influence of the writings of Marx, Durkheim and Weber. See Mark Goodale, *Introduction, in Anthropology and Human Rights in a New Key*, 108 *AMERICAN ANTHROPOLOGIST* 1 (March 1, 2006); Patricia Hynes et al., *Sociology and Human Rights: Confrontations, Evasions and New Engagements*, 14 *INT'L J. HUM. RTS.* 811 (Nov. 2010).

poverty. What are just, sustainable, and equitable food systems? What are the values on which they are built? What tools are available to push for change? What are the advantages and disadvantages of rights-based approaches? Should actors focus on the sub-national, national, regional or global level in their advocacy efforts? And should these actors push for new laws, focus instead on policies and programs, or put efforts into developing alternative practices? How should they approach the challenge of large-scale land acquisitions in the Global South, intellectual property regimes imposed from above or the growing fragmentation in the international management of food systems? What is and what should be the role of the state in addressing issues of hunger and food insecurity and what role do and should international institutions, consumers and producers play?

Taking as a starting point that hunger is a result of social exclusion and distributional elements and that lasting and sustainable solutions are found in changing the structures that underlie the food system, this volume examines the role that law is playing in upholding a variety of systems and how the law could be employed towards more just and sustainable food systems. Through detailed case studies, historical mapping and legal analysis, this volume explores how various actors (farmers, civil society groups, government officials, international bodies) are using or could use different legal tools (legislative, jurisprudential, norm-setting) on various scales (local, national, regional, global) to achieve structural changes in food systems.

The contributing authors bring unique voices and experiences to the table—they include long time right to food and food sovereignty activists, legal academics and practitioners, students of sociology, development studies and global affairs, former and current non-governmental organization (NGO) and civil society organization (CSO) members, and individuals who have worked directly or tangentially with various arms of the United Nations. Their experiences as academics, activists, lawyers and social scientists who grapple with legal issues, bring a distinct perspective on the use of legal tools and strategies to promote more equitable, sustainable and rights-based food systems.

This introduction sets the scene and provides an account of the legal and rights-based approaches taken throughout the book. It also begins a discussion on the benefits and limitations to using the law to address hunger and malnutrition. Section 2 describes the two dominant alternative visions for change—the right to food and food sovereignty—that underpin many of the chapters in this volume. Section 3 examines how the various chapters discuss and reflect on the legal underpinnings of current food systems, as well as the possibilities for using legal tools—such as legislation, trade law etc.—to produce structural changes that will improve the ability of individuals around the globe to meet their food needs. The section is divided into three subsections focusing on institutionalizing, regulating and governing for improved food systems. A final section reflects on the combined lessons learned from the chapters and discusses some crosscutting themes, such as legitimacy, the advantages and limits of insider and outsider strategies and the limitations of the statist framework.

2 Countervailing Forces

The chapters in this volume reflect different understandings of the ways in which food systems need to change. Yet, most emphasize the importance of reinforcing the ability of individuals and communities to meet their food needs, of transitioning towards food systems more broadly focused on principles of equity and sustainability, and of improving the ability of producers and consumers to participate in local and global food systems as decision makers. These elements are at the heart of both the “right to food” and “food sovereignty” frameworks.

2.1 *The Human Right to Adequate Food*

The right to adequate food is a human right recognized under international law, which protects the right of all human beings to feed themselves in dignity, either by producing their food or by purchasing it. As authoritatively defined by the Committee on Economic, Social and Cultural Rights in General Comment No. 12, “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.”²¹ The central idea of a rights based approach to hunger, is that ensuring adequate, accessible and affordable food for all is not a question of charity but rather a legal entitlement held by all, which imposes duties on the state to act in certain ways, to refrain from acting in others, and to provide remedies when violations occur.

The right to adequate food, a part of the right to an adequate standard of living, was first articulated in the Universal Declaration of Human Rights in 1948, which recognizes the right of everyone “to a standard of living adequate for the health and well-being of himself and of his family, including food.”²² In 1966, it was expanded upon in the International Covenant on Economic, Social and Cultural Rights

²¹ U.N. Comm. on Econ., Social and Cultural Rights [UNCESCR], General Comment No. 12: The Right to Adequate Food, para. 6, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter General Comment No. 12]. According to the General Comment No. 12, three key elements—availability, accessibility and adequacy—form the foundation of the right to food, describing the core content of the right: *adequacy* refers to the quality, nutritional and cultural value of food consumed; *availability* “refers to the possibilities either for feeding oneself directly from productive land or other natural resources, or for well-functioning distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with demand”; and, *accessibility* means food should be both *economically accessible* (referring to affordability and, purchasing power) and *physically accessible* (“that adequate food must be accessible to everyone, including physically vulnerable individuals, such as infants and young children, elderly people, the physically disabled, the terminally ill and persons with persistent medical problems, including the mentally ill”). *Id.* at paras. 12–13.

²² Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), art. 25.

(ICESCR).²³ While proliferation of the right to food in international law has been widespread,²⁴ it wasn't until the mid-1990s that the international community sought to clarify the content of the right and the means for its implementation.

Following the World Food Summit of 1996, the Committee on Economic, Social and Cultural Rights developed General Comment No. 12, which further defined the content of the right to food and elaborated on the corresponding state obligations.²⁵ These obligations were defined as the obligations to *respect*, *protect* and *fulfill* the right to food. The obligation to *respect* requires that States not engage in activities that directly hinder the ability of populations to access food. The corresponding *obligation to protect* requires that States ensure that third parties do not hinder the ability of people to grow or purchase food. The obligation to *fulfill* requires that States ensure that no one goes hungry, even during times of emergency, and engage in remedying systemic structural causes of food insecurity. The Committee also stressed the importance of adopting national policies and strategies for the right to food as well as framework laws, monitoring mechanisms and remedy procedures.²⁶

In 2004, the 187 Member States of the General Council of the United Nations Food and Agricultural Organization (FAO) adopted the *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*,²⁷ which provide guidance on adopting framework laws and integrating the right to food into economic development policies, the regulation of markets and resources such as labor, water and land, and programs that support vulnerable groups. The *Guidelines* also offer direction with respect to developing monitoring systems and indicators to track progress in reducing food insecurity.

In the last two to three decades, many countries have taken steps to make the right to food operational.²⁸ Several states have adopted constitutional or legislative

²³ International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, G.A. Res. 2200(XXII), U.N. GAOR, 21st sess., Supp. No. 16, U.S. Doc. A/6316 (1966), 993 UNTS 3, art. 11.

²⁴ The right to food has been incorporated into a number of other international and regional instruments, including the Convention on the Rights of the Child (Article 6), the Convention on the Elimination of All Forms of Discrimination Against Women (Articles 12 and 14), the Convention on the Rights of Persons with Disability (Article 28), the European Social Charter (Articles 4, 12 and 13), the African Charter on Human and People's Rights (Articles 16, 22 and 24), the African Charter on the Rights and Welfare of the Child (Article 14), the American Convention on Human Rights (Article 26) and the S. Salvador Additional Protocol (Article 12).

²⁵ See General Comment No. 12, *supra* note 21, at paras. 40–41.

²⁶ *Id.* at paras. 21–35.

²⁷ See U.N. FOOD & AGRIC. ORG. [FAO], VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY (2004).

²⁸ For more information on implementing the right to food at the national level see, OLIVIER DE SCHUTTER, U.N. SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, COUNTRIES TACKLING HUNGER WITH A RIGHT TO FOOD APPROACH (Briefing Note No. 1, 2010) [hereinafter COUNTRIES TACKLING HUNGER] (surveying progress in implementing the right to food at the national level in Africa, Latin America and South Asia); OLIVIER DE SCHUTTER, U.N. SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, FROM CHARITY TO ENTITLEMENT: IMPLEMENTING THE RIGHT TO FOOD (Briefing Note No. 5, 2012) [hereinafter FROM CHARITY TO ENTITLEMENT] (discussing constitutional protection of the right to food and

protection of the right to food. Latin America has substantially taken the lead in adopting the right to food domestically, though there have been significant developments in Africa and Asia as well. South Africa, for example, was the first country to afford constitutional protection to the right to food when it adopted a wide variety of economic and social rights in its 1994 post-apartheid Constitution.²⁹ Over twenty other countries, including recently Kenya and Brazil, have followed suit amending their constitutions to include the right to food.³⁰ In recent years seven Latin American countries—Argentina, Guatemala, Ecuador, Brazil, Venezuela, Nicaragua and Honduras—adopted right to food framework laws, while ten other countries in the region have laws proposed for adoption.³¹ Many other countries have national strategies, which do not afford legal protection to the right to food, but provide a coordinated effort towards improving access and availability of food as well as adequacy of diets. Often these strategies include programs aimed at certain demographics, such as school feeding for children and fertilizer supplements for smallholder farmers.³²

Advancement of the right to food has also been achieved through judicial action and court rulings. Most notable in this respect is the *People's Union for Civil Liberties v. Union of India and Others* case launched in 2001 in India.³³ Through a number of significant interim orders over the past ten years, the Indian Supreme

implementation of the right to food through laws and policies in nine countries in Eastern and Southern Africa); OLIVIER DE SCHUTTER, U.N. SPECIAL RAPPOREUR ON THE RIGHT TO FOOD, *A RIGHTS REVOLUTION: IMPLEMENTING THE RIGHT TO FOOD IN LATIN AMERICA AND THE CARIBBEAN* (Briefing Note No. 6, 2012) [hereinafter *A RIGHTS REVOLUTION*] (discussing constitutional protection of the right to food and implementation of the right to food through laws and policies in nine countries in Latin America and the Caribbean); LIDIJA KNUTH & MARGRET VIDAR, U.N. FOOD. & AGRI. ORG. [FAO], *CONSTITUTIONAL AND LEGAL PROTECTION OF THE RIGHT TO FOOD AROUND THE WORLD* (2011) (providing a global survey of right to food implementation, with detailed descriptions of constitutional protection); U.N. FOOD. & AGRI. ORG. [FAO], *RIGHT TO FOOD MAKING IT HAPPEN: PROGRESS AND LESSONS LEARNED THROUGH IMPLEMENTATION* (2011) [hereinafter *RIGHT TO FOOD MAKING IT HAPPEN*] (providing detailed description of processes in Brazil, Guatemala, India, Mozambique and Uganda).

²⁹ See South Africa Constitution art 27(1)(b), (1994) (“Everyone has the right to have access to ... sufficient food and water”). See also Report of the Special Rapporteur on the right to food, Olivier De Schutter, to the Human Rights Council, Addendum: Mission to South Africa, A/HRC/19/59/Add.3 (2012).

³⁰ KNUTH & VIDAR, *supra* note 28, at 13; *Kenya President Ratifies New Constitution*, BBC NEWS, 27 August 2010; U.N. Food & Agri. Org. [FAO], The Right to Food Unit, *The Republic of Kenya Recognizes the Right to Food in the New Constitution* (Aug. 31, 2010). Affording the right constitutional protection provides direction to state policy, and depending on the specificity of each domestic legal system, may be used to challenge laws that lead to violations of the right to food, as well as to redress specific violations of the right to food by the State.

³¹ *A RIGHTS REVOLUTION*, *supra* note 28, at 4–5.

³² See COUNTRIES TACKLING HUNGER, *supra* note 28, at 7–10; FROM CHARITY TO ENTITLEMENT, *supra* note 28, at 10–12; *A RIGHTS REVOLUTION*, *supra* note 28, at 5–6.

³³ Writ petition (Civil) No. 196 of 2001 (Supreme Court of India). See also Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICHIGAN J. INT’L L. 691 (2010).

Court has recognized a constitutional human right to food, determined a basic nutritional floor, established accountability mechanisms to monitor noncompliance with Court orders and provided directives in the creation of various programmes, such as a national mid-day meal scheme in schools.³⁴

Despite these advancements, the right to food is still a relatively young approach to addressing change in food systems. It has been championed by a number of human rights organizations, in particular FIAN International, but also rights-based development NGOs such as ActionAid, and by the FAO right to food team, which has actively been engaged with parliamentarians in drafting and pushing for the adoption of right to food framework laws.³⁵ Other advancements in theoretical thinking about the right to food have come from the two United Nations Special Rapporteurs on the right to food, appointed by the Human Rights Council, and mandated to promote the full realization of the right to food and to examine ways and means of overcoming obstacles to its full realization.³⁶ In most cases, while efforts have been supported by local civil society organizations, the approach to promulgating the right to food has largely been top-down.

Using the right to food as a legal tool is attractive to many advocates seeking to improve food systems. The right to food frames a relationship between rights-holders and the state and labels food as an entitlement, which can be claimed by rights-holders from the state. When implemented, the right to food addresses the means by which people procure food and not simply food as a commodity, suggesting that governments should contemplate a number of areas including agriculture, fisheries, and the environment in determining food policies. The right to food emphasizes focusing on the most vulnerable and marginalized populations, and requires the state support these populations in meeting their food needs. Finally, while the right to food asserts the state as the primary duty bearer towards its population, other entities, such as corporations and international institutions, have human rights responsibilities and all states have extraterritorial obligations “to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required.”³⁷

³⁴ *Id.*

³⁵ RIGHT TO FOOD MAKING IT HAPPEN, *supra* note 28.

³⁶ *See, e.g.*, Human Rights Council, 6th Session, Mandate of the Special Rapporteur on the Right to Food, U.N. Doc. A/HRC/6/L.5/Rev.1 (Sept. 26, 2007).

³⁷ *Id.* at para. 36. The extraterritorial obligations of States in respect of economic, social and cultural rights were recently compiled and restated in the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. *See* Olivier De Schutter, et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084 (2012) (including the full text of the Principles).

2.2 Food Sovereignty

The concept of food sovereignty was originally developed by *Vía Campesina*, a transnational agrarian movement embracing organizations of peasants, small and medium-scale farmers, rural women, farm workers, and indigenous agrarian communities in Asia, the Americas, Europe and Africa. *Vía Campesina* is constituted of relatively well-known national or sub-national peasant movements such as the landless workers movement MST (O Movimento dos Trabalhadores Sem Terra) in Brazil, the CNCR (Conseil National de Concertation et de Coopération des Ruraux) in Senegal, the Karnataka State Farmers' Association (KRSS) in India, and the Confédération Paysanne in France. Current membership amounts to about 150 organizations in 70 countries.³⁸ The network claims to represent 200 million peasants worldwide.³⁹

Food sovereignty can be described as the right of communities, peoples and states to independently determine their own food and agricultural policies. As a term, food sovereignty was introduced on the international scene in 1996 when *Vía Campesina* members took part in the NGO and CSO forum held parallel to the World Food Summit. On that occasion, *Vía Campesina* activists defined food sovereignty as “the right of each nation to maintain and develop its own capacity to produce its basic foods respecting cultural and productive diversity”.⁴⁰ Earlier that year, *Vía Campesina* members who participated to the second International Conference of the movement in Tlaxcala, Mexico, established a first list of food sovereignty principles. Food sovereignty was associated with the right to produce, with access to land and with the democratic control of food systems. The negative impacts of the dumping of food surpluses produced by the North and the growing presence of transnational corporations in agriculture were clearly identified in the Tlaxcala Declaration as being in contradiction with food sovereignty.⁴¹

Since then, a large number of social movements, CSOs and NGOs beyond *Vía Campesina* have integrated the food sovereignty concept into their terminology and have contributed to its further development, with the aim to strengthen peasants and their small-holder agriculture, enhance their political participation in national and international arenas and reinforce their autonomy. Today, the definition provided in the 2007 Declaration of Nyeleni is considered to be the most representative, as more than 500 representatives of organizations of peasants/family farmers, artisanal fisherfolk, indigenous peoples, landless peoples, rural workers, migrants, pastoralists, forest communities, women's, youth, consumers, and environmental and urban

³⁸ See *Vía Campesina*, The International Peasant's Voice, <http://viacampesina.org/en/index.php/organisation-mainmenu-44> (last visited Mar. 9, 2013).

³⁹ *Id.*

⁴⁰ *Vía Campesina*, The right to produce and access to land. Food Sovereignty: A Future without Hunger (Statement at the occasion of the World Food Summit, Rome, Italy, Nov. 11, 1996).

⁴¹ *VIA CAMPESINA*, COMPTE RENDU DE LA IIÈME CONFÉRENCE INTERNATIONALE DE LA *VIA CAMPESINA* (Apr. 18–21, 1996); *VIA CAMPESINA*, TLAXCALA DECLARATION OF THE *VIA CAMPESINA* (Declaration of the Second International Conference of *Vía Campesina*, 1996).

movements from more than 80 countries took part in its elaboration. The Declaration reads:

Food sovereignty is the right of peoples to healthy and culturally appropriate food produced through ecologically sound and sustainable methods, and their right to define their own food and agriculture systems. It puts those who produce, distribute and consume food at the heart of food systems and policies rather than the demands of markets and corporations. It defends the interests and inclusion of the next generation. It offers a strategy to resist and dismantle the current corporate trade and food regime, and directions for food, farming, pastoral and fisheries systems determined by local producers. Food sovereignty prioritizes local and national economies and markets and empowers peasant and family farmer-driven agriculture, artisanal-fishing, pastoralist-led grazing, and food production, distribution and consumption based on environmental, social and economic sustainability. Food sovereignty promotes transparent trade that guarantees just income to all peoples and the rights of consumers to control their food and nutrition. It ensures that the rights to use and manage our lands, territories, waters, seeds, livestock and biodiversity are in the hands of those of us who produce food. Food sovereignty implies new social relations free of oppression and inequality between men and women, peoples, racial groups, social classes and generations.⁴²

Food sovereignty is generally described as a holistic concept, which requires the full implementation of all its elements. It can be described as rights-based, for it includes the right to food and the right to produce food, as well as a number of other associated rights (including the right to land, to resources, and to live in dignity).

At the international level, Via Campesina activists have claimed food sovereignty as a basic human right, to be recognized in international human rights law.⁴³ At the national level, a series of states, in alliance or under the pressure from peasant movements, have initiated efforts to recognize the right to food sovereignty and translate it in public policies. Constitutional recognition of the right to food sovereignty has been achieved in a number of countries, notably Ecuador, Bolivia, Nepal and Venezuela. Ecuador, Bolivia and Venezuela have all gone through shifts in presidential power as well as constitutional reforms, which have led to the establishment of legal frameworks for food sovereignty.⁴⁴ But legal recognition does not necessarily translate into the implementation of food sovereignty laws and policies, a process, which, as the experiences of Bolivia and Ecuador demonstrate, can be slow and uncertain. In other countries, such as Mali and Senegal, food sovereignty laws and policies have been passed following the perseverance and advocacy work of peasant organizations.

Despite important differences between country examples, the translation of the food sovereignty paradigm in public food and agriculture policies shows a general trend towards policies aimed at: promoting agriculture as a motor of the economy, meaning that agriculture should not only feed the national population but contribute

⁴² NYELENI FOOD SOVEREIGNTY FORUM, DECLARATION OF NYELENI (Feb. 27, 2007).

⁴³ Priscilla Claeys, *The Creation of New Rights by the Food Sovereignty Movement: The Challenge of Institutionalizing Subversion*, 46 SOCIOLOGY 844 (2012).

⁴⁴ Tina D. Beuchelt & Detlef Virchow, *Food Sovereignty or the Human Right to Adequate Food: Which Concept Serves Better as International Development Policy for Global Hunger and Poverty Reduction?*, AGRIC. & HUM. VALUES (Jan. 2, 2012).

to economic growth; boosting local and peasant-based food production for food security, often in the context of a self-sufficiency strategy, although agroexport remains seen as an opportunity for rural economic development; compensating the inherent weaknesses of the agricultural sector and if possible bringing rural incomes at par with those of urban inhabitants; favoring alternative farming practices (less industrial, more family-based), although industrial farming and large-scale agriculture have been difficult to move away from; and, providing access to land and limiting the invasion of transgenic seeds.

An exploration of all the challenges involved in translating the (right to) food sovereignty in national legislation is beyond the scope of this book. Yet, the influence of local and national agrarian movements is notable in most, if not all, the legislative developments presented above. This undeniably testifies to the success of efforts undertaken by peasant movements and their allies to institutionalize food sovereignty.

3 Building Better Food Systems: *Institutionalization, Regulation and Governance*

The volume is organized into three sections, reflecting interconnected approaches to achieving social change through using legal tools: *institutionalizing* new legal and policy frameworks for addressing questions of food security; *regulating* government and third parties in order to implement changes in food system management; and, *governing* and adopting governance structures at the state and international level to achieve better food systems.

3.1 Institutionalizing New Approaches to Managing Food Systems and Addressing Hunger

Food sovereignty and the right to food have emerged as perhaps the two most prevalent alternative models to the legal and policy fabric that have established and continue to regulate our food systems. The underlying principles behind both of these models have been well articulated and defined by a range of academics, NGOs and United Nations bodies for the right to food, and by a diversity of social agrarian movements (mostly but not exclusively *Vía Campesina*), NGOs, environmentalists and consumer groups, for food sovereignty. A number of attempts have also been made to institutionalize the right to food and food sovereignty at the national level and into international bodies. While these theoretical underpinnings and practical on the ground experiences provide guidance, the process of adopting and institutionalizing, or deciding whether to adopt and institutionalize the right to food and food sovereignty in domestic or international arenas, remains a challenge.

In Part One of this volume, the chapters discuss institutionalizing social change through law, focusing on cases studies. In her chapter on implementing the right to food in Uganda, Isabella Rae discusses the process of elaborating a new right to food framework law and the challenges of having it adopted. Rae also explores how other avenues, such as policy development and institutional coordination, have been used to advance the right to food in Uganda. The two other chapters, in contrast, focus on the challenges of advancing food sovereignty in national and international settings, mostly, but not only, through law. In their chapter Saulo Araujo and Wendy Godek focus on the elaboration and adoption of a food sovereignty law in Nicaragua, which now faces the challenge of implementation. At the international level, Priscilla Claeys discusses efforts by *Vía Campesina* to see the right to food sovereignty recognized in international law and embodied in an alternative international trade framework.

The processes discussed in these chapters are unique in many ways. First, because the right to food and food sovereignty are at very different stages of their conceptual development and interpretation, institutionalizing food sovereignty presents the additional challenges of defining food sovereignty and determining which aspects to institutionalize and how to do so. Second, the right to food and food sovereignty are promoted and defended by different sets of actors and constituencies, who tend to adopt distinct strategies. *Food sovereignty activists* include, for the most part, small-scale farmers, peasants and indigenous people who belong to *Vía Campesina* or another contemporary agrarian movement but also NGO representatives, environmentalists, and academics. *Right to food defenders*, in contrast, are usually from NGOs, academia or the United Nations. Finally, national and international level dynamics are quite distinct, presenting their own specific challenges.

While the processes are unique, the challenges highlighted in the three chapters are largely similar in nature, with differences often reflective of distinct stages of the institutionalization process. A first challenge, faced by right to food advocates in Uganda, food sovereignty champions in Nicaragua, and *Vía Campesina* at the international level, concerns determining which dimensions of food sovereignty (and to a lesser extent the right to food) should be institutionalized and which should not. The chapter by Araujo and Godek on Nicaragua focuses on two major dimensions of the food sovereignty concept: the demand for democratic control and more participation in policy-making, and the transition to relocalized food systems. These two aspects are characterized by Claeys as the internal/political and external/economic dimensions of food sovereignty. The internal dimension of food sovereignty, or the right of local communities to define policies and participate in decision-making, has been institutionalized in Nicaragua through the establishment of citizen committees and legal instruments that reinforce citizen participation. Despite this encouraging development, challenges remain in terms of ensuring real participation. The external dimension of food sovereignty, or as Araujo and Godek refer to it, the “right of states to define adequate food and agricultural policies”, and their need to recover sufficient “policy space”, is a central objective of the 2009 Nicaraguan Law of Food and Nutritional Sovereignty and Security. The law seeks to operate a shift to a development model based on agriculture and rural development, through

an emphasis on rebuilding local economies, restoring local food cultures and creating opportunities for rural families through access to resources. The main challenge to moving forward is the international trade and investment framework in which Nicaragua is embedded, as exemplified by the country's commitment to its trade liberalization agreement, the CAFTA-DR, with the United States.

In her chapter Claeys discusses steps taken by *Vía Campesina* to institutionalize food sovereignty at the international level. Two distinct but complementary approaches are addressed: the recognition of the right to food sovereignty as a new human right and the translation of food sovereignty as an alternative international framework for food and agriculture trade. After explaining the reasons why, in her opinion, the transnational peasant movement *Vía Campesina* stopped pursuing the objective of getting food sovereignty recognized as a universal human right, Claeys moves on to show that other avenues for institutionalizing food sovereignty have been explored by the movement, such as engaging with the newly reformed CFS, seeking the recognition of "peasants' rights" at the UN Human Rights Council, and pushing for the elaboration of national (and local) public policies for food sovereignty. She argues that the lack of a clear definition of (the right to) food sovereignty may not have impeded its institutionalization, for, to the contrary, it has allowed the movement to frame its claims in a way that integrates the various ideologies, cultures and local struggles that constitute it. Yet, disagreements are persistent within the movement, not only on which dimensions of food sovereignty to institutionalize, but also on whether to concentrate movement efforts at the local, national or international level.

A second challenge raised by the institutionalization of both the right to food and food sovereignty concerns identifying the most efficient avenues for advancing these alternative regimes. The chapters in Part One explore whether change is best made through law, policy, institutional coordination or judicial mechanisms. And further whether it is possible and if so, how, to have a combined approach? In a fascinating account of legal and policy debates in Uganda in the last decades, Rae argues that, contrary to many experiences in Latin America where the right to food was largely operationalized through the elaboration of framework laws, in Uganda, the policy route has so far proven best. The adoption of the Food and Nutrition Policy in 2003 has paved the way for legal action, specifically the elaboration of the Food and Nutrition Bill, currently awaiting Cabinet approval. In her discussion of the process of institutionalizing the right to food, Rae demonstrates that various dimensions (legal, policy, institutional coordination and judicial) can be combined to make the right to food operational and that progress can be achieved in each of these separately. Ultimately, however, she argues that all the dimensions are needed for the full realization of the right to food.

A third challenge concerns ensuring that new laws, policies and institutional frameworks are adequately implemented. Rae's chapter on the right to food in Uganda identifies a number of problems associated with the operationalization of the right to food at the national level. The successful implementation of the right to food, she argues, requires the full alignment of laws and policies with both

government priorities and budget, as well as clear targets for implementation and monitoring. Meanwhile, a lack of coordination across sectors, tensions over ownership of the concerned law or policy, donor-driven agendas and budget constraints all have negative impacts on the implementation of the right to food. As a result, crucial aspects of the right to food prove particularly difficult to implement, such as ensuring compatibility of existing land, water, fisheries, intellectual property, trade and labor laws with right to food standards, or adopting measures to protect individuals and communities from actions that could negatively impact on their access to natural resources, notably through stronger regulation of private actors.

What then, would be some lessons learned from the case studies in terms of successful institutionalization processes? The chapters all emphasize the importance of engaging a series of social actors and of creating and seizing opportunities for social change.⁴⁵ At the national level, experience with both the right to food and food sovereignty tends to indicate that the involvement and participation of a variety of actors (government, social movements, NGOs, UN agencies, donors and international organizations) in the instigation, development and implementation of new laws, policies and institutions is a crucial success factor. For example, alliances between civil society (in particular farmers' organizations and indigenous movements), government and political leadership were central to induce legal change in Nicaragua. At the international level, *Vía Campesina* successfully and carefully identified and then created legal opportunities to advance its rights-based claims, mostly through the UN. Several international-level factors are also listed as relevant in the Nicaragua and Uganda cases, such as the momentum created by the global debate on hunger and food insecurity generated by the Global Food Crisis, the Scaling-Up Nutrition initiative (mostly in Uganda) and the implementation of the *Voluntary Guidelines on the Right to Food* by the FAO (both in Nicaragua and Uganda). This tends to show that the extent to which national level actors are able to use global events or processes to advance their own national objectives is also a key factor of success.

Yet, institutionalization should not be looked at as an objective in and of itself. Institutionalization processes are not only long, tedious, and time- and resource-consuming—they are also considered risky by many social movements, who need to be careful in their engagement with the institutional world. Indeed, movements who decide to engage in legal work must find a way to also keep active repertoires of action such as mobilization and protest, as discussed by Claeys. Internal *Vía Campesina* debates are symbolic of this struggle to decide whether or not to institutionalize the right to food sovereignty, and more specifically whether food sovereignty should be advanced from below or above, and whether and how the two strategies can be combined.

⁴⁵ The concept of *legal opportunity structures*—taken from Israël who paraphrased Tarrow's "political opportunity structures"—is particularly appropriate to describe the process of identifying and opening of institutional spaces allowing for legal changes. See Liora Israël, *Faire Émerger le Droit des Étrangers en le Contestant, ou l'Histoire Paradoxe des Premières Années du GISTI*, 16 POLITIX 115, 115–43 (2003); see generally SIDNEY TARROW, SIDNEY, POWER IN MOVEMENT (1998).

3.2 *Regulating for Change*

Part Two of this volume, explores the extent to which regulation of actors can or cannot change incentives in food systems and produce transformative results. Numerous actors—from states, to international institutions, transnational corporations, farmers and consumers—take part in food systems. These actors are governed by a number of different regulatory regimes, which provide rules for how actors may act. Regulatory regimes exist at the international, regional, national and subnational levels, as well as inter-industry through self-regulatory mechanism such as codes of conduct. Because regulations can be so varied in whom they target and how they target them, many questions are raised by the use of regulatory regimes to improve food systems. When is regulation warranted? To what extent can regulation change behavior? Who should regulate and who should be regulated? What are the benefits or drawbacks of formal versus informal regulatory regimes? And does the process of regulating and setting parameters on certain behaviors, legitimize behaviors that are otherwise unwanted?

In her chapter, Nadia Lambek spells out the implications for states of adopting a right to food approach to hunger and food insecurity. States, as the primary duty bearers under international human rights law, are tasked with regulating their own actions, as well as the actions of third-parties, such as transnational corporations, investors or international financial institutions, to ensure they do not infringe on the population's enjoyment of their human rights, and their ability to grow or procure adequate food. Lambek's focus is on the obligations that fall on states to respect and protect the right to food though she also discusses the obligation to fulfill. These obligations require the state to regulate in support of the right to food.

The challenge of ensuring states meet these regulatory obligations, the constraints imposed on states by a variety of international spheres and the lack of incentives for states to act to respect and protect the right to food of their populations, are amply discussed in the two other chapters in Part Two. These chapters provide a contextual analysis, exploring the emerging issue of large-scale land acquisitions and the possibilities of using regulatory regimes to address this trend. The term large-scale land acquisitions, often referred to as land grabs, connotes the large-scale national and transitional land transactions that have occurred primarily in the Global South since the 2007–2008 Global Food Crisis. In their chapter, Lea Brilmayer and William Moon discuss the extent to which, considering the lack of incentives for states to regulate investment in the interest of the legitimate occupiers of land, international trade law could be explored as an avenue for action. The piece by Jun Borrás and Jennifer Franco explores emerging regulatory mechanisms for international investments in land, and distinguishes between regulatory, human rights based frameworks and non-binding, voluntary frameworks, i.e. codes of conduct. In quite different ways, both sets of authors question who should regulate, when to regulate and how much regulation is needed.

Borrás and Franco describe how the corporate social responsibility agenda has unfolded in the area of large-scale transactions in land through the use of generic

international Codes of Conduct (CoC) for land deals. In a context marked by the increasingly patent failure of state-led regulation, self-regulation by land investors i.e. the voluntary adherence by corporations to good business practices and ethical behavior, is emerging as the dominant framework for “regulating” land grabs. Reliance on voluntary and non-binding norms is supported, the authors argue, by a powerful “win-win” narrative that suggests that large-scale acquisitions in land—with the important levels of investments in agriculture these are supposed to attract—can meet the interests of resource-poor countries, resource-rich countries and investors, while also enhancing poor people’s incomes and livelihoods. Borrás and Franco demonstrate why this proposed win-win formula is highly problematic in their view, and cannot bring truly pro-poor outcomes. To the contrary, they argue, a CoC-framed response to land grabbing is likely to facilitate, not block, further land grabbing and thus should not be considered, even as a second-best approach.

Looking at land grabs from a distinct but complementary perspective, Brilmayer and Moon identify a number of reasons why states are likely to offer land and why they are unlikely to act to protect local populations affected by land deals. After arguing that international investment law cannot address this problem, the authors explore how international trade law could be explored by third party states as a way to regulate land grabs. They argue that trade law could make a significant and positive contribution to the problem of land grabs, if it is able to recognize that third states and their citizens may have legitimate reason to refuse to purchase agricultural products produced through land grabs. Indeed, they contend, World Trade Organization (WTO) rules may be flexible enough to allow third party member states to limit their imports of agricultural products from regions where land grabs have given way to chronic food insecurity. In this way, they argue, third party states could play a considerable role in disincentivizing land grabs while still resorting to measures that are WTO-consistent.

The issue of regulating for the right to food is at the core of Lambek’s chapter. The author discusses what she calls the negative rights associated with the right to food—the aspects of the right to food that oblige the state not to interfere and not to permit third parties to interfere with the means by which people acquire food. While acknowledging that much progress has been made with implementing the right to food at the national level (as discussed in Rae’s piece), she regrets that little attention has been placed on the myriad of ways states directly or by omission act, or permit third parties to act, that undermine the ability of people to meet their food needs. Most implementation efforts, indeed, have focused on school feeding programs and social protection schemes, rather than on the structural causes of hunger. The right to food approach, she argues, requires addressing the indirect and direct effects of laws and international legal frameworks governing the environment, trade, mining, agrefuels, access to land, forests, water and fisheries, and a host of other areas. While certainly not sufficient to drive the necessary shift towards just and sustainable food systems, which would require building an alternative rural development model that places small-scale food producers at its core, addressing the negative rights associated with the right to food (its respect and protect dimensions), is equally central and should be made a priority.

3.3 *Governing for Better Food Systems*

The chapters in Part Three discuss the fragmentation of international law and the impacts of this fragmentation on the realization of human rights. Although the problems associated with the fragmentation of international law have long been known, since the Global Food Crisis of 2007–2008 they have become a renewed topic of global discussion. In the opinion of many contributors to this volume, the conflicts between norms, international treaties and the policy agendas pursued by international institutions in the area of human rights, development, the environment, intellectual property, trade and investment require urgent action.

While the authors propose different approaches to addressing the conflicts posed by fragmentation, they share the conviction that the solutions to the current fragmentation of international law should be anchored in human rights, and in particular in the right to food framework. For Carmen G. Gonzalez, adoption and integration of the right to food at various levels is the catalyst for addressing fragmentation. She highlights key measures that governments could take to realize the right to food, individually and in collaboration with other states, such as reinvesting in small-holder agriculture, shifting from agro-export based development to a diversified economic base, regulating transnational corporations, regulating land acquisitions, preventing speculating practices, and so on. The successful implementation of these measures, she argues, would require a complete reconceptualization of international law that would remedy fragmentation by better integrating human rights, environmental protection and trade and investment law. Hans Haugen analyzes the conflicts that may arise between the right to food and farmers' rights on one hand and intellectual property law on the other. After exploring avenues for reconciliation between these conflicting norms, he argues that when adopting measures for the protection of intellectual property rights, it is crucial that states ensure protection of the right to food and of farmers' rights, by making use of available policy spaces. Olivier De Schutter similarly grounds his exploration of alternative governance models in the conviction that human rights can and should become a "global public standard". Indeed, apart from the preeminent position that human rights occupy in the original project of the United Nations, they present the advantages of being both legal norms and ideals, and of corresponding to the requirements of moral cosmopolitanism. In addition, their "incompleteness" requires social actors to actively engage in deliberations on how to best translate them in international regimes.

The authors all offer diverse and creative approaches to addressing the fragmentation challenge. Gonzales explores various avenues, some more politically feasible than others, for integrating environmental protection and human rights into the existing framework for trade and investment, such as introducing human rights exceptions or "hierarchy of norms" clauses, or establishing waiver procedures in case of conflict. Yet, these measures would not be sufficient to address the global food security challenge. For the right to food to be fully realized for all, she defends a full alternative approach to the integration of international law, which, rather than tinkering with the export-oriented WTO framework, would be grounded in

the concept of food sovereignty. While a food sovereignty regime would likely be fiercely resisted by agro-export powers, she argues, it has the potential of appealing to a broad constituency of broader consumer groups, farmers, indigenous peoples, human rights groups, environmentalists, etc. The idea of a global food sovereignty convention is also discussed by Claeys in Part One.

Haugen discusses the potential and limitations of two avenues for reconciling competing human rights and intellectual property laws: benefit-sharing mechanisms and the use of national legislation to ensure that genetic resources are adequately managed. His approach, which is close to that advocated by Brilmayer and Moon, is to explore the extent to which states can use existing flexibilities within the WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) framework to better implement the right to food and farmers' rights. He argues that it is possible to use existing frameworks to improve the lives of farmers, and offers road maps on how to do so.

De Schutter, in contrast, explores various ways to address the fragmentation of international law that would enable us to move beyond the failures of the Washington Consensus. After showing the limitations of existing alternative proposals, such as the Geneva Consensus advanced by former WTO Director General Pascal Lamy, De Schutter describes a new, potentially promising governance model, which he calls the "Rome model". Following the reform of the CFS, he argues, food security has emerged as a "global public good" in the sense that it requires countries to work with one another more closely to remove the structural causes of hunger and overcome the sectorialization of development, trade, financial, agricultural and rural policies.

The reformed CFS, De Schutter argues, is promising because it provides a forum in which all relevant actors can acquire new knowledge and expertise, learn collectively and potentially experience a shift in the way they frame the issues at stake. The CFS is particularly interesting for it provides civil society organizations with a formal space (the Civil Society Mechanism, also discussed by Claeys) and a role to play in global governance debates. The CFS has already demonstrated its ability to innovate with new forms of participation and dialogue between stakeholders, and to successfully develop new international norms, such as the recently adopted *Voluntary Guidelines on the Responsible Governance of Land, Fisheries and Forests in the Context of National Food Security*.⁴⁶ While the direct involvement of civil society in norm-setting at the global level has given these *Guidelines* a strong legitimacy, it remains to be seen how civil society will engage in their implementation, and in the monitoring mechanisms that remain to be established.

⁴⁶ See U.N. FOOD & AGRIC. ORG. [FAO], VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY (2012).

4 Crosscutting Themes and the Road Ahead

While the chapters in this volume reflect different approaches to addressing food insecurity, a number of themes regarding the challenges in improving food systems through a legal or rights based approach are common throughout. Many of these crosscutting themes address areas of contention that actors, scholars, activists, policy makers, producers and consumers may want to take up in conversations about reducing food insecurity. The following paragraphs highlight common themes and reflect on the road ahead.

4.1 *The Question of Legitimacy*

One of the endemic problems with current food systems is that most suffer from a crisis of legitimacy. This crisis of legitimacy manifests itself in numerous ways at the international level, as well as the domestic. The pervasiveness of these legitimacy issues crosscut many of the themes and conversations throughout this volume.

A first crisis of legitimacy concerns how the current international apparatus governing food systems was developed and as a result who benefits from the status quo. More specifically, the crisis of legitimacy stems from the fact that international policies and frameworks governing food systems have been built on generations of compromises that entrench and uphold inequality and imbalances of power between states and between states and the international system and have adverse impacts on the rural and urban poor in the Global South. Both De Schutter and Gonzalez highlight these legitimacy challenges in their historical analysis of the lead up to the Global Food Crisis, and the creation of the apparatuses governing the modern global food and agriculture regimes. For De Schutter, this crisis of legitimacy is reinforced by deep fragmentation between the various sectors, including trade, agriculture and human rights, governing food systems.

A second crisis of legitimacy concerns the dearth of both meaningful avenues of participation provided to non-state actors, specifically social movements and marginalized peoples, and opportunities available for public dialogue in major international policy-making fora. For supporters of food sovereignty, international laws governing trade, intellectual property, and the regulation of genetically modified organisms (GMOs) have created regimes in which peasants, fisherfolk and pastoralists are negatively impacted every day, and yet they had no role in creating or implementing these laws. As described by Claeys, without opportunity to be heard and space to challenge dominant detrimental forces, social movements such as *Vía Campesina* have chosen not to engage in dialogue with what they view as illegitimate international institutions (the WTO, the World Bank and the International Monetary Fund), while initiating careful dialogue with some UN institutions. One opportunity to partly overcome this legitimacy crisis may be the newly reformed CFS, which, as described by both De Schutter and Claeys, provides opportunity for

civil society engagement and could form a model for reforming other international institutions.

Domestically, legitimacy concerns underscore the responsiveness of states to the food insecure within their territories. The reasons for legitimacy crises at the national level are varied, context specific and too vast to describe in detail here, but they often concern weakened democratic structures, priority setting by governments and the non-enforcement of basic human rights standards. The context of large-scale land acquisitions, and the role of those states who are providing land, is particularly illustrative of these legitimacy crises. Brilmayer and Moon describe what they call “the endemic problem of agency” to explain in part the prevalence of large-scale land acquisitions, and why advocacy to end these acquisitions directed at those states providing land will not be fruitful. According to the authors, democratic deficits, corruption, dependence on food aid and weak and unenforced legal regimes for the protection of real property contribute to the proliferation of these acquisitions. Lambek describes the impending adoption of a new mining policy in Bangladesh, that despite bitter opposition by local populations, may lead to the legalization of open-pit coal mining, which given the current investment climate in the country and the lack of environmental regulations, could have devastating effects on local food security. These authors highlight the non-responsiveness of the state to the needs of local populations and underscore the weakened trust between populations and their governments.

The right to food, and food sovereignty, offer a counterforce to what is often viewed as the illegitimacy of law/policy making, particularly at the national level. Both frameworks are founded on participation, empowerment and active engagement of producers and consumers in the development of laws and policies that affect their lives and may provide room for broader food policy changes that garner their support from being responsive to the needs of the most vulnerable and marginalized. Experiences with right to food and food sovereignty laws and policies are at too early a stage to be analyzed in a systematic way. Yet, it appears likely that a number of the challenges associated with the implementation of the right to food at the national level, as discussed above, may be experienced in the future by the food sovereignty movement. This being said, implementation of food sovereignty laws and policies may prove easier, because food sovereignty laws and policies have tended to benefit from strong social movement support and political leadership. In contrast, strong civil society support and political will have often been missing in national experiences with the right to food.⁴⁷

⁴⁷ Whether there is a global or national “constituency” to support and champion economic, social and cultural rights is a question advocates will have to further explore. For some background, see PAUL J. NELSON & ELLEN DORSEY, *NEW RIGHTS ADVOCACY: CHANGING STRATEGIES OF DEVELOPMENT AND HUMAN RIGHTS NGOS* 83 (2008).

4.2 To Work Within the System or to Work Towards a New System

A second challenge, facing actors and activists seeking to improve food systems, is how to focus their efforts—whether to work within the system, improving what we have and making the most of the tools available, or working towards new systems. The extent to which parties view the legitimacy of current systems, or engage in pragmatic reasoning about the possibility for change in food systems, influence this approach.

The structures underpinning global food governance may be seen as relatively ossified, particularly in the short-term, and unlikely to be changed in the current political climate. A number of treaties and regulatory instruments—such as TRIPS and the Agreement on Agriculture – have been in force for many years. Extended campaigning to change trade laws and intellectual property laws, for example, have had minimal impacts. As already noted above, several authors through this book rely on the fact that it may not be possible, at least in the short term, to be rid of these laws and institutions. These pieces, which include the chapters by Brilmayer, Moon and Haugen, present compelling ways states can creatively use policy space available to them to change behaviors and improve the livelihoods of rural farmers. Brilmayer and Moon suggest that the WTO permits states to create labeling laws that indicate the process by which foods are produced in the hope to influence consumers. Haugen suggests that benefit sharing and the adoption of country specific intellectual property measures, as permitted under TRIPS, might ensure respect towards traditional knowledge and the promotion and protection of biodiversity.

On the other side, several authors present approaches that require changing the rules governing food systems, either by creating new norms and new laws, or by creating alternatives that remain outside of the legal landscape altogether. The first set of authors, including Araujo, Godek and Rae discuss efforts that have been made to alter the legal landscape through the introduction of new legal regimes to govern food systems, eliminate food insecurity and reinforce the participation of both consumers and producers in decision-making. While these authors seek to transform food systems through entirely new structures, the means for achieving this end rely on legal processes, such as the passing of legislation or policies, already in place. *Vía Campesina*, as illustrated by Claeys, has combined this approach (as embodied in the elaboration of national or local public policies for food sovereignty or with the pursued recognition of new rights for peasants at the international level) with mobilization and protests that seek to delegitimize the current governance system. Increasingly, however, the movement turns to the development of alternative food sovereignty practices that seek to create new food systems in the margins.

4.3 *The State and Alternatives Beyond the Statist Framework*

States have largely been at the center of food policy over the years—states have set the national policies and laws to govern food systems and acted in international arenas, at least in name, on behalf of their populations. However, the state centric model of food systems management and governance poses a number of challenges to the promotion of improved food systems and to how actors should engage in advocacy.

First, international laws from trade rules stemming from the WTO, to those prescribed by TRIPs, put limits on states with respect to policy options on domestic trade laws, the use of public procurement and subsidies, the governance of intellectual property and so on. Many countries have lost “policy space” to develop and implement laws and policies that are reflective of and responsive to domestic circumstances and population needs. While some states are able to influence these processes, a large number of states, particularly those states in the Global South, are unable to do so.

Second, the state is at once targeted as the entity to provide solutions to hunger issues, and the perpetrator behind many human rights abuses. Under human rights law, states are required to ensure that people do not go hungry, by providing food or social protection, and by regulating their own actions and the actions of third parties to ensure they do not interfere with how people feed themselves. However, states often interfere with how people produce or procure food, making it a challenge for them to meet their food needs, as shown by Lambek. Dealing with the challenge of enforcer and violator are common legal problems dealt through separation of powers, with the executive, legislator, and judiciary having separate functions, and each serving as a check on the others. However, in many of the countries where hunger and food insecurity are most prevalent access to justice domestically is often impossible. This emphasis on the state, as both a provider of food in certain circumstances and as a potential barrier to the ability of people to feed themselves, represents a considerable challenge, in particular for right to food advocacy.

The pieces in this book also all discuss, in one way or another, the limits of a state-centric approach to the governance of our food systems. The right to food and food sovereignty frameworks present different perspectives on this. Right to food defenders have sought over recent years to highlight the extra-territorial obligations of states (i.e. the obligations of states to ensure they do not engage in activities that negatively impact the ability of people to meet their food needs in other jurisdictions) and the implications of the right to food approach for imposing responsibilities on transnational corporations as well as international and intergovernmental institutions to not only refrain from violating rights but to actively engage in promoting their protection.⁴⁸ Food sovereignty activists, in contrast, have emphasized

⁴⁸ See General Comment No. 12, *supra* note 21 (providing human rights responsibilities, not obligations, for international institutions such as the World Trade Organization, the International Monetary Fund and the United Nations Development Programme, as well as other United Nations’ programs). See also Special Representative of the Secretary-General on the Issue of Human Rights

the importance of repoliticizing food politics.⁴⁹ Rather than target the state as the violator, they have developed a multi-level approach to democracy and decision-making in food systems, and directed their claims at society as a whole. Through the conceptualization of the “right of peoples to food sovereignty” as not only the right of nations, states, regions, but also communities, and possibly individuals,⁵⁰ they have paved the way for alternative thinking about local, national, regional and global food and agriculture governance.

5 Conclusion

Around the globe actors are grappling on a number of levels with what will improve food systems and how to go about implementing these improvements. The challenges facing food producers and consumers, the food insecure and the activists, civil society groups and social movements seeking to improve food systems are many. The chapters in this volume point to the fragmentation in international law, the challenges of adopting domestic legislation, the sweeping enclosure and commoditisation of land through large-scale land acquisitions, the limited ability of states to adopt progressive approaches to change the current neoliberal world order and a number of historical circumstances that have shaped our food systems today. These food systems are broken and it is the most marginalized who are paying the price.

However, our food systems may be poised, like never before, for the possibilities of social change. The Global Food Crisis has brought a wave of interest in issues of hunger and civic engagement, a system wide recognition that the status quo is no longer working and a newfound engagement by key policy and decision makers in addressing food insecurity. Together these factors make the time ripe for parties interested in improving systems to seek out meaningful changes. The authors in the volume point to the different ways using law and legal based tools could provide unique opportunities to challenge unfair regimes and practices and to rebuild and remodel institutions and legal frameworks. In learning from the past, thinking creatively about the future and making use of the unique opportunity of the current political climate, they argue that it may be possible to build new food systems grounded in human dignity, equality among people, democratic decision making and respect for nature, natural habitats and sustainability.

and Transnational Corporations and Other Business Enterprises, John Ruggie, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (2011).

⁴⁹ Rajeev Patel, *Transgressing Rights: La Vía Campesina’s Call for Food Sovereignty*, 13 FEMINIST ECON. 87, 93 (2007).

⁵⁰ See generally Claeys, *supra* note 43.

Part I
Institutionalizing New Approaches
to Managing Food Systems
and Addressing Hunger

Vía Campesina's Struggle for the Right to Food Sovereignty: From Above or from Below?

Priscilla Claeys

Abstract The transnational agrarian movement La Vía Campesina has successfully mobilized a human rights discourse in its struggle against capitalism and neoliberalism. As La Vía Campesina celebrates its 20th anniversary, this chapter proposes a critical overview of the right of peoples to food sovereignty. Looking at food sovereignty both as La Vía Campesina's most prominent collective action frame and as a new collective human right, this chapter explores some of the challenges social movements are confronted with when using human rights. It discusses efforts by La Vía Campesina to achieve the international recognition of food sovereignty as a new human right and explores past and current challenges involved in the institutionalization of food sovereignty.

1 Introduction

The transnational agrarian movement Vía Campesina is known for having successfully mobilized a human rights discourse in its struggle against capitalism and neoliberalism in agriculture. Rights have provided a common language to peasants' and small-scale farmers' organizations which are politically, culturally and ideologically radically different.¹ Rights talk has shaped the movement.² As this transnational

¹ Saturnino Borras, *La Vía Campesina and its Global Campaign for Agrarian Reform*, in TRANSNATIONAL AGRARIAN MOVEMENTS CONFRONTING GLOBALIZATION 109 (Saturnino Borras, Marc Edelman & Cristóbal Kay eds., 2008).

² Peter Rosset & Maria Elena Martinez, *La Vía Campesina: the Birth and Evolution of a Transnational Social Movement*, 37 J. PEASANT STUD. 149 (2010); Peter P. Houtzager, *The Movement of the Landless (MST): Juridical Field, and Legal Change in Brazil*, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (Boaventura De Sousa Santos & César A. Rodríguez-

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peasant movement celebrates its 20th anniversary, this chapter proposes a critical overview of the *right of peoples to food sovereignty*, which is probably *Vía Campesina*'s most emblematic invention in the area of human rights. Looking at food sovereignty both as *Vía Campesina*'s most prominent collective action frame and as a new collective human right, this chapter explores some of the challenges social movements are confronted with when using human rights.

This chapter starts with a short introduction to *Vía Campesina*. It traces the origins of the movement and describes the various ways in which it has used human rights. The main argument of this chapter is that the use of rights has confronted peasant movements with the “paradox of institutionalization”.³ The first and well-known aspect of that paradox has to do with the institutionalization of social movement organizations⁴ and their engagement with the institutional world. The second aspect of the paradox has to do with the fact that the institutionalization of human rights constantly threatens their subversive potential.

The first part of this chapter discusses the advantages and constraints of the human rights framework. It then examines how *Vía Campesina* has dealt with both the conceptual and strategic limitations of the human rights framework, in an attempt to keep intact the subversive potential of its rights-based claims. The second part of this chapter analyzes the institutional trajectory of the new right of peoples to food sovereignty. It discusses efforts by *Vía Campesina* to achieve the international recognition of food sovereignty as a new human right and explores past and current challenges involved in the institutionalization of food sovereignty.

2 The Food Sovereignty Movement and the Rights Master Frame

Vía Campesina developed in the early 1990s as small farmers from Central America, North America and Europe sought to articulate a common response to the free-market onslaught that had devastated their lives.⁵ The movement emerged in reaction to the drastic reshaping of state-society relations and the multiplication of neoliberal policies aimed at overcoming rampant inflation and declining rates of profits and growth. Indeed, a double movement of state restructuring took place in the 1980s: from the outside, the privatization of public enterprises—“the minimal state”—put an end to the “producer state”; from the inside, the creation of a

Garavito eds., 2005); Rajeev Patel, *Transgressing Rights: La Via Campesina's Call for Food Sovereignty*, 13 FEMINIST ECON. 87 (2007); TRANSNATIONAL AGRARIAN MOVEMENTS CONFRONTING GLOBALIZATION (Saturnino Borrás, Marc Edelman & Cristóbal Kay eds., 2008).

³ NEIL STAMMERS, HUMAN RIGHTS AND SOCIAL MOVEMENTS 102 (2009).

⁴ SIDNEY TARROW, POWER IN MOVEMENT (1998).

⁵ ANNETTE AURÉLIE DESMARAIS, LA VÍA CAMPESINA: UNE RÉPONSE PAYSANNE À LA CRISE ALIMENTAIRE (2008); Rosset & Martinez, *supra* note 2; TRANSNATIONAL AGRARIAN MOVEMENTS CONFRONTING GLOBALIZATION, *supra* note 2.

“managerial state” led to the structuring of new relations between government and social subjects.⁶ National self-sufficiency in cereals, livestock and fish products was abandoned as an objective of national economic policy, as states adopted agricultural export-led strategies as “the principal means of enhancing rural accumulation”.⁷

Peasants in the South saw a drastic decline in their livelihood options as crops and livestock prices dropped. They were hit by the combined effects of subsidies in the North—which had been triggered by low world prices and were in turn to blame for low commodity prices⁸—and the dismantling of supply management schemes⁹ in the South resulting in over-supply¹⁰. In this context, exchanges between peasant organizations from North America, Central America, and Europe helped develop ties between farmers who soon realized that they faced similar problems. A French peasant from the Confédération paysanne who attended the first meeting of Via Campesina, in 1993, in Mons, Belgium,¹¹ recalls: “before, the state of mind was, we need to help the starving poor in Africa, but then we realized that we were destroying each other”.¹²

Since then, 148 national and sub-national rural organisations from 69 countries—mobilizing against genetic crops, dams, mining concessions, natural reserves, and/or trade liberalization—have joined forces in what some consider “the most dynamic” contemporary transnational agrarian movement.¹³ The movement has opposed “global

⁶ PIERRE DARDOT & CHRISTIAN LAVAL, *LA NOUVELLE RAISON DU MONDE* 355 (2009).

⁷ Haroon Akram Lodhi & Cristóbal Kay, *Neoliberal Globalisation: the Traits of Rural Accumulation and Rural Politics, the Agrarian Question in the Twentieth Century*, in *PEASANTS AND GLOBALISATION: POLITICAL ECONOMY, RURAL TRANSFORMATION AND THE AGRARIAN QUESTION* 318 (Haroon Akram Lodhi & Cristóbal Kay, 2008).

⁸ PETER ROSSET, *FOOD IS DIFFERENT: WHY WE MUST GET THE WTO OUT OF AGRICULTURE* 43 (Global Issues Series, 2006).

⁹ *Id.* at 30.

¹⁰ Adding to the impacts of trade liberalization, the technical transformation of farming through chemicalization and mechanization in the US and industrialized North resulted in increased concentration and a growing labor and land productivity gap between large scale capitalist farmers in both North and South and small-scale farmers mostly in the South. Moreover, the elimination of capital controls among economies, to enable speculative capital to move quickly to take advantage of differentials in value of currencies, stocks and other financial instruments, resulted in the emergence of a truly unified global capital market. As input-output chains became territorially optimized, and were no longer producer-driven but buyer-driven, farmers found themselves to be mere price-takers with little information at hand. As these chains grew, they often merged with, acquired or forced out smaller retailers.

¹¹ The Mons meeting led to the creation of Via Campesina as a transnational network. Peasant leaders who attended the 1993 meeting defined five regions and elected a Coordinating Commission made up of the Movimento dos Trabalhadores Rurais Sem Terra (MST), representing South America, ASOCODE, representing Central America, the Caribbean, and North America, Peasant Solidarnosc (Poland), representing Eastern Europe, KMP (Philippines), representing Asia, and CPE (Europe), representing Western Europe.

¹² “Avant, l'état d'esprit c'était 'il faut aider les petits noirs' [referring to the African famines of 1973–74 and of the mid-80s], là on a réalisé qu'on se détruisait l'un l'autre”. Interview with French Peasant, Confédération paysanne, Via Campesina, in Montreuil, Fr. (May 4, 2010).

¹³ Marc Edelman & Carwil James, *Peasants' Rights and the UN System: Quixotic Struggle? Or Emancipatory Idea Whose Time Has Come?*, 38 *J. PEASANT STUD.*, 90 (2011).

depeasantization”¹⁴ and the emerging “corporate food regime”.¹⁵ It has developed a “food sovereignty” model to counterpose the dominant “market economy” paradigm.¹⁶ It has managed to build a common agenda across the North–South divide, and to gain the support of numerous non-governmental organizations (NGOs), academics, environmentalists and even states that today defend some version of food sovereignty.¹⁷

To do this, *Vía Campesina* efficiently deployed a powerful “rights master frame”.¹⁸ Framing is one of the core activities of social movements. Movements carry and transmit mobilizing beliefs and ideas, but they are also actively engaged in the production of meaning for participants and opposers. This productive work, which may involve the shaping and restructuring of existing meanings, has been conceptualized as framing in the social movements literature.¹⁹ Framing serves the purposes of diagnosing certain situations as problematic, offering solutions and calling to action.²⁰ While most collective action frames are movement-specific or “organizational”—in the sense that they are limited to the interests of a particular group or to a set of related problems—some frames function as a kind of algorithm that colours and constrains the orientations and activities of other movements. These more generic frames are referred to as “master frames”.²¹ The “rights master frame” is a good example of a collective action frame which has been identified as sufficiently broad in interpretive scope, inclusivity, flexibility and cultural resonance to function as a master frame.²² The rights master frame was mobilized by the civil rights movement²³ and later adopted by gay and lesbian rights groups.²⁴ It is prominent in

¹⁴ Farshad A. Araghi, *Global Depeasantization, 1945–1990*, 36 *Soc. Q.* 337 (1995).

¹⁵ Philip McMichael, *A Food Regime Genealogy*, 36 *J. PEASANT STUD.* 139 (2009).

¹⁶ Rosset & Martinez, *supra* note 2, at 154.

¹⁷ Tina D. Beuchelt & Detlef Virchow, *Food Sovereignty or the Human Right to Adequate Food: Which Concept Serves Better as International Development Policy for Global Hunger and Poverty Reduction?*, 29 *AGRIC. & HUM. VALUES* 259 (2012).

¹⁸ Priscilla Claeys, *The Creation of New Rights by the Food Sovereignty Movement: The Challenge of Institutionalizing Subversion*, 46 *Soc.* 844, 845, (2012).

¹⁹ Robert Benford & David Snow, *Ideology, Frame Resonance, and Participant Mobilization*, 1 *INT’L SOC. MOVEMENTS RES.* 197, 198 (1988).

²⁰ *Id.* at 199.

²¹ Robert Benford & David Snow, *Framing Processes and Social Movements: an Overview and Assessment*, 26 *ANN. REV. SOC.* 611, 618 (2000).

²² *Id.* at 619.

²³ Doug McAdam, *The Framing Function of Movement Tactics: Strategic Dramaturgy in the American Civil Rights Movements*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS* 338 (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996); Steve Valocchi, *The Emergence of the Integrationist Ideology in the Civil Rights Movement*, 43 *SOCIAL PROBS.* 116 (1996).

²⁴ Kathleen E. Hull, *The Political Limits of the Rights Frame: the Case of Same-Sex Marriage in Hawaii*, 44 *Soc. PERSP.* 207 (2001); Ken Plummer, *Rights Work: Constructing Lesbian, Gay and Sexual Rights in Late Modern Times*, in *RIGHTS: SOCIOLOGICAL PERSPECTIVES* (Lydia Morris ed., 2006).

pro-life versus pro-choice debates and in struggles over workers' rights, mothers' rights and welfare rights²⁵ as well as women's and migrants' rights.²⁶

The advantages of mobilizing a rights master frame have been well documented. Human rights can be used by activists to transform ordinary perceptions of what is just and unjust and to redefine the boundaries between what is normal and unacceptable.²⁷ They allow social movements to frame claims in a way that does not emphasize particular or sectorial interests. Rights allow for a flexible and open master frame,²⁸ that facilitates the integration of multiple ideologies. Indeed, as we will see in the case of *Vía Campesina*, a variety of ideologies can be framed with the concept of rights²⁹ and rights facilitate the international exportation of claims to movements with divergent ideological references and who belong to different geographical contexts.³⁰ Also, a rights master frame combines easily with other master frames, and therefore allows for the constitution of a very potent multivo- cal frame.

Yet, to frame social movement claims as rights presents social movements with a number of constraints, which can considerably hinder the subversive potential of human rights. Two sets of challenges will be explored in this article. First, contemporary conceptions of human rights are rooted in the "enlightenment era"³¹ and liberal streams of thought. The liberal origins of human rights represent a considerable challenge for movements that decide to use rights talk in their struggle against capitalism and neoliberalism. Second, rights-based social change has been conceptualized as a top-down process which insists on stronger laws, responsive legal institutions and accountability mechanisms.³² This insistence on change from the top may be at odds with grassroots mobilization and "repertoires of collective action",³³ such as protests, that are traditionally deployed by social movements.

²⁵ Ellen Reese & Garnett Newcombe, *Income Rights, Mothers' Rights, or Workers' Rights? Collective Action Frames, Organizational Ideologies, and the American Welfare Rights Movement*, 50 SOC. PROBS. 294 (2003).

²⁶ Juanita Elias, *Transnational Migration, Gender, and Rights: Advocacy and Activism in the Malaysian Context*, 48 INT'L MIGRATION 44, 44–71 (2010).

²⁷ Eric Agrikoliansky, *Les Usages Protestataires du Droit*, in PENSER LES MOUVEMENTS SOCIAUX: CONFLITS SOCIAUX ET CONTESTATIONS DANS LES SOCIÉTÉS CONTEMPORAINES 229 (Olivier Fillieule, Eric Agrikoliansky & Isabelle Sommier eds., 2010).

²⁸ Patrick H. Mooney & Scott A. Hunt, *A Repertoire of Interpretations: Master Frames and Ideological Continuity in U.S. Agrarian Mobilization*, 37 SOC. Q. 179 (1996).

²⁹ Valocchi, *supra* note 23, at 118.

³⁰ Agrikoliansky, *supra* note 27, at 232.

³¹ Kevin Kolben, *Labor Rights as Human Rights?*, 50 VA. J. INT'L L. 453 (2008).

³² *Id.* at 477.

³³ CHARLES TILLY, *LA FRANCE CONTESTE* (1986).

3 Overcoming the Liberal Origins of Human Rights

From a conceptual perspective, three main obstacles commonly associated with human rights had to be overcome by *Vía Campesina*: the dominance of a Western, liberal and individualist conception of rights; state-centrism and the inability of international human rights law to adequately address the responsibilities of (increasingly threatening) private and transnational actors; and the fundamentally liberal³⁴ character of human rights regimes and the resulting emphasis on economic liberty—understood as individual appropriation of, access to and control over economic resources—at the expense of equality of outcome/welfare.³⁵

In order to deploy a rights master frame that serves the movement's goals, resonates with activists' worldviews and encourages them to take action, *Vía Campesina* had to develop an alternative conception of rights. Indeed, the social-democratic approach to human rights, which underlies the existing and already codified human right to adequate food—as well as other economic, social and cultural rights—did not provide *Vía Campesina* with the narrative, autonomy and vision it needed.³⁶

Instead, the movement mobilized around a newly created “right of peoples to food sovereignty” and sought to develop a conception of human rights that would: emphasize the collective dimension of claims over the individual one; target the various levels where food and agricultural governance issues ought to be deliberated, from the local, national, regional to the international, rather than rely on a statist framework; and provide the tools to fight neoliberalism and capitalism in agriculture, through the defense of autonomy and equality-reinforcing food systems.

3.1 *The Right to Food Sovereignty*

Food sovereignty (“soberanía alimentaria”) apparently emerged³⁷ as early as the mid-80s in Central America, essentially in response to a combination of drastic structural adjustment programs, the deliquescence of state support for agriculture and the arrival of food imports from the United States. Food sovereignty was understood at the time as meaning “national food security” and was usually coupled with the “right to continue being producers”.³⁸ The *right to food sovereignty* made

³⁴ Liberalism can be defined as a project that “promotes social outcomes that are, as far as possible, the result of free individual choices, provided that such choices respect equal freedom and the rights of others”. For more on this, see JOHN CHARVET & ELISA KACZYNSKA-NAY, *THE LIBERAL PROJECT AND HUMAN RIGHTS: THE THEORY AND PRACTICE OF A NEW WORLD ORDER 2* (2008).

³⁵ *Id.* at 11–12.

³⁶ Claeys, *supra* note 18, at 848.

³⁷ MARC EDELMAN, *PEASANTS AGAINST GLOBALIZATION: RURAL SOCIAL MOVEMENTS IN COSTA RICA* (1999).

³⁸ *Id.* at 102–103.

its appearance on the international scene in 1996.³⁹ At the occasion of the World Food Summit which was held in Rome, the NGO Forum to the World Food Summit insisted that: “Each nation must have the right to food sovereignty to achieve the level of food sufficiency and nutritional quality it considers appropriate without suffering retaliation of any kind”.⁴⁰ The diagnosis was explicit: “The neo-liberal agricultural policies have led to the destruction of our family farm economies and to a profound crisis in our societies”.⁴¹ In reaction, Vía Campesina demanded that the global community “establish alternatives to the neo-liberal policies and institutions such as the WTO [World Trade Organization], WB [World Bank] and the IMF [International Monetary Fund]”.⁴²

In the late 1990s and early 2000s, the right to food sovereignty dealt mainly with trade and the WTO.⁴³ The direct effects of the entry into force of WTO's Agreement on Agriculture (AoA) on developing countries were relatively limited since 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.⁴⁴ Yet, the WTO quickly became the predominant target of the global justice movement,⁴⁵ and certainly of Vía Campesina activists. Opposition to the WTO helped federate the movement and protests during WTO Ministerial Conferences—the topmost decision-making body of the WTO, which usually meets every two years—punctuated the life of the food sovereignty movement. The WTO came under attack as an institution, and as a symbol, despite the fact that, according to members of its secretariat, the WTO is first and foremost a members-driven organization over which the WTO secretariat exercises relatively little influence.⁴⁶

This period was crucial to the elaboration of food sovereignty as Vía Campesina's central collective action frame. A first period of “frame formulation” can be identified in the mid-1980s to the early 1990s during which the right to food sovereignty tapped, quite naturally, into dormant Marxist, anti-imperialist, and

³⁹ As early as 1993, in the Mons Declaration, Via Campesina demanded “the right of every country to define its own agricultural policy according to the nation's interest and in concertación [sic] with the peasant and Indigenous organizations, guaranteeing their real participation”, although not explicitly linking these claims to food sovereignty.

⁴⁰ NGO FORUM TO THE WORLD FOOD SUMMIT, PROFIT FOR A FEW OR FOOD FOR ALL, STATEMENT AT THE OCCASION OF THE WORLD FOOD SUMMIT, ROME, ITALY (Nov. 1996).

⁴¹ VÍA CAMPESINA, SEATTLE DECLARATION: TAKE WTO OUT OF AGRICULTURE (Dec. 3, 1999).

⁴² *Id.*

⁴³ Although WTO and trade were the main focus of mobilizations between Rome (1996) and Seattle (1999), anti-GMOs mobilizations were very important also, in particular in the 1998–2003 period, and were often led under the food sovereignty banner.

⁴⁴ Tobias Reichert, *Agricultural Trade Liberalization in Multilateral and Bilateral Negotiations*, in THE GLOBAL FOOD CHALLENGE: TOWARDS A HUMAN RIGHTS APPROACH TO TRADE AND INVESTMENT POLICIES 33 (FIAN & IATP, 2009).

⁴⁵ RUTH REITAN, GLOBAL ACTIVISM (2007).

⁴⁶ Interview with WTO Staff, Geneva, Switz. (June 25, 2008).

anti-colonialist frames.⁴⁷ It reactivated/amplified⁴⁸ the “self-determination” frame⁴⁹ in particular. *Vía Campesina* leader Paul Nicholson, from the farmers’ organization EHNE in the Basque country in Spain, recalls: “When the concept came out, it was intuitive and uncontrollable, it came out of a small group, which today is the whole world”.⁵⁰

Some time in the mid-1990s, food sovereignty became the reference—or organizational—frame of *Vía Campesina*, and its international “diffusion” appears to have taken place quite organically and rapidly within *Vía Campesina* member organizations. The (right to) food sovereignty frame was successful in mobilizing not only the rights master frame but also a number of other master frames, such as the “cultural pluralist” and “environmental” master frames⁵¹ and the “producer” and “agrarian” master frames that run through agrarian mobilizations.⁵² Moreover, it was able to link up to a number of ideologies present in the movement—Marxist, agrarian populist, anarchist and environmentalist.⁵³

Since then, it has undergone processes of further “elaboration/articulation” and has continuously been reconstituted through interactions among movement activists.⁵⁴ To this day, activists spend a lot of time discussing what is (the right to) food sovereignty, why it is important to them, how it should be defined, and how it should be implemented. As the right to food sovereignty frame has evolved in the face of new international events, new strategies,⁵⁵ new members, and counterframing by adversaries,⁵⁶ it has needed to be constantly re-elaborated and appropriated by movement activists.

⁴⁷ Frames are intimately connected to the social, cultural and political environments in which they emerge; they are built using available cultural toolkits. Benford & Snow, *supra* note 21, at 629.

⁴⁸ “Frame amplification” designates attempts by activists to invigorate existing values or beliefs. *Id.* at 624.

⁴⁹ Mooney and Hunt use the term “repertoires of interpretations” to highlight that movements interpret and reconstruct existing systems of meanings. They contend that such repertoires can draw on several frames and that ideological themes persist between movements over time. Ideologies might lead an underground existence, survive and re-emerge in what they call “abeyance processes”. Mooney & Hunt, *supra* note 28, at 179.

⁵⁰ “Cuando salió el concepto, fue intuitivo e incontrolable, salió de un grupo pequeño, que hoy es todo el mundo”. *Vía Campesina* Leader Paul Nicholson, at ECVC Seminar on Food Sovereignty and Trade, Paris, Fr. (Jan. 8–9, 2009).

⁵¹ Benford & Snow, *supra* note 21, at 619.

⁵² Mooney & Hunt, *supra* note 28, at 184.

⁵³ Borras, *supra* note 1, at 109.

⁵⁴ Benford & Snow, *supra* note 21, at 623.

⁵⁵ Analysis of other social movements has shown that, over time, frames are increasingly shaped by strategic decisions and contests with interlocutors. See Doug McAdam, John D. McCarthy & Mayer N. Zald, *Introduction: Opportunities, Mobilizing Structures, and Framing Processes—Towards a Synthetic, Comparative Perspective on Social Movements*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS* 16 (Doug McAdam, John D. McCarthy & Mayer N. Zald eds., 1996).

⁵⁶ Benford & Snow, *supra* note 21, at 625.

Looking at the features of the right to food sovereignty frame in 2013, it is striking how far it has expanded. It has integrated the movement's wide variety of struggles at the local and national levels—such as securing control over natural productive resources, protecting local knowledge and cultural identity, creating local markets, guaranteeing remunerative prices, and the right to land and territory—into a fully-fledged rights-based paradigm, resting on six pillars.⁵⁷ It has diffused to new geographic regions, including Africa,⁵⁸ and has taken on new meanings. If the right to food sovereignty remains extremely potent and popular, it nevertheless appears to be at crossroads. In the next section, we explore the main challenges facing the right to food sovereignty frame.

4 Overcoming the Focus on Top-Down Social Change

From a strategic perspective, the use of a rights frame presented Via Campesina with three interrelated challenges. First, the human rights framework is heavily associated with strong and responsible (national) institutional and legal frameworks⁵⁹ as well as with encouraging the ability of citizens to claim their rights through effective accountability mechanisms. It relies on top-down social change. Second, the level of expertise required to deploy human rights arguments is such that human rights have more often than not been defended by human rights lawyers,⁶⁰ and not by average citizens. The prominent role of human rights experts and the associated tendency to solve conflicts in specialized arenas run the risk of undermining social movements' efforts to organize and mobilize. Third, human rights claims tend to be constructed in ways that demand their institutional instantiation,⁶¹ but the institutionalization of human rights claims may considerably hinder the subversive potential of human rights.

Stammers has shown that “non-institutional activism has historically demanded the institutionalisation of human rights”.⁶² Has Via Campesina sought to obtain the universal recognition of the right to food sovereignty or to translate this right in alternative international trade rules for food and agriculture? If yes, has it managed to do so without undermining the subversive potential of this new right?

⁵⁷ Food Sovereignty rests on 6 pillars: Focuses on Food for people (1), Values Food Providers (2), Localizes Food Systems (3), Puts Control Locally (4), Builds Knowledge and Skills (5), Works with Nature (6). NYELENI FOOD SOVEREIGNTY FORUM, SYNTHESIS REPORT: NYELENI FORUM FOR FOOD SOVEREIGNTY 2007 (2007).

⁵⁸ The selection and adaptation of frames to other contexts, a direct result of frame diffusion processes, have been well documented. Benford & Snow, *supra* note 21, at 627.

⁵⁹ Kolben, *supra* note 31, at 477.

⁶⁰ Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 108 AM. ANTHROPOLOGIST 52 (2006).

⁶¹ NEIL STAMMERS, HUMAN RIGHTS AND SOCIAL MOVEMENTS 106 (2009).

⁶² *Id.*

Around the year 2000, *Vía Campesina*, together with a large network of social movements and NGOs, which were mobilizing in the run up to the WTO Ministerial of Doha (2001), demanded that the right to food sovereignty be enshrined in an international convention.⁶³ The “Priority to Peoples’ Food Sovereignty—WTO out of Food and Agriculture” campaign stressed that, to ensure peoples’ food sovereignty, governments must begin working on a new multilateral framework, within a reformed United Nations (UN), to govern sustainable agricultural production and the food trade.⁶⁴ Central to the alternative multilateral framework was the demand for an International Convention on Food Sovereignty that would replace the current AoA and relevant clauses from other WTO agreements.⁶⁵ These calls were reiterated by the 2002 NGO Forum for Food Sovereignty⁶⁶ at the occasion of the inter-governmental World Food Summit: Five Years Later, during which *Vía Campesina* asked the United Nations Food and Agriculture Organization (FAO) to defend “the right of peoples to food sovereignty, the right to eat healthy foods, and the right to access productive resources such as land, water and seeds”.⁶⁷

Other instruments were proposed at the time, not in the form of “a coherent package, but rather a list of incomplete ideas”⁶⁸: a World Commission on Sustainable Agriculture and Food Sovereignty, which would undertake a comprehensive assessment of the impacts of trade liberalization on food sovereignty and security, and develop proposals for change; an independent dispute settlement mechanism integrated within a new International Court of Justice, especially to prevent dumping and GMOs in food aid; and an international, legally binding treaty that defined the rights of smallholder farmers to the assets, resources, and legal protections they need to be able to exercise their right to produce.⁶⁹

In 2004, French activist José Bové brought *Vía Campesina*’s call for a Convention on Food Sovereignty to then UN Secretary General Kofi Annan, whom he

⁶³ Such a convention “would implement, within the international policy framework, Food Sovereignty and the basic human rights of all peoples to safe and healthy food, decent and full rural employment, labor rights and protection, and a healthy, rich and diverse natural environment. It would also incorporate trade rules on food and agricultural commodities”. See *Our World is Not for Sale: Priority to Peoples’ Food Sovereignty, WTO out of Food and Agriculture* (Nov. 6, 2001), available at www.citizen.org/documents/wtooutoffood.pdf.

⁶⁴ ANNETTE AURÉLIE DESMARAIS, *THE WTO ... WILL MEET SOMEWHERE, SOMETIME: AND WE WILL BE THERE!* (2003).

⁶⁵ *Our World is Not for Sale*, *supra* note 63.

⁶⁶ NGO/CSO FORUM FOR FOOD SOVEREIGNTY, *FOOD SOVEREIGNTY: A RIGHT FOR ALL POLITICAL STATEMENT OF THE NGO/CSO FORUM FOR FOOD SOVEREIGNTY* (2002); NGO/CSO FORUM FOR FOOD SOVEREIGNTY, *FOOD SOVEREIGNTY: ACTION AGENDA* (2002).

⁶⁷ *VÍA CAMPESINA, SOBRE ATRASO DE LA CUMBRE FAO EN 2001* (2001), available at <http://via-campesina.org/es/index.php/temas-principales-mainmenu-27/soberanalimentary-comercio-mainmenu-38/313-sobre-atraso-de-la-cumbre-fao-en-2001>.

⁶⁸ MICHAEL WINDFUHR & JENNIE JONSÉN, *FOODFIRST INFORMATION AND ACTION NETWORK (FIAN), FOOD SOVEREIGNTY: TOWARDS DEMOCRACY IN LOCALIZED FOOD SYSTEMS* 44 (2005).

⁶⁹ This idea later materialized in the form of a Declaration on the Rights of Peasants, Women and Men, which was adopted by the International Coordination Committee of *Vía Campesina* in March 2009, as we will see below.

asked “to support Via Campesina organizations in their efforts to have food sovereignty recognized as a new basic human right”.⁷⁰ Bové explained: “the idea is to be able to produce and to be able to protect ourselves from the economic logic, by putting forward the right of peasants and food self-determination. It is an entirely distinct conception of development, which underlies this question. It will enable us to link the collective interests of populations with the interests of states. We are mobilizing to get food sovereignty ... internationally recognized as a right. We need to go to the UN for this”.⁷¹

Attempts to institutionalize the right to food sovereignty peaked between 2001 and 2005 then somewhat disappeared from the movement's agenda. Although the idea of an International Convention on Food Sovereignty was discussed at the Nyeleni Food Sovereignty Forum of 2007,⁷² calls for such a Convention have not been reactivated by the global food price crisis of 2007–08⁷³ nor brought so far to the reformed Committee on World Food Security (CFS). Today, it appears that efforts to pursue the institutionalization of the right to food sovereignty at the international level have been largely abandoned. Via Campesina's famous demand that agriculture be placed under the auspices of a reformed UN has also not made much progress, and the movement has put forward no concrete proposals as to how to institutionally organize the symbolic exit of agriculture from the WTO. What happened in those pivotal years?

5 Understanding the Institutional Trajectory of the Right to Food Sovereignty

In this article, I argue that the institutionalization of the right to food sovereignty was impeded by a set of factors, ranging from strategic decisions, internal frame disputes and changing political opportunities structures. Indeed, to institutionalize

⁷⁰ Via Campesina, Jose Bove Meets Kofi Annan: Civil Society Raises Food Sovereignty Issue (June 13, 2004).

⁷¹ “La future convention de la Via Campesina est effectivement un exemple d'utilisation du droit international en vue de l'amélioration des conditions de vie actuelle. C'est du moins le pari que l'on fait. A partir d'un droit fondamental reconnu universellement, en l'occurrence le droit à l'alimentation, limité aujourd'hui, on espère promouvoir le concept de souveraineté alimentaire. L'idée est de pouvoir produire et de pouvoir se protéger contre la logique économique, en mettant en avant le droit des paysans et l'autodétermination alimentaire. C'est toute une autre conception du développement qui est sous-jacente à cette question. Cela permettra de lier les intérêts collectifs des populations avec les intérêts des Etats. Nous militons pour que la souveraineté alimentaire (...) soit un droit reconnu mondialement. Il faut passer par l'ONU pour cela”. Translation by the author. José Bové, *La Réalité Locale Dépend Aussi du Contexte Global: Interview de José Bové par le CETIM*, in ONU DROITS POUR TOUS OU LOI DU PLUS FORT? 366–68 (Centre Europe Tiers-Monde eds., 2005).

⁷² NYELENI FOOD SOVEREIGNTY FORUM, *supra* note 57.

⁷³ International Planning Committee for Food Sovereignty (IPC), *Policies and Actions to Eradicate Hunger and Malnutrition* 30 (Working Document, Nov. 2009).

a new human right requires elaborating a strategy of institutional dialogue (“from above”) and creating and seizing “legal opportunity structures”.⁷⁴ In order to be successfully deployed, the institutionalization strategy needs to be aligned with the movement’s organizational frames.⁷⁵

5.1 The “Reclaiming Control” Frame

Over recent years, the centrality of the right to food sovereignty frame has been threatened by the emergence of an increasingly potent and competing frame: the “reclaiming control” frame. The following excerpt from the 2007 Nyeleni Forum provides a good insight into this new frame: “We will fight against the corporate control of the food chain by *reclaiming control*⁷⁶ over our territories, production, markets and the ways we use food ... We will promote ecological production (agroecology, pastoralism, and artisanal fisheries etc.) as a direct strategy against transnational corporations.”⁷⁷

At the heart of the “reclaiming control” frame is reliance on grassroots organizing and mistrust in the capacity of the state and of institutional frameworks to bring social change. The “control” frame highlights alternative “practices” at the local level and building another world from the bottom up: “As a general principle, Food Sovereignty is built on the basis of our concrete local experiences, in other words, from the local to the national.”⁷⁸

A growing number of initiatives that take place within the Via Campesina network resonate with this “reclaiming control” frame, be it agroecological practices, direct marketing or indigenous control over land and territories. Agroecology, which has a strong appeal for many peasant groups,⁷⁹ is increasingly described as food sovereignty in practice. Rather than wasting time debating institutionally focused strategies for structural changes, Via Campesina activists insist that “there is

⁷⁴ This concept describes the opening of institutional spaces allowing for legal changes. Liora Israël, *Faire Émerger le Droit des Étrangers en le Contestant, ou l’Histoire Paradoxe des Premières Années du GISTI*, 16(62) POLITIX 115 (2003). It derives from Tarrow’s “political opportunity structures”. SIDNEY TARROW, *POWER IN MOVEMENT* (1998).

⁷⁵ The interactions between strategies, framing and political opportunity structures are extremely complex and not yet fully explored in the social movements studies literature. See Benford & Snow, *supra* note 21.

⁷⁶ Emphasis added by the author.

⁷⁷ NYELENI FOOD SOVEREIGNTY FORUM, *supra* note 57.

⁷⁸ Via Campesina, Declaration of Maputo (Declaration of the 5th International Conference of Via Campesina, Maputo, Mozambique) (Oct. 19, 2008).

⁷⁹ Peter Rosset et al., *The Campesino-to-Campesino Agroecology Movement of ANAP in Cuba: Social Process Methodology in the Construction of Sustainable Peasant Agriculture and Food Sovereignty*, 38 J. PEASANT STUD. 161 (2011); Eric Holt-Gimenez, *Linking Farmers’ Movements for Advocacy and Practice*, 37 J. PEASANT STUD. 203 (2010); Miguel Altieri, Fernando R. Funes-Monzote & Paulo Petersen, *Agroecologically Efficient Agricultural Systems for Smallholder Farmers: Contributions to Food Sovereignty*, 32 AGRONOMY FOR SUSTAINABLE DEV. (2012).

a ruthless war going on” and that this battle in being fought on the ground.⁸⁰ In the North, the “reclaiming control” frame finds expressions in the growing number of initiatives seeking to develop producer-consumer connections and encourage “critical consumption.”⁸¹ A peasant from the Confédération paysanne, a Via Campesina member organization in France, asks: “How to regain possession of our territories? Occupy space? This is what this is about.”⁸²

A shared perception among groups engaged in agroecological practices in the South and short distribution chains in the North—and the same could be said of most indigenous struggles in the South—is mistrust of government support and institutions. De Munck, for example, highlights that critical consumption movements in Belgium tend to show a preference for “sub-political” action.⁸³

The “reclaiming control” frame marks a departure from the “from above” conception of social change that characterizes the rights master frame. Rather, it mobilizes a “from below” master frame. This master frame manifests itself in conjunction with a number of different ideological currents, such as subaltern cosmopolitanism, postmodernism and third-world feminism. It emphasizes the “collective agency of subaltern social groups”⁸⁴ struggling against exploitation and oppression. It focuses on resistance and on grassroots processes, a good example of this being the term “globalization from below”, first coined by Falk⁸⁵ but also explored by Appadurai.⁸⁶ It also emphasizes “subjectivity” and the importance of “experience”.⁸⁷

The “from below” master frame has been powerfully deployed by indigenous groups such as the Zapatistas in Mexico, in order to insist that their struggle was not about seizing power, as has been outlined by Marxist thinker Holloway. For Holloway, capitalism should be fought in the cracks, not by alternatives that mimic the

⁸⁰ Via Campesina support staff, reacting to the question of whether agroecology and industrial agriculture can coexist, at expert meeting on agroecology organized by the Special Rapporteur on the right to food in Brussels, Belg. (June 21, 2010).

⁸¹ GEOFFREY PLEYERS, *LA CONSOMMATION CRITIQUE: MOUVEMENTS POUR UNE ALIMENTATION RESPONSABLE ET SOLIDAIRE* (2011).

⁸² “Comment se réappropriier nos territoires? Occuper l’espace? C’est de cela qu’il s’agit” (peasant addressing other members of the French Confédération paysanne during the organization’s General Assembly, Montreuil, Fr., May 4, 2010).

⁸³ See ULRICH BECK, *THE REINVENTION OF POLITICS: RETHINKING MODERNITY IN THE GLOBAL SOCIAL ORDER* (1997), cited in Jean De Munck, *Alterconsommation: La Reconfiguration d’une Critique*, in GEOFFREY PLEYERS, *LA CONSOMMATION CRITIQUE: MOUVEMENTS POUR UNE ALIMENTATION RESPONSABLE ET SOLIDAIRE* 304–305 (2011).

⁸⁴ Alf Gunvald Nilsen & Laurence Cox, ‘*At the Heart of Society Burns the Fire of Social Movements*’: *What Would a Marxist Theory of Social Movements Look Like?*, in *MARXISM AND SOCIAL MOVEMENTS 2* (C. Barker, L. Cox, J. Krinsky & A. G. Nilsen eds., 2011).

⁸⁵ Richard Falk, *Resisting ‘Globalisation From Above’ Through ‘Globalisation From Below’*, 2 *NEW POL. ECON.* 17 (1997).

⁸⁶ Appadurai uses the term “grassroots globalization” or “on behalf of the poor”. Arjun Appadurai, *Grassroots Globalization and the Research Imagination*, 12 *PUB. CULTURE* 3 (2000).

⁸⁷ GEOFFREY PLEYERS, *ALTER-GLOBALIZATION: BECOMING ACTORS IN THE GLOBAL AGE* (2010).

system: “The cracks begin with a No, from which there grows a dignity, a negation-and-creation ... The cracks are always questions, not answers”.⁸⁸

Applied to international law,⁸⁹ this master frame emphasizes the “lived experience of ordinary people” rather than the role of the elites,⁹⁰ notably in “building and defining the norms for coexistence, including individual and collective rights and obligations”.⁹¹ The “from below” master frame thus seeks to give voice to the “subaltern”,⁹² a term which is derived from the work of the Marxist theorist Antonio Gramsci, and was later employed by postcolonial studies.⁹³

If it is clearly anti-institutional, the “from below” master frame is also, in some places, about rejecting the human rights rhetoric. Questions over the very value of deploying a rights master frame to support local struggles have been raised by groups such as GRAIN, and appear to have had increased resonance in the global food movement over the past years. According to GRAIN, the rights master frame is not only ineffective to “defend from corporate control the ways of life that people themselves have defined”, it is damaging. Social organisations and NGOs that have attempted to advance certain rights have “ended up causing confusion and divisions, and even harming the very interests and welfare of those claiming the rights”.⁹⁴

For GRAIN, rights regimes have forced many peoples, especially indigenous peoples, to “define according to alien values some fundamental aspects of their identity and way of life, such as their art, their medicinal and agricultural knowledge, their tenure systems and so on” and have contributed to the increased inequity and the loss of sovereignty and dignity”.⁹⁵ Moreover, “the very concept of rights is being used to impose and expand neoliberalism” and actions that were previously considered natural and taken for granted—such as keeping, reproducing and sharing seeds and animals, accessing water—are no longer permitted but are becoming criminalised, all in the name of property rights”.⁹⁶ A central aspect of this critique revolves around the “wide physical, cultural, political and social distance of local communities from the people who write legal definitions of rights”.⁹⁷

⁸⁸ JOHN HOLLOWAY, *CRACK CAPITALISM* 17 (2010).

⁸⁹ For an initiation to third world approaches to international law (TMAIL), which are a good illustration of this, see BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE* (2003).

⁹⁰ *Id.* at xiii.

⁹¹ GRAIN, *What's Wrong With 'Rights'?*, SEEDLING (2007).

⁹² BOAVENTURA DE SOUSA SANTOS & CÉSAR A. RODRÍGUEZ-GARAVITO, *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* 14, 39 (2005).

⁹³ In postcolonialism and related fields, subaltern refers to persons socially, politically, and geographically outside of the hegemonic power structure.

⁹⁴ GRAIN, *supra* note 91.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

5.2 *Frames, Strategies and Political Opportunities Structures*

A movement's range of possible strategic choices is highly constrained by framing in the sense that strategic orientations need to align with the movement's most resonant and motivational frames. Looking at the interconnection between Vía Campesina's frames and strategies, it appears that, on one hand, frame disputes have limited the range of strategies available, and that, on the other hand, strategic decisions have influenced the outcome of frame disputes. The right to food sovereignty and debates on whether or not it should be institutionalized provide an excellent illustration of this. As we will explore below, the tension that is palpable within Vía Campesina between food sovereignty from above and food sovereignty from below can be analyzed as a "dispute"⁹⁸ between the rights master frame ("from above") and the increasingly resonant "from below" master frame.

How is the right to food sovereignty frame evolving as a result of its dispute with the reclaiming control frame? Is the rights master frame losing relevance in the face of an increasingly potent from below master frame? Analyzing the interplay between the movement's frames and strategies, it appears that, over recent years, the growing resonance of the "reclaiming control" frame has generated support, from activists, for "from below" strategies. In turn, strategic decisions to undermine the legitimacy of the WTO and avoid cooptation,⁹⁹ firmly implemented by Vía Campesina's leadership, have reinforced the appeal of the "from below" master frame. In addition, a number of changes in political opportunity structures have influenced the outcome of this "from above" versus "from below" frame dispute,¹⁰⁰ inducing a shift from international to local issues.

First, the WTO is no longer a powerful target. For a good decade, from its entry into force on January 1, 2005 until the 6th Ministerial of in Hong Kong, the WTO was sufficiently active and at the centre of global media attention to get peasant activists to engage in global anti-WTO protests. Since the mid-2000s, however, with its successive failing rounds of negotiations, the WTO no longer fuels the outrage needed to catalyze collective action. Second, Vía Campesina activists have faced

⁹⁸ The social movements literature elaborates on three kinds of challenges confronting all those who engage in movement framing activities: frame contests or counter-framing by movement opponents, bystanders, and the media; frame disputes within movements; and the dialectics between frames and events. Benford & Snow, *supra* note 21, at 625.

⁹⁹ For the food sovereignty movement, the UN system, and the FAO in particular, appear to "constitute the only alternative to the WTO/Bretton Woods institutions as a multilateral locus for addressing the issues of food and agriculture according to a logic in which human rights and equity take precedence over the liberalization of markets". NORA MCKEON, *THE UNITED NATIONS AND CIVIL SOCIETY: LEGITIMATING GLOBAL GOVERNANCE-WHOSE VOICE?* 106 (2009). The movement has, consistently, limited its involvement with multilateral institutions at the exception of the FAO and other "farmer-friendly institutions". DESMARAIS, *supra* note 64, at 22.

¹⁰⁰ It has been well documented that changes in public policy—be them objective changes or changes in the interpretation of reality by movement activists—can induce framing changes. See Kevin Fox Gotham, *Political Opportunity, Community Identity, and the Emergence of a Local Anti-Expressway Movement*, 46 SOC. PROBS. 342 (1999).

stark economic challenges and the increasingly aggressive appropriation of their resource base by the private sector, making organizing and international work more difficult. As one activist from the Confédération paysanne in France put it: “Today’s context is different than in 1993. There are a lot less peasants today”.¹⁰¹ In particular since the global food crisis of 2007–08, many peasant organizations have had to defend their members from immediate threats.

Adding to these challenges, the arrival of new issues on the global agenda, such as climate change, land grabbing, financial speculation, and public reinvestment in agriculture, has diverted the attention of peasants’ activists away from trade and the WTO: “Mobilizations are inconstant”, comments a Belgian NGO activist.¹⁰² Instead, land “is becoming a nexus, the common denominator”, argues a representative from Habitat International, interviewed during the intergovernmental World Summit on Food Security in Rome in 2009.¹⁰³ The world over, the global food prices crisis has propelled the resurgence of local/localist strategies, which tend to be anchored in the defense of lands and territories.

5.3 *Food Sovereignty from Below or from Above?*

The following exchanges show how strategies, framing and political opportunity structures are intertwined and shape divisions between activists on whether or not the right to food sovereignty should be institutionalized. They touch on a recurrent question, which appears to be the dividing line¹⁰⁴ in many debates on food sovereignty: should food sovereignty be implemented from above or from below?

Opponents to the institutionalization of the right to food sovereignty prioritize the objective of delegitimizing the WTO and Bretton Woods institutions and tend to see the absence of any agreement in the Doha Development Round of negotiations

¹⁰¹ Interview with a member of the French Confédération Paysanne, Via Campesina, Montreuil, Fr. (May 4, 2010). In this interview, this peasant also expresses his conviction that the dependence on public agricultural subsidies has had a negative impact on mobilizing.

¹⁰² “Les mobilisations sont inconstantes”. Interview with a Member of the Collectif Stratégies Alimentaires, Brussels, Belg. (May 13, 2009).

¹⁰³ Interview with an Activist from the Mazingira Institute and HIC during the World Summit on Food Security, Rome, Italy (Nov. 14, 2009).

¹⁰⁴ This division has been largely discussed by other authors. Bové and Dufour comment that two different sets of attitudes towards the WTO came to coexist within the movement: “the anti-WTO and those who believe that we need a new regulatory framework for international trade”. JOSÉ BOVÉ & FRANÇOIS DUFOUR, *LE MONDE N’EST PAS UNE MARCHANDISE: ENTRETIENS AVEC GILLES LUNEAU* 262 (2004). Desmarais has analyzed this divergence of opinions as a reformist vs radical debate. DESMARAIS, *supra* note 64, at 22. For Bonhommeau, the division reflects the fact that Via Campesina member organizations are very different in their composition and, as a result, diverge in what they identify as their primary concerns, access to land or protection from the global market. Paul Bonhommeau, *Questions et Réflexions sur l’Affirmation d’un Droit de la Souveraineté Alimentaire* (internal Via Campesina document) (Dec. 2008).

as a movement's victory¹⁰⁵ (no matter if a multiplicity of bilateral trade agreements has progressively replaced the ambitious multilateral framework and if it is difficult to assess to what extent outside protests actually influenced the outcome of negotiations at the WTO). They believe in changing the world through developing alternative practices, on the ground, or at least believe that the conditions are not met to engage with enemy institutions. Members have stated: "The Agreement on Agriculture [of the WTO] is not compatible with food sovereignty. No agreement can ever be"¹⁰⁶ and "We need a revolution, a different model. We need to get rid of the WTO. We need alliances with the "rupturistas", not the reformists".¹⁰⁷ They are wary of the danger of "being co-opted to serve watered-down intergovernmental agendas rather than advancing their own visions and objectives".¹⁰⁸ They are, in general, skeptical of the added value of transforming food sovereignty into a right. A French peasant woman comments: "I am feeling at a loss when I see all this [international] law that exists and which does not manage to coerce".¹⁰⁹

Other peasant activists refuse to see food sovereignty restricted to local alternative practices: "Let us not limit food sovereignty to agricultural practices".¹¹⁰ They want more than limiting food sovereignty to a relocalization strategy: "Localizing is valorizing, it explains with the facts, it makes a link with the consumer. But I don't believe in food sovereignty islots in an neoliberal ocean".¹¹¹ They are scared the dominant market model will prevent their alternative practices from developing: "We need to struggle in our practices but also fight in the streets against governments, otherwise the dominant market model will more and more impede these alternatives".¹¹² They are also anxious to participate in world debates: "There can't be world known debates and us being absent. We need to be where people talk about

¹⁰⁵ Interview with Via Campesina Support Staff, during WSFS, Rome, Italy (Nov. 13, 2009).

¹⁰⁶ "El acuerdo sobre la agricultura no es compatible con la soberanía alimentaria. Ningun acuerdo puede serlo". Member of the COAG, Via Campesina in Spain, at a seminar on market regulation organized by the Collectif Stratégies Alimentaires (CSA), Brussels, Belg. (May 5, 2009).

¹⁰⁷ Member of SOC, Spain, addressing other participants at an ECVC seminar, Paris, Fr. (Jan. 2009).

¹⁰⁸ McKEON, *supra* note 99, at 11.

¹⁰⁹ "Je suis désarmée par rapport à tout ce droit qui existe et qui n'arrive pas à contraindre". French peasant woman, Confédération paysanne, member of the International Coordination Committee of Via Campesina, at the General Assembly of the Confédération paysanne, Montreuil, Fr. (May 5, 2010).

¹¹⁰ "Ne cantonnons pas la souveraineté alimentaire à des pratiques agricoles. On pourrait imaginer le système actuel en bio ou en mesures agro-environnementales". French peasant member of the Confédération paysanne, addressing other members of the European Coordination of Via Campesina (ECVC), Paris, Fr. (Jan. 6, 2009).

¹¹¹ "La localisation, c'est valorisant, ça explique par les faits, ça fait le lien avec le consommateur. Mais je ne crois pas à des îlots de souveraineté alimentaire dans un océan neoliberal". French peasant woman member of the Confédération paysanne, addressing other members of the ECVC, Paris, Fr. (Jan. 6, 2009).

¹¹² Member of SOC, agricultural workers' union, Spain, addressing other members of the ECVC, Paris, Fr. (Jan. 6, 2009).

us and against us”.¹¹³ They want to believe in the possibility of reorganizing international institutions into an adequate hierarchy and in giving them a new meaning. They put their hopes in the UN as the only legitimate institution.

If we consider the two components—internal and external—of the right to food sovereignty, it appears clearly that there is a division in the movement along these (internal/external) lines. One fraction focuses on/prioritizes the external (international, institutional) dimension because it appears easier to institutionalize. To make the right to food sovereignty operational, they contend, requires turning it into the right of states. The other fraction sees the internal (local, political) dimension as central to the struggle, and resists institutionalization: local democracy and local autonomy have to be won and experienced. For this second group, more influential within *Vía Campesina*, “the dominant policy scheme is one of imposition from the international level on the national and local. This flow should be reversed (...) so that the global level provides support for local and national initiatives”.¹¹⁴

The conviction is shared, of course, that the local and national/international levels are inevitably intertwined, and that: “Food sovereignty will be gained locally, but, at the end of the day, the policies are determined by governments”.¹¹⁵ But disagreements are persistent on which collective action repertoires to prioritize, or potentially combine, and on the appropriate timing, nature and conditions for advocacy and dialogue with policy makers. Some activists, such as former *Vía Campesina* leader José Bové, favour immediate engagement with governments: “We won’t succeed with only an external balance of power, with no dialogue with states or international institutions”.¹¹⁶ Other activists are more cautious and insist that the movement should pressure and lobby governments while “staying autonomous of them, including of political parties and progressive governments”.¹¹⁷

¹¹³ “Il ne peut pas y avoir des débats mondialement connus et être absents. Il faut être là où les gens discutent sur nous et contre nous” (African farmer at seminar on market regulation organized by the CSA, Brussels, Belg., May 5, 2009, responding to another participant arguing that “we can’t dialogue with the WTO”).

¹¹⁴ NORA McKEON & CAROL KALAFATIC, U.N. NON-GOVERNMENTAL LIAISON SERVICE, *STRENGTHENING DIALOGUE: UN EXPERIENCE WITH SMALL FARMER ORGANIZATIONS AND INDIGENOUS PEOPLES* (2009).

¹¹⁵ Interview with Paul Nicholson, Member of the Basque Country’s EHNE, “Food Sovereignty and a New Way of Internal Democracy”, Matola, Mozambique. The interview was conducted (and later edited) by Nic Paget-Clarke on October 17, 2008 during the 5th International Conference of La Via Campesina and is published in *In Motion Magazine* (Feb. 23, 2009).

¹¹⁶ Bové, *supra* note 71.

¹¹⁷ *Vía Campesina* support staff, at expert seminar on agroecology organized by the Special Rapporteur on the right to food, Brussels, Belg. (June 21–22, 2010).

6 Skeptical, but Still Trying: Other Institutionalization Attempts

6.1 National and Sub-National Food Sovereignty Policies

While proponents of the institutionalization of the right to food sovereignty at the international level continue to face the daunting obstacle of identifying the right place to bring their claim, the movement has explored new spaces at the national and sub-national levels. Via Campesina's efforts to institutionalize the right to food sovereignty have been particularly successful at the national and local/municipal levels. A series of states, in alliance or under the pressure of peasant movements, have initiated efforts to recognize food sovereignty as a right in national laws or constitutions and translate food sovereignty in public policies. Constitutional recognition of the right to food sovereignty has been achieved in Ecuador, Bolivia, Nepal and Venezuela while Mali and Senegal have adopted food sovereignty policies.¹¹⁸ The influence of people's movements, often members of the agrarian transnational movement Via Campesina, is notable in most, if not all, of these legislative developments.¹¹⁹

When recognized in national constitutions, laws or policies, the right to food sovereignty tends to be equated with the right of states to determine their food and agriculture policies (Mali, Ecuador, Nicaragua). Yet the external dimension of the right to food sovereignty remains extremely difficult to implement, considering conflicting WTO-related obligations. In turn, the internal dimension of the right to food sovereignty—understood as guaranteeing public participation in policy-making—tends not to be translated into legislation, which raises the issue of whether civil society participation in the elaboration and implementation of such policies will continue to be encouraged under a different political context.

The exploration of all the challenges involved in translating (the right to) food sovereignty in national and local legislation and policies is beyond the scope of this paper, but some lessons can be learned from national examples. Public policies for food sovereignty tend to promote agriculture as the motor of the economy and as a main contributor to economic growth (Mali, Nicaragua, Venezuela); they seek to boost local and peasant-based food production for food security, often in the context of a self-sufficiency strategy, while not excluding agro-export as an opportunity for

¹¹⁸ For an overview of these developments, see Tina D. Beuchelt & Detlef Virchow, *Food Sovereignty or the Human Right to Adequate Food: Which Concept Serves Better as International Development Policy for Global Hunger and Poverty Reduction?*, 29 *AGRIC. & HUM. VALUES* 259 (2012).

¹¹⁹ Sadie Beauregard, *Food Policy for People: Incorporating Food Sovereignty Principles into State Governance. Case Studies of Venezuela, Mali, Ecuador, and Bolivia* 64 (April 2009) (unpublished Senior Comprehensive, Urban and Environmental Policy Department, Occidental College, Los Angeles).

rural economic development; they mean to compensate the inherent weaknesses of the agricultural sector (Venezuela, Bolivia) and if possible to bring rural incomes at par with those of urban inhabitants; they favor alternative farming practices (less industrial, more family-based) but do not exclude industrial farming and large-scale agriculture; and, in some places, they seek to provide access to land and to limit the invasion of transgenic seeds. These policies tend to generate a lot of enthusiasm within *Vía Campesina*, although they usually fail to cover crucial dimensions such as trade, access to land, seeds, marketing or state support. These policies also generate frustration because of the lack of implementation. A *Vía Campesina* support staff complains: “A few countries make legislative efforts but it looks more like a communication exercise. Is there a real change in agricultural policy?”¹²⁰ The biggest challenge facing these developments is probably that efforts at the national or sub-national level remain severely constrained by the global neoliberal framework in which national economies are inserted.

6.2 *Peasants’ Rights at the UN Human Rights Council*

If food sovereignty remains the movement’s central organizational frame, its centrality has been threatened over recent years by the emergence of a new rights-based organizational frame, the “peasants’ rights” frame. The peasants’ rights frame was elaborated during village-level consultations with peasant communities in Indonesia, in 1999–2000. It was further articulated and to some extent broadened by the inclusion of new concerns expressed by various organizations within the *Vía Campesina* network, in the period ranging from 2002 (the first time the “rights of peasants” were discussed at a regional *Vía Campesina* conference) to 2009 (when the Declaration on the Rights of Peasants was adopted by the International Coordinating Committee of *Vía Campesina*).

The peasants’ rights frame has not yet acquired mobilizing qualities: it does not constitute a uniting and mobilizing frame. In addition, it is presently confronted with “frame diffusion”¹²¹ challenges. The appropriation of the peasants’ rights frame by other regions, in particular Latin America—where references to (the right to) food sovereignty dominate—remains a considerable obstacle to the diffusion of the peasants’ rights frame, although it appears that African member organizations are quite receptive. Despite the organization of internal consultations on various drafts of the Declaration on the Rights of Peasants, the document remains little known in some regions and some find the level of internal debate insufficient. In contrast with the (right to) food sovereignty frame, which has proven to be highly motivational and adaptable, and has spread far beyond Central America where it emerged, the peasants’ rights frame remains disconnected from grassroots activists. Nevertheless, the

¹²⁰ Interview with *Vía Campesina* Support Staff, Brussels, Belg. (June 2, 2009).

¹²¹ Benford & Snow, *supra* note 21, at 627.

decision has been made to institutionalize peasants' rights at the international level: Via Campesina has worked actively over recent years to "bring" the Declaration "to the UN Human Rights Council".¹²²

Will the right to food sovereignty and peasants' rights frames reinforce each other in the future? Can they durably coexist? When asked about potential conflicts between the right to food sovereignty and peasants' rights, Via Campesina activists tend to discard the possibility that conflicts might surface between the two rights frames.

So far, the International Declaration on the Rights of Peasants has been generally well received within the movement. But it has also raised criticism for not dealing with (and taking the attention away from) what some activists perceive as more relevant or pressing issues. A Via Campesina support staff argues: "But peasants' rights are not an agricultural policy issue".¹²³ A particular source of concern, for some, is whether the work on food sovereignty as an alternative international trade framework,¹²⁴ will be abandoned "now that the Indonesians are working on peasants' rights".¹²⁵ These critiques are well received by Via Campesina's former Secretary General Henry Saragih, who has been leading the peasants' rights initiative: "We don't pressure other regions. We know it is difficult for national organizations to add new issues. Latin America is about land and indigenous peoples. Africa has little capacity. Different regions have different issues".¹²⁶

As Via Campesina invests more political capital into getting the rights of peasants codified at the UN, it is likely that internal disputes between the right to food sovereignty and peasants' rights frames will surface. At the same time, the peasants' rights frame appears to facilitate the construction of a collective identity for a movement confronted with a highly diverse membership and always in search of new ways to build symbolic links. Now that identification with the WTO as the shared enemy—which helped build the unity of the movement in the 1995–2005 period—no longer plays a determining role, will the peasants' rights frame help continue facilitate the construction of a collective identity?

¹²² VIA CAMPESINA, IN THE 60TH ANNIVERSARY OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, WE PEASANTS DEMAND OUR OWN CONVENTION: FINAL DECLARATION OF INTERNATIONAL CONFERENCE ON PEASANTS' RIGHTS (June 25, 2008).

¹²³ "Mais les droits des paysans c'est pas une question de politique agricole". Interview with European Coordination of Via Campesina (ECVC) Staff, Via Campesina, Brussels, Belg. (June 2, 2009).

¹²⁴ Indeed, it is unlikely that the movement could simultaneously push for the translation, in international law, of both the right to food sovereignty and peasants' rights. At some level, the two initiatives would inevitably compete for human and financial resources, symbolic capital, and for access to "legal opportunity structures".

¹²⁵ Interview with ECVC Staff, Via Campesina, Brussels, Belg. (June 2, 2009).

¹²⁶ Interview with a Via Campesina Leader, Jakarta, Indon. (Mar. 2010).

6.3 *The Committee on World Food Security*

This overview of attempts to institutionalize the right to food sovereignty would not be complete without touching on *Vía Campesina's* involvement within the Committee on World Food Security (CFS). Following its reform in 2009, the CFS has slowly emerged as the central UN political platform dealing with food security, agriculture and nutrition. With an explicit mandate on realising the right to food for all, the CFS has been celebrated for proposing an alternative governance model for decision-making on global issues. Indeed, the CFS membership extends beyond states, to include international financial institutions and organisations dealing with food security, as well as private philanthropic organisations/foundations, the private sector and Civil Society Organisations (CSOs). Hence, it has provided peoples' movements and NGOs with a new institutional space to which they can bring their claims.

Vía Campesina's interactions with the CFS have been rather ambivalent. On one hand, *Vía Campesina* has, mostly through the International Planning Committee for Food Sovereignty (IPC), ensured that a Civil Society Mechanism (CSM) be established to allow civil society to participate in CFS debates in a meaningful and significant way. The CSM is an autonomous and self-organized mechanism,¹²⁷ which provides for the participation of 11 constituencies (smallholder farmers, fisherfolk, pastoralists, landless, urban poor, agricultural workers, women, youth, indigenous peoples, consumers and NGOs) from 17 sub-regions. *Vía Campesina* sits on a number of CSM working groups where issues such as land, agricultural investment, gender and nutrition are debated. Moreover, *Vía Campesina* has, alongside other CSM participants, taken an active part in the negotiations of *Voluntary Guidelines on the governance of tenure of land, fisheries and forests* that took place in 2011–2012 and has actively participated in the subsequent CFS process that is to lead to new principles on responsible agroinvestment.

On the other hand, *Vía Campesina* regards the CFS as yet another international arena which is unlikely to bring social change, despite its promising innovative governance structure. The issues that have featured on the agenda of the CFS have included land, investment in agriculture, volatility, climate change and social protection, but not international trade rules, and it is unlikely that the CFS will touch on issues perceived as belonging to the WTO in the near future. In addition, the right to food sovereignty frame has proven difficult to mobilize at the CFS, where the already codified human right to food tends to be used by civil society instead,¹²⁸ for the right to food is recognized as the reference frame for CFS work and thus easier to impose on CFS member states. These factors may explain why the CFS has, so far, been little explored as a global arena in which to institutionalize the (trade and non-trade related dimensions of) the right to food sovereignty.¹²⁹

¹²⁷ International Food Security & Nutrition Civil Society Mechanism, <http://www.csm4cfs.org/>.

¹²⁸ The human right to food has been accepted as a reference frame in a number of CFS documents, such as the *Voluntary Guidelines on the governance of land, fisheries and forests*, and the *Global Strategic Framework*, while references to food sovereignty are still highly contested.

¹²⁹ So far, the trade issue has been addressed only indirectly at the CFS: discussions relating to the impacts of the current trading system and the need for alternative trade rules during the 38th session

7 Conclusion

Stammers has argued that social movement struggles construct human rights claims in ways that demand their institutional instantiation.¹³⁰ So far, the experience of Vía Campesina appears to indicate a somewhat different trend. So far, Vía Campesina appears to have succeeded in preserving the subversive potential of the right to food sovereignty, thanks to a strong strategic orientation and the flexibility and local adaptability of its organizational frame. Yet, this has been achieved at the expense of a shift from the international to the local and a reduced emphasis on structural change. If the multiplication of food sovereignty initiatives “from below” constitute a source of unity and hope for the movement, the right to food sovereignty “from above” appears to be in an impasse. Are we witnessing a “retreat to a nebulous populism that instantiates a logic of communitarianism as the grounds for an ethics of a new political economy”?¹³¹

Over the past two decades, the right to food sovereignty frame has considerably evolved under the pressure of the increasingly resonant “reclaiming control” frame and as a result of “internal dissent”.¹³² It has expanded to incorporate struggles around localization and grassroots resistance. New interpretations of food sovereignty appear to be emerging, which insist less on “the international level”¹³³ and on the right to decide on agricultural policy. The structural aspects of the right to food sovereignty have given way to a focus on concrete and feasible alternatives, here and now, making the (oppositional) rights master frame less relevant. Efforts by Vía Campesina to reach out to and apply the achievements of the agroecology movement will likely take the right to food sovereignty frame further “below”. In short, despite assertions that the struggle for the right to food sovereignty should be articulated at all relevant levels, the focus on the “local” is increasingly striking.

Vía Campesina appears to be more internally oriented than before. Whether what is at stake is a regression in international advocacy or is in fact a waning internationalism—how much energy, time and efforts local and national movements devote to building and participating in an international movement, exchanging views, joining international protests and meetings—is unclear. This could indicate that the movement is facing a tension between sustaining collective actions against an identified enemy and engaging in mobilizations seeking to establish a new life order through alternatives, a tension that has been well documented in social movements studies.¹³⁴ In these dire times marked by a conjunction of environmental, energy, food

of the CFS (2011) were limited to the round table on food prices volatility.

¹³⁰ STAMMERS, *supra* note 61, 106.

¹³¹ Rajeev Patel, *International Agrarian Restructuring and the Practical Ethics of Peasant Movement Solidarity*, 41 J. ASIAN & AFRI STUD. 87 (2006).

¹³² Valocchi, *supra* note 23, at 122.

¹³³ Discussion with Different Members of SPI, Vía Campesina, Jakarta, Indon. (Mar. 18, 2010).

¹³⁴ Good examples of movements, which refused confrontation and sought to develop alternatives are the cooperative and mutualist movements. ERIK NEVEU, *SOCIOLOGIE DES MOUVEMENTS SOCIAUX* 10–11 (1996).

and financial crises, the ability of radical social movements to combine protest and proposal appears more than ever needed.

Will the right to food sovereignty ever achieve international recognition as a new human right? Will it ever be translated in alternative trade rules? It certainly appears that what Alston describes as the “incubation phase” of the right to food sovereignty has so far been too short. Considering that a certain period of time is necessary for new rights to be debated and to mature before they can achieve universal recognition, Alston notes that the incubation phase of new rights is now taking place within the UN at a much earlier stage than was the case for rights that found their way in the Universal Declaration of Human Rights (UDHR). Rights recognized in the UDHR, he argues, had time to reasonably mature in terms of their transformation into laws, mostly through debates at the national level.¹³⁵ This might mean that the growing recognition of the right to food sovereignty at national level will help promote, in the future, the universal recognition of the right to food sovereignty.

¹³⁵ Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INTER’L L. 614 (1984).

Opportunities and Challenges for Food Sovereignty Policies in Latin America: The Case of Nicaragua

Saulo Araújo and Wendy Godek

Abstract In 2009, Nicaragua joined a growing number of Latin American nations with the passing of its Law of Food and Nutritional Sovereignty and Security. The law combines elements of both the Right to Food and Food Sovereignty frameworks and offers a broader and radical perspective to achieve the right to food. This chapter explores the origins of the law, the process by which it was passed, and its institutional framework. The chapter puts particular emphasis on the role of peasant and other civil society organizations in conceiving and adopting the law, as well as the mechanisms for participation of civil society in implementing the law. More generally, this chapter explores the potential of the law to enhance democratic food and agricultural policymaking. A member of the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA) and the Bolivarian Alliance of the Americas (ALBA), Nicaragua offers a unique perspective of the role of internal and external factors in the design and implementation of new food policies to achieve the right to food.

1 Introduction

Today, the power to create global food policy is concentrated in the hands of a few stakeholders who have the means by which to influence policy at multiple levels, including nationally and internationally. “Food sovereignty”—a concept coined by La Via Campesina, a transnational social movement of peasant and indigenous

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organizations—addresses this situation by calling for the rights of local communities and nations to decide their own food policies.

Through alliances with friendly governments, rural social movements have been able to influence policy makers to include food sovereignty principles in new food and nutrition laws based on the right to adequate food framework, especially in Latin America, but also in Africa and Asia.¹ Among the eleven Latin American nations that have amended their constitutions to recognize their citizens' right to food, Bolivia, Venezuela, Cuba, Ecuador, and Nicaragua² have enacted framework laws that include food sovereignty principles to address the chronic problem of food insecurity. In doing so, they have attempted to implement more inclusive mechanisms of democratic participation in food and agriculture policy.

The case of Nicaragua is of particular interest. Nicaragua, once a food basket, has since the early 1990s become increasingly dependent on food aid. In August of 2008, domestic food prices inflation reached 34.2% in Nicaragua, leaving families in a situation of even further increased food insecurity.³ In 2009, the Nicaraguan government adopted the Law of Food and Nutritional Sovereignty and Security (*Ley 693 de Soberanía y Seguridad Alimentaria y Nutricional*).⁴ The proposal for the Law of Food and Nutritional Sovereignty and Security was initially introduced and lobbied for by food sovereignty movement organizations, including peasant organizations. The law itself was formulated and negotiated using a multi-stakeholder approach with the participation of civil society organizations. It emphasizes the need to make Nicaragua self-sufficient in its food production, to support small and medium-sized farmers, to strengthen coordination between government agencies, and, perhaps most importantly, to create institutions at various levels of jurisdiction to expand opportunities for citizens to effect policy.

Nicaragua's Law of Food and Nutritional Sovereignty and Security provides an instructional case study for analyzing the development and practice of participatory democracy, the role of civil society organizations in such processes, and the implications of both for global governance. At the national level, it represents an opportunity to examine alternative policy instruments that result from bottom-up approaches and institutionalize mechanisms for expanding participation in policy and decision-making. At the global and regional levels, it is a unique case to consider in that this national food sovereignty law represents efforts to mitigate the negative impacts of trade liberalization, as exemplified by the Dominican Republic–Central America Free Trade Agreement (DR-CAFTA), which exclusively favors the industrial, export-led model of agricultural development. In contrast, food sovereignty presents

¹ See Sadie Beauregard, *Food Policy for People: Incorporating Food Sovereignty Principles into State Governance 26–7* (Apr. 2009) (unpublished senior comprehensive, Urban and Environmental Policy Department, Occidental College, United States).

² These states are affiliated to the Bolivarian Alliance of People of Our America (ALBA).

³ AGNÈS DHUR, U.N. WORLD FOOD PROGRAMME [WFP], *EVALUATION OF THE EFFECTS OF THE GLOBAL FINANCIAL CRISIS AT MACRO-LEVEL AND ON VULNERABLE HOUSEHOLDS IN NICARAGUA* (2009).

⁴ Ley No. 693, 18 June 2009, *Ley de Soberanía y Seguridad Alimentaria y Nutricional* [Law of Food and Nutritional Sovereignty and Security], *La Gaceta* [L.G.], N. 133, 16 July 2009 (Nicar.).

an alternative framework that departs from the export-led model of development for achieving food security and fulfilling the right to food.

In this chapter, we examine Nicaragua's Law of Food and Nutritional Sovereignty and Security. We first look at the law's origins and continue with a discussion of the process by which it was passed, focusing on the role of peasant and other civil society organizations. We then examine the law's institutional framework, paying particular attention to its mechanisms for facilitating participation by various Nicaraguan stakeholders. We finally turn to the question of whether Nicaragua's new law has the potential to enhance democratic food and agriculture policymaking in light of the country's various regional commitments.

2 Food Sovereignty, Food Security and the Right to Food

Food sovereignty was defined originally as “the right of each nation to maintain and develop its own capacity to produce its basic foods, respecting cultural and productive diversity.”⁵ The concept has since evolved and become increasingly more sophisticated and complex and a unifying platform for communities worldwide seeking to influence food and agriculture policy and to defend their right to food.

Food sovereignty is very much a response to the contradictions of modern food systems, which are predicated on the industrial approach to agricultural and food production and market-centered in their economic orientation. Critics of the modern food system argue that the industrialization of agriculture combined with the focus on “neoliberal” policies to promote economic development have served to concentrate power over food systems into the hands of a few actors who are able to compete on a global scale and influence policy from their respective positions. This has considerably marginalized small and medium-sized farmers, rural workers, indigenous groups, fisherfolk, and other small producers from accessing resources. Drawing on a number of key food sovereignty principles,⁶ networks of small, local

⁵ VIA CAMPESINA, *THE RIGHT TO PRODUCE AND ACCESS LAND—FOOD SOVEREIGNTY: A FUTURE WITHOUT HUNGER* (1996).

⁶ While there are a diverse and evolving range of definitions of food sovereignty, some principles common to most all definitions of food sovereignty include the following: priority of local agricultural production to feed people locally; access of smallholder farmers, pastoralists, fisherfolk and landless people to land, water, seeds and livestock breeds and credit; the right to food; the right of smallholder farmers to produce food and a recognition of Farmers Rights; the right of consumers to decide what they consume, and how and by whom it is produced; the right of countries to protect themselves from under-priced agricultural and food imports; the need for agricultural prices to be linked to production costs and to stop all forms of dumping; the populations' participation in agricultural policy decision-making; the recognition of the rights of women farmers who play a major role in agricultural production in general and in food production in particular; and agroecology as a way not only to produce food but also to achieve sustainable livelihoods, living landscapes and environmental integrity. These principles were further elaborated and discussed at the occasion of the 2007 Nyéléni Food Sovereignty Forum. See NYELENI FOOD SOVEREIGNTY FORUM, *SYNTHESIS REPORT: NYELENI FORUM FOR FOOD SOVEREIGNTY 2007* (2007).

food producers, and consumers have sought to advocate policies that strengthen local sustainable agriculture initiatives, increase food access in both rural and urban areas, and democratize access to productive resources, such as water, land, and seeds.

In articulating the concept of food sovereignty, it is important to distinguish it from food security.⁷ Food sovereignty represents a policy framework for achieving food security: It defines a road map for the democratization of resources to produce food and defines criteria of how food should be produced via small-scale agriculture and agroecology.

Food sovereignty adds on to the right to adequate food framework, which informs nations of the legal and administrative steps they need to take to implement the human right to food.⁸ It brings the new element of democratic control and participation in the fulfillment of right to food. Because of its capacity to bring together different social sectors, food sovereignty has generated political engagement of disenfranchised communities and enough political pressure to put and maintain the right to food at the center of national agendas and to mobilize communities to advocate for the implementation of food security and nutrition laws.

3 Nicaragua's Pursuit of Food Sovereignty

In analyzing the strategies Nicaragua has drawn on to fulfill the right to food over the last decades, it is first helpful to take a brief look back at several developments that occurred during the Revolution (1979–1990). The creation of the National Food Program in 1982 represented the first initiative by any Central American government to assume the responsibility for ensuring national food self-sufficiency by explicitly supporting peasant farming in order to increase food access in both rural and urban areas.⁹ The adoption of Agrarian Reform programs and the inclusion of a constitutional provision on the right to food in the 1987 Constitution further

⁷ One of the most commonly used definitions of food security is that of the Food and Agriculture Organization (FAO), which states that, “Food security exists when all people, at all times, have physical and economic access to sufficient safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life.” The FAO recognizes four “dimensions” of food security: physical availability of food, economic and physical access to food, food utilization, and the stability of the other three dimensions over time. U.N. FOOD & AGRIC. ORG. [FAO], AN INTRODUCTION TO THE BASIC CONCEPTS OF FOOD SECURITY (2008).

⁸ The right to food focuses on the obligations of states and on allowing people who are negatively affected to use legal remedies to get their rights implemented. States have to guarantee the right to food but have a wide margin of discretion on how to implement it. Taking a rights-based approach, food sovereignty recognizes the right to food as a core principle and provides a pathway for guaranteeing the right to food through its policy prescriptions.

⁹ SINFORIO CÁCERES BACA & NADINE LACAYO RENNER, SOBERANÍA Y SEGURIDAD ALIMENTARIA EN NICARAGUA: CAUSAS Y EFECTOS [FOOD SOVEREIGNTY AND SECURITY IN NICARAGUA: CAUSES AND EFFECTS] 35 (2010). See also Michael Zalkin, *Peasant Response to State Grain Policy in Revolutionary Nicaragua* 3 (The Helen Kellogg Inst. for Int'l Stud., Working Paper No. 94, 1987).

institutionalized this commitment. Finally, the revolutionary era saw the emergence of mass organizations, including agrarian organizations, like the Rural Workers Association (Asociación de Trabajadores, or ATC) and the National Union of Small Farmers and Ranchers (Unión Nacional de Agricultores y Ganaderos, or UNAG), which became vehicles through which citizens could effectively participate at the local level and be represented at the national level.¹⁰

3.1 *The 1990s and Structural Adjustment in Nicaragua*

The Sandinista loss in the elections of 1990 ushered in a new policy environment that favored a neo-liberal economic approach in which the impetus to ensure food security was significantly weakened.¹¹ The administration of President Violeta Chamorro signed Nicaragua's first structural adjustment agreement with the International Monetary Fund (IMF) and the Inter-American Development Bank (IDB) in 1994 and additional structural adjustment agreements were signed by the Alemán and Bolaños administrations (1997–2002 and 2002–2007, respectively). Under these structural adjustment regimes, credit was reduced for small farmers and increased for large-scale producers to encourage exports; trade tariffs were lowered, opening pathways for the importation of foods and agricultural products already produced domestically and encouraging the further development of non-traditional exports (e.g. coffee); state-appropriated funds for rural development programs, including price regulatory schemes that protected local agricultural economies from speculators, were eliminated; state-owned farms and agricultural enterprises were privatized, consolidating land into the hands of large-scale commercial producers; and wages for rural laborers were reduced.¹²

The effects of these changes on peasants were profound. Small farmers in some regions began to experience difficulty accessing productive resources like credit, technical assistance, and land.¹³ As a result, production and consumption declined, farmers were forced to find other sources of income, and some lost their land as a result of being unable to compete in the market.¹⁴ Additionally, farmers became increasingly dependent on non-traditional exports. This dependence had its own set

¹⁰ HARRY E. VANDEN & GARY PREVOST, *DEMOCRACY AND SOCIALISM IN SANDINISTA NICARAGUA* 55–6, 62–6 (1993).

¹¹ Baca & Renner, *supra* note 9, at 36–7.

¹² VANDEN & PREVOST, *supra* note 10, at 55–6, 62–6; LAURA J. ENRIQUEZ, *REACTIONS TO THE MARKET: SMALL FARMERS IN THE ECONOMIC RESHAPING OF NICARAGUA, CUBA, RUSSIA, AND CHINA* 71–85 (2010). It should be noted here that the Sandinistas themselves actually implemented policies of economic fiscal austerity in the late 1980s in their efforts to curb the 30,000% plus rate of inflation; however, this was not in conjunction with the International Monetary Fund (IMF) or any other external actor or institution. Joseph Ricciardi, *Economic Policy, in Revolution and Counterrevolution in Nicaragua* 263–264 (Thomas W. Walker ed., 1991).

¹³ ENRIQUEZ, *supra* note 12, at 95–120.

¹⁴ *Id.* at 109.

of implications, one important one being that farmers became increasingly vulnerable to fluctuating world commodity prices, which was made clear by the coffee crisis of 2000 when world coffee prices dropped so low that they could not cover the costs of Nicaraguan coffee production.¹⁵ Finally, most of Nicaragua's small farmers—who were primarily grain producers—were negatively affected by the influx of food aid and imports during this period.¹⁶ The extent to which the post-1990 economic reforms affected peasants was reflected in high rates of rural poverty and food insecurity among rural families—one of the highest in Latin America—and by the emigration of a significant portion of the population (estimated at twelve percent) to other countries in search of work.¹⁷

Sixteen years later, peasant communities faced the same challenges that existed before the civil war. Without the vital rural development programs that were dismantled during the structural adjustment period and the neoliberal policies that were subsequently introduced, and in light of increasing migration, the contribution of peasant agriculture to the national economy became seriously threatened. As a result, the role of rural organizations vis-à-vis the government shifted significantly in the post-1990 period.¹⁸ Considered fundamental partners by the Sandinista government, these organizations began to display characteristics of comprising “counter movements” to protect the interests of their members facing market reforms led by the government.¹⁹

At the same time that Nicaragua was undertaking this dramatic economic restructuring, global food insecurity became a pressing matter of international interest. Mounting international concern led to the 1996 World Food Summit in Rome where governments committed themselves to taking steps to alleviate the extreme state of food insecurity plaguing communities worldwide. What followed was the Rome Declaration on World Food Security and World Food Summit Plan of Action. While heads of state met in Rome to discuss food insecurity and hunger, non-governmental organizations (NGOs) convened a parallel forum. It was at this forum that La Vía Campesina first introduced the concept of food sovereignty in a document entitled: *The Right to Produce and the Access to Land—Food Sovereignty: A Future Without Hunger*.

In Nicaragua, several key events took place in 2001 that responded to the developments mentioned above. First, in response to Nicaragua's commitments made at the 1996 World Food Summit, President Enrique Bolaños enacted the National Policy of Food and Nutritional Security (PNSAN) and its Action Plan, both of which were developed by an inter-ministerial commission, via presidential decree.²⁰ The decree represented a pathway towards the constitutional commitment

¹⁵ *Id.* at 108.

¹⁶ *Id.* at 111–12.

¹⁷ U.N. DEV. PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2011 (2011); DILIP RATHA ET AL., WORLD BANK, THE MIGRATION AND REMITTANCES FACTBOOK 2011: NICARAGUA (2011).

¹⁸ ENRIQUEZ, *supra* note 12.

¹⁹ *Id.*, at 117.

²⁰ CAROLINE SAHLEY ET AL., U.S. AGENCY FOR INT'L DEV. [USAID], THE GOVERNANCE DIMENSIONS OF FOOD SECURITY IN NICARAGUA 25 (2005); U.N. FOOD & AGRIC. ORG. [FAO], ESTADO DE LA SEGURIDAD ALIMENTARIA Y NUTRICIONAL EN NICARAGUA 6–8 (2006).

to the right to food, but it was described more as “a series of goal statements than a strategy designed for immediate implementation.”²¹ The PNSAN’s scope and effectiveness was limited by the fact that one of its core components, the formation of the National Food and Nutritional Security Commission (COMUSAN), was never implemented.²²

Some felt that PNSAN was not sufficient to address the structural issues of food insecurity, and that a broader piece of legislation was needed. At the urging of civil society organizations and several members of the National Assembly, National Assembly Deputy Dora Zeledón introduced a proposal for a Law of Food Security in 2001.²³ Although the proposal for the law was assigned to the Committee on Production, Distribution, and Consumer Affairs and the Committee on Economy, Finance, and Assembly Budget, as well as lobbied for forcefully by civil society organizations, it was never reviewed.²⁴

3.2 *Towards Food Sovereignty*

In the years between 2002 and 2004—in light of heightened food insecurity, the decline of peasant influence in policymaking, and the increasing dominance of the industrial, export-led model of agricultural development—Nicaraguan organizations like the ATC, the National Union of Agricultural and Associated Producers (Unión Nacional Agropecuaria y Productores Asociados, or UNAPA), and the National Federation of Agricultural Cooperatives (Federación Nacional de Cooperativas Agropecuarias y Agroindustriales, or FENACOO) began to work on a draft food security law that was explicitly informed by the framework of food sovereignty. This new project was influenced by developments in the broader transnational food sovereignty movement, led by *Vía Campesina*, following two important meetings: the 2001 World Forum on Food Sovereignty in Havana, Cuba, and the 2002 NGO/CSO Forum on Food Sovereignty convened in Rome parallel to the World Food Summit: Five Years Later. These meetings further developed and articulated the food sovereignty framework and the movement more generally.²⁵

²¹ SAHLEY ET AL., *supra* note 20, at 25.

²² BACA & RENNER, *supra* note 9.

²³ FAO, *supra* note 20, at 12.

²⁴ The reasons for this are not clear. According to Dora Zeledón, the idea for a food security law emerged in 1997 but the PNSAN was announced before the law was proposed. Furthermore, she states that the proposal for the law was backed by the Sandinista party and was advocated by the Proactive Advocacy Group, which was comprised of organizations working on food security issues. See Dora Zeledón, *Proceso de la Ley de SSAN en Nicaragua* [Process of the SSAN Law in Nicaragua] (unpublished paper). A possible inference here is that party politics between the dominant Constitutionalist Liberal Party (Bolaños’s party) and the opposition Sandinista party may have interfered with review of the law.

²⁵ ANNETTE AURÉLIE DESMARAIS ET AL., *FOOD SOVEREIGNTY: CONNECTING FOOD, NATURE, AND COMMUNITY* 3 (2011).

Once an important social segment in Nicaragua, marginalized peasant farmers struggled to rebuild their influence on the country's political decision making by uniting around a political agenda based on food sovereignty. The coordinated lobbying effort of peasants, who during the civil war fought on different sides of the political battlefield, was reflected in organizations such as the Agriculture and Livestock RoundTable (Mesa Agropecuaria y Forestal, or MAF) in which both pro-Sandinista and former Contra factions participated. Support for the proposed food sovereignty law was expanded in 2004 with the creation of the Interest Group for Food and Nutritional Sovereignty and Security (Grupo de Interés por la Soberanía y Seguridad Alimentaria y Nutricional, or GISSAN), which had an initial membership of some seventy-three Nicaraguan organizations, including peasant organizations, university groups, and other civil society organizations vested in food and agriculture issues. GISSAN campaigned extensively to create awareness around the issue of food sovereignty and the pending law. Adopting the phrase, "Now is the time for Food Sovereignty!" ("¡Ahora es el tiempo de Soberanía Alimentaria!"), which was coined in 2006 following the breakdown of the Doha Round of the WTO, from Nicaraguan peasant organizations that likewise embraced the phrase, GISSAN sought to popularize the term food sovereignty and create consciousness about the proposed law through conferences, workshops, reports, and written media.

United under the banner of food sovereignty, civil society organizations and social movements took advantage of the political moment generated by Nicaragua's commitment to implement the right to food framework by advocating a broader framework that included a strong emphasis on food sovereignty and security. Indeed, at the international level, the implementation of the U.N. Food and Agriculture Organization's (FAO) Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food by signatory countries of the International Covenant of Economic, Social and Cultural Rights, including Nicaragua, created a space for public debate and action around the topic of the right to food. At the national level, the political victory of the Sandinistas motivated peasants and other marginalized social segments to advocate for radical changes around the issues of food and human rights. In this favorable political context, members of GISSAN embraced the food sovereignty framework as a real solution to social, economic and environmental issues in Nicaragua. And the organizing of civil society around food sovereignty helped to maintain the right to food in the national agenda.

In February of 2005, Deputy Walmarro Gutierrez introduced the proposal for the Law of Food and Nutritional Security and Sovereignty (SSAN), drafted by leaders of organizations belonging to GISSAN, which was given a positive opinion and submitted to the plenary of the National Assembly in October of 2006 for debate and approval. While the law was pending, Nicaragua pursued two other initiatives for enhancing national food security that ultimately complemented the proposal for the SSAN. The first was the introduction in 2007 of the Zero Hunger Program ("Hambre Cero"), which distributes seeds and animals to peasant women and provides them with technical training to encourage food security and micro-enterprise. The second was a program to rebuild food storage facilities through the government-run Nicaraguan Basic Food Company (Empresa Nicaragüense de Alimentos Básicos, or ENABAS)

to contain the price volatility of basic grains and food shortages. These government programs—Zero Hunger Program and ENABAS—have sought to contribute to the strengthening of local food economies and food sovereignty in Nicaragua.

4 Nicaragua’s Food and Nutritional Sovereignty and Security Law (SSAN)

The Nicaraguan experiment with food sovereignty as a policy framework is still in its early stages. Nevertheless, the new food law already offers some instructive examples in the Latin American context for attaining food sovereignty and broadening bottom-up approaches to policy making. Among them is the multi-stakeholder approach reflected in the formulation of the law, as well as in provisions of the law that decentralize government decision making and invite diverse societal actors to participate in policy making. In the following section, we examine the process by which the SSAN was passed, highlighting the role of peasant organizations, the institutional structure established by the new law, and the opportunities it offers for participatory policy making.

4.1 Formulation and Passing of the SSAN

Comprehensive policy changes have been hard to come by in Nicaragua’s polarized political arena. The power struggle reflected in the ideological differences between the opposition and the left-leaning Sandinistas in the past has prevented the country from making progress in its campaigns to eliminate hunger and illiteracy. Until recently, Sandinistas faced a combative opposition in the National Assembly and were unable to pass critical legislative initiatives. Such a political environment forced Sandinistas into power-sharing schemes with political rivals and moderate political positions. The ideological shift among leaders of the Sandinista party (FSLN) from a hard-line stance to a moderate position was essentially tactical. However, it was enough to create tensions and divisions in the party’s own ranks. Some members left or were expelled from the party to make space for members whose origins were in the urban middle class and/or whose politics reflected a more moderate Sandinista position.²⁶

The case of the SSAN was a dramatic departure from Nicaragua’s history of political polarization. For the most part, all political factions were on board with the idea of the law. While there were disagreements regarding specific measures included in the initial proposal for the law, as will be described below, these were overcome during the process of reaching consensus between factions but not necessarily to the satisfaction of all stakeholders. In particular, civil society organizations became remarkably polarized during the course of negotiating the consensus.

²⁶ ORLANDO NUÑEZ, *LA OLIGARQUÍA EN NICARAGUA [OLIGARCHY IN NICARAGUA]* (2006).

After Deputy Walmarro Gutiérrez introduced the proposal for a law of Food and Nutritional Sovereignty and Security in 2006, the proposal was approved for debate in a June 2007 session of the National Assembly. The National Assembly approved the first four articles of the proposal. However, tensions developed around some issues in the law, specifically a measure of the law that would ban the importation of genetically modified foods (GMOs). At this point, the National Assembly suspended debate on the law with the intention of reconvening once the heads of different political factions had more time to reach consensus on controversial points of the law.²⁷

The National Assembly team working on the law, led by Deputy Dora Zeledón, then asked the FAO to provide technical assistance.²⁸ The National Assembly also consulted with a diverse range of stakeholders, including representatives of the Ministry of Agriculture and Forests, the Ministry of Health, the Ministry of Education, Culture and Sports, and civil society organizations like the High Council of Private Businesses (Consejo Superior de Empresas Privadas, or COSEP), MAF, and GISSAN.²⁹ As Zeledón reports: “The contributions of these consulted actors were key for strengthening the proposal for the law and advancing the creation of a consensus.”³⁰ Through the process of building consensus between multiple stakeholders and the government, the measure to ban the importation of GMOs was dropped from the proposal for the law and the concept of “precaution” was added instead, defined by the law as “[guaranteeing] the safety of internal production as well as imported and donated food so that these do not harm national production and human consumption” (Art. 9b).³¹ The decision not to include a ban on GMOs was contested by GISSAN, which ultimately did not support the final version of the law. Despite GISSAN’s adversarial reaction to the exclusion of the GMO provision, a representative from both GISSAN and MAF retained influence in the process of developing the law. Indeed, the involvement of peasant organizations, such as *Vía Campesina* members ATC and UNAPA ultimately contributed to maintaining key propositions in the law, including language recognizing the idea of “food sovereignty” and provisions providing government support to small and medium-sized farmers. In June of 2009, the National Congress passed the Law of Food and Nutritional Sovereignty and Security (Law 693) by a wide margin—of the 63 deputies present, all of them voted in favor.³²

²⁷ *Continuacion de la Sesión Ordinaria Numero Dos de la Honorable Asamblea Nacional, Correspondiente al Día de Junio del 2007* [Continuation of the Second Ordinary Session of the Honorable National Assembly, June 12, 2007], 23rd Legislatura (2009).

²⁸ This paragraph is largely informed by interviews with National Assembly Deputy Dora Zeledón and Jose Angel Cruz of UNAPA. It is inconsistent with the findings of Elise Montano. See ELISE MONTANO, *FOOD AND POWER: THE POLITICAL ECONOMY OF FOOD SECURITY IN NICARAGUA* 37 (2008).

²⁹ Zeledón, *supra* note 24; see also Baca & Renner, *supra* note 9, at 65.

³⁰ Zeledón, *supra* note 24.

³¹ Ley No. 693, 18 June 2009, *Ley de Soberanía y Seguridad Alimentaria y Nutricional* [Law of Food and Nutritional Sovereignty and Security] tit. I, ch. II, sec. 9b, *La Gaceta* [L.G.], N. 133, 16 July 2009 (Nicar.).

³² Continuation of the Second Ordinary Session of the Honorable National Assembly, June 12, 2007, *supra* note 27.

4.2 Key Features of the SSAN

Of the seven stated objectives of the new law, the aim of enhancing national food production through short to long-term initiatives that support small and medium-sized producers who have been forced to compete with products imported via free market policies (Art. 4(4)(a)), is particularly important.³³ With the country still tied to legally-binding free trade agreements, the law focuses on the rebuilding of local food economies. Other key objectives are to address the root causes of food insecurity by creating opportunities for families to access land, water, and loans for agricultural production³⁴ and to restore local food culture to create permanent access to foods that are culturally and nutritionally appropriate.³⁵

One of the strategies to rebuild local food economies is based on the expansion of the Zero Hunger Program, an initiative that initially helped over 15,000 peasant women to diversify their income and food production. Women participants received a sow, a heifer, seeds, and tools with the expectation that they would create and manage a local revolving fund to benefit other women in the community. Judging from the experiences of other Latin American countries that have enacted food sovereignty laws, the coordination (and expansion of) existing programs like the Zero Hunger Program will play a critical role in the success of the law,³⁶ assuming the program is renewed when its five-year term is scheduled to end. Moreover, peasant women will be able to participate not only as beneficiaries but also as decision makers through the program.³⁷

The law proposes applying food sovereignty to two distinct levels. In Chap. 1, Art. 2.1, food sovereignty is defined as “the right of local communities to define their own policies and sustainable strategies of production, distribution and

³³ Ley No. 693, 18 June 2009, Ley de Soberanía y Seguridad Alimentaria y Nutricional [Law of Food and Nutritional Sovereignty and Security] tit. I, ch. I, sec. 4a, La Gaceta [L.G.], July 16, 2009 (Nicar.).

³⁴ *Id.* at tit. I, ch. I, art. 4(b).

³⁵ *Id.* at tit. I, ch. I, art. 4(c).

³⁶ OLIVIER DE SCHUTTER, U.N. SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, BRIEFING NOTE 1: COUNTRIES TACKLING HUNGER WITH A RIGHT TO FOOD APPROACH 6 (May, 2010) (“One of the strengths of the Ecuadorian framework law is the emphasis placed in several provisions on small-scale farmers, who in many underdeveloped countries constitute the majority of people affected by hunger and food insecurity.”); *see also* Beauregard, *supra* note 1, at 26 (“Countries that have shown the most success and actual implementation of food sovereignty, however, are those that have followed up with legislation that puts food sovereignty into action through concrete programs, support for small scale producers, and agroecological efforts. In all cases, food sovereignty does not mean food self-sufficiency. Rather, it takes into account the way in which food is grown, the consideration of cultural values, the support and rights of small-scale producers, the protection of indigenous knowledge and resources, equitable access to land and productive resources, the creation and support of localized markets, and the democratic participation of the people.”).

³⁷ The law includes a specific article on gender equity that states that all initiatives and policies related to the law should address this issue. Law of Food and Nutritional Sovereignty and Security, *supra* note 33, at tit. I, ch. II, art. 7.

consumption that guarantee the right to food for the total population.”³⁸ In Art. 9 of Title II, food sovereignty is described as “a right of the *State* to define its own policies, strategies of sustainable production, transformation, distribution, and consumption that guarantee the right to food for the total population.”³⁹ This second interpretation of food sovereignty could help the Nicaraguan government defend its “policy space” against international pressures to adhere to free trade imperatives. Indeed, the Nicaraguan law aims to restore local food cultures (Art. 4(4)(c)), which implies the preservation of Nicaraguan food traditions.⁴⁰ Practices that result from less regulated, open markets—such as food “dumping” and the proliferation of new foods through heavy advertising and expanding fast food chains—threaten local food cultures, and can thus be addressed as a threat to national food sovereignty. Also critical here is that the law explicitly calls for the support of a national base of small and medium-sized food production to counter the effects of free trade agreements on local production (Art. 4(a)). In addition, the law encourages the coordination of government programs and at the same time the decentralization of decision making from federal government to departments/autonomous regions and municipalities. Yet, as we will explore below, the ability of the Nicaraguan government to use and defend its “policy space” is severely constrained by the trade and investment agreements to which the state is a party.

The food sovereignty framework, as defined in the Nicaraguan law, is more detailed than in similar legislative initiatives in Central and Latin America. Guatemala approved a new food security and nutrition law that also includes food sovereignty but provides little connection with the main goals of the legislation and does not indicate how food sovereignty can support the fulfillment of the right to food. Similarly, Brazil’s food security and nutrition law indirectly implies food sovereignty and its critical role to the fulfillment of the right to food stating that, “[T]he consecution of the right to adequate food and food security and nutrition requires respect for sovereignty, which grants nations the right to make decisions about production and food consumption.”⁴¹ But in similar manner, the law is not grounded in a food sovereignty framework per se. In contrast, Ecuador’s law of 2009 is based on the food sovereignty framework. The law links food sovereignty to the right of communities to land and more broadly to the fulfillment of the constitutional rights of living well (*el buen vivir*) stating that, “[I]ndividuals and collectives have the right to the safe and permanent access to healthy foods, sufficient and nutritional; preferably produced locally and based on the diversity of identities and cultural traditions.”⁴² Similar to the Brazilian experience, the Ecuadoran law also establishes a permanent space of dialogue and coordination of different civil society organizations. These spaces

³⁸ *Id.* at tit. I, ch. I, art. 2.1.

³⁹ *Id.* at tit. II, art. 9 (emphasis added).

⁴⁰ *Id.* at tit. I, ch. I, art. 4(c).

⁴¹ Ley No. 11,346, 15 Sept. 2006, *Lei de Seguridad Alimentar e Nutricional* [Law of Food Security and Nutrition] tit. I, ch. I, art. 5, *Diario da Uniao*, Aug. 26, 2010 (Nicar.).

⁴² Ley No. 583, 5 May 2009, *Ley Organica del Regimen de la Soberania Alimentaria* [Organic Law of the Food Sovereignty Regime] Official Supplement Registry, May 5, 2009 (Nicar.).

of dialogue reinforce the critical role of democratic control and civic participation in the implementation and development of the new food security and nutrition laws.

4.3 Institutional Framework of the SSAN and Citizen Participation

SSAN carries the expectation that increasing citizen participation can attain both the right to food and national food security. The law calls for the creation of local, departmental, regional, and national coordination committees comprised of representatives of government agencies, civil society organizations, food producers, the private sector, indigenous groups, and/or universities, depending on the type of committee. Relevant stakeholders praised this multi-stakeholder approach as an important political mechanism.⁴³ In addition to the creation of civic committees, the Nicaraguan law also provides a legal mechanism to hold government officials and agencies accountable for the constitutional protection of the right to food.

The new law establishes the creation of the National System of Food and Nutritional Sovereignty and Security (SINASSAN), which is comprised of various institutions responsible for promoting and guaranteeing the right to food and food security through the framework of food sovereignty. The National Commission for Food and Nutritional Sovereignty and Security (CONASSAN) is led by the Nicaraguan President and advised by a special secretary (SESSAN) and technical councils (COTESSAN) made up of representatives from government agencies, nongovernment organizations, trade unions, indigenous organizations, the private sector, and universities, all of which are nationally based. The SESSAN coordinates and provides technical and organizational assistance to the different commissions and oversees the work of the COTESSANs. The SESSAN also designs and evaluates the implementation of the national policy on Food and Nutritional Sovereignty and Security.

Decentralization is a key principle of the law and impacts how it is implemented. Decentralization refers to the Nicaraguan government's increasing coordination with local governments on food and agriculture policy issues. In this framework, the national government transfers decision making to local and departmental/regional committees that will identify needs, design programs, and direct government funding accordingly. The law creates departmental commissions (CODESSANs), regional commissions for the two autonomous indigenous regions (CORESSANs), and commissions at the municipal level (COMUSSANs). These commissions all include representatives from government ministries that are part of CONASSAN, local government representatives, and representatives from civil society organizations.

⁴³ OLIVIER DE SCHUTTER, *supra* note 36 (“Nicaragua which has a framework law in place since 19 June 2009 has adopted a multi-stakeholder approach in order to develop the law, which is why the law now receives broad support from all relevant actors.”).

The Citizen Participation Law (No. 475) of 2003 supports the decentralizing features of the food sovereignty law. This law defines the spaces for civic participation (committees, elections, etc.), as well as establishes norms for the interactions between citizens and government officers. It also regulates the organization and operation of committees for municipal development and other spaces of civic participation. Since 2007, the government has also supported the organization of Citizen Power Councils (Consejos de Poder Ciudadano, or CPCs). These spaces have provided a “political pulse” for detecting failures and successes of government policies. It is expected that CPCs will have a role in the implementation of the SSAN.

The SSAN establishes political and legal mechanisms for citizen participation, both of which have yet to be fully implemented. Political mechanisms, such as the decentralization of decision making, are expected to strengthen accountability for government actions through increased citizen participation. In addition to serving as spaces where food policies can be designed and implemented, the different national, departmental/regional, and municipal commissions will serve as spaces where citizens will be able to hold government officials accountable for policy decisions related to the right to food. In Title 1, Art. 3 the SSAN reaffirms the Citizen Participation Law ensure that these spaces will be open to all citizens.⁴⁴ In the Citizen Participation Law, the Nicaraguan State prohibits discrimination on the basis of political affiliation, gender, or ethnicity.⁴⁵ SSAN goes beyond it and also includes a provision emphasizing women’s participation and gender parity.⁴⁶

The SSAN also creates a legal mechanism for claims against government officials and third parties “that violate or conflict with this law and its regulations.”⁴⁷ The law states that the attorney general’s human rights office will name a special national prosecutor to oversee cases related to food and nutritional sovereignty and security (Title IV, Art. 38). The ability of this mechanism to achieve justice will largely depend on whether national institutions are strong enough to enforce their decisions. The legal mechanisms established in the law additionally have the potential to foster conditions for more effective civic participation; through citizen-led advocacy efforts appealing to legal mechanisms, citizens can have additional means by which to influence policy.

5 Strengthening Food Sovereignty in Nicaragua: Advances and Challenges

Various factors support and challenge the food sovereignty framework in Nicaragua, and we argue that these factors in turn have the potential to affect the extent to which governance of food and agricultural matters can be made more democratic at

⁴⁴ Law of Food and Nutritional Sovereignty and Security, *supra* note 33, at tit I, ch. I, art. 3(1).

⁴⁵ Ley No. 475, 22 Oct. 2003, Citizen Participation Law (No. 475) of 2003, tit I, art. 7(2) (Nicar.).

⁴⁶ Law of Food and Nutritional Sovereignty and Security, *supra* note 33, at tit. I, ch. II, art. 7

⁴⁷ *Id.* at tit. III, ch. I, art. 32.

the national and international levels. In this section, we will address factors that can facilitate the implementation of SSAN including what we call internal factors (those reflected in the local and national context), and external factors (those reflected in Nicaragua's foreign commitments and agreements with regional neighbors). We will then turn to a discussion of the various factors that may impede the implementation of Nicaragua's food sovereignty law.

5.1 Internal and External Factors that Support Food Sovereignty in Nicaragua

There are a number of internal factors in Nicaragua that support the domestic implementation of a food sovereignty framework. The very nature of Nicaragua's food sovereignty law as reflecting inclusive, participatory forms of policy making is a definite opportunity for enhancing democracy. It is clear from the discussion above that SSAN enhances opportunities for broad participation in policy and decision making at multiple levels—municipal, departmental/regional, and national—by including the participation of a number of stakeholders representing different societal groups from the public sector, private sector, and civil society. This is one of the great strengths of the law in terms of creating a more democratic and inclusive policy space, and one that reflects elements of democracy-from-below.

The historical precedent for civic participation established during the revolutionary period is an important factor in support of Nicaragua's current efforts to institute more democratic forms of governance in the food policy and agricultural arenas. In the 1980s, the revolutionary government encouraged an enhanced role for civil society organizations in the governance of the nation, cultivating national familiarity with bottom-up approaches to government. The model set forth during the revolutionary period is a source of knowledge and experience for the practice of participatory democracy that the current government and stakeholders can draw on in implementing the SSAN. A fact of particular salience is that the rural organizations that took part in participatory governance during the 1980s are the very organizations that championed the SSAN, especially the ATC and UNAG.⁴⁸ Many of the current leaders of these organizations were members (if not leaders) during the revolutionary period.

With the victory of the FSLN in the 2006 presidential elections came a renewed interest of the new government in food security,⁴⁹ one of the key issues on the agendas of rural peasant organizations, especially the ATC and UNAG, which have had longstanding relationships with the FSLN as a result of their participation in the revolutionary government in the 1980s. This relationship contributed greatly to the formulation and subsequent passing of the food sovereignty law, demonstrating the capacity of the government to approve policies that represent the interests and perspectives of their constituents.

⁴⁸ VANDEN & PREVOST, *supra* note 10, at 55–6, 62–6; BACA & RENNER, *supra* note 9, at 84–5.

⁴⁹ *Id.* at 39.

There are also a number of external factors that support the domestic implementation of food sovereignty. For example, the Nicaraguan government's membership and leading role in the Bolivarian Alliance of the Americas (ALBA) is another factor that supports Nicaragua's turn to food sovereignty. ALBA has pledged a commitment to food sovereignty as a key mechanism for achieving food security.⁵⁰ Fellow ALBA members Ecuador, Bolivia, and Venezuela have also passed food sovereignty laws like Nicaragua's. This regional collaboration provides an external source of support for Nicaragua's food sovereignty legislation.⁵¹ Another key factor is that La Vía Campesina, the transnational organization that includes the ATC and MAF, plays a strong role in the Social Movements Council of ALBA.⁵² Nicaraguan peasant organizations have thus been able to influence national policies and participate in regional policy initiatives both through their relationship with the Nicaraguan government and through their membership in La Vía Campesina.

Among the ways that Nicaraguan peasant organizations have participated in ALBA is by attending ministerial meetings where they have presented claims and negotiated programs to benefit local farmers' cooperatives. This access to policy-making spaces represents an old demand of social movements in the region and a critical first step towards their goal of advancing their food sovereignty agenda. Through the ALBA of Social Movements, a coordination space for social movements from different countries (including those who are not ALBA members, such as Brazil) exists and represents a promising space for organizations affiliated with La Vía Campesina to create new alliances, thereby strengthening the food sovereignty movement in Latin America.

The rising political support for food sovereignty throughout Central America in response to the organizing efforts of regional and national civil society organizations has been another factor in improving the external climate in which Nicaragua is implementing food sovereignty. In El Salvador, the National Association of Agricultural Workers (Asociación Nacional de Trabajadores Agropecuarios, or ANTA) and the National Council of Rural Workers (Consejo Nacional de Trabajadores del Campo, or CNTC) (both members of La Vía Campesina) have worked together to advocate for a new food sovereignty law initiative similar to Nicaragua's SSAN. In Guatemala, Mayan indigenous and peasant organizations have led a campaign for the approval of a new law that would address government programs for rural communities and families' land rights, as established in a 1996 Peace Agreement.

⁵⁰ ALIANZA BOLIVARIANA PARA LOS PUEBLOS DE NUESTRA AMERICA [ALBA], FINAL DECLARATION OF THE MANAGUA PRESIDENTIAL SUMMIT FOOD SOVEREIGNTY AND SECURITY: "FOOD FOR LIFE" (May 7, 2008).

⁵¹ Shawn Hattingh, *Creating a Regional Alternative to Neo-liberalism*, MRZINE (July 2, 2008).

⁵² The Social Movements Council of ALBA-TCP is the principal mechanism that facilitates integration and direct social participation in ALBA-TCP and it reports directly to the Council of Presidents of ALBA-TCP. See Bolivarian Alliance for the Peoples of Our America—People's Trade Treaty, *Social Movements Council of ALBA-TCP*, <http://www.alba-tcp.org/en/contenido/social-movements-council-alba-tcp>.

In addition, throughout the region the Central American Network for Food and Nutritional Sovereignty and Security (La Red Centroamericana por la Soberanía y Seguridad Alimentaria y Nutricional, or REDCASSAN), coordinated by GIS-SAN, has sought to promote food sovereignty at the national level.⁵³ Established in 2006, and comprised of civil society organizations from Guatemala, Honduras, El Salvador, and Nicaragua that promote food sovereignty, it represents another source of support for food sovereignty law in Central American nations. Finally, support has also followed from other organizing efforts among peasants, including the Global Campaign for Agrarian Reform—led by La Vía Campesina, FoodFirst International Network (FIAN), and the Land Research and Action Network (LRAN)—which has provided training, legal assistance, and organizational support to peasant, indigenous and afro-descendent communities struggling for land rights in Central America and elsewhere worldwide.

5.2 Challenges to Food Sovereignty in Nicaragua

Nicaragua faces several challenges to realizing food sovereignty and strengthening democracy with respect to food and agriculture policy. These challenges range from internal dynamics to the competing international and domestic commitments.

With respect to internal challenges, Nicaraguans report that the political impetus for the implementation of the SSAN has been quite weak. While the law provides a clear institutional structure, it lacks a “road map” for the implementation process. Political disputes between local leaders at the municipal level, a lack of an effective coordination space for civil society organizations, and confusion about various aspects of the law have all affected the implementation process in detrimental ways, which was made evident by complications in the creation of COMUSSANs in various municipalities. Currently, the extent to which SSAN has been implemented in Nicaragua is quite limited but nonetheless growing with the support of civil society organizations, the government, and the FAO.

One particular internal challenge faced by Nicaragua has been that decentralization does not, on its own, generate civic participation. To truly enhance democratic decision making with respect to food and agriculture policy, the government will need to educate citizens about the new law, support community leaders, effectively respond to the concerns and demands of constituents, and ensure that a clear space for democratic decision making from below exists.

Nor does decentralization naturally ensure that there will be funding for food sovereignty priorities. Decentralization of the decision-making process was a common feature in the restructuring of government functions during the structural adjustment period in Latin America. During that period, neoliberal policies dictated a diminishing role of government in social and economic development programs. Budgets for these programs were cut, which in some cases represented the end

⁵³ BACA & RENNER, *supra* note 9.

of essential services such as health care and technical support to small-scale farmers. To maximize the use of the remaining funding, governments were advised to “decentralize” program operation to local governments. This form of decentralization meant that communities were left to compete for funding from cash-stripped local governments and international nongovernmental organizations (in the form of project grants and partnerships), while the federal government abdicated its responsibility to protect constitutional rights like the right to food. In some cases, budget allocations for food and agriculture initiatives in peasant communities were even diverted to support large-scale agriculture. Similarly, the SSAN’s decentralization provisions still may not be enough to ensure that funds are allocated to support local agricultural production and to provide the infrastructure needed to strengthen a local-based food economy. Without community engagement and budgetary support, the Nicaraguan food sovereignty experiment will be limited to the rhetoric of civic participation in policy making.

Important external factors challenge the implementation of a food sovereignty framework in Nicaragua as well. The global food system is currently dominated by the industrial agro-export model, which is grounded in a neoliberal, market-based approach to economic development. International institutions such as the IMF, the World Bank, and the Inter-American Development Bank have placed significant pressure on developing nations to liberalize markets by removing trade barriers, to encourage export-led growth, to increase foreign direct investment, to privatize state-owned enterprises, and to practice fiscal austerity. For example, they have stipulated that nations experiencing economic crisis implement such programs in order to borrow the funds needed to rescue their economies. The United States (U.S.) has also been a key advocate of this model; in the Latin American region, it has been influential in institutionalizing it through a series of free trade agreements such as the North American Free Trade Agreement (NAFTA) between Mexico, Canada, and the U.S. in 1994, DR-CAFTA in 2006, and the bilateral free trade agreements with various Latin American nations (including Chile, Peru, Colombia, and Panama). These market-oriented policies are at odds with food sovereignty priorities, which emphasize local producers, local markets, and the democratic distribution of necessary resources such as government funding, land, water, and seeds.⁵⁴

Nicaragua is party to DR-CAFTA, a free trade agreement with the U.S. The market-based approach to achieving food security envisioned by DR-CAFTA contradicts the food sovereignty approach Nicaragua has endorsed through the SSAN and its membership in ALBA yet Nicaragua maintains its legal obligations to that agreement. DR-CAFTA prioritizes attracting new investments to the national economy, requiring Central American countries “to bring their legal system[s] into compliance” with the agreement by adopting regulatory schemes that favor the interests of international investors.⁵⁵ Often, DR-CAFTA compliance means limiting the resource rights of local communities. For example, the demands of DR-CAFTA may require changes to national constitutions to allow for foreign ownership of na-

⁵⁴ NYÉLÉNI FORUM FOR FOOD SOVEREIGNTY, DECLARATION OF NYÉLÉNI (Feb. 27, 2008).

⁵⁵ THE STOP CAFTA COALITION, DR-CAFTA: EFFECTS AND ALTERNATIVES (2008).

tural resources like land and water. Under these circumstances, peasant and indigenous communities are left with few constitutional protections against development projects and foreign-owned operations that deplete local resources, such as metallic mining and agro-fuel plantations.

As a legally binding accord, DR-CAFTA gives full protection to international investors of extractive industries and agribusinesses. Under Chapter 11 of DR-CAFTA, international investors receive the same legal privileges as local individuals and enterprises, enabling corporations to sue governments when national policies threaten their profit-making interests. Legal cases brought under DR-CAFTA are litigated in special courts with limited public oversight. Multimillion-dollar lawsuits against nations like Nicaragua have the potential to cause considerable damage to government finances, threatening the government's capacity to deliver essential services. Intimidated by the financial power of corporations under this legal regime, many governments have fallen short of taking the steps necessary to protect the interests of their constituents.

The complex relationship with the U.S., Nicaragua's largest trade partner, is probably the biggest challenge facing Nicaragua in terms of achieving food sovereignty. Even though this chapter does not address all the historical and political elements of the relationship between these two nations, it is expected that the free trade agreement with the U.S. and Nicaragua's economic and financial dependency has the potential to deeply affect the outcomes of SSAN. The U.S., through different mechanisms from food aid to DR-CAFTA, has imposed a market-based approach to food security that is clearly reflected in initiatives such as Feed the Future, the U.S. government's Global Hunger and Food Security Initiative. A recent Feed the Future publication issued by the U.S. government highlighted the conflict between Nicaragua's new food sovereignty law and the market-led approach to guaranteeing food security promoted by the U.S.:

The GON [Government of Nicaragua] food security strategy does not identify nor clearly distinguish the competencies and complementary roles of the private and public sectors. The strategy emphasizes the role of government in meeting this objective ... The GON strategy identifies food self-sufficiency as an integral component of the food security strategy. USAID/Nicaragua uses a market-based approach that enables individuals to purchase nutritious, low cost food, either domestically or from other nearby countries. In turn, Nicaraguan farmers would have the ability to sell their crops domestically or in neighboring markets at the highest available price.⁵⁶

U.S. food security initiatives deployed in Nicaragua are largely top-down and do not provide a policy space for the participation of local citizens and communities. This was evidenced in the aforementioned Feed the Future report, which described the process by which it developed its implementation plan in the following manner:

USAID/Nicaragua's background work on this plan during the past year has included technical analysis and strategic consultations with the GON, other USG agencies, private sector associations, academia, and other donors. The process included

⁵⁶ FEED THE FUTURE, NICARAGUA FY 2010 IMPLEMENTATION PLAN 6-7 (2010) (a "working document [] outlining U.S. government planning").

a formal presentation to public and private sector stakeholders, and incorporation of their feedback into this Plan.⁵⁷

No Nicaraguan civil society organizations, citizens, or community stakeholders were mentioned as being consulted in the process by which the plan was formulated. This approach is antithetical to the principles of food sovereignty, which unequivocally call for the participation of local citizens and communities in constructing food and agriculture policies.

6 The Path Ahead

Nicaragua's SSAN creates tension in national and global policy-making spaces as it embraces food sovereignty, which challenges the core assumptions of the neoliberal doctrine of development and economic order. It demystifies the idea that food security can be accomplished through the industrialization of agriculture and commodification of nature. Food sovereignty puts food justice in the center of the policy agenda and brings to light structural issues that cause food insecurity, such as the lack of democracy and the erosion of local communities' rights to land and water. In that sense, the passing of food sovereignty laws in Latin America represents a potentially strong alternative to neoliberalism, depending on the success with which these laws are implemented and enforced, and barring any political developments that could threaten their efficacy.

The promulgation of food sovereignty laws reinvigorates the opposition to the status quo and galvanizes public support for a new direction in macro-economic policies. At the global level, the growth in the relationship between social movements and allied governments has the potential to strengthen the capacity of nations in Latin America and elsewhere to fight for policy space within the dominantly neoliberal global realm.

Like other Latin American nations, Nicaragua is going through a transition period in which the building of a new economic development framework is still in its early stages. This period is marked with contradictions; Nicaragua has preserved its free trade agreement with the U.S. at the same time that it maintains an alignment with ALBA, which espouses a pro-sovereignty position challenging the imposition of free trade policies. The reason behind this contradictory position is simple and pragmatic. To fulfill its population's right to food, Nicaragua needs a strong economy and cash from international trade—trade with the U.S., in particular—in order to pay for programs like the Zero Hunger Program and those that provide technical assistance to small-scale farmers. Nicaragua's dual commitments to DR-CAFTA and ALBA (as ALBA provides economic channels between its members) have helped it to increase trade. In 2011, the Nicaraguan economy outperformed other Central American nations with a surprising 4.7% growth.⁵⁸ Despite such economic

⁵⁷ *Id.*, at 4.

⁵⁸ BANCO CENTRAL DE NICARAGUA, NICARAGUA IN CIFRAS: INDICADORES ECONOMICOS 2 (2011).

gains, Nicaragua's food system is still far from stable; the development of local food economies requires long-term investments, but it remains essential.

The emergence of stronger regional alliances represents a new geopolitical phase in the Americas, one that has the capacity to open new spaces for food sovereignty. ALBA's People's Trade Treaty, for example, has established an alternative trade agreement among Latin American and Caribbean nations that is based on cooperation and shared resources. ALBA's health care, agricultural development, energy, and educational programs have created tangible benefits for low-income families in the eight member-countries, as well as in non-member nations. Cuba's "Operación Milagro" alone has benefited 1,030,545 people from low-income families in 30 countries in Latin America and Caribbean region.⁵⁹ ALBA nations also have been able to foster alliances with other Latin American nations. In South America, Venezuela, Bolivia, and Ecuador are members of the Union of South American Nations and regionally are participants of the Community of Latin American and Caribbean States, along with 29 other nations. The growth of such regional organizations may be able to mitigate the economic dependence of countries like Nicaragua on U.S. buying power.

In this question of economic dependency and the progress of food sovereignty laws, it is important to mention that Latin American nations, including ALBA members, have maintained development policies based on agro-export, which contrasts with political perspectives of food sovereignty. These contradictions show the complexity of a transitional period from neoliberalism and food sovereignty. Within those contradictions, social movements operate to generate pressure on national governments like Nicaragua's to move from economic dependency through free trade to the rebuilding of peasant agriculture and a new food economy that creates self-sufficiency. The progress of food sovereignty in Latin America will depend on the capacity of peasant movements to establish alliances with different social sectors, such as unions and consumers. In particular, social movements need to establish tactical alliances with friendly governments without losing their political autonomy.

Nicaragua's unique experience with the SSAN shows the complexity involved in addressing the right to food through principles of food sovereignty. Although the law is still in the implementation stage, Nicaragua's successes with multi-stakeholder policy making are already commendable. After a painstaking negotiation process, the government was able to approve a law that speaks to the demands of diverse stakeholders, including peasant organizations and civil society organizations, within a general framework of food security and nutrition.

The adoption of the SSAN breaks new ground by establishing decentralized spaces for coordination among government agencies, civic participation, and participatory policy making, representing an alternative to the exclusive and undemocratic mode of policy making through free trade agreements. The Nicaraguan law also suggests a political re-balancing of influence between governments in

⁵⁹ MEDICAL EDUCATION COOPERATION WITH CUBA, SIGHT FOR SORE EYES: CUBA'S VISION RESTORATION PROGRAM (2008).

the North and popular constituencies in the South with regard to economic policies. Although free trade agreements still shape the dominant economic framework in Central America, as evidenced by DR-CAFTA, peasants and indigenous people have been able to institutionalize the oppositional perspective of food sovereignty through alliances with friendly governments and regional initiatives like ALBA. Thus, the case of Nicaragua's food sovereignty law illustrates that a strong relationship between a civil society movement and a government can lead to the formulation and passage of a law that represents the interests and perspectives of diverse local stakeholders, even in the face of countervailing international influences.

This tension between the exclusive and undemocratic free trade agreements and the inclusive and democratic food sovereignty framework breaks the monopoly of neoliberalism and nourishes hope in Nicaragua and Latin America in general that another Americas, a more democratic continent, is possible.

Implementing the Right to Food in Uganda: Advances, Challenges and the Way Forward

Isabella Rae

Abstract This chapter explores action taken at legal, policy and institutional levels to advance the right to food in Uganda. Particular emphasis is placed on the present draft Bill for a Food and Nutrition Act and the way in which this legal tool aims to assist in determining the dynamics of the food system in Uganda and in suggesting a possible replicable model for other African countries. In particular, the extent to which the Bill incorporates international human rights norms and the principles of respect, protect and fulfill is discussed. The role of law in promoting and protecting the right to food is explored within the broader framework of those structural, social and economic dynamics which influence and affect the creation of an enabling environment. Some suggestions are advanced in relation to possible ways to make legal mechanisms more effective in addressing current shortfalls in local food systems.

1 Introduction

The evolution of global thinking on the issue of hunger and food security in the past decades—with hunger being increasingly understood as a failure of governance rather than a question of food yields alone—has been accompanied by significant advancements in the recognition and protection of the right to food at both national and international levels.

Progressive thinking in looking at food and nutrition through a human rights lens, which dates back to the early 1990s in Uganda, is adequately captured in the recently developed Draft Bill for a Food and Nutrition Act (hereinafter Food and Nutrition Bill) or Bill, at the time of writing awaiting Cabinet approval. By way of legitimizing a policy commitment and translating it into a legal entitlement, the Bill, together with other initiatives at policy and institutional levels, offers a key

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opportunity for the country to strengthen local voices in the governance of local food systems through the protection of the right to food. Led by the Ministry of Agriculture, Animal Industry and Fisheries (MAAIF), the Ministry of Health and the Human Rights Commission, with support from development agencies, Uganda has made significant advancements in laying some milestones for the protection of the right to food in the country. Obstacles remain while, at the same time, opportunities arise as a new enabling environment takes shape.

The legal, policy and institutional advances explored in this chapter, all contribute to the country's fight against hunger and to the advancement of the right to food at different levels in the context of fragile national food security.¹ The chapter begins by tracing the evolution of the right to food as a human right before moving to a country-specific focus. It explores the way in which the right to food has been understood and advanced in Uganda through legal, policy and institutional mechanisms. It ends by discussing some of the challenges that Uganda is currently facing with regard to implementing the right to food. This case study is particularly interesting as it reflects progressive thinking at legal and policy levels—which could provide replicable models for other countries in the region—and depicts the challenges remaining in terms of leveraging political support.

2 The Right to Food as a Fundamental Human Right: Legal Foundation, Normative Content and Implementation Avenues

Understanding hunger as an issue of access and deprivation, rather than one of availability, dates back to the 1980s and in particular to the seminal work of Amartya Sen in his study on *Poverty and Famines*.² In Sen's words "starvation is the characteristic of some people not *having* enough food to eat. It is not the characteristic of there *being* not enough food."³ The right to food is thus not a function of food stocks but rather of a person's ability to access resources necessary for the satisfaction of his/her needs. The right to food can be defined as "the right, for all, to have legal frameworks and strategies in place that further the realization of the right to adequate food as a human right recognized under international law".⁴

¹ The population of Uganda has a per capita daily caloric intake of 2,247 and 20% of children are undernourished and underweight, while 32% are undernourished with stunted growth. Of the 34 million overall population, 6.1 million, or 21% of Ugandans suffer undernourishment. See U.N. FOOD & AG. ORG. [FAO], COUNTRY BRIEF: UGANDA (2012). About 40% of all rural people—some 10 million men, women and children—still live in abject poverty. See INT'L FUND FOR AGR. DEV. [IFAD], RURAL POVERTY COUNTRY PROFILE (2012).

² AMARTYA SEN, POVERTY AND FAMINES—AN ESSAY ON ENTITLEMENT AND DEPRIVATION (1981).

³ *Id.* at 1.

⁴ UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, OLIVIER DE SCHUTTER, COUNTRIES TACKLING HUNGER WITH A RIGHT TO FOOD APPROACH – SIGNIFICANT PROGRESS IN IMPLEMENTING THE

The right to food has gone from being recognized (in the 1940s, through its inclusion in the Universal Declaration of Human Rights), to being interpreted (in the 1990s, with the adoption of General Comment No. 12 by the Committee on Economic, Social and Cultural Rights⁵), to being increasingly operationalized (in the last decade, guided by the adoption of the *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* by the United Nations Food and Agriculture Association (FAO) in 2004). The FAO Guidelines have since informed national legal and policy processes for the advancement of the right to food, including the process of formulation of a Food and Nutrition Bill in Uganda.

3 The Right to Food in Uganda: An Enabling Environment

In the first part of this chapter we explore the role played by legal, policy and institutional frameworks in the advancement of the right to food in Uganda. The way in which Uganda has availed of these avenues is outlined, with particular emphasis on the Food and Nutrition Bill (legal), the Food and Nutrition Policy and Strategy (policy) and the foreseen renewed Food and Nutrition Council (institutional). The difficulty in advancing the right to food at the judicial level is also highlighted.

3.1 Legal Protection

One way for countries to protect the right to food is through legal means. This can be done through the incorporation of the right to food in national constitutions, the adoption of specific framework laws or the revision of sectoral legislation to enhance compliance with the right to food.⁶ Uganda is a party to many international instruments which protect the right to food and stipulate obligations on the state. Uganda acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on January 21, 1987. Uganda also ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples' Rights, and the African Charter on the Rights and Welfare of the Child—all of which entail right to food related obligations. However, the National Consti-

RIGHT TO FOOD AT NATIONAL SCALE IN AFRICA, LATIN AMERICA AND SOUTH ASIA 1 (Briefing Note 1, May 1, 2010).

⁵ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rts. [CESCR], *General Comment No. 12: The Right to Adequate Food*, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter General Comment No. 12].

⁶ On legislating for the right to food, see, DUBRAVKA BOJIC BULTRINI, *GUIDE ON LEGISLATING FOR THE RIGHT TO FOOD* (FAO, 2009).

tution does not give treaties a higher status than domestic law, and being a State with a dualist system, international conventions need to be passed through domestic legislative processes before the norms contained in them are fully applicable and justiciable in domestic law.⁷

The following sections outline how Uganda is proceeding in incorporating the obligations to respect, protect and fulfill the right to food into national legal instruments: the Constitution, a Framework Law and sectoral legislation.

3.1.1 Constitutional Protection

The 1995 National Constitution recognises the right to food in the National Objectives and Directive Principles of State Policy in Objective XIV.b, which calls on the State to ensure that “all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, work, decent shelter, adequate clothing, food security and pension and retirement benefits.”⁸ Furthermore, Objective XXII indicates that “The State shall (a) take appropriate steps to encourage people to grow and store adequate food; (b) establish national food reserves; and (c) encourage and promote proper nutrition through mass education and other appropriate means in order to build a healthy State”.⁹

While the right to food appears in the statutory objectives section of the Constitution, it is absent in the main body of it, and in particular in the section dealing with the *Promotion and Protection of Fundamental and Other Human Rights* in Chapter IV. This significantly weakens the right’s constitutional protection and its justiciability, in that it confines it to an area of policy orientation rather than one of full legal guarantee. It will be left to the discretion of the judiciary whether or not to avail of such directives in interpreting substantial provisions. Whether National Courts can use the Directive Principles of State to interpret and derive rights that exist in the constitution remains a controversial issue around the world, due to the doctrine of separation of powers and the fear of “judge-made” law.¹⁰ Positive examples can be found, among others, in the German Federal Constitutional Court and the Federal Administrative Courts,¹¹ the High Court of Fiji,¹² and the Supreme

⁷ M. AKEHURST, *MODERN INTRODUCTION TO INTERNATIONAL LAW* 45 (1987).

⁸ National Constitution of Uganda, 1995, Objective XIV(b).

⁹ *Id.* at Objective XXII.

¹⁰ Dejo Olowu, *Constitutional Interpretation and the Notion of Unenumerated Rights: Circumventing the Exclusion of Socio-Economic Rights in Africa* (ANCL-RADC Annual Conference, The Internationalisation of Constitutional Law, Working Paper, 2011).

¹¹ See, e.g., German Federal Constitutional Court (BVerfG) and German Federal Administrative Court (BVerwG), BVerfGE 1, 97 (104 et sequ), BVerwGE 1, 159 (161), BVerwGE 25, 23(27), BVerfGE 40, 121 (134), BVerfGE 45, 187 (229), BVerfGE 82, 60 (85), BVerfGE 87, 153 (169).

¹² *Rarasea v. State*, Criminal Appeal Case No. HAA0027 of 12 May 2000 (Fiji).

Courts of India,¹³ Bangladesh¹⁴ and Nepal.¹⁵ Other countries appear to resist this approach, among them Ireland.¹⁶

Although recommendations were made as early as 2003¹⁷ for the Human Rights Commission to address the Constitutional Review Commission and suggest the introduction of the right to food in the main body of the Constitution, no constitutional review has so far targeted economic and social rights.

3.1.2 Framework Law

The function of a framework law in protecting the right to food is that it can clarify its normative content by articulating it in greater detail and by defining the scope and content of the right, related State obligations, institutional coordination mechanisms and remedies for cases of violation. In a given legal system, a framework law would represent the overarching umbrella under which subsidiary legislation can be adopted. A number of countries have already adopted framework laws based on the human right to food, among them Argentina, Brazil, Ecuador, Guatemala, Mexico and Nicaragua. Drafts are awaiting approval in Honduras, Peru, South Africa and Uganda, and similar legislative processes have also begun in Bolivia, India, Indonesia, Malawi, Mali, Mozambique, and Venezuela.¹⁸

The Uganda draft is at present the most advanced and innovative text in the African continent. It reflects progressive thinking at the international level and did not shy away from an “entitlement and obligation” language, drawing from the normative interpretation of the right to food provided in the ICESCR and in General Comment No. 12.¹⁹

Uganda Food and Nutrition Bill: Background Discussions on the need for a legislative framework for food and nutrition in Uganda date back to 1993 and were a result of thinking inspired by the 1992 International Conference on Nutrition,

¹³ India Supreme Court, *People’s Union for Civil Liberties v. Union of India and Others*, Writ Petition (Civil) No. 196 (2001) (India).

¹⁴ Supreme Court of Bangladesh (High Court Division), *Dr Mohiuddin Farooque v. Bangladesh and Others* (No.1) (July 1, 1996) (Bangl.).

¹⁵ *Prakash Mani Sharma and others on behalf of Forum for Protection of Public Interest (Pro-Public) v. Prime Minister and Office of Council of Ministers and Others*, Writ Petition No. 0065-w0-149 of 2065 BS (2008) (Nepal).

¹⁶ *G v. An Bord Uchtala*, 2005 (Ir.).

¹⁷ This recommendation was made on the occasion of a National Seminar on the Implementation of the Right to Adequate Food, held in Jinja, Uganda, organized by the Uganda Human Rights Commission, the MAAIF, Makerere University and the Oslo-based International Project on the Right to Food in Development.

¹⁸ U.N. Food & Ag. Org. [FAO], Right to Food Legal Database, available at http://www.fao.org/righttofood/kc/legal_db_en.asp?lang=EN.

¹⁹ General Comment No. 12, *supra* note 5.

hosted by the FAO. Members of an *ad hoc* multi-sectoral Food and Nutrition Council (UFNC), formed in 1987, were responsible for the drafting of the Bill under the leadership of the line ministries of Health and Agriculture. At that time both a policy and a legal framework for food and nutrition security were explored. The possibility of a Food and Nutrition Bill was first explored through multi-sectoral consultations led by the MAAIF, with representatives from the Food and Nutrition Council. As discussions progressed, attention was drawn to the adoption of a policy instrument rather than a legislative one—with a Food and Nutrition Policy adopted in 2003—and for the next ten years or so little attention was given to the idea of a Bill.²⁰

The need for a legislative instrument was also brought up in 2004, on the occasion of the Africa Vision 2020 Conference held in Kampala. However, the Bill was again left silent to give precedence to work on a National Food and Nutrition Strategy, which was completed in 2005, and work on it resumed only in 2008. At that time extensive consultations were carried out with local governments and district-based stakeholders through three regional meetings across the country and a final national one organized by the MAAIF in Kampala. The Bill seemed to meet consensus on the part of different stakeholders and a consolidated draft was ready that year. The process was also informed by parallel work being undertaken by the FAO on developing a Guide on Legislating for the Right to Food—which brought stakeholders together in three regional validating meetings, one of which was held in Uganda in 2007. The MAAIF presented the Bill to Cabinet in 2009. The Bill received a certificate of financial implications in 2011, and is currently waiting to be tabled again in Cabinet and then transmitted to Parliament.

Uganda Food and Nutrition Bill: The Text The Bill presents a very comprehensive text dealing with areas of: entitlements and responsibilities, institutional frameworks, financial provisions, assessment, monitoring and evaluation, and recourse mechanisms. It qualifies the right to food as “fundamental” and in this it surpasses international standards, which limit this connotation to the right to be free from hunger alone.²¹ It defines the right to food as:

[T]he right of every person to have regular, permanent and free access, at all times, either directly or by means of financial purchases, to quantitatively and qualitatively adequate,

²⁰ Interview with Peter Milton Rukundo, Kyambogo University Lecturer and PhD Research Fellow (June 2012).

²¹ See International Covenant on Economic, Social and Cultural Rights, art. 11.2, G.A. Res. 2200A, U.N. Doc. A/RES/21/2200A (Dec. 16, 1966) (“The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programs, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”).

sufficient and safe food, corresponding to his or her cultural traditions and which ensures a physical and mental, individual or collective fulfilling and dignified life free of fear of hunger or under nutrition.²²

The Bill defines its objectives as:

- a. to recognise, promote, protect and fulfil the right to food as a fundamental human right;
- b. to provide a legal basis for implementing the Uganda Food and Nutrition Policy;
- c. to plan, budget and implement the Uganda Food and Nutrition Policy using a right—based approach and to ensure the participation of rights holders and the accountability of duty bearers;
- d. to ensure that food is treated as a national strategic resource;
- e. to promote the policies on food and nutrition as part and parcel of the overall national development policy;
- f. to ensure the integration of the needs of the vulnerable in food and nutrition strategies;
- g. to promote public education and sensitization on food and nutrition, especially in rural areas, to enhance the impact on food and nutrition security; and
- h. to promote the drawing up of strategies to respond to food and nutrition concerns at all levels of Government.²³

The text specifies different levels of obligations to *respect*, to *protect*, and to *fulfil* the right to food.²⁴ The Bill emphasises the need to mainstream a rights-based approach at all levels of policy making. Among the principles deemed to form the philosophy of application of the Bill are: equity, non-discrimination, coordination, accountability, transparency and participation.²⁵ The text refers to individuals as “right holders” and to those who have a duty to perform under this Act as “duty bearers”.²⁶ The Bill not only discusses obligations on the part of the State but also identifies responsibilities within the household, and in particular regarding the head of the household.²⁷ This approach to rights and duties is a feature of the African Charter on Human and Peoples’ Rights.²⁸ In relation to right holders, however, the Bill refers to individuals and not to groups, avoiding a mention of collective rights or peoples’ rights.

Most interestingly, the text makes clear provisions to deal with cases of violations and infringements of the right to food and states:

²² Draft Bill for a Food and Nutrition Act, 2008, art. 2.1 (Uganda).

²³ *Id.* at art. 3.

²⁴ *Id.* at art. 7.

²⁵ *Id.* at art. 4.

²⁶ *Id.* at art. 3.

²⁷ See ALEXANDER NĚKÁM, EXPERIENCES IN AFRICAN CUSTOMARY LAW (1966); T.W. BENNETT, THE APPLICATION OF CUSTOMARY LAW IN SOUTHERN AFRICA: THE CONFLICT OF PERSONAL LAWS 1–16 (1985). See also Martin Chanock, *Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform*, INT’L J. L. POL’Y FAM. 72, 72–88 (1989).

²⁸ African Charter on Human and Peoples’ Rights, art. 27, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

1. Every person shall respect, protect and fulfill the right to food by acting in a way that creates and maintains conditions under which another person may freely and regularly enjoy the right to food.
2. It is unlawful for a person to act in a way which is incompatible with or which hinders another person's enjoyment of the right to food.
3. No person shall undertake an economic, social, cultural or other activity or practice which -
 - a. potentially affect the enjoyment of the right to food;
 - b. is detrimental to another person's nutrition status.
4. A person who contravenes this section, commits an offence and is liable on conviction
 - a. if an individual, to a fine not exceeding twelve currency points or to imprisonment for a term not exceeding six months, or both;
 - b. if a body corporate, to a fine not exceeding one thousand currency points.
5. Where a person is convicted under this section, the court may in addition to the penalty prescribed, make an order for restitution, cessation of unlawful acts, guarantee of non-repetition, rehabilitation or compensation.²⁹

For cases of violation, the Bill provides for a “right to remedy” and refers to the Uganda Human Rights Commission as a means for redress, stating “a person whose right to food is violated may refer to the Human Rights Commission for redress”.³⁰ The Food and Nutrition Council or the relevant Minister can also be appealed to.³¹ The aspect of designating remedies is what makes the Ugandan example stand out, although only administrative mechanisms are foreseen at this stage.³²

Moving to institutional arrangements, the Bill provides for the institutionalisation of the Food and Nutrition Council tasked with ensuring “that Uganda meets its national and international obligations on the right to food and to ensure food security and adequate nutrition for all the people in Uganda for their health and social and economic wellbeing”.³³ Its functions will be discussed below under Institutional Protection. In terms of monitoring and evaluation, the draft Bill assigns this function to the Office of the Prime Minister,³⁴ according to its great political leverage.

Uganda Food and Nutrition Bill: Obstacles Facing its Adoption The Bill is currently waiting to be tabled again with Cabinet before being transmitted to Parliament. The process is taking longer than expected, which may indicate in part a lack of effective coordination among relevant stakeholders involved, including the MAAIF, the Ministry of Health, the National Planning Authority and the Human Rights Commission, and in part a shift of attention on to other processes, which

²⁹ Draft Bill for a Food and Nutrition Act, *supra* note 22, at art. 7.

³⁰ *Id.* at art. 40 (1).

³¹ *Id.* at art. 40.

³² In the case of judicial remedies, an individual alleging to be the victim of a violation is afforded access to a review procedure before a court, with subsequent granting of a remedy upon verification of the violation. Remedies include: restitution, cessation of the violation, rehabilitation and compensation. In the case of administrative remedies on the other hand, individuals can access government ministries, agencies and other non-judicial bodies. The exhaustion of administrative processes is in some countries a pre-requisite for bringing a case to court.

³³ Draft Bill for a Food and Nutrition Act, *supra* note 22, at art. 10.

³⁴ *Id.* at art. 31.

are taking place in parallel (for example, a suggestion was recently made to begin work on a Food Safety Act). In particular an issue of ownership arose during the process between the MAAIF and the Ministry of Health, both having a key interest in the right to food in terms of agriculture one, health and nutrition the other. The drafting process was initiated, and has since been driven, by Government institutions (like the PMA Secretariat) with not enough support from civil society³⁵ until more recently. When the FAO came on the scene in 2007, the Bill was taken up again and a renewed draft was prepared with the UN agency's support by 2008.

Although the latest draft was discussed in a multi-sectoral forum, including both Government and non-governmental organization (NGO) representatives, more could have been done to make individual Members of Parliament (MPs) aware and knowledgeable about the Bill ahead of its being tabled. This could have given the Bill the political support it seemed to be lacking. While no stakeholder is formally opposing the Bill at present, none are pushing its advancement either, with efforts instead focused on other priorities such as the newly adopted Nutrition Action Plan.³⁶ The international agenda, which currently places great emphasis on nutrition, has had enormous influence on the country's development agenda and priority setting. This said, opportunities can still be sought in this new thematic "wave"—the Nutrition Action Plan itself calls for fast-tracking the adoption of the Bill. There is indeed a stronger role to be played by NGOs and by interested networks, the Food Rights Alliance³⁷ being one of them.

Resource constraints have also been an obstacle to the full involvement of all interested agents—for instance the Human Rights Commission. The Commission has the ability to take this process even further by entering the area of investigating complaints for violations. This has not yet happened due to the Commission's mandate being limited to constitutionally protected rights alone, among which the right to food does not yet feature, and to its limited resources.³⁸

Furthermore, conceptual challenges still exist in some sectors in relation to understanding the right to food *not* as the right to be fed—which would imply significant resource allocation on the part of the Government—but as the right to feed oneself in dignity. The issue of remedies and justiciability remains politically sensitive, and some capacity gaps need to be addressed.

³⁵ The Uganda Farmers Federation has been involved in the drafting process although their contribution has been rather limited, possibly due to their network being somewhat fragmented and more devoted to commercial farming than subsistence—a factor which may also lead to less emphasis on human rights. The group has been supportive and could be more effectively engaged in the future to bring this process forward. See Uganda Farmers Federation, <http://www.unffe.org/>.

³⁶ The Nutrition Action Plan is discussed *infra* at sec. 2.2.1.

³⁷ The Food Rights Alliance (FRA) is a membership organization comprising 56 local, national and international organizations active in the field of agriculture and food security programming in Uganda.

³⁸ National Constitution of Uganda, *supra* note 8, at art. 52.

3.1.3 Sectoral Legislation

One important step to advancing the legal protection of the right to food is ensuring that other domestic laws do not hinder the progressive realization of the right. A review of sectoral legislation can measure the compatibility of specific sectoral laws (i.e. on land, water, fisheries, genetic resources) with the right to food with a view to amending the relevant provisions that may have a negative implication for the full realisation of the right. A sectoral review can identify provisions in laws that directly or indirectly limit a person's ability to access food. These provisions might relate to, for instance: insufficient minimum wage, discriminatory conditions in access to land and natural resources essential for sustenance, lack of transparency in determining criteria for access to social safety nets, incentives for commercial activities irrespective of the impact on community livelihoods, excessive charging for water services, etc. In areas such as agriculture, forestry, food safety, trade, and the environment, a country could be a party to both human rights treaties and a number of other international agreements, which may determine the way in which the country deals with a specific sector. In case of conflict between the two sets of obligations, human rights standards should prevail.³⁹

A number of sectoral laws in Uganda would be relevant for a compatibility review⁴⁰ given that they regulate aspects of food quality and safety, clean safe and sufficient water for domestic use, adequate care for children, protection against harmful chemicals, sustainable management of natural resources, institutionalization of relevant services and land ownership.⁴¹ However, so far, no sectoral review has been undertaken in Uganda against right to food standards. Such an exercise would seem most appropriate, particularly in view of the adoption of the Food and Nutrition Bill, and could be led by the Human Rights Commission, with support from the FAO. The review could be undertaken by Parliament (which could provide authoritative recommendations and effective follow up in terms of amendments and political support), a Government agency (which has the advantage of mainstreaming across departments, but may lack objectivity in relation to a particular piece it had initiated in the past) or an independent institution (which could provide objectivity and critical scrutiny).⁴²

³⁹ CULLET PHILIPPE, *FOOD SECURITY AND INTELLECTUAL PROPERTY RIGHTS IN DEVELOPING COUNTRIES* 37 (2003), *quoted in* BULTRINI, *supra* note 6, at 187.

⁴⁰ See relevant observations prepared by Uwe Kracht in support of the Intergovernmental Working Group on the Elaboration of a Set of Voluntary Guidelines for the realization of the Right to Food in the Context of National Food Security: Uwe Kracht, *Right to Food Case Study: Uganda*, RTFG/INF.4/APP.4, 34035 (2004). See also Peter Rukundo, *Uganda: Joining Forces for the Right to Food*, in *RIGHT TO FOOD: MAKING IT HAPPEN—PROCESS AND LESSONS LEARNED THROUGH IMPLEMENTATION*, 135, 147–48, 156 (FAO, 2011).

⁴¹ These include sectoral laws such as the Food and Drug Act of 1959, the Water Act of 1997, the Children Act of 1997, the Penal Code Act of 1950, the Adulteration of Produce Act of 2000, the Plant Protection Act of 2000, the National Agricultural Advisory Services Act of 2001, the Land Act with Amendment of 2009, the Agricultural Chemicals Act of 2007, the Public Health Act of 1935 and the National Environment Act of 1995.

⁴² BULTRINI, *supra* note 6, at 188.

Issues of incompatibility with right to food standards would possibly arise in a number of areas including land, natural resource management, water, and trade among others. One provision that comes to mind is contained in Art. 5(2) of the Uganda Education Act and assigns the responsibility for providing food to children to parents alone,⁴³ with no provision for the Government to assist when parents are unable to provide adequately. The current tabled Bill addresses this gap in Art. 5.3 by stating “the State shall ensure respect for the right to food by the duty bearers”⁴⁴ and in Art. 5.4 by stating “Where a person is identified as vulnerable under this Act and suffers or is at risk of suffering from hunger or under nutrition, the State shall provide that person with a minimum amount of food.”⁴⁵ The Bill further stresses these aspects by tasking the Government with special protection for mothers and children under Art. 34.1(b) through an obligation to “ensure the enjoyment of the right to food for children of five years or less”⁴⁶ and Art. 34.1(c) committing the Government to “adopt measures to provide for food and nutrition needs of orphaned and vulnerable children”.⁴⁷

Aside from legislation, some incompatibilities could be found in relation to policy and programs like, for instance, in the Plan for Modernisation of Agriculture (PMA) and the National Agricultural Advisory Services (NAADS) that mainly target the “economically active poor”⁴⁸ with limited options for those who are extremely poor, a position which conflicts with Art. 36 of the Bill dealing with food emergencies, food aid and vulnerability mapping systems.⁴⁹ Other incompatibilities could also arise from international agreements, including trade agreements the country is party to, which may conflict with Uganda’s international obligations under the International Covenant on Economic, Social and Cultural Rights and the Bill. While a review could take place in a favourable environment like the Uganda context, the difficulty would lie in the follow up to its recommendations—political will would need to be strongly behind any legal or policy amendment.

3.2 Policy Protection

At the policy level, effective protection of the right to food rests with national strategies, such as poverty reduction strategies, food and nutrition strategies and development plans.⁵⁰ These instruments can play a critical role in the protection

⁴³ The Education (Pre-primary, Primary and Post-primary) Act, 2008 (Uganda).

⁴⁴ Draft Bill for a Food and Nutrition Act, 2008, art. 5.3 (Uganda).

⁴⁵ *Id.* at art. 5.4.

⁴⁶ *Id.* at art. 34.1(b).

⁴⁷ *Id.* at art. 34.1 (c).

⁴⁸ See National Agricultural Advisory Services, NAADS Guiding Principles, available at <http://www.naads.or.ug/guiding-principles-2/poverty-targeting/>.

⁴⁹ Uganda Food and Nutrition Bill, *supra* note 44, at art. 36.

⁵⁰ Several countries have adopted food and nutrition security strategies and poverty reduction strategies that are rights-based, in particular: Angola, Burkina Faso, Cambodia, Cap Verde, Congo,

and advancement of the right to food in that they set the direction the Government wishes to take in a particular area—thus giving it political leverage—with clear objectives, targets and an investment plan (in the case of a strategy). With a view to advancing the right to food, such policies should place particular emphasis on issues such as the provision of basic services for the poorest, as well as investment in human resources and primary education, basic health care, capacity building, clean drinking water and adequate sanitation, and basic literacy, numeracy and adequate hygiene practices in the preparation and consumption of food.⁵¹ Furthermore, attention should be paid to increasing productivity and revitalizing the agricultural sector, including livestock and forestry, through targeted interventions in favour of small-scale and traditional fishers and farmers in rural areas, and to the creation of enabling conditions for private sector participation, with an emphasis on human capacity development and the removal of constraints to agricultural production, marketing and distribution.

The following subsections examine the main features of Uganda's Food and Nutrition Policy framework, highlighting the thinking behind the instruments developed so far and the Government's position in relation to the implementation of food and nutrition security within a human rights approach. Emphasis is placed on Uganda's Food and Nutrition Policy, the draft Food and Nutrition Strategy and the recently adopted Food and Nutrition Action Plan.

3.2.1 Uganda Food and Nutrition Policy Framework

A Food and Nutrition Policy was adopted in Uganda in 2003, championed by the MAAIF and the Ministry of Health. The Policy explicitly recalls the ICESCR and recognises adequate food and nutrition as a human right.⁵² It describes the duty of the State to ensure food and nutrition security as a “constitutional obligation.”⁵³

With the main objective of improving the nutritional status of the people of Uganda through multi-sectoral and coordinated interventions that focus on food security, improved nutrition and increased incomes, the Policy focuses on a number of key objectives including, in particular, “to ensure availability, accessibility, affordability of food in the quantities and qualities sufficient to satisfy the dietary needs of individuals sustainably” and “to promote the formulation and/or review of appropriate policies, laws and standards for food security and nutrition.”⁵⁴ Accompanied by

Ecuador, El Salvador, Guatemala, Indonesia, Kenya, Madagascar, Mali, Mozambique, Namibia, Nicaragua, Panama, Peru, Sierra Leone, South Africa, Swaziland, Tanzania, and Zanzibar. U.N. Food & Ag. Org. [FAO], Right to Food Policy and Strategy Database, *available at* http://www.fao.org/righttofood/inaction/ajustice_strategylist_en.htm.

⁵¹ U.N. Food & Ag. Org. [FAO], *Voluntary Guideline to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* guideline 3.6 (2004).

⁵² Uganda Food and Nutrition Policy (2003), sect. 2.3.1 (Uganda).

⁵³ *Id.* at Foreword.

⁵⁴ *Id.* at sec. 2.2.i-2.2.viii.

a number of specific strategic interventions, the Policy identifies 12 main areas of action: (1) Food supply and access; (2) Food processing and preservation; (3) Food storage, marketing, and distribution; (4) External food trade; (5) Food aid; (6) Food standards and quality control; (7) Nutrition; (8) Health; (9) Information, education and communication; (10) Gender, food and nutrition; (11) Food, nutrition and surveillance; and (12) Research.⁵⁵ In terms of institutional frameworks, it points to the Ministry of Health and the MAAIF as leading in matters relating to food security and nutrition while at the same time acknowledging the multi-sectoral nature of this area, involving both public and private stakeholders.⁵⁶ The Policy assigns to the Food and Nutrition Council the functions of coordination, policy advice, research, monitoring and evaluation.⁵⁷

While the Policy marks a significant step in the right direction, the absence of quantifiable targets and the lack of an appropriate legal framework to support it, make implementation weak. The establishment of clear, verifiable and time-bound targets and benchmarks is central in the process of monitoring progress and ensuring accountability. These are usually defined on technical grounds and from a basic needs perspective. They allow for a clear focus to be placed on the planned achievables against which to measure success. To further operationalize the policy, in 2005, a draft National Food and Nutrition Strategy and Investment Plan was developed which focuses on inter-sectoral coordination mechanisms, governance and accountability, and on reaffirming the value of right to food thinking.⁵⁸ The Strategy is still awaiting approval from Cabinet. Most of its aspirations have been reflected in the Agriculture Sector Development Strategy and Investment Plan 2010/11 and the Health Sector Strategic Plan 2010/11.

While these instruments represent an important development, there appears to be a disconnect between policy orientation and operationalization. Further work will be required to translate these policy objectives into clear measurable targets. Other policies in the areas of food, agriculture, and health⁵⁹ that are relevant for the realization of the right to food, will also need to be considered.⁶⁰ The recent adoption of the Nutrition Action Plan (UNAP) for the period 2011–2015 has renewed the emphasis on food and nutrition as well as political commitment. In the Foreword, the President of Uganda stated, “as Ugandans, we must all do whatever is possible in the Food and Nutrition Bill. This Bill will establish a legal institution

⁵⁵ *Id.* at sec. 7.

⁵⁶ *Id.* at sec. 4.

⁵⁷ *Id.* at sec. 4.3.

⁵⁸ Uganda Draft National Food and Nutrition Strategy and Investment Plan (2005).

⁵⁹ See relevant observations made by Kracht, *supra* note 40, at 22–33 and by Rukundo, *supra* note 40, at 140–44.

⁶⁰ See e.g. Poverty Eradication Action Plan (PEAP) (1997); Universal Primary Education Policy, 1997; National Health Policy (1999); Plan for Modernisation of Agriculture (2003); National Orphans and other Vulnerable Children Policy (2004); National Policy for Internally Displaced Persons (2004); Uganda National Culture Policy (2006); Land Policy (2010); Agriculture Sector Development Strategy and Investment Plan (2010/11–2014/15); Health Sector Strategic Plan (2010/11–2014/15); and, Nutrition Action Plan (2011–2016).

to co-ordinate different nutrition partners, ensure accountability in reaching the objectives of both the National Development Plan (NDP) and the Uganda Nutrition Action Plan, and increase commitment of resources and expertise to scale up high-impact programs and policies to improve nutrition in our country.”⁶¹ The UNAP was developed through a consultative process led by the National Planning Authority and it aims at scaling up nutrition in the first 1,000 days of human survival from conception to age two. This new focus on two vulnerable groups—women of reproductive age and children—may inevitably generate more discussions on the content and final direction of the Bill. If on the one side the UNAP draws on the UN Scaling up Nutrition (SUN) movement and in this sense confines an understanding of nutrition to mother and child with a focus on addressing micronutrient deficiency rather than the entitlement-poverty gap, on the other its reference to the ICESCR⁶² and its call for the adoption of the Food and Nutrition Bill (strongly rights-based) bring it one step further.

The challenge arising from instruments being adopted that may conflict with the Bill is not one the Bill itself can address. Tasking a body with complementarity reviews at both legal and policy level for right to food or human rights broadly would be a good step to ensure future and ongoing compatibility between various policy agendas.

3.3 *Institutional Protection*

At the national level, different institutions can be mandated with the protection and promotion of the right to food, either as a stand-alone function or as part of a broader mandate. Given that the right to food would naturally fall under the remit of different sectors (food and agriculture, education, health, and social affairs), inter-sectoral coordination mechanisms are key.⁶³

⁶¹ Foreword, Nutrition Action Plan. For more information on the Uganda National Development Plan, see Uganda National Development Plan 2010/2011–2014/2015, April 2010. For more information on the Nutrition Action Plan, see Uganda Nutrition Action Plan 2011–2016: Scaling up Multi-Sectoral Efforts to Establish a Strong Nutrition Foundation for Uganda’s Development (Nov. 2011).

⁶² See Uganda Nutrition Action Plan 2011–2016, *supra* note 61, at sec. 2.

⁶³ On the need for coordination mechanisms as key in the implementation of the right to food, see: U.N. Food & Ag. Org. [FAO], *THE RIGHT TO FOOD GUIDELINES—INFORMATION PAPERS AND CASE STUDIES* (2006) and BULTRINI, *supra* note 6.

National food security and nutrition coordination institutions can be found in Bolivia,⁶⁴ Brazil,⁶⁵ Guatemala,⁶⁶ Malawi,⁶⁷ Mozambique,⁶⁸ Nicaragua,⁶⁹ and Peru.⁷⁰ Related functions are often assigned to National Human Rights Commissions,⁷¹ tasked with mandates, which range from promotion and monitoring of human rights to hearing complaints and recommending remedial action.⁷² The effectiveness of such coordination mechanisms depends on the institution's location within the Government hierarchy as well as its composition.

The sections below discuss three key institutions in Uganda that are involved in the implementation of the right to food broadly: the Food and Nutrition Council, the Secretariat of the Plan for Modernisation of Agriculture and the Human Rights Commission. There is some overlap between the representation in the institutions, with both the Secretariat and the Commission having representatives in the Council, which acts as a national coordination body on food issues.

3.3.1 The Uganda Food and Nutrition Council

The role of coordination in the area of food and nutrition in Uganda is assigned to the Food and Nutrition Council—a body set up with *ad hoc* functions as early as 1987, the institutionalization of which is provided for in the Food and Nutrition Bill. The Council is composed of representatives from thirteen sectors, including Government, academia, the Human Rights Commission, civil society and the private

⁶⁴ The Bolivia Food Security Council was re-established under the Brazil National Council for Food and Nutrition Security model.

⁶⁵ Brazil created the National Council for Food and Nutrition Security (CONSEA), composed 2/3 by civil society organizations and 1/3 by Government representatives. CONSEA reports directly to the President, and is tasked with advising the government on guidelines and policies to advance the right to food in the country.

⁶⁶ See Guatemala National Council for Food and Nutrition Security (CONASAN).

⁶⁷ Malawi created the National Food and Nutrition Security Committee, which reports to the Cabinet Committee on Food and Nutrition chaired by the President.

⁶⁸ In Mozambique, the Technical Secretariat for Food and Nutrition Security within the Ministry of Agriculture is tasked with advising the government on food security and right to food related policy with a view to integrating the right into relevant policies and programs.

⁶⁹ In Nicaragua, the National Commission on Food and Nutrition Sovereignty and Security, attached to the Office of the President of the Republic.

⁷⁰ In Peru, the Multisectoral Commission on Food Security was created within the Presidency of the Council of Ministers.

⁷¹ On the rationale for establishing similar commissions see Paris Principles Relating to the Status of National Institutions, G.A. Res. 48/134, U.N. Doc. A/RES/48/134 (Dec. 20, 1993).

⁷² Examples can be found in Brazil, Canada, Guatemala, India, Ireland, Malawi, Mali, New Zealand, Nicaragua, Peru, Philippines, Republic of Korea, Uganda, and South Africa. Most of these are tasked with the promotion and protection of human rights in general; some mandates refer specifically to economic and social rights (like, for instance, the South African one) and others to the right to food (like, for instance, in the case of Brazil, where a Special Commission to Monitor Violations of the Right to Food was established).

sector,⁷³ with a chair appointed by the MAAIF. The Council is tasked with ensuring that Uganda fulfils its international right to food obligations by, among others, ensuring harmonization of food and nutrition concerns at all levels of government, coordinating and monitoring the implementation of the Food and Nutrition Policy, advising the Government on relevant policy, legislative and strategic action required to promote food and nutrition security in the country, promoting research and advocacy and regulating private activities that affect the enjoyment of the right to food.⁷⁴ The Bill provides for the Council to be assisted by Food and Nutrition Committees tasked with coordination, awareness raising and monitoring functions at district and sub-county levels.⁷⁵

3.3.2 The Plan for Modernisation of Agriculture—Secretariat

Set up in 1997 to “transform the country’s agriculture from subsistence to a commercially oriented sector,”⁷⁶ the PMA represents a strategic framework within which to address livelihood improvement and the eradication of poverty through multi-sectoral interventions at both central and local government levels. The Plan is part of the Poverty Eradication Action Plan⁷⁷ and focuses on facilitating the country’s transition from subsistence agriculture to commercial agriculture, with little or no attention to the *process dimension* and *substantive dimension* of human rights principles. While the PMA Secretariat has undoubtedly played a key role in the coordination of the process of negotiation of a Food and Nutrition Bill, its mandate does not fully reflect a rights-based approach. In fact, an emphasis on market and agro-processing factories and services could represent a threat to the right to food, by underestimating the risk an overemphasis on markets can have on domestic food consumption, incentivizing farmers to grow cash crops to the possible detriment of household food security. An adequate regulatory framework would need to be set up by the State in compliance with its obligation to protect the right to food. The PMA was part of the Poverty Eradication Action Plan (PEAP), which has now been replaced by the Uganda National Development Plan, with a thematic focus on

⁷³ Draft Bill for a Food and Nutrition Act, *supra* note 22, at art. 13.

⁷⁴ *Id.* at art. 11.

⁷⁵ *Id.* at art. 29.

⁷⁶ Rukundo, *supra* note 40, at 144.

⁷⁷ The PMA is part of the Government of Uganda’s broader strategy of poverty eradication contained in the poverty Eradication Action Plan (PEAP) of 1997. The PEAP was revised in 2004 to cover the period 2004/2005–2007/2008. Its main objectives are to: increase incomes and improve the quality of life of poor subsistence farmers by increasing their productivity and share of marketed production; improve household food security through the market rather than emphasizing self-sufficiency; provide gainful employment to the rural poor through the secondary benefits of investments in agro-processing factories and services; promote sustainable use and management of natural resources by developing a land use and management policy; and the promotion of environmentally friendly agricultural technologies. See Plan for Modernisation of Agriculture Objectives, available at <http://www.pma.go.ug/page.php?tb=aboutus>.

“growth, employment and socio-economic transformation for prosperity”. The Development Plan appears to have better mainstreamed human rights principles within its text, and more effectively attempted to address their promotion and advancement at legal, policy and institutional level—in this sense the Development Plan is more in line with the Food and Nutrition Bill than the PEAP was.⁷⁸

The functions of the PMA Secretariat include: providing cross sectoral linkages, as well as technical and policy analysis; monitoring the implementation of the plan; and facilitating legal, policy and strategic processes. The Secretariat has played a key coordination and convening role throughout the process of elaborating the Food and Nutrition Bill.

3.3.3 The Uganda Human Rights Commission

A constitutionally mandated independent body, the Uganda Human Rights Commission is tasked with investigating complaints made by any person or group of persons against the violation of any human right; carrying out research, education and information programs; making recommendations to Parliament including in the area of compensation for victims of violations; and monitoring Government compliance with international obligations.⁷⁹

While the Human Rights Commission has indeed played a key role in promoting the right to food through several capacity building initiatives at the national level, and has been active throughout the process of discussion of the Food and Nutrition Bill, as well as in making recommendations for a constitutional review process to take into consideration the right to food, its work is presently constrained by the right to food not being among the fundamental rights protected in the Constitution. Explicit constitutional recognition would allow the Commission to investigate complaints against the violation of any of the human rights enshrined in the Constitution, and to recommend compensation for victims as well as compliance mechanisms for the Government—as is the case, for instance, with the Human Rights Commission in South Africa.⁸⁰

3.4 Judicial Protection

In recent years, objections to the justiciability of the right to food have been overcome by a growing body of jurisprudence across the world, which has recognized

⁷⁸ Uganda National Development Plan 2010/11–2014/15, adopted in 2010.

⁷⁹ National Constitution of Uganda, *supra* note 8, at art. 52.

⁸⁰ For more information, see the functions of the Human Rights Commission in the Constitution of South Africa, 1996, art. 184(a)–(b). In 2010/2011 a total of 5626 complaints were handled by the Commission with growing emphasis on violation of economic and social rights with equality and human dignity featuring as the two highest attention matters. See SOUTH AFRICA HUMAN RIGHTS COMMISSION, SOUTH AFRICA HUMAN RIGHTS COMMISSION ANNUAL REPORT (2011).

the right to food in its entirety, or aspects of it, as a justiciable right.⁸¹ Case law so far has shown that a judicial claim—in the form of an individual or collective action or a public interest litigation process—on an alleged violation of the right to food can be found admissible and adjudicated in a number of legal systems, on the basis of the combination of international treaties and constitutional provisions.⁸² While successful jurisprudence is reported in a number of countries,⁸³ no jurisprudence has yet emerged in Uganda with regard to the right to food specifically. Cases have been filed in relation to other rights protected in the Constitution or in other Acts, including the Children Act and relevant provisions in it on adequate care, like the provision of adequate food.⁸⁴ However, violations of the right to food as such have not been claimed, and instead other infringements, such as attempted murder and intent to cause grievous harm have been pleaded in its place.

The full enactment of the Food and Nutrition Bill, together with a constitutional review, introducing the right to food in the body of fundamental rights and freedoms section of the Constitution, would significantly enhance the justiciability of the right to food in the country. The right would then fall under the provisions in Art. 53.2 of the Constitution whereby the Human Rights Commission, if satisfied that a violation has occurred, can determine the appropriate legal remedy or redress. Furthermore, a person who is aggrieved by the action or decision of a public authority may appeal to the Council for a review of the action/decision. In the case of such action/decision being taken by the Council, the person can appeal to the Minister.⁸⁵

Other obstacles exist to the judicial protection of the right to food in Uganda. Individual access to judicial remedies is hindered at present by high legal fees, lack of access to information and legal aid, and inadequate legal representation.⁸⁶ Efforts sought to remedy these obstacles have focused mainly on civil and political rights. Uganda's ratification of the Optional Protocol to the ICESCR would offer another avenue for individual complaints.

⁸¹ CRISTOPHE GOLAY, *THE RIGHT TO FOOD AND ACCESS TO JUSTICE: EXAMPLES AT THE NATIONAL, REGIONAL AND INTERNATIONAL LEVELS* (2009).

⁸² *Id.*

⁸³ See e.g. Bundesgericht [BGer] [Federal Court] V, *Einwohnergemeinde X. und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367) (Switz., 1998); *Rarasea v. State*, Criminal Appeal Case No. HAA0027 (May 12, 2000) (Fiji); Action No 4/830/07 of 12 March 2007 (Braz.); Corte Constitucional, *Acción de tutela instaurada por Abel Antonio Jaramillo y otros contra la Red de Solidaridad Social y otros*, Sentencia T-025/2004 (Colom.); Corte Suprema de Justicia de la Nación, *Defensor del Pueblo de la Nación c. Estado Nacional y otra*, 2007, para. 1 (Arg.); *Kenneth George and others v. Minister of Environmental Affairs and Tourism*, File No. EC 1/ 2005 (S. Afri.); *People's Union for Civil Liberties v. Union of India and others*, Writ petition (civil) No. 196/2001 (India); and *Prakash Mani Sharma and others on behalf of Forum for Protection of Public Interest (Pro Public) v. Prime Minister and Office of Council of Ministers and others*, Writ petition No. 0065-Wo-149 of 2065 BS (2008) (Nepal).

⁸⁴ Uganda Children Act, 1997, art. 11.

⁸⁵ Draft Bill for a Food and Nutrition Act, *supra* note 22, at art. 40(2)–(3).

⁸⁶ Rukundo, *supra* note 40, at 151.

4 Implementation of the Right to Food in Uganda: Lessons Learned, Challenges and Way Forward

4.1 Lessons Learned from Implementation Mechanisms

Through a favorable policy and institutional framework, the right to food in Uganda began its journey from a policy commitment to a legal entitlement with the recently tabled Food and Nutrition Bill. Starting with the 1995 Constitution and the recognition of food as a right in its Directive Principles of State Policy, the right to food has since advanced in Uganda mainly through policy action. While a rights-based approach was already somewhat present in the 2003 Food and Nutrition Policy—which went as far as calling “ensuring food and nutrition security” a constitutional obligation—it took nearly a decade for this to be reflected in law, with a Bill still awaiting approval.

These developments stand somewhat in contrast with other experiences in the implementation of the right to food at the national level in different regions of the world. First, it is striking that, while legislation has been a major tool in Latin America, policy action remains the first choice in Africa.⁸⁷ Second, while the right to food has travelled ‘from the legislator to courts of law’ in a number of countries, establishing its indisputable justiciability, with leading cases in South Asia,⁸⁸ such judicial action seems still far from reach in Africa, with the exception of South Africa.⁸⁹ Finally, the cases of India, Guatemala and Brazil tend to indicate that the right to food has advanced most successfully where strong political leadership and a vibrant civil movement were behind it.⁹⁰ As we will discuss below, this has been somewhat lacking in the Ugandan context.

What lessons can be drawn from the Ugandan experience? While the three main implementation avenues discussed above—legal, policy and institutional, leaving aside judicial protection—are presented one after the other in this chapter, no actual sequence is to be prescribed: whichever means are most appropriate, available and effective in a given context can have precedence. Ideally, action should be taken at all levels (legal, policy and institutional), starting where the environment is most

⁸⁷ For more information see the case studies in U.N. Food & Ag. Org. [FAO], *RIGHT TO FOOD: MAKING IT HAPPEN—PROCESS AND LESSONS LEARNED THROUGH IMPLEMENTATION* (2011) [hereinafter *MAKING IT HAPPEN*].

⁸⁸ See e.g. *People’s Union for Civil Liberties v. Union of India and others*, Writ petition (civil) No. 196/2001 (India); *Prakash Mani Sharma and others on behalf of Forum for Protection of Public Interest (Pro Public) v. Prime Minister and Office of Council of Ministers and others*, Writ petition No. 0065-Wo-149 of 2065 BS (2008) (Nepal).

⁸⁹ See, e.g., High Court, *Kenneth George and Others v. Minister of Environmental Affairs & Tourism* (2007) (S. Afri.).

⁹⁰ Aruna Sharma & Margret Vidar, *India—Legal Campaigns for the Right to Food* 93–117, in *MAKING IT HAPPEN* *supra* note 87; Mauricio Rosales & Luis Enrique Monterosso, *Guatemala—Writing a Page of History*, 75–92, in *MAKING IT HAPPEN* *supra* note 87; Elisabetta Racine & Frank Mischler, *Brazil—A Pioneer on the Right to Food* 55–73, in *MAKING IT HAPPEN* *supra* note 87.

conducive and chances of success and impact higher, but ultimately combining all. The likelihood of impact in reducing hunger that can be attributed to each of the above avenues is related, for most, to the position each holds in the domestic order. While, for instance, legislative action is considered an avenue of particular importance,⁹¹ if a given country is not receptive to such means, a lot more can be achieved through other mechanisms that are more effective in a given context. At the same time, no mechanisms in isolation can lead to success: should a law be passed with no mechanism in place at policy and institutional level to execute its provisions, then the law would remain meaningless.

In other words, all three mechanisms (legal, policy and institutional) can prove effective in protecting the right to food whether this happens through a) the technical precision of a law translating programs into legal entitlements, b) the strategic direction of a policy giving the right to food the political leverage it requires, or c) the leadership of a strong multi-sectoral coordination body, bringing actors together and measuring progress against time bound targets.

4.2 Obstacles Facing the Legal, Policy and Institutional Mechanisms in Uganda

With regard to legal protection, the main challenge in advancing the right to food relates to transforming the understanding of food as a benefit or question of charity to recognizing it as a “legal entitlement”. Recognizing food as a legal entitlement has consequences in terms of accountability of duty bearers, and the ability of a person to take action to obtain remedy to an alleged violation. This transformation introduces the justiciability of the right to food, which is still for some Governments a very politically sensitive subject.

While policy protection may seem an easier avenue to pursue in some cases, the difficulty with policy-based implementation is ensuring that Government priorities and budgets are aligned with the policy objectives and support the protection of the right to food. Often Government priorities are determined by external factors (including donors’ agenda, international agreements, etc.) that may or may not comply with a human rights agenda.

Finally, in terms of institutional protection, the main challenge is whether a designated body has the capacity to undertake a particular task and the related capacity to take ownership and responsibility over implementation. One factor that has slowed down the process of advancement of the right to food in Uganda is the “Bill ownership debate” between the Ministry of Agriculture, Animal Industry and Fisheries and the Ministry of Health. Resource constraints can also play a key role.

Looking at the obligations of the Ugandan state to “respect, protect and fulfill” the right to food, it is clear that challenges remain in meeting all three types of obligations. In terms of *respect*, more efforts need to be made to ensure compatibility of legal and policy frameworks with right to food standards and to guarantee that

⁹¹ General Comment No. 12, *supra* note 5, at para. 29.

new instruments will not harm individuals' existing access rights. With regard to the obligation to *protect*, Uganda's initiatives in agri-industry development, macro economy strategy and building multi-lateral partnerships may be posing challenges. Measures must be taken to protect individuals and communities from actions that could have a negative impact on their access to natural resources and services, and tighter regulation of external actors is needed. In terms of *fulfill*, greater emphasis should be placed on support programs for the most vulnerable (*facilitate* dimension), including social safety net schemes, and in strengthening the resilience of communities to shocks through programs aimed at preparedness and rehabilitation, including food reserves, and aid programs (*provide* dimension).

4.3 Furthering the Implementation of the Right to Food in Uganda: Opportunities

While the right to food journey in Uganda has been and is a difficult one, a number of opportunities have arisen most recently which present fertile ground for action. Below are some recommendations addressed to a multi-sectoral audience (government and civil society alike) to advance the right to food at national level.

4.3.1 Prioritizing Hunger

As hunger is currently a high priority on the international development agenda, it is important for Uganda to build on this momentum and maintain the eradication of hunger as a key Government objective. This should be strongly emphasized in policy documents, particularly those related to areas of agriculture, nutrition and economic and social development. Political leverage will enhance this objective, and for this reason it would be advisable to locate the new Food and Nutrition Council (foreseen in the Bill) at the highest political level of Government, possibly under the Office of the Prime Minister.

Aside from the Council, other actors, such as the Human Rights Commission, have played and can still play a key role in the fight against hunger and in the advancement of the right to food. The Commission is at present inadequately resourced to effectively work on the right to food. Better equipping the Commission will grant the right to food access to both legal and policy areas of action. More specifically with regard to investigating violations, a further constitutional review could also expand the category of rights protected to include economic and social rights. This would legitimize the Commission to investigate violations of the right to food and recommend remedial action, and enhance the justiciability of the right to food.

4.3.2 Inter-ministerial Coordination, Policy Coherence and Budgeting

To avoid conflict, policy coherence among different sectoral instruments should be promoted. Inter-ministerial coordination could be strengthened in order to harness multi-sectoral strengths and ensure coherent action plans. Efforts should be made to more effectively link policies and strategies to annual budgets, as adequate funding is a key determinant to implementation. Similarly, more effort must be directed to strengthening the connections between economic growth and poverty reduction and clear immediate and long term goals should be set.

With a view to promoting effective action at different levels, and better targeting of programs, undertaking a right to food assessment at legal, policy and institutional level is highly recommended. This exercise could be conducted by the Government in partnership with civil society and be guided by the practical suggestions in the *Voluntary Guidelines on the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security* and the FAO's *Right to Food Methodological Toolbox*.⁹² It would entail assessing the extent to which the right is protected, promoted or put at risk in current legal and policy instruments, as well as in institutional arrangements, examine the way in which vulnerability is defined and addressed, resources allocated, and action taken. It would look at both outcomes and process and assess the extent to which human rights principles are mainstreamed in relevant national processes. It would finally identify areas of action, and related institutional responsibility. It should be accompanied by the promotion of more comprehensive vulnerability assessment tools that rely on disaggregated data and participatory data collection to ensure inclusive targeting. Conducting proper assessments would entail developing clear verifiable and time-bound right to food indicators on both outcome and processes against which to measure progress and accountability. Most recently developed tools, including the *FAO Guide on How to Conduct a Right to Food Assessment at District Level*,⁹³ will assist in this process which would also entail facilitating access to relevant data and information in all languages to enhance dissemination of information, transparency and public participation. In this light, engaging the Government more effectively with UN monitoring mechanisms, such as periodic reviews of various UN bodies, would be advisable. Submitting reports would assist the country in better identifying areas needing further action and in seeking technical support where needed.

4.3.3 Promoting Education

Capacity and capability building on the right to food should be strengthened at all levels, from Government to grassroots. Training and advocacy materials should be

⁹² U.N. Food & Ag. Org. [FAO], Right to Food Methodological Toolbox, available at http://www.fao.org/righttofood/publi_02_en.htm.

⁹³ U.N. FOOD & AGRIC. ORG. [FAO], GUIDE ON HOW TO CONDUCT A RIGHT TO FOOD ASSESSMENT AT DISTRICT LEVEL (2011).

translated into local languages to facilitate local groups understanding and to empower them for action. Introducing right to food modules in relevant university curricula as a way of mainstreaming a rights-based approach would also be important. In order to strengthen advocacy on food and nutrition issues and to create a vibrant national movement, strengthening linkages with academia and research institutions to promote knowledge dissemination would be key.

A number of enabling factors offer key opportunities for Uganda at present to advance the right to food. The forthcoming adoption of the Food and Nutrition Bill will offer a solid legal basis for the Food and Nutrition Policy, enhancing its reach and improving its effectiveness. The new institutionalized role of the Food and Nutrition Council will address inter-sectoral coordination gaps and further policy coherence. The availability of new capacity building tools, such as those mentioned above, will assist in undertaking relevant assessment and monitoring work through a human rights lens and put emphasis on *process* and not only on *outcomes*. The emerging role of the Human Rights Commission also provides a key opportunity for change. The presence of an active international right to food multi-stakeholder network provides further leverage for change at the domestic level. Finally, a renewed national focus on food and nutrition security, led by the recent adoption of the Nutrition Action Plan for 2011–2015, is opening policy space for the promotion of the right to food and the adoption of the Bill, and is engaging a new set of players, the nutrition community, in the struggle for the realization of the right to food.

5 Conclusion

During the past two decades, progressive thinking in Uganda has informed policy and legal processes alike, with the latter encountering more obstacles in gaining political leverage. Capacity building and adequate resources remain a constraint in strengthening local agents' ability to determine meaningful change. Possibly the absence of a clear national political focus—at times donor driven—in the area of food and nutrition security, as well as weak advocacy, have been such that political parties have not always maintained the eradication of hunger and malnutrition and the protection of the right to food at the top of their agenda. More needs to be done to enhance Government ownership of these processes and to promote harmonised responses at different ministerial levels.

As other countries where the right to food has advanced successfully have shown, it is essential to allow critical space for NGOs in national political debates and priority-setting processes.⁹⁴ This has been somewhat missing from the Uganda experience and needs to be addressed. Political leadership is the second aspect that has been critical in successful other countries and one that could be enhanced in

⁹⁴ See, for instance, the example of the right to food in Brazil and India detailed in MAKING IT HAPPEN, *supra* note 87.

Uganda through the positioning of relevant right to food related functions (to be well resourced and coordinated) at the highest Government level.

In spite of the current challenges faced by Uganda in further advancing the protection of the right to food at national level, key lessons can be learned from the country's experience in the past decade, which could inform similar processes in other countries. The Uganda case shows how important it is for a country to be fully involved in regional and international dialogue and to participate in relevant consultations as these activities can enhance progressive action in legal, policy and institutional processes at the national level. Uganda's participation in the FAO-led regional workshop on legislating for the right to food⁹⁵ was certainly a key step in the process of redrafting the Bill and provided insights into the different aspects the Bill should address. The case also shows the importance of addressing hunger from a united front. The Uganda Food and Nutrition Bill is the result of multi-stakeholder consultations, which led to a very comprehensive text that captures the multidimensional nature of the right to food and its *entitlement-obligation dimension* that for long remained silent. This text, the most advanced in Africa with regard to the right to food, is testimony to the power of a multi-sectoral approach to maximize results. Finally, the example of Uganda shows how policy, separately from legal frameworks, can be a powerful means to advance a right. For approximately a decade the introduction of a rights-based approach into development processes in the country took place through policy instruments alone, such as the Food and Nutrition Policy and Strategy, with no support from legislation. While the absence of a sound legal basis did affect the full implementation of the right to food, policy dialogue alone was sufficient to keep the debate alive and bring the right to food to the legal table again, and in view of Parliament approval.

As the international community further emphasizes the need to maintain the fight against hunger at the top of the development agenda, with a central role for human rights, new opportunities will arise to strengthen local voices in the governance of local food systems through the protection of the right to food. By capitalizing on the momentum offered at the international level—which can assist in leveraging political support at the local level—local movements can take leadership and work towards the promotion and advancement of the right to food, in a way that reflects domestic priorities and leads to meaningful and lasting change.

⁹⁵ The Regional Workshop on Legislating for the Right to Food was organized by FAO and MA-AIF in Uganda in 2007.

Part II
Regulating for Change

Respecting and Protecting the Right to Food: When States Must Get Out of the Kitchen

Nadia C.S. Lambek

Abstract One of the benefits of the right to food approach in combating food insecurity is the emphasis it places on the state providing an environment for individuals, and in certain cases communities, to meet their own food needs. This emphasis on creating the space for individuals to meet their food needs is often misunderstood by critics of the right to food. The right to food is often imagined as solely a positive right—with obligations on the state to provide food to the hungry. The right to food encompasses this right—and places corresponding obligations on the state to fulfill the right to food—but like other economic and social rights it contains other state obligations as well. These other obligations in essence derive from negative rights, depicting where and when the state or other third parties must not hinder the ability of individuals to meet their own food needs. This chapter explores these negative rights from a theoretical standpoint as well as through a case study. It argues that addressing the negative rights to food—and the state obligations to respect and protect the right to food—is essential for building sustainable food systems grounded in the promotion of human dignity.

1 Introduction

In 1996, when world leaders, activists and food producers met in Rome for the World Food Summit, several clear messages emerged. One message was that States and stakeholders were interested in how the right to food could be operationalized at

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the national level.¹ The right to food had been recognized internationally as a human right since its inclusion in the Universal Declaration of Human Rights (UDHR) in the 1940s,² and later the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the 1960s.³ But what the core content of the right contained and what corresponding obligations fell on states and other entities was not clear.⁴

Following the Summit two important documents were drafted that have helped shape the progression of the right to food. The first, *General Comment No. 12*, drafted by the Committee on Economic, Social and Cultural Rights, authoritatively clarified the content of the right to food and provided greater detail on state obligations.⁵ The second, the *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, adopted by state parties to the United Nations Food and Agricultural Organization (FAO), provided steps for the implementation of the right to food at the national level.⁶

In describing the content of the right to food and tools for implementing it, both *General Comment No. 12* and the *Voluntary Guidelines* emphasized the central role of the state not only as a provider of food in certain circumstances, but as a potential barrier to the ability of people to meet their food needs. Specifically, the state could be a barrier by engaging in activities or allowing third parties to engage in activities that impeded on the ability of people to grow or purchase food. In recognition of these conflicting roles, the drafters of both documents described the right to food as consisting of three state obligations—the obligations to *respect*, *protect* and *fulfill* the right to food. This framework reflects negative and positive rights—positive

¹ See World Food Summit, *Rome Declaration and Plan of Action* 61, objective 7.4 (1996).

² Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/10, art. 25 (Dec. 12, 1948) [hereinafter UDHR].

³ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, art. 11 (Dec. 16, 1966), *reprinted in* 6 I.L.M. 360 (1967) [hereinafter ICESCR].

⁴ In the mid-1980s, Philip Alston argued that, “despite the importance attached to the norm, no international agency or organ, whether in the human rights or food field, has ever endeavored to analyze, develop or codify the specific normative implications of the right to food. On the contrary, they have to a significant extent permitted a devaluation of the actual international law norm—the right to adequate food—by the use of surrogate terms purporting to affect international law but which are in fact devoid of any recognized normative content.” Philip Alston, *International Law and the Human Right to Food*, in *THE RIGHT TO FOOD* 9 (Philip Alston & Katarina Tomasevski eds., 1984).

⁵ See U.N. Comm. on Econ., Social and Cultural Rights [CESCR], *General Comment No. 12: The Right to Adequate Food*, 40–41, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter *General Comment No. 12*].

⁶ The World Food Summit: Five Years Later invited the United Nations Food and Agricultural Organization (FAO) Council “to elaborate ... a set of Voluntary Guidelines to support Member States’ efforts to achieve the progressive realisation of the right to adequate food”. See World Food Summit, *Draft Declaration of the World Food Summit: Five Years Later* 10 (2002). At the 127th Session of the FAO Council, these Voluntary Guidelines were adopted. See U.N. FOOD & AGRIC. ORG. [FAO], *VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY* (2004). For more information on the negotiations and adoption of the guidelines, see Report of the U.N. Special Rapporteur on the Right to Food, Jean Ziegler, *The Right to Food*, U.N. Doc. E/CN.4/2005/47, paras. 27–33 (2005).

rights that require the state to ensure no one goes hungry (*fulfill*) and primarily negative rights that require the state not to infringe upon or impede upon the ability of people to meet their own food needs (*respect* and *protect*).

Despite these differing obligations, the right to food is often understood as requiring states to put in place school feeding programs, implement social protection schemes, and provide food to people in need without significant focus on what states are not permitted to do.⁷ Even the right to food response to the Global Food Crisis of 2007–2008 has emphasized the importance of investing in small-scale food producers, who form the bulk of the world's hungry, and of transitioning to more sustainable, equitable food systems.⁸ While investing in small-scale farmers, school feeding programs and safety nets are clear ways that government action can address issues of hunger and food insecurity, this chapter argues they are not enough to guarantee food as an entitlement. Indeed, there are a myriad of ways states directly or by omission act, or permit third parties to act, that undermine the ability of people to meet their food needs. Only by adequately addressing the aspects of the right to food that oblige the state not to interfere or to permit third parties to interfere with the means by which people acquire food, can the right to food be fully realized.

This chapter argues that these negative rights—the portions of the right to food that underpin the *respect* and *protect* state obligations and require non-interference with the ability of people to meet their food needs—extend the right to food broadly to encompass many forms of state action and inaction. In so doing, the obligations to *respect* and *protect* require states to take seriously how people meet their food needs and to consider what might affect the ability of people to meet these needs today and in the future. They require states to contemplate the impacts of industrial development policies and plans, the indirect and direct effects of laws governing the environment, trade and fisheries, and a host of other areas. They also challenge the dominant critiques of social and economic rights, and present a framework for analyzing food systems that is grounded in the promotion of human dignity and flourishing.

The chapter begins in Section 2 with a description of the negative (*respect*, *protect*) elements of the right to food. Section 3 places these elements in context, using a case study to explore the wide reaching implications of the negative aspects of the right to food. Section 4 draws lessons from these case studies and Section 5 concludes by suggesting areas that should be addressed by advocates and social movements engaging in rights-based advocacy on issues of hunger.

⁷ For example, in India implementation of the right to food has focused on midday meal programs and access to work schemes. See Ministry of Human Resource Development, About the Mid Day Meal Scheme, <http://mdm.nic.in/> (last visited Feb. 5, 2013); The Mahatma Gandhi National Rural Employment Guarantee Act 2005 (In.).

⁸ See e.g. U.N. Special Rapporteur on the Right to Food Olivier De Schutter, Crisis in Opportunity: Reinforcing Multilateralism A/HRC/12/31 (2009).

2 The Negative and Positive Rights Encompassed in the Right to Food

2.1 *Misconceptions: Negative and Positive Rights*

Economic, social and cultural human rights, as distinct from political and civil human rights, are often viewed as positive rights, placing obligations on states to act in certain ways—states are required to provide housing, water, sanitation, education and food to those unable to provide adequately for themselves. Civil and political rights, on the other hand, are often viewed as negative rights, requiring the state to refrain from certain activities—the state must not interfere with peoples’ rights to practice their religion, to assemble and to vote. Negative rights also require the state to refrain from treating people in a discriminatory manner, and to ensure that third parties do not interfere with the rights of individuals to practice their religion or assemble etc. In this dualistic model, economic and social rights or positive rights oblige the state to proactively act, while civil and political rights or negative rights require the state to refrain from acting and to regulate third parties.

This dichotomy between negative and positive human rights, however, is flawed for a number of reasons. First, it ignores the fact that civil and political rights and economic, social and cultural rights were never to be understood as separate categories of rights. The two categories of rights are interdependent within the United Nations doctrine; there is no sense of “separateness or priority” between them and neither can be “logically nor practically ... separated into watertight compartments.”⁹ Further, the rights are mutually reinforcing with the enjoyment of civil and political rights dependent on the enjoyment of economic, social and cultural rights and vice versa.

The second reason the dichotomy is flawed, is that it fails to capture the multifaceted nature of rights—that one right can be made up of a collection of rights, both positive and negative. Indeed, this dichotomy fails to capture what I refer to herein as the “negative rights” associated with economic and social rights, and the right to food specifically. While these rights may not always be strictly negative, they require the state and third parties to refrain from interfering with the ability of people to conduct certain activities, thus protecting these activities in similar ways that traditional civil and political rights are protected.

The right to food, as an economic and social right, has come to be defined in such a way as to encompass both positive and negative rights. While this may not be clear on its face, the following subsections articulate what the negative rights associated with the right to food are. We begin with some background on the right to food and hunger broadly.

⁹ HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* 275 (2007).

2.2 *The Right to Food*

Before discussing the negative and positive rights associated with the right to food, a number of background points are useful. First, the right to food, as codified in the UDHR, is more than simply a right to be free from hunger. The right to food is an element of the right to an adequate standard of living, along with the rights to adequate housing, health and education.¹⁰ The right to food is described in two ways in the ICESCR. In Article 11.1, it is depicted as part of the right “to an adequate standard of living for himself and his family, including adequate food”.¹¹ In Article 11.2 it is described as “the fundamental right of everyone to be free from hunger”.¹² While these elements on their face suggest different rights, the fundamental right to be free from hunger is a subset of the more expansive and inclusive right to adequate food. Philip Alston, following a review of the *travaux préparatoires* for the drafting of Article 11, explains this as follows:

While on the one hand there is substantial difference between the two norms, with the first being much broader than the second, on the other hand the term “right to adequate food” is the appropriate overall one since there is no indication that paragraph 2 was intended by the drafters or by States which have ratified the Covenant to restrict or narrow the scope of the right proclaimed in paragraph one. Moreover, if the paragraph 2 formulation was taken in isolation as the definitive statement of the right, the Covenant would constitute not an elaboration and codification of the Universal Declaration as intended, but a considerable reduction in the scope of the right proclaimed in 1948.¹³

Any discrepancy in the text, notes Alston, is simply historical explained by the campaigns of the FAO at the time of the drafting.¹⁴ The right to food as part of a right to an adequate standard of living, and not simply as the right to be free from hunger, is also referred to by civil society as the right to food oneself.¹⁵

Second, the right to food as described in *General Comment No. 12*, and as with other economic, social and cultural rights, is to be achieved progressively.¹⁶ The concept of progressive realization understands the costly implications of

¹⁰ UDHR, *supra* note 2. The right to food is also protected in a number of other international conventions, from the Convention on the Elimination of All Forms of Discrimination Against Women to the Convention on the Rights of the Child, that have included protections for the right to food. For a lengthy discussion of the many places where the right to food has emerged in international law since the 1940s, see Laura Niada, *Hunger and International Law: The Far-Reaching Scope of the Human Right to Food*, 22 CONN. J. INT’L. 131, 166–77 (2006) and U.N. Special Rapporteur on the Right to Food, Jean Ziegler, *The Right to Food*, U.N. Doc. E/CN.4/2001/53, at para. 28 (2001).

¹¹ ICESCR, *supra* note 3, at art. 11(1).

¹² *Id.* at art. 11(2).

¹³ Alston, *supra* note 4, at 32–33.

¹⁴ See *id.* at 33. For a history of the negotiations that led to drafting of Article 11, see *id.* at 30–31.

¹⁵ ROLF KÜNNEMANN & SANDRA EPAL-RATJEN, FIAN INTERNATIONAL, *THE RIGHT TO FOOD: A RESOURCE MANUAL FOR NGOs* 51, 56, 58 (2004).

¹⁶ General Comment No. 12, *supra* note 5, at paras. 6, 14 & 16.

positive elements of the right to food for much of the developing world, i.e. the cost of providing food. But it is more than that. The progressive realization of the right to food is not an indication that the right to food is not absolute or not justiciable and thus unenforceable in court. Rather the progressive realization of the right to food takes on a transformative quality, adjusting how governments interact with people and the process by which people procure food, and reflecting that over time depending on population shifts, the right to food may need to be supported in different ways, requiring a continuous and progressive reexamination of food systems.

Third, the right to food, understood as the right to feed oneself or the right to an adequate standard of living, is of particular importance to rural smallholder farmers and peasants in the Global South who make up the majority of the world's hungry.¹⁷ These smallholder farmers and peasants are growing food or other agricultural goods, such as tea or coffee, for their own subsistence, which includes both growing agricultural products for personal consumption and to sell.¹⁸ Being able to sell food or agricultural goods is crucial for the rural poor, as it provides income for buying food supplements and non-food essential goods, as well as the inputs, such as seeds and fertilizers needed to continue growing food in the future. While the urban poor may be the fastest growing population of food insecure people, projections suggest that in 2050, if current trends continue, more than 50% of the hungry people will still reside in rural areas, often with difficulty in accessing infrastructure, such as roads, markets, extension services, credit, social protection and so on.¹⁹ These rural small-holder farmers in the Global South in many ways experience most acutely the failure of states to meet their obligations to *respect*, and *protect* the right to food because they rely on land and natural resources, areas of encroachment by the state and third parties. Because of this, the examples throughout this chapter focus primarily on rural poor populations.

¹⁷ Approximately 80% of the world's hungry live in rural areas and half of them are smallholder farmers or peasants. INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT [IFAD], RURAL POVERTY REPORT 2011, at 16 (2011); Thomas Hirsch et al., *Deepening the Food Crisis? Climate Change, Food Security and the Right to Food*, in THE GLOBAL FOOD CHALLENGE 79, 84 (2009). Consolidated data prepared by ETC Group suggest that there "are 1.5 billion [peasants] on 380 million farms; 800 million more growing urban gardens; 410 million gathering the hidden harvests of our forests and savannas; 190 million pastoralists and well over 100 million peasant fishers. At least 370 million of these are also indigenous peoples. Together these people make up almost half of the world's population and they grow at least 70% of the world's food." ETC GROUP, WHO WILL FEED US? QUESTIONS FOR THE FOOD AND CLIMATE CRISIS 1 (2009).

¹⁸ The vast majority of the world's undernourished, 852 million out of 870 million, in the period of 2010–2012 resided in the developing world. See U.N. FOOD & AGRIC. ORG. [FAO], THE STATE OF FOOD INSECURITY IN THE WORLD 2012, 8 (2012).

¹⁹ Hirsch, *supra* note 17, at 84.

2.3 *Negative Rights, Positive Rights and Corresponding State Obligations*

As previously noted, the *respect, protect* and *fulfill* typology was laid down authoritatively in *General Comment No. 12*.²⁰ This typology of state duties comprising three elements, now used widely as a framework for analyzing states' human rights obligations,²¹ was first developed by Asbjørn Eide in his report on the right to adequate food as a human right presented to the United Economic and Social Council (ECOSOC) in 1987.²² In addition to a number of procedural obligations,²³ this typology provides the basis for understanding states' obligations with respect to food.

The typical understanding of the right to food stems from the obligation to *fulfill* and the positive rights associated with the right to food. The obligation to *fulfill*, requires that the state ensure that no one goes hungry, even during times of emergency, and engage in remedying systemic structural causes of food insecurity. The obligation to *fulfill* the right to food has two branches: the obligation to provide and the obligation to facilitate. The obligation to *fulfill* (provide) requires the state to meet the right to food directly, "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".²⁴ Examples of state programmes aimed at the obligation to provide the right to food include the food stamp program in the United States,²⁵ or the

²⁰ General Comment No. 12, *supra* note 5.

²¹ For application of the *respect, protect* and *fulfill* framework to the right to adequate housing, social protection and health, see U.N. Comm. on Econ., Social & Cultural Rights [CESCR], General Comment No. 4: The Right to Adequate Housing (Dec. 13, 1991); U.N. Comm. on Econ., Social & Cultural Rights [CESCR], General Comment No. 19: The Right to Social Security, U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008); U.N. Comm. on Econ., Social & Cultural Rights [CESCR], General Comment No. 14: The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

²² ECOSOC, Sub-Comm. on Prevention of Discrimination & Prot. of Minorities, *The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right*, U.N. Doc. E/CN.4/Sub.2/1987/23 (July 7, 1987) (submitted by Asbjørn Eide).

²³ In addition to substantive provisions, the human right to food, like all economic, social and cultural rights, places procedural requirements on states. These requirements are part of the United Nations Common Understanding on a Human Rights Based Approach and seek to guide the process by which government decision-making is conducted. See United Nations Development Group, *Human Rights-Based Approach to Development Programming*, <http://www.undg.org/?P=221>. The basic principles have been summarized by the FAO with the mnemonic PANTHER—Participation, Accountability, Non-discrimination, Transparency, Human dignity, Empowerment and Rule of law. See U.N. Food and Agriculture Organization [FAO], The Right to Food Unit, *Guide to Conducting a Right to Food Assessment* at Box 2.1 (2009); LORENZO COTULA, MOUSSA DJIRÉ & RINGO W. TENGA, *THE RIGHT TO FOOD AND ACCESS TO NATURAL RESOURCES* 17 (2008).

²⁴ General Comment No. 12, *supra* note 5, at para. 15.

²⁵ For information on the program, see United States Social Security Administration, *Supplemental Nutrition Assistance Program Facts*, SSA Publication No. 05–10101, ICN 468655 (May 2012).

mid-day meal program in India.²⁶ The obligation to *fulfill* (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.”²⁷ Examples of facilitation include India’s *Mahatma Gandhi National Rural Employment Guarantee Scheme*,²⁸ Malawi’s fertilizer subsidy,²⁹ and Canada’s various social assistance schemes.³⁰

In contrast, the obligation to *respect* the “existing access to adequate food requires States’ parties not to take any measures that result in preventing such access.”³¹ The obligation can be seen as predominately ensuring a negative right, because it obliges the state not to act in certain ways and not to interfere with the means by which people acquire food. The obligation to *respect* requires that states look at the impact of legislation, regulation and government action on how people access and acquire food. This obligation implies that states must not take actions or engage in practices that prevent people from having adequate, available and accessible food.

In context, the obligation to *respect*, requires that the state refrain from interfering with individuals’ and communities’ rights to access the resources needed to provide food for themselves. For those who procure food through agriculture, this could mean access to land, water, roads and markets. For those who procure food through husbandry or fishing, this could mean access to grazing land or rivers, lakes and oceans, as well as access to markets. For those who procure food through purchase, the obligation to *respect* requires that the government refrain from interfering with access to income and markets. Interference, understood as engaging in activities with harmful impacts, could come in many forms including through trade laws that allow dumping of cheap foreign agricultural goods, resulting in an inability of local farmers to sell their food goods domestically. It could also come from government policies to subsidize certain crops like jatropha or corn, from which agrofuels are produced, or from government initiatives to lease land to foreign investors, despite the fact that smallholder farmers have non-formalized tenure rights to the land. The increased support for agrofuel production by many states has already had an impact on food security—not only has demand for agrofuels affected global food prices by increasing demand for certain products on commodity markets, but it has also undermined local food insecurity in many developing countries, as increasing quantities of land are converted to energy crop production and people are displaced

²⁶ For information on the program see, Ministry of Human Resource Development, *supra* note 7.

²⁷ General Comment No. 12, *supra* note 5, at para. 15

²⁸ The Mahatma Gandhi National Rural Employment Guarantee Act, *supra* note 7. The Act seeks to enhance the livelihood security of people in rural areas by guaranteeing one hundred days of wage-employment every financial year to each rural household if adult members agree to do unskilled manual work. For more information, see <http://nrega.nic.in/netnrega/home.aspx>.

²⁹ *Can it Feed Itself? An Expensive Fertilizer Subsidy Delivers a Bumper Harvest—But at What Cost?* THE ECONOMIST (May 1, 2008).

³⁰ See e.g. Ontario Ministry of Community and Social Services, About Social Assistance in Ontario, <http://www.mcscs.gov.on.ca/en/mcss/programs/social/> (last visited Feb. 5, 2013).

³¹ General Comment No. 12, *supra* note 5, at para. 15.

from their farms.³² Indeed, the rise in demand for agrofuels has been linked with the increased prevalence of large-scale land acquisitions,³³ and a host of violations of the right to food.³⁴

The obligation to *respect* extends into trade and intellectual property laws, ocean and fisheries' management, women's rights and a wide number of state activities. As summarized by Jean Zeigler, the former United Nations Special Rapporteur on the right to food:

Violations of the obligation to respect would occur, for example, if the Government arbitrarily evicted or displaced people from their land, especially if the land was their primary means of feeding themselves, or even if the Government took away social security provisions without making sure that vulnerable people had alternative ways to feed themselves, or if the Government knowingly introduced toxic substances into the food chain, as the right to food entails access to food that is "free from adverse substances."³⁵

The obligation also extends to specific populations. For example, with regards to indigenous populations, the obligation to *respect* requires that states not interfere with how indigenous populations hold and access land, water and other resources, and that indigenous populations are not deprived of any property or resource rights without being provided an opportunity for free prior and informed consent, and adequate compensation.³⁶

The obligation to *protect* the right to food "requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food."³⁷ The obligation provides that states regulate non-state actors to ensure that their activities do not have direct or indirect negative impacts on the access and availability of adequate food, including the resources needed to produce food. It also requires that states create entities to monitor and investigate third parties, and that institutions are in place to ensure that those whose rights have been violated are able to seek remedies. While the obligation to *protect* does require the state to act in certain ways, I refer to it as securing predominantly negative rights, because it secures non-interference by parties in the means by which people procure food.

At its essence, the obligation to *protect* ensures that more powerful actors are not able to engage in practices that harm the ability of less powerful actors to meet their food needs. As noted by Zeigler, "if the Government does not intervene when a powerful individual evicts people from their land, then the Government violates the obligation to protect the right to food. The Government would also fail to pro-

³² U.N. Special Rapporteur on the Right to Food, Olivier De Schutter, *What are the Impacts of Agrofuels on the Right to Food?* (2012).

³³ *Id.*; KLAUS DEININGER & DEREK BYRELEE, WORLD BANK, RISING INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS? 11–12(2010).

³⁴ See ACTION SOLIDAAITE TICAS MONDE ET AL., NOT ONE IDLE HECTARE: AGROFUEL DEVELOPMENT SPARKS INTENSIFIED LAND GRABBING IN ISABELA, PHILIPPINES (2011).

³⁵ U.N. Special Rapporteur on the Right to Food, Jean Zeigler, Note to the Secretary-General prepared by Jean Zeigler, The Right to Food U.N. Doc. A/56/201, at para. 27 (2001).

³⁶ *Id.* See also United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007).

³⁷ General Comment No. 12, *supra* note 5, at para. 15.

tect the right to food if it took no action if a company polluted a community's water supply."³⁸ Further examples of activities by non-state actors that could lead to violations of the obligation to *protect* if the state does not intervene include fraud and unethical behavior in contractual relations, and discriminatory treatment based on, for example, gender or race, in employment practices or the provision of services.³⁹ The obligation to *protect* also requires that states look forward and ensure that environmental regulations are in place to protect access to resources needed in food production in the future and to ensure that third parties do not degrade the environment. For example, with respect to large-scale land acquisitions and the rise in demand for agrofuels, concerns have been raised about the impact of unsustainable monocrop agriculture on land viability in the future.⁴⁰

At the heart of both the obligations to *respect* and *protect* the right food, is the right of people to feed themselves: these obligations ensure that the state does not interfere, hinder or impede on the ability of people to feed themselves. While the obligations to *protect* and *respect* require some proactive efforts on the part of the state, to regulate, monitor and enforce rights, even these proactive efforts are deeply rooted in the idea of noninterference. Both can be ensured by sectoral reviews of laws, using and responding to impact assessments, and providing a justiciable right to food that allows people to challenge state action or inaction in court. The following section illustrates how the negative elements of the right to food—the *respect* and *protect* obligations—can be understood using a real world example.

3 Respecting and Protecting in Context

The implications of state action and inaction on the ability of people to meet their food needs—whether from a rights perspective or any other—are not to be taken lightly. This section focuses on a concrete example that brings to light the implications of the negative elements of the right to food. The example concerns a new mining policy in Bangladesh and the potential construction of a large open-pot coalmine. Through this example, this section explores typical *respect* and *protect* violations and how the ability of people to access available and adequate food can

³⁸ Zeigler, *supra* note 35, at para. 28.

³⁹ For more discussion on this, see Karen Kong, *The Right to Food for All: A Right-Based Approach to Hunger and Social Inequality*, 32 SUFFOLK TRANSNAT'L L. REV. 525, 539–40 (2009).

⁴⁰ In a press release concerning violations of the right to food in the Philippines and in Indonesia relating to land-acquisitions for agrofuel production, Olivier De Schutter warned, "Large-scale monocrop developments mean a wholesale shift in land use and land access . . . All too often, this is to the detriment of existing land users. If the environment they depend upon is repurposed, degraded and placed off limits, their ability to produce or to procure food—and thus their right to food—will be severely threatened." Olivier De Schutter & S. James Anaya, *Agrofuel: UN Rights Experts Raise Alarm on Land Development Mega-Projects* (May 23, 2012).

be impeded by activities conducted directly by the state or by third parties. By unpacking the ways in which the right to food can be violated, this section further seeks to provide a framework for analyzing when and how a government should act or permit third parties to act, and the scope and reach of what needs to be considered by states employing a right to food approach. This example is not meant to indicate that states should not engage in development projects or the privatization of national industries per se, but that in any state action or inaction, the human rights consequences must form part of the decision making process. Where the consequences are too vast, the state should refrain from acting—and where states do choose to act, the state should minimize the infringements upon the ability of people to feed themselves, and offer proper compensation to remedy violations that have occurred. The state should also include those affected in any decision-making, and if indigenous people's rights are at stake, the state must seek prior and informed consent before acting.

3.1 *Bangladesh and the Phulbari Coalmine*

A planned but not currently operational large-open pit coal mine, located in one of Bangladesh's most fertile agricultural regions, provides an example of how development or infrastructure projects can impact on the enjoyment of the right to food and consequentially why and how the obligations to *respect* and *protect* can be crucial to addressing hunger and to developing sustainable and equitable food systems.⁴¹ The example, while specifically related to Bangladesh and a particular coalmine, is largely representative of other development projects around the globe. The example highlights many universal challenges posed by developments, from land conversion to environmental degradation, and the impact these developments can have on people's ability to meet their food needs.

As background, Bangladesh struggles with hunger, poverty and food insecurity. It is estimated that more than 17% of the population—upwards of 160 million people—is extremely poor.⁴² Poverty is often correlated with hunger and malnutrition and government figures suggest that about 40% of the population is food insecure, consuming less than the minimum daily recommended amount of food.⁴³ Agriculture is an extremely important industry in Bangladesh. Today, more than 70% of people in Bangladesh are employed either directly or indirectly in the agricultural

⁴¹ Bangladesh acceded to the ICESCR on October 5, 1998 and is thus duty bound to uphold the right to food as well as the other rights recognized in the Covenant.

⁴² United Nations World Food Programme [WFP], Bangladesh Overview, <http://www.wfp.org/countries/bangladesh/overview> (last visited Feb. 5, 2013).

⁴³ *Id.*

sector.⁴⁴ The average farm size is small, averaging only 0.62 hectares in 2011.⁴⁵ Farmers predominantly grow food for their own consumption and rely on the land and the environment for their sustenance and income. The fragility of the food situation is well documented,⁴⁶ as are the deep challenges Bangladesh has faced in administering food supplementation programs.⁴⁷

The proposed coalmine, often referred to as the Phulbari coalmine, is today at a critical juncture—and the future of the mine as well as its impact on the people of Bangladesh lies in the hands of the government. Project development was stalled in January 2007, when emergency rule was imposed on Bangladesh. A new government was formed following December 2008 elections, and from about that time, a parliamentary standing committee has been drafting and revising the mining policy for Bangladesh, and in so doing considering whether or not to permit open-pit mining. There have been significant domestic protests against the construction of the mine, which have been brutally suppressed by the government⁴⁸ and international recognition of the potentially disastrous consequences if the mine were to be constructed.⁴⁹ Meanwhile, Global Coal Management Resources, formerly Asian Energy Corp., the company behind the Phulbari project, has been pushing for it to move forward.

If constructed the mine will be located in northwest Bangladesh in the township of Phulbari, which sits over a large coal deposit.⁵⁰ The mine footprint will be approximately 2,180 hectares, but the accompanying infrastructure will occupy close

⁴⁴ MINISTRY OF AGRICULTURE, GOVERNMENT OF PEOPLES REPUBLIC OF BANGLADESH & U.N. FOOD AND AGRICULTURE, [FAO], TOWARDS A FOOD SECURE BANGLADESH: COUNTRY PROGRAMMING FRAMEWORK 2010–2015, 3 (2011) [hereinafter TOWARDS A FOOD SECURE BANGLADESH].

⁴⁵ M. A. Quayum & Amin Muhammad Ali, *Adoption and Diffusion of Power Tillers in Bangladesh*, 37 BANGLADESH J. AGRICULTURE RESEARCH 307, 308 (2012).

⁴⁶ See WFP, *supra* note 42.

⁴⁷ The Asian Human Rights Commission, Right to Food unit documents violations of the right to food in Bangladesh and across Asia. See Asian Human Rights Commission, <http://www.human-rights.asia/> (last visited Feb. 5, 2013).

⁴⁸ There has historically been significant push back from civilians on the construction of the mine and other energy developments in the country. These push backs came to a head in 2006, when police opened fire on a crowd of between 70,000 and 100,000 protestors, killing 3 and wounding many more. See Anu Muhammad, *ADB and the Case of the Phulbari Coal Project*, COUNTERCURRENTS (2007).

⁴⁹ On December 21, 2011, seven United Nations Special Rapporteurs sent a letter to the Government of Bangladesh raising concerns over the likely impacts of the Phulbari coal mine and the possible human rights violations that could ensue as a result of the mine's construction. The Special Rapporteurs combined concerns indicate the interconnectedness of human rights issues, particularly where they concern economic and social rights. See Joint Allegation Letter, Communication to the Government of Bangladesh, in U.N. Human Rights Council, Communication Report of Special Procedures, U.N. Doc. A/HRC/20/30 (June 15, 2012).

⁵⁰ GHD, Phulbari Coal Project, <http://www.ghd.com/global/projects/phulbari/> (last visited Feb. 5, 2013).

to 6,000 hectares.⁵¹ A number of significant infrastructural and development projects are set to be constructed alongside the mine, including at least one 500 Mega Watt coal-fired power plant, a new rail corridor and a new road. The construction will also lead to the realignment of an existing railway as well as two roads, and the diversion of two rivers.⁵² The extracted coal will allegedly be primarily for export, with only one-fifth targeted for domestic energy consumption.⁵³

So how might the construction of the mine impact the rights of people to access available and adequate food? First, the construction of the mine will impact the lives of all those who live on the mine foot-print or in the surrounding areas. For the farmers who directly farm in the mine foot-print, a lack of land will be the same as a lack of food. The majority of the farmers in the project area are smallholders, and according to NGO reports 80% derive their livelihoods from subsistence agriculture, primarily through rice cultivation.⁵⁴ Over one thousand households also cultivate fish in local ponds for both subsistence and income, and others own fruit trees and livestock that serve as a vital source of meat, milk, eggs and cash income.⁵⁵ Displacing these people will result not only in a loss of their food source, but their entire livelihoods. Unless proper compensation is provided (compensation including access to land or possibilities for secure gainful employment), they will not be able to meet their food needs. As of now, the draft Resettlement Plan for the project states clearly that no land-for-land compensation will be provided for the mostly farming and indigenous communities⁵⁶ who will be displaced as a result of the project.⁵⁷

Access to water for subsistence farmers, is not always easy to come by. There is a scarcity of water in Bangladesh suitable for irrigation in agriculture. Surface water across the country is characterized by high sediment levels, which block rivers and waterways in the dry season, and by increased levels of salinity in surface water over the last 30 years.⁵⁸ This results in limited water for irrigation. The last decade has been marked by a lowering of water tables during the peak dry months, making it a challenge for farmers to access water.⁵⁹ The costs of purchasing water for

⁵¹ See ASIAN ENERGY CORPORATION, ENVIRONMENTAL ASSESSMENT REPORT, BANGLADESH: PHULBARI COAL PROJECT, para. 7 (2006).

⁵² See generally *id.*

⁵³ INTERNATIONAL ACCOUNTABILITY PROJECT [IAP], THE PHULBARI COAL PROJECT: A THREAT TO PEOPLE, LAND, AND HUMAN RIGHTS IN BANGLADESH 1 (2002).

⁵⁴ *Id.* at 1.

⁵⁵ Joint Allegation Letter, *supra* note 49.

⁵⁶ The construction of the mine may impact 50,000 indigenous people, from 23 different tribal groups. See IAP, *supra* note 53, at 2.

⁵⁷ GCM Resources, Phulbari Coal Project: Resettlement, <http://www.gcmplc.com/resettlement> (last visited Feb. 5, 2013).

⁵⁸ TOWARDS A FOOD SECURE BANGLADESH, *supra* note 44, at 14.

⁵⁹ *Id.*

irrigation are prohibitively expensive for most farmers in Bangladesh, and so they must rely on available water.⁶⁰

At the same time that farmers in Bangladesh face significant challenges in accessing water, the Phulbari coalmine could have severe adverse impact on rivers and groundwater vital for household and agricultural use within the township of Phulbari, surrounding villages and local farming communities. Mining is water intensive and the project plans indicate that the mine will draw water continuously while in operation. This could reduce the water table by 15 to 25 meters, affecting a region extending over 10 kilometers beyond the mine's footprint and reducing access to water for 220,000 people.⁶¹ Further complicating access to water, reports from NGOs have signaled that there may be a high risk of acid mine drainage that could contaminate rivers beyond the project area, extending the impact of the mine on the ability of people to procure food.⁶² Water and agricultural land may also be polluted by the emissions and coal dust generated by the project. The pollution and drainage of existing water resources will ensure that violations of the right to food and the obligations to *respect* and *protect* the right to food extend into the future as people are unable to access water for irrigation or for their own consumption.

Second, the construction of the mine could impact access to food across all of Bangladesh for those who purchase food for their own consumption. The amount of arable land in Bangladesh has been steadily decreasing since the 1980s, due to rapid industrialization and urbanization. In 1980–81 the net cropped area in the country was 8.56 million hectares, and by 2004–2005 it was 7.97 million hectares.⁶³ About 220 hectares of arable lands suitable for farming are lost every day, or about 1 % of cropped land per year, to non-agricultural sectors.⁶⁴ The 12,000 acres around Phulbari is one of Bangladesh's most fertile, productive agricultural regions, naturally shielded from flooding and tropical storms,⁶⁵ and local farmers produce a variety of crops, including wheat, potatoes, maize, sugarcane, vegetables, fruits and numerous varieties of rice, through multiple harvests. These crops, and in particular, rice, Bangladesh's staple crop, are vital to the nation's granary and food security.⁶⁶ The footprint of the mine is also home to grazing lands, a network of waterways that support over one thousand fisheries, and nearly 50,000 fruit trees which also serve as vital food sources for all of Bangladesh.⁶⁷ The conversion of this land could reduce available food nationally.

⁶⁰ *Id.*

⁶¹ See IAP, *supra* note 53, at 2–3.

⁶² Joint Allegation Letter, *supra* note 49.

⁶³ Quayum & Ali, *supra* note 45, at 308.

⁶⁴ *Id.*; TOWARDS A FOOD SECURE BANGLADESH, *supra* note 44, at 12.

⁶⁵ Bangladesh is a lowland nation, and flooding is an annual occurrence, which often destroys crops. The location and elevation of the Phulbari region however, means the land is uniquely protected from the elements.

⁶⁶ Joint Allegation Letter, *supra* note 49.

⁶⁷ *Id.*

Third, the environmental impact of the mine could have long term effects on the ability of people in Bangladesh to meet their food needs in the future. Bangladesh is particularly prone to natural disasters and is affected by cyclones, flooding, salt-water intrusion and riverbank erosion.⁶⁸ Climate change is increasing the severity and frequency of flooding and changing water levels, which according to the World Food Programme, are “impacting the lives of millions in Bangladesh, particularly in the poorest and most vulnerable regions.”⁶⁹ Climate related shocks have already “led to increased food insecurity and displacement” and have reduced agricultural production in the region.⁷⁰

One of the key sources of resistance to the looming problem of climate change, is the Sundarbans Reserve Forest that lines the coast of Bangladesh in the delta of the Ganges, Brahmaputra and Meghna rivers on the Bay of Bengal and offers protection against tropical storms, shielding the coastline and helping to ensure agricultural areas and homes are not destroyed. The forest is a UNESCO-protected wetlands habitat and is one of the largest remaining mangrove forests in the world. The forest supports exceptional biodiversity, shields the coastline, prevents erosion and absorbs carbon dioxide in its sediments, further dampening the effects of climate change.⁷¹ The extracted coal will likely have to be transported through the Sundarbans Reserve Forest to reach an offshore facility. An Environmental and Social Impact Assessment conducted for the project concluded that there is an “extremely high risk” that barge fuel could contaminate the Sundarbans, and identified potential damage to this UNESCO-protected reserve as “one of the most significant issues associated with the project.”⁷² Damage to the Sundarbans Reserve Forest could have lasting effects on the ability of people to feed themselves through increasing the effects of climate shocks, tampering with the delicate and extraordinary biodiversity, and leading to the erosion of coastal land.

This case study shows how displacement, environmental degradation, conversion of agricultural land, resilience to climate shocks, interference with indigenous peoples rights and access to water can all play a critical role in food availability and food accessibility, particularly for small-scale farmers. Connecting this to government and third party action then illustrates the power of the obligation to *respect* and *protect* the right to food. In determining what the national coal policy will be, the right to food requires that the government consider the potential impact of various policies on the right to food, and chose what policy to adopt in part based on its obligation to avoid hindering the ability of people to meet their own food needs. The right to food requires that the government look at the impact of the mine and of various mining policies on the environment, including the mine’s impact on water

⁶⁸ WFP, *supra* note 42.

⁶⁹ UNITED NATIONS WORLD FOOD PROGRAMME, 2011 ANNUAL REPORT BANGLADESH 23 (2011).

⁷⁰ *Id.*

⁷¹ United Nations Educational, Scientific and Cultural Organization (UNESCO), The Sundarbans, <http://whc.unesco.org/en/list/798> (last visited Dec. 29, 2012).

⁷² See NOSTROMO RESEARCH, PHULBARI COAL: A PARLOUS PROJECT 25 (2008), *citing* ASIA ENERGY CORP., ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT (2006).

systems. Finally, in determining when to offer contracts to businesses and how to regulate third parties, such as the mining industry, the right to food requires the state to assess the impact of any development on the environment as well as access to water, land and employment, and to any other area connected to how people feed themselves.

4 Respecting and Protecting: Non-interference and Sustaining the Right to Food

The negative rights associated with the right to food—the *respect* and *protect* state obligations—provide a very different understanding of the right to food than what is often depicted when discussions of hunger or food insecurity arise in the news. The dominant response to the Global Food Crisis of 2007–2008, for example, has focused on raising productivity (through the provision of agricultural inputs, such as seeds or fertilizers), on increasing global food production and on providing food aid internationally and charity domestically.⁷³ Right to food advocates, and in particular those focused on the negative aspects associated with the right to food, argue that changing how governments interact with food systems and the people in them can alleviate food insecurity and end systemic hunger. The following subsections offer some reflections on how the negative rights associated with the right to food can help reform how we think about food, the role of the state, and the people whose rights are violated when the state or third parties hinder their means of procuring food.

4.1 A Transformative Approach

Amartya Sen, in his seminal work on poverty and famine, changed the way in which we view hunger—rather than see hunger as a question of low productivity or a lack of knowledge, we now understand that hunger is a question of distribution and disempowerment.⁷⁴ Understanding hunger through a human rights perspective also changed the way we view food—rather than a form of charity, to be given depending on goodwill, adequate food is understood as an entitlement, something owed to each person because she or he is human. The negative rights associated with the right to food provide an additional lens that allows us to see food as part of system deeply linked to human activity and dignity. Rather than simply viewing food as a commodity, the negative rights associated with the right to food require examining the entire food system and the ways in which people interact with that system. This is truly a transformative approach to tackling hunger and food insecurity.

⁷³ See e.g. U.N. HIGH LEVEL TASK FORCE ON THE GLOBAL FOOD SECURITY CRISIS, PROGRESS REPORT APRIL 2008–OCTOBER 2009 (2009).

⁷⁴ AMARTYA SEN, POVERTY AND FAMINES—AN ESSAY ON ENTITLEMENT AND DEPRIVATION (1981).

First, the negative rights associated with the right to food require the state to understand how people procure food, rather than simply whether they have adequate caloric and nutritional intake. In meeting the obligations to *respect* and *protect* the right to food, the state must understand who is engaging in agriculture and who is fishing, gathering from forests, raising livestock or purchasing food from markets. Meeting the obligations also requires that the state understand what resources people need to procure food such as potable water, seeds and uncontaminated soils or employment and living wages.

It then requires states to contemplate the impacts of industrial development policies and plans, the indirect and direct effects of laws governing the environment, trade and fisheries, and a host of other areas. Taking negative rights seriously should mean that states conduct human rights impact assessments before taking action or adopting laws and regulations. These assessments should look not only at the potential outcome of people's nutritional and caloric intake but at how people access food and what food is available. As the management of food systems touches upon many areas, this may involve engaging multiple government ministries—health, agricultural, development, fisheries, education, gender, labor etc.—through inter-ministerial coordination.

Second, at the heart of human rights is a notion that people must be empowered to participate in decision-making that affects their lives. The negative rights associated with the right to food remind us that this includes decision-making about state activities that may impede upon the ways people access available and adequate food. So when policy decisions are being made regarding state action or the regulation of third parties in some area that affects the food system, the people whose lives may be affected must be at the table. They must be part of decision-making and a party to policy development. Their participation must be more than consent. They must be part of the entire process and the decisions and outcomes must reflect their participation, voices and desires.

In these ways the realization of (or attainment of) the right to food should create and institutionalize food systems and infrastructures that ensure people have the resources required to produce enough food for themselves or the purchasing power sufficient to procure food from the market in the short and long term. This is an empowering approach because it respects food producers and consumers for the choices they make in their lives and the means by which they consume.

4.2 Addressing Right to Food Critics

The negative rights associated with the right to food turn much of the criticism of the right to food, and economic and social rights more generally, on its head. The dominant criticisms of economic and social rights, including the right to food, are first, that they are too costly and complex to implement and second, that they cannot truly be rights because they are not justiciable. Implementing positive rights as opposed to negative rights are costly and complex, critics say, because the rights require not

only redistribution but also a complex state infrastructure to administer the redistribution. According to David Kelley, “To implement the liberty rights of individuals, government must protect them against incursions by other individuals ... The laws involved are relatively simple; they essentially prohibit specific types of actions. The government apparatus required is relatively small, the ‘night-watchman state’ of classical liberalism.” He contrasts this to welfare rights, which require a much more activist and expansive government as well as significantly more costs.⁷⁵ This sentiment is echoed by Aryeh Neier, who notes that there are costs to ensuring fair trials (providing the accused access to a lawyer) and not engaging in cruel and unusual punishment (providing clean, not overcrowded and decent prisons), but that these incidental costs are minimal in comparison to the extensive re-distributional costs associated with economic and social rights.⁷⁶

The costs for the state associated with the negative aspects of the right to food are not zero, particularly if the state embarks upon proper monitoring, and engages in frequent human rights and environmental impact assessments of legislation and projects. In addition, it is fair to argue that in many cases, particularly with relation to the building of development projects like the Phulbari coalmine, there are lost opportunity costs for the state if a project is heavily regulated or halted altogether. However, implementing negative rights does not require redistribution or complex state infrastructure. It requires political will and a belief that just as the state should not interfere with the freedom of people to express themselves, the state should not interfere with the freedom of people to procure food.

Another criticism made against economic and social rights is that they are not enforceable and not justiciable, with courts being the improper venue to adjudicate violations. This criticism also concerns costs, though from the perspective of the separation of powers. Critics argue that courts do not have the power of the purse and allowing courts to make decisions with major financial and infrastructural consequences is an encroachment of the judiciary into the other branches of government, namely the legislature. Legislatures and parliaments are seen as the appropriate venue for making change in this area as positive rights require redistribution and are thus outside the ambit of the court.

This argument both neglects the negative elements of economic and social rights, and in particular the right to food, as well as fails to capture the growing success of courts in enforcing economic and social rights, often providing guidance to legislatures.⁷⁷ The negative rights associated with the right to food are easily justiciable by courts as they deal directly with state action or inaction in interfering with certain rights of people. Courts are accustomed to engaging in this type of analysis as they

⁷⁵ DAVID KELLEY, *A LIFE OF ONE’S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE* (1998).

⁷⁶ Aryeh Neier, *Social and Economic Rights: A Critique*, 13 HUM. RTS. BRIEF 1 (2006).

⁷⁷ Christian Curtis, *The Right to Food as a Justiciable Right: Challenges and Strategies*, 11 MAX PLANCK YEARBOOK OF U.N. L. 317, 317–337 (2007); CHRISTOPHE GOLAY, *THE RIGHT TO FOOD AND ACCESS TO JUSTICE: EXAMPLES AT THE NATIONAL, REGIONAL AND INTERNATIONAL LEVELS* (FAO Right to Food Unit, 2009); FIAN INTERNATIONAL, *ADVANCING THE RIGHT TO FOOD AT THE NATIONAL LEVEL: SOME LESSONS LEARNED* (2009).

commonly do so for a variety of civil and political rights. In addition, there are increasing examples of success in economic and social right jurisprudence. For example, while it was not decided on right to food based grounds, the decision of the High Court in South Africa to repeal the Marine Living Resources Act, which prevented access to the sea for small-scale traditional fisherfolk, provides a successful example of the potential justiciability of negative elements of economic and social rights.⁷⁸ Outside of the food context, courts have also found violations by states of their duty to *respect* and *protect* economic rights. For example, in a constitutional petition in 2011, the High Court at Embu in Kenya found that the government had failed to live up to its obligation to *respect* the right to adequate housing when the District Commissioner violently evicted 1,122 persons including children, women and the elderly from their homes.⁷⁹ In its ruling the Court found that as Kenya had ratified the ICESCR it was duty bound to “respect, protect and enforce the rights therein” and awarded damages to the victims.⁸⁰ Positive elements of economic and social rights have also been successfully adjudicated: the most commonly referenced case being the *People’s Union for Civil Liberties v. Union of India and Others*, launched in 2001 in India. In this case, the Supreme Court *inter alia* established a constitutional right to food, elaborated a basic nutritional floor and changed various government food schemes into legal entitlements.⁸¹ In both the Indian and South African example, the Court did not dictate to the legislature what the contents of the new law must be, but rather provided guidance to the legislature in how to develop a new law through participatory processes grounded in human rights.⁸²

One of the biggest obstacles to implementing the right to food at the domestic level is a lack of political will. Where this lack of political will comes from is difficult to gauge, but if it draws from the fears associated with how expensive implementation may be, or how unfeasible implementation may be from a justiciability perspective, then highlighting the negative rights associated with the right to food may provide a means of increased engagement from parties skeptical of the right to food, and economic and social rights more broadly. In answering some of its critics, the right to food may gain supporters and may engage politicians in reexamining

⁷⁸ South Africa, High Court, *Kenneth George and Others v. Minister of Environmental Affairs & Tourism*, Order 2007. For more information on the case, see OLIVIER DE SCHUTTER, SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, FROM CHARITY TO ENTITLEMENT: IMPLEMENTING THE RIGHT TO FOOD IN SOUTHERN AND EASTERN AFRICA 13–14 (Briefing Note 5, 2012).

⁷⁹ *Ibrahim Sangor Osman & 1,122 Others v. The Minister of State for Provincial Administration and Internal Security & 10 Others* [2011] eKLR, Constitutional Petition No. 2 of 2011, High Court at Embu (Nov. 16, 2011). These individuals and their relatives had occupied the concerned land since the 1940s, initially as grazing land, but beginning in the 1980s as homesteads. The residents were given no written notice of the eviction and the respondents did not obtain a court order or engage in any consultations with the residents.

⁸⁰ *Id.* at 8.

⁸¹ Writ petition (Civil) No. 196 of 2001 (Supreme Court of India). On this case, see in particular Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. I. INT’L L. 691 (2010).

⁸² See DE SCHUTTER, *supra* note 78, at 13–14; Birchfield & Corsi, *supra* note 81.

their assumptions and views on food, while changing their commitments and approaches to alleviating hunger.

4.3 *Reminding Us that Food is Different*

Focusing on the negative rights associated with the right to food reminds us that food systems need to be governed by democracy and democratic values that respect the producer and the consumer as well as people's relationship to food. The endemic and systemic challenges to achieving better food systems that arise when negative elements of the right to food are examined may lead one to believe that the fight for better food systems should no longer be focused on protecting the ability of much of the world's poor and hungry to procure food for their own consumption by farming, fishing etc. The argument could go that regulating the state and regulating third parties is an impossible endeavor in a world of competing interests and rather than pursue a romanticized version of the peasant, from a human rights standpoint it is better policy to move people away from agriculture, husbandry and fisheries, towards paid employment, and focus on the right to fulfill, addressing minimum wages, and building social security systems. In practice however, such an approach is unfeasible for a variety of reasons. For one the environmental costs of getting rid of small-scale farming and the biodiversity small-farms protect are too high.⁸³ Second, cities are not prepared to handle even greater rural urban migration, as they themselves are increasingly becoming areas of food insecurity.⁸⁴

But, perhaps the most important reason is that to a large degree this does not appear to be what many rural poor want. The success of *Vía Campesina* and other contemporary agrarian movements is an indication that the question of how to address food insecurity is not one of simply food or livelihood—but how food and livelihood are sought, and ultimately who gets to make decisions about food systems. The peasant movements are not nostalgic for an idealized past—they care about the freedom to make choices about how to lead their lives. They are struggling to regain this say and part of their message is about control over their farms, lives, food and livelihoods. Of course for many rural peasants the opportunity to move to paid employment is seen as an opportunity for an improved life. But at the heart of the message of contemporary agrarian movement is that decisions about whether to reinvest and revitalize localized food systems that respect food producers and peasants, whether to promote rural urban migration, and more generally, how food systems should be managed, are collective decisions that societies need to make in a participatory manner.

The right to food may be different from other sorts of rights. Food, and our relationship to it, is deeply personal, linked to family, tradition, culture, history

⁸³ U.N. Special Rapporteur on the Right to Food, Olivier De Schutter, *Agroecology* U.N. Doc. A/HRC/16/49 (Dec. 20, 2010).

⁸⁴ Hirsch, *supra* note 17, at 84.

and ways of life. Long-time right to food activists, Flavio Valente and Ana Maria Franco, have argued that food is not simply a commodity:

Food, for human beings, is much more than a commodity. It is a basic necessity of life, and an integral part of cultural identity and diversity. Its quality and the way people access it are also strongly linked with basic human values such as dignity, freedom and respect. At the same time, decisions about what, where, how, and by whom food is produced have serious implications not only for the issue of malnutrition, but also for the environment, the climate, and human health. We are certainly much more than what we eat, but the way our food is produced influences who we are and the future of humankind.⁸⁵

When the state takes seriously the relationships people have with food and for many rural poor the means by which they procure food, it reinforces the root of human rights—a deep respect for human dignity and freedom.

5 Conclusions

The right to food can be a powerful tool in reducing food insecurity through means that are both sustainable and respectful of human beings. As activists, parliamentarians and academics continue to fight for states to take the right seriously, the negative rights associated with the right to food cannot be forgotten or sacrificed to the positive rights. In other words, just as the state must be held accountable for failures to provide food or social protection to hungry and food insecure populations, states must also be accountable for state action and the regulation and monitoring of third parties.

This paper is by no means a call for a reduction of the role of the state, dismantling of infrastructure or state programming, or an end to the *fulfillment* of the right to food and redistribution of wealth. Of course, *fulfilling* the right to food remains extremely important, particularly in societies where historical disadvantages continue, structural violence persists and inequality is deeply entrenched. Indeed, addressing the facility aspect of the duty to *fulfill* can work towards the alleviation of inequality and disadvantage, and address vulnerability and marginalization.⁸⁶ However, on a domestic level, if the right to food is achieved for all, it will only be when all three state obligations—the obligations to *respect*, *protect* and *fulfill* the right to food—work in tandem in the fight against hunger, structural violence, poverty and social inequality. Conscious efforts on the part of governments need to be made to

⁸⁵ Flavio Luiz Schieck Valente & Ana María Suárez Franco, *Human Rights and the Struggle Against Hunger: Laws, Institutions, and Instruments in the Right to Realize the Right to Adequate Food*, 13 YALE HUM. RTS. & DEV. L.J. 435, 437 (2010).

⁸⁶ This has been well documented, for example, in the case of social protection schemes which ensure people have an adequate standard of living. See generally MAGADELNA SEPÚLVEDA & CARLY NYST, *THE HUMAN RIGHTS APPROACH TO SOCIAL PROTECTION* (2012); SAVE THE CHILDREN, *A CHANCE TO GROW: HOW SOCIAL PROTECTION CAN TACKLE CHILD MALNUTRITION AND REMOTE ECONOMIC OPPORTUNITIES* (2012). See also OLIVIER DE SCHUTTER & MAGADELNA SEPÚLVEDA, *UNDERWRITING THE POOR: A GLOBAL FUND FOR SOCIAL PROTECTION* 1–6 (Briefing Note 7, 2012).

develop a paradigm shift, through transition policies and rural development efforts: the right to food after all requires not simply that the state serve as a social safety net for marginalized groups or provide food in times of emergency, but that the state adopt a coherent approach throughout various policies, laws and strategies to act in ways that support the ability of people to feed themselves. The negative rights associated with the right to food ensure that the state does not undermine progress in reducing food insecurity in one area, by engaging in violations of the right to food in another.

The problems facing the food systems, the rural poor and the food insecure are many. Negative rights are certainly not the solution to all these problems, but they are part of it. People are not hungry because they do not have enough food—they are hungry because they are marginalized economically, powerless politically and disregarded by government decision makers.⁸⁷ Unless we take seriously how people procure food, where that food comes from and what people want, we will not address the structural causes of hunger or create food systems that work in sustainable ways rooted in the promotion of human dignity.

⁸⁷ DE SCHUTTER, *supra* note 78, at 3.

Regulating Land Grabs: Third Party States, Social Activism and International Law

Lea Brilmayer and William J. Moon

Abstract This chapter explores how international law may regulate large-scale leases and acquisitions of land (“land grab”) that have accelerated in pace and scope in recent years. We start by identifying why the land grab phenomenon concerns food security. In particular, we observe that the lessor countries (those where the land is located) are almost invariably states plagued by corruption, lack of democracy, dependence on food aid, and weak property rights. Where agents (state leaders) have conflicts of interests with their principals (citizens) it cannot be assumed that these transactions will work to the local population’s advantage. After examining why international investment law is not equipped to police these transactions, we turn to sources within trade law. Because trade law concerns the cross border flow of products, it has the potential to de-incentivize food from leaving land grabbed states and deter similar transactions in the future. The central question, then, is whether World Trade Organization (WTO) law accommodates strategies that are designed specifically to discourage particular categories of free trade. Drawing on recent WTO jurisprudence, we propose labeling laws and import restrictions as potential regulations that may be adopted by third party states.

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1 Introduction

In 2008, Daewoo Logistics Corporation, a division of a major South Korean conglomerate, secured a 99-year lease on a large tract of agricultural land in Madagascar.¹ Spanning 3.2 million acres, the tract—as large as the entire country of Qatar—constituted half of Madagascar’s arable land.² A *Time* magazine story reporting Daewoo’s planned \$6 billion infrastructure investment touted the jobs it would supposedly create, saying that these would “help the people of Madagascar earn money to buy their own food—even if it is imported.”³ The local population did not appreciate the purported benefits; the land deal abruptly terminated when the massive public outcry that it sparked culminated in a coup.⁴

This chapter addresses the ever-more-important topic of “land grabs”. While the term has been used broadly throughout history, we refer to the large-scale acquisitions and leases of land following the Global Food Crisis (2007–2008) that have concentrated in Africa, Asia, and Latin America. It is an issue that has already gained a certain prominence on the agenda of human rights activists,⁵ and promises to be of increasing concern in other fields, as well.⁶ “Land grabs”, for some, is a story of easier access to markets, improved crop yields, and the modernization of agriculture. To these people, the commodification of land will help the global market allocate resources optimally to maximize global food output (thereby indirectly lowering price and benefiting the poor).⁷ But others see only the “invisible hand” of neocolonialism, ruthless pursuit of profit, and capitalism run amok. The land grab trend portends dispossession of indigenous populations, appropriation of ancestral lands, entrenchment of chronic hunger, potentially permanent environmental degradation, extermination of endangered species, and contamination or depletion of water supplies.

Since 2008 there have been a number of discussions surrounding how land grabs should be regulated. Some of the more noteworthy regulatory frameworks being discussed include: the Special Rapporteur on the right to food’s *Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address*

¹ Vivienne Walt, *The Breadbasket of South Korea: Madagascar*, TIME, Nov. 23 2008.

² *Id.*

³ *Id.*

⁴ *Madagascar Leader Axes Land Deal*, BBC NEWS, Mar. 19, 2009, <http://news.bbc.co.uk/2/hi/africa/7952628.stm>.

⁵ See, e.g., Center for Human Rights and Global Justice at NYU SCHOOL OF LAW, FOREIGN LAND DEALS AND HUMAN RIGHTS: CASE STUDIES ON AGRICULTURAL AND BIOFUEL INVESTMENT (2010).

⁶ Environmentalists, for instance, have raised concern over land degradation, water pollution, and deforestation associated with industrialized agricultural production. See ALISON GRAHAM ET AL., FIAN, “ADVANCING AFRICAN AGRICULTURE” (AAA): THE IMPACT OF EUROPE’S POLICIES AND PRACTICES ON AFRICAN AGRICULTURE AND FOOD SECURITY – LAND GRAB STUDY (2010).

⁷ For a general overview, see FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS [FAO], TRADE REFORMS AND FOOD SECURITY: CONCEPTUALIZING THE LINKAGES (2003).

the Human Rights Challenge,⁸ and the *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* developed by the World Bank, Food and Agriculture Organization (FAO), the International Fund for Agricultural Development (IFAD) and the United Nations Conference on Trade and Development (UNCTAD).⁹ Some of these models focus on the responsibilities of private investors and others on the human rights obligations of host/lessor states to protect affected communities from the negative impacts of land grabs. While these models have gained some following in international circles, they have also been heavily criticized by social movements who see them as forms of legitimization of a practice that they believe is completely unacceptable.¹⁰

In this chapter, we explore how international law—more specifically, international trade law—affects the ability of states to address the problems generated by foreign land acquisitions and long-term lease agreements. After first providing some background on the subject, we identify reasons why the lessor state and investors (sometimes states and sometimes corporations) will not adequately deal with the present problem. In particular, we identify four relevant characteristics shared by typical “lessor states” (i.e., those where the land is located)—lack of democracy, dependence on food aid, corruption, and weak property ownership laws—that suggest both why these states are likely to offer land and why they are unlikely to act to protect their populations affected by the deals. This is the endemic problem of agency.

Turning to sources within World Trade Organization (WTO) law, we then ask what role third party states can play in the regulation of land grabs. For, where agency problems irreparably plague the decision-making of the lessor states, we argue, it is only third party state activism that provides a potential solution. The most important contribution that trade law can make to the problem of land grabs is to recognize that third party states and their citizens may have legitimate reason to refuse to purchase agricultural products produced under such circumstances. As the current rush towards land acquisitions and long term agricultural leasing demonstrates, the topic can safely be delayed no longer.

2 Factual Background

Although possibly the first example of its kind to attract significant media attention, the infamous Daewoo case is far from unique. The rush of land leases at about the same time included cases in Ethiopia (2008), the Democratic Republic of Congo

⁸ The Special Rapporteur on the Right to Food, *Report of the Special Rapporteur on the Right to Food, Olivier De Schutter: Large-scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge, delivered at the 13th Session of the Human Rights Council*, U.N. Doc. A/HRC/13/33Add.2 (Dec. 28, 2009).

⁹ THE WORLD BANK, *PRINCIPLES FOR RESPONSIBLE AGRICULTURAL INVESTMENT THAT RESPECTS RIGHTS, LIVELIHOODS AND RESOURCES* (Jan. 25, 2010).

¹⁰ See, e.g., Saturnino Borrás Jr. & Jennifer Franco, *From Threat to Opportunity? Problems with the Idea of a “Code of Conduct” for Land-Grabbing*, 13 YALE HUM. RTS. & DEV. L.J. 507 (2010).

(2009), and Malawi (2009).¹¹ National governments,¹² private investors,¹³ hedge funds,¹⁴ and even private universities¹⁵ have sought land abroad, contracting to lease thousands of hectares of land usually for a period of 50 to 100 years.¹⁶

The pace of the phenomenon's acceleration has been extraordinary, especially during and after the 2007–2008 Global “Food Crisis”.¹⁷ Although the overall scope of the land grab phenomenon is difficult to document,¹⁸ a recent 2012 report released by the non-governmental organization (NGO) GRAIN traces more than 400 instances of large-scale land grabs initiated after 2006, covering nearly 35 million hectares of land in 66 countries.¹⁹ The World Bank's 2011 study reported 56 million hectares of land deals by the end of 2009.²⁰

While land grabs are occurring across the globe, Africa is the scene of many of the most dramatic examples. This is no surprise. According to a World Bank study, five out of the ten countries most suited for expansive agricultural cultivation are on the African continent.²¹ The World Bank estimates that over 70% of large-scale land deals have taken place there.²²

Because of the importance of African states in the general trend, we take Africa as our primary focus to examine both why land grabs have been prevalent in these countries and why lessor states are unlikely to address the negative impacts of land grabs. In addition to Madagascar, we look at the Democratic Republic of Congo, Ethiopia, Ghana, Malawi, Mali, Mozambique, Nigeria, Senegal, Sudan, Tanzania,

¹¹ GRAIN, *LAND GRAB DEALS* (Jan. 2012), available at <http://www.grain.org/article/entries/4479-grain-releases-data-set-with-over-400-global-land-grabs> [hereinafter GRAIN 2012 REPORT].

¹² *Ethiopia: Thousands Driven Out in Land Grab*, UNITED PRESS INT'L, Jan. 18, 2012, http://www.upi.com/Business_News/Energy-Resources/2012/01/18/Ethiopia-Thousands-driven-out-in-land-grab/UPI-60071326912191/.

¹³ *Id.*

¹⁴ *Hedge Funds 'Grabbing Land' in Africa*, BBC NEWS, June 8, 2011, <http://www.bbc.co.uk/news/world-africa-13688683>.

¹⁵ John Vidal & Claire Provost, *US Universities in Africa 'Land Grab'*, THE GUARDIAN, June 8, 2011.

¹⁶ See Sonja Vermeulen & Lorenzo Cotula, *Over the Heads of Local People: Consultation, Consent, and Recompense in Large-scale Land Deals for Biofuels Projects in Africa*, 37 J. PEASANT STUD. 899, 906 (2010).

¹⁷ Sue Branford, *Food Crisis Leading to an Unsustainable Land Grab*, Nov. 21, 2008, THE GUARDIAN, <http://www.guardian.co.uk/environment/2008/nov/22/food-biofuels>.

¹⁸ CECILIE FRIIS & ANETTE REENBERG, *LAND GRAB IN AFRICA: EMERGING LAND SYSTEM DRIVERS IN A TELECONNECTED WORLD 7* (Global Land Project Report No. 1, 2010) [hereinafter GLP REPORT].

¹⁹ GRAIN 2012 REPORT, *supra* note 11. The list analyzed in the Report is not exhaustive. It only documents those deals that “were initiated after 2006, have not been cancelled, are led by foreign investors, are for the production of food crops, and involve large areas of land.” GRAIN, *GRAIN Releases Data Set With Over 400 Global Land Grabs*, <http://www.grain.org/article/entries/4479-grain-releases-data-set-with-over-400-global-land-grabs> (last visited Aug. 3, 2012).

²⁰ Klaus Deininger & Derek Byerlee, *Rising Global Interest in Farmland: Can It Yield Sustainable and Equitable Benefits?*, THE WORLD BANK xiv (2011) [hereinafter WORLD BANK REPORT 2011].

²¹ *Id.*

²² *Id.* at xxxiv.

Table 1 Top Land Lessor States in Africa

Lessor Countries	Magnitude (1,000 ha) ^a	Number of Deals ^b	Democracy Index (2011) ^c	Corruption Perception Index (2011) ^d	Physical Property Rights Index (2012) ^e	World Food Programme (2010) ^f
D.R. Congo	11.048	6	155th	168th	N/A	7st
Mozambique	10.305	10	100th	120th	112th	23st
Sudan	3.171	20	153th	177th	N/A	1st
Ethiopia	2.892	26	121th	120th	101th	2st
Madagascar	2.745	24	116th	100th	112th	41st
Mali	2.417	13	63th	118th	94th	52st
Zambia	2.245	6	71th	91th	68th	39st
Uganda	1.874	7	96th	143th	107th	10st
Tanzania	1.717	15	90th	100th	107th	30th
Nigeria	0.821	6	119th	143th	125th	N/A
Senegal	0.510	5	93th	112th	101th	50th
Malawi	0.307	5	84th	100th	84th	17th
Ghana	0.089	5	78th	69th	84th	46th

^a GRAIN, LAND GRAB DEALS (Jan. 2012).

^b *Id.*

^c The Democracy Index is a snapshot of democracy measured by the necessary conditions for democratic governance. ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2010: DEMOCRACY IN RETREAT (2006) is intended to measure the democratic deficit problem.

^d The Public Perceptions Index ranks countries according to their perceived levels of public sector corruption. TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX 2011: DEMANDS FOR BETTER GOVERNMENT MUST BE HEEDED (2011).

^e The Physical Property Rights Index ranks countries by security of real property rights, as measured by factors including the ease of registering property. AMERICANS FOR TAXATION REFORM FOUNDATION, INTERNATIONAL PROPERTY RIGHTS INDEX 2012: DATA (2012). This figure is intended to measure the level of real property protection.

^f The U.N. World Food Programme (WFP) figures include Development, Relief, Special Operations, and Bilateral Trust Funds. The rankings were calculated by the authors based on the data provided by the WFP, and is intended to measure the dependence on foreign food aid. U.N. WORLD FOOD PROGRAMME [WFP], WFP ANNUAL REPORT 2010 (2010).

Uganda, and Zambia. These countries were identified as the top “land lessor” by a recent *Global Land Project* report.²³ Available data ranking these countries according to the size of existing land grabs is contained in Table 1 above.

Although some accounts assume the object of such land grabs to be acquiring food for developed countries with limited arable land, market conditions suggest additional motivations. For one thing, food is not just grown for sustenance; it is also subject to commodification and speculation. Global surges in food prices make land itself an important asset. According to the United Nations, the world’s population is projected to grow to 9.3 billion by 2050, requiring a 70% increase in food production.²⁴ Such surges in population and expected demand for food make land an increasingly scarce good and promise a potentially important long-term return on investment. The combined food and financial crisis has turned land into a strategic investment opportunity for corporations with ties to hedge funds.²⁵

In addition, not all crops are grown for food: take, for example, biofuel production. The World Bank predicts that between 18 and 44 million hectares of land will be required for biofuel production by 2030,²⁶ and there has been an increasing interest in plant-based biofuel production among developed countries.²⁷ Not surprisingly, significant portions of land in the Democratic Republic of Congo, Ghana, Mali, Papua New Guinea, and Laos have been reported as acquired for the express purpose of biofuel production.²⁸

From a liberal capitalist perspective, the land-lease agreements generate an incredible range of possibilities: mobilizing capital into developing countries that may not have otherwise utilized the land up to full productivity could greatly increase the aggregate supply of world food. The land deals also open up the possibility for import-dependent states to develop a stable source of food, safeguarding against price fluctuations and domestic food shortages. But concerns have been expressed that long-term land acquisitions and leases threaten the food security of the poor in developing countries that are leasing land.²⁹

The local people’s negative reactions are easy enough to appreciate. A London-based NGO describes land grabs in Africa as “the ‘new colonialism’, a modern day version of the 19th-century scramble for Africa.”³⁰ But the “old” colonialism is still

²³ GLP REPORT, *supra* note 18.

²⁴ Alan Bjerga & Luzi Ann Javier, *Foreign Investors Increase ‘Land Grabs,’ Harming poor Farmers*, *Oxfam Says*, BLOOMBERG, Sept. 22, 2011.

²⁵ Share The World’s Resources, *Land Grabbing: the End of Sustainable Agriculture?*, May 6, 2009, <http://www.stwr.org/food-security-agriculture/land-grabbing-the-end-of-sustainable-agriculture.html>.

²⁶ WORLD BANK REPORT 2011, *supra* note 20, at 15.

²⁷ *U.S. Biofuel Target Could be More Expensive*, COMMODITY ONLINE, Feb. 18, 2011, <http://www.commodityonline.com/news/US-biofuel-target-could-be-more-expensive-36584-3-1.html>; John Vidal, *How Food and Water are Driving a 21st Century African Land Grab*, THE GUARDIAN, Mar. 7, 2010.

²⁸ GRAIN 2012 REPORT, *supra* note 11.

²⁹ Vidal & Provost, *supra* note 15. See also Vermeulen & Cotula, *supra* note 16, at 903 (arguing that plantation-based investments can create major repercussions for local food security).

³⁰ Share The World’s Resources, *supra* note 25.

very real to many Africans. Within the memory of people still alive, colonial governments still enforced the discriminatory land laws that dispossessed the original owners of the continent's farming and grazing lands. Some of Africa's countries, such as Zimbabwe, are currently torn apart by the legacy of colonial land policies, while in others (such as South Africa) the issue lies just beneath the surface.³¹

3 Land Lessor State Characteristics: The Perils of Neoliberal Economics

Free flow of trade and investment is the dominant paradigm underlying the goals of contemporary international economic relations. The underlying premises are familiar. As a general matter—domestically and internationally—efficiency is promoted by a system in which goods and services go to those buyers who are willing to pay more. Unrestricted exchange should promote the free flow of goods and result in lowering prices of goods, including the means of basic sustenance.

Whereas the domestic context involves mainly agreements between individuals or individuals and business entities, the international context focuses first and foremost on agreements between states or states and transnational corporations. But the premises are, mostly, otherwise the same. Under international law, states enter into arrangements with other states that work to the benefit of both.³² The problem, of course, is that government leaders may make decisions in their own interests rather than to advance the public welfare.

This is the familiar problem of agency. The interests of leaders may be financial (to appropriate an economic benefit) or political (to maintain a grip on power). Either way, these countervailing considerations raise the probability that agreements made by state leaders may not in fact reflect the interests of the local population. Obviously, this is of concern where state leaders have the power to bargain away their citizens' future food supply. It is of particular concern where the returns from selling or leasing agricultural lands do not accrue to the former inhabitants, but to the government.

Examination of the states where land grabs have been most prominent suggests a strong correlation between land grabs and agency problems. The lessor states tend to have important things in common. Aside from the fact that they tend to be cash-strapped developing counties—hardly a surprise, since otherwise they might not find it so attractive to lease out their farm land—they generally score low in commitment to democracy and high in the prevalence of corruption. Because these countries suffer from long-term disinvestment in the agricultural sector or have history of conflicts, they tend to be heavily reliant on foreign food aid; in addition, most lack clear legal protections for land title.

³¹ See Sam Moyo, *The Land Occupations Movement and Democratisation: The Contradictions of the Neoliberal Agenda in Zimbabwe*, WORLD SUMMIT 1 (2002).

³² See Lea Brilmayer, *From 'Contract' to 'Pledge': The Structure of International Human Rights Agreements*, 77 BRIT. Y.B. INT'L L. 163, 165 (2007).

3.1 *Democracy Deficit*

The simple liberal free trade model that promises general well-being implicitly assumes that state leaders reflect their people's wishes. Efficiency gains through trade may come with distributional consequences,³³ but governments can more than offset such costs through various forms of social insurance. This makes sense in a democracy, where a leader who ignores peoples' basic need for sustenance will most likely be removed from office. It is not necessarily true in countries where staying in power instead means keeping the support of the military or other privileged elites who themselves may benefit from seizure of small farmers' lands.

This is not to say that authoritarian leaders do not incur cost when local people go hungry. Famines, in some cases, have helped to bring down even nondemocratic governments.³⁴ But speaking comparatively, leaders of states in democratic governance structures are more threatened by food insecurity—and more likely to take effective measures to prevent it—than autocrats.³⁵ This is especially the case if the benefits of land leases—the long-term rental income—accrue directly to the government, rather than to the former cultivators. While it is the small farmer that pays the price (by loss of his or her farming land) the rental income is paid straight into government coffers.

The benefits that states receive from these long-term land leases may not be limited to pecuniary rewards. In weak and dysfunctional states, the internationally-recognized central governments do not always have effective control over the entire territories within their juridical borders. Some are locked in struggle with rival entities seeking to replace the central government, or with secessionist movements demanding independence. In such cases, the central government may either strengthen its control by evicting rebel groups from their home areas³⁶ and selling off lands to foreign investors (and in this way acquiring foreign allies), or achieve at least a measure of return from land that was hardly productive from its point of view, anyway.

The link between land grabs and lack of democracy in Africa can be observed from the Economist Intelligence Unit's Democracy Index. Purporting to measure "electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture", the Democracy Index classifies states by regime types and ranks them.³⁷ The categories are full democracies; flawed

³³ For instance, the Stolper-Samuelson theorem predicts that abundant factors in an economy gain from trade while the scarce factors lose. See Wolfgang F. Stolper & Paul A. Samuelson, *Protection and Real Wages*, 9 REV. ECON. STUD. 58 (1941).

³⁴ A massive famine in Ethiopia during the early 1970s that triggered the collapse of the Haile Selassie regime is an excellent example. See Peter Koehn, *Ethiopia: Famine, Food Production, and Changes in the Legal Order*, 22 AFR. STUD. REV. 58 (1979).

³⁵ BRUCE BUENO DE MESQUITA ET AL., *THE LOGIC OF POLITICAL SURVIVAL* (2003).

³⁶ Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991).

³⁷ ECONOMIST INTELLIGENCE UNIT, *DEMOCRACY INDEX 2010: DEMOCRACY IN RETREAT* (2010) [hereinafter *ECONOMIST INTELLIGENCE UNIT*].

democracies; hybrid regimes; and authoritarian regimes.³⁸ Out of 167 countries, the land lessor states on our list ranged from 63rd (Mali) to 155th (Democratic Republic of Congo).³⁹

3.2 Corruption

Political corruption is generally understood as the abuse of public power for private gain.⁴⁰ The permutations are almost endless, including direct appropriation of public assets (e.g., embezzlement of state funds); taking of money to influence government decisions (influence peddling); or extortion of private money (demanding bribes or kickbacks). Corruption not only drains public resources directly, but also results in distortion of state policies and thus (among other things) the reduction of the effectiveness of development policies.⁴¹ Corruption flourishes under undemocratic regimes.⁴²

The advantage of land grabs to corrupt officials is clear. Land is not an easy source of value to misappropriate. Cash and bank accounts are easily stolen because they are mobile and liquid; land is exactly the opposite. But a long term lease agreement with a foreign state or corporation turns property into a cash income stream, which can be stolen. Bribes and kickbacks can also be demanded for awarding contracts. These transactions are especially attractive from the view of corrupt state leaders because foreign investors shoulder part of the burden in enforcing contracts, which allows land leases to take place even in dysfunctional states that lack effective police power.

Long-term lease payments also have the “advantage” that they can be “front loaded”—the payments can be advanced to the earlier years of the lease. Front loading has the effect of making resources available immediately, while current officials are still in power and poised to misappropriate them. Theft of both present and future assets is possible as the current government can effectively position itself to steal from future generations. Unsurprisingly, the states that have been the scene of the most outrageous land grabs are generally also those most corrupt. This is demonstrated by reference to the Corruption Perception Index (CPI), generated by Transparency International, through a combination of polls, “drawing on

³⁸ *Id.* at 1.

³⁹ Five countries on the list are classified as “Authoritarian Regimes,” two are classified as “Flawed Democracies,” and six are classified as “Hybrid Regimes.” None of the top land lessor states were classified as “full democracies” where “basic political freedoms and civil liberties are respected.” *Id.*

⁴⁰ See e.g., SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 91 (1999).

⁴¹ *Id.* at 3–5.

⁴² Shyamal K. Chowdhury, *The Effect of Democracy and Press Freedom on Corruption: An Empirical Test*, 85 ECON. LETTERS 93 (2004).

corruption-related data collected by a variety of reputable institutions.”⁴³ The surveys and assessments include “the bribery of public officials, kickbacks in public procurement, embezzlement of public funds, and the effectiveness of public sector anti-corruption efforts.”⁴⁴ Out of 183 countries, all but two countries on our top land lessor list ranked as worse than 100th.

3.3 *Dependence on Food Aid*

Poor, cash-strapped developing states are accustomed to receiving international aid. Often, the aid comes in the form of food, whether in the form of direct donations to the needy, food for work programs or famine relief.⁴⁵ The survival of people in these regions often depends on food aid supplied by international organizations, non-governmental organizations, and voluntary humanitarian aid programs.⁴⁶

As provided in Table 1, twelve of the thirteen states that made the “top lessor state” list received a significant amount of food aid in 2010 from the World Food Programme (WFP).⁴⁷ Nigeria was the only state on the list that did not receive international food aid for the period examined.⁴⁸ How ironic that the very countries that are currently engaged in long term leasing of agricultural land are many of the world’s largest recipients of food aid. With twenty-six reported land deals by April 2010, for a total of almost 3 million hectares,⁴⁹ Ethiopia—famed for its famines—had the highest number of transactions across African countries. Ethiopia receives more bilateral food aid from the United States than any other state,⁵⁰ and is behind only Sudan in total food aid received through the WFP.⁵¹ Other states that are leasing significant land while receiving food aid include Democratic Republic of Congo and Mozambique.

International aid makes it easier, in a way, for poor and dysfunctional states to contract out land to foreigner investors⁵² because outsiders assume the responsibility

⁴³ Transparency International, *Frequently Asked Questions about the Corruption Perceptions Index*, http://cpi.transparency.org/cpi2011/in_detail/.

⁴⁴ *Id.*

⁴⁵ U.N. WORLD FOOD PROGRAMME [WFP], WFP ANNUAL REPORT 2010 (2010) [hereinafter WFP 2010 REPORT].

⁴⁶ *Id.*

⁴⁷ The WFP is the principle international organization that responds to acute food shortages. In 2009 alone, the WFP provided food and nutrition assistance for 101.8 million people around the globe. *Id.*

⁴⁸ Nigeria’s local conditions (e.g., arable land, tropical climate), coupled with a relatively high GNI per capita, likely accounts for why the state is less prone to acute food shortages.

⁴⁹ GLP REPORT, *supra* note 18.

⁵⁰ Carol Schachet, *US Aid to Ethiopia Supports Forced Relocations for Land Grabs*, GRASSROOTS INT’L, Jan. 26 2012 (“Ethiopia is the largest recipient of US food aid. In FY 2010, the US government provided \$932.6 million in assistance, including more than \$451 million in food aid.”).

⁵¹ WFP 2010 REPORT, *supra* note 45.

⁵² For a historical perspective on the issue, see Carmen Gonzalez, *The Global Food Crisis: Law, Policy, and the Elusive Quest for Justice*, 13 YALE HUM. RTS. & DEV. L.J. 462 (2010).

of providing the basic means of sustenance. Hence the dark-side of international food aid that popular author Graham Hancock narrates: aid has perpetuated the rule of governments that are characterized by corruption, greed, and incompetence.⁵³ International aid serves as an important buffer that guarantees certain levels of sustenance of the general public. Foreign food aid, in other words, diminishes the opportunity cost of selling off land.

3.4 *Legal Regimes for Protection of Real Property*

A fourth characteristic shared by the states leasing out their land is that they tend to have weak legal regimes for protection of property rights.⁵⁴ The weakness of legal protection for real property (land) makes it possible to evict the current occupants without fear of legal push-back. It is far easier to evict the present occupiers of land intended for leasing if they cannot establish or enforce legal title and have no access to justice.

The states where land grabs have occurred have largely been ones where property interests of the current occupants, although recognized by the local population, are not legally enforced or not enforceable. Even if rights over land are in theory recognized, the local courts may be so corrupt, crowded, or politicized that for all intents and purposes the rights of the existing occupants are illusory. Ruth Meinzen-Dick, a senior research fellow at the International Food Policy Research Institute warns: “The majority of agricultural land in Africa is not titled. If these rights are not respected in these transactions, the livelihoods of millions of people will be put at risk.”⁵⁵ The World Bank, estimated in 2003 that only between two and ten percent of land in Africa is held under formal land tenure, and this land is mostly urban and not agricultural.⁵⁶

The connection between land grabs and weak property regimes is confirmed by the ranking of the largest lessor states in Africa on the 2012 International Property Rights Index. The relevant data is contained in the section of Table 1 entitled Physical Property Rights.⁵⁷ The index measure includes expert analysis on the quality of judicial protection of private property, the difficulty in registering property, and the availability of financial loans that play a complementary role to bring economic assets into the formal economy. The Physical Property Rights Index, which studied

⁵³ GRAHAM HANCOCK, *LORDS OF POVERTY: THE POWER, PRESTIGE, AND CORRUPTION OF THE INTERNATIONAL AID BUSINESS* (1992); DAMBISA MOYO & NIALL FERGUSON, *DEAD AID: WHY AID IS NOT WORKING AND HOW THERE IS A BETTER WAY FOR AFRICA* (2009).

⁵⁴ By weak legal regimes, we are simply referring to the difficulty in enforcing legal titles to particular land. We recognize that there are many ways of protecting communal interests attached to land, including usufruct rights that do not rely on Western notions of private property.

⁵⁵ Business Analysis and Features, *Land Grab: The Race for the World’s Farmland*, THE INDEPENDENT, May 3, 2009.

⁵⁶ KLAUS DEININGER ET AL. *LAND POLICIES FOR GROWTH AND POVERTY REDUCTION: A WORLD BANK POLICY RESEARCH REPORT* (2003).

⁵⁷ AMERICANS FOR TAXATION REFORM FOUNDATION, *INTERNATIONAL PROPERTY RIGHTS INDEX 2012: DATA* (2012).

130 states in total, generally confirms anecdotal impressions of weak real property rights in Sub-Saharan Africa. Of the thirteen states ranking at the top of our land grab list, data for two states (Sudan and DR Congo) were unavailable, while the eleven other states ranged between 68th and 125th of the 130 states surveyed.

The expulsion of traditional occupants from their lands is probably the most troubling aspect of the land lease agreements. Foreign lessees want to have the “freedom” to farm as they think fit. They do not want to have to consult or bargain with peasants or pastoralists, let alone to buy them out. While it is imperative from the point of view of foreign agricultural interests that the land be delivered free of bothersome legal claims, the removal of the local people and the extinction of their claims of ownership drives much of the international human rights community’s criticism.

Although the lessor states have in many cases denied evicting the local inhabitants—sometimes saying the land in question is vacant—the evidence does not support this claim. After on the ground investigation the organization GRAIN observed that “farmer and pastoralist communities are being expelled from their land.”⁵⁸ Once displaced, these peasants have neither incomes nor entitlements.⁵⁹ Weak property regimes that characterize land lessor states turn neoclassical assumptions upside down. Even if it was safe to assume that large-scale acquisitions and leases of land would lead to increased investments in fertilizers, seeds and equipment, leading to greater production and reduced global food prices—which it is not⁶⁰—displaced farmers would have no way to afford it.

3.5 *Linkages*

The four characteristics we identify are overlapping, as one might expect. Corruption is perpetuated by a lack of democratic control over a state’s leadership; dependence on international aid results from and is fueled by corruption; and weak property rights regimes are most likely where there is little popular control over the officials who make the law. Of the four connected characteristics it is lack of

⁵⁸ One account from a farmer in Mali describes the phenomenon: “We have been living in our villages for hundreds of years, yet nobody came and told us about these projects. Then one day, this machine came and started to dig. They gave us a paper which we could not read. . . . They dug up a cemetery, they robbed us of our harvest and ruined our land.” GRAIN, *Farmers Mobilise to Find Solutions Against Land Grabbing*, Nov. 17, 2011, http://www.grain.org/bulletin_board/entries/4408-farmers-mobilise-to-find-solutions-against-land-grabbing.

⁵⁹ Vandana Shiva, *The Real Reasons for Hunger*, THE GUARDIAN, June 23, 2002.

⁶⁰ In order for the neoclassical trade model to work, we would have to assume that the land-leases will be used for food production in sufficient proportions to increase global food supply. This assumption may not hold true, for many things can grow on land. Indeed, a significant portion of the large-scale foreign land acquisitions are being used for the production of sunflowers, biofuels, cotton, among other non-food related production. Others are unoccupied and used for the purpose of financial investment or real estate “brokerage” services. See GRAIN 2012 REPORT, *supra* note 11.

Table 2 Correspondence between different factors

Lessor Countries	Magnitude (1000 ha)	Number of Deals	Democ- racy Index (2011)	Corruption Percep- tion Index (2011)	Physical Property Rights Index (2012)	World Food Programme (2010)
Ghana	0.089	5	78th	69th	84th	46th
Malawi	0.307	5	84th	100th	84th	17th
Tanzania	1.717	15	90th	100th	107th	30th
Senegal	0.510	5	93th	112th	101th	50th
Uganda	1.874	7	96th	143th	107th	10st
Average for Group 1	0.8994	7.4	88.2	104.8	96.6	30.6
Mozambique	10.305	10	100th	120th	112th	23st
Madagascar	2.745	24	116th	100th	112th	41st
Nigeria	0.821	6	119th	143th	125th	N/A
Average for Intermediate Group	4.623	13.33	111.6	121	116	N/A
Ethiopia	2.892	26	121th	120th	101th	2st
Sudan	3.171	20	153th	177th	N/A	1st
DR Congo	11.048	6	155th	168th	N/A	7st
Average for Group 2	5.704	17.33	143	155	N/A	3.33

popular control over government that seems most central. The connection between democracy and corruption has already been mentioned.

But connection between lack of democratic control and dependence on food aid seems equally plausible. In a seminal work, Amartya Sen famously argued that famines do not occur in properly-functioning democracies, the reason being that leaders must be accountable to the demands of their citizens.⁶¹ By similar logic, one would expect that food scarcity more generally would be less likely to take place in properly functioning democracies. And since endemic food scarcity leads to dependence on foreign food aid, it would not be surprising to see a correlation between aid dependence and lack of popular control. It would also be reasonable to expect that popular control over government would lead to enhanced protection for ownership rights in real property while lack of popular control would facilitate official disregard.

Table 2 (based on the same data as Table 1) is designed to illustrate the connections between the different factors and the extent to which states have experience land grabs. Ranked according to their scores on the democracy index, the states fall into three rough groups. The five highest ranked states (Group 1) are Ghana, Malawi, Tanzania, Senegal, and Uganda. Group 2 includes three states at the opposite end of the spectrum: Ethiopia, Sudan, and Democratic Republic of the Congo. The

⁶¹ AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION (1984).

Intermediate Group contains three states with mixed scores: Mozambique, Madagascar, and Nigeria.

The three groups can be compared to one another by computing the averages for the different categories (size and number of deals, democracy index, corruption index, property protection, and food assistance). In each category, Group One's average is higher than the intermediate group, with its ranking in turn better than Group Two's. While hardly a scientific sample, these comparisons illustrate the general point that not only are all of these states below the outside world average but also that amongst themselves, there is a rough correlation between scores on these various characteristics.

4 Land Grab and International Trade

Given the human rights challenges posed by land grabs, the question remains how much regulation is needed, when to regulate the process, and how to go about it. Given the shared interest of governments and investors in appropriating the value of agricultural land even at the expense of current occupiers, is there any good way of factoring back in the current occupiers' legitimate interests? In particular, can oversight be reconciled with existing international law, which seems largely to favor unrestricted trade?⁶² We cautiously explore the conditions under which we believe that it can.

4.1 Why Trade Law?

There are several reasons why an answer to the land grab problem should be sought in trade law. The first of these is that international investment law, which might seem more directly relevant, cannot address the task.⁶³ International investment law facilitates land grabs by providing legal protection for foreign investors. The device mainly employed is the bilateral investment treaty, or BIT. These bilateral agreements typically codify substantive protections (e.g., against expropriation and discrimination, and in favor of fair and equitable treatment) and provide an international forum where foreign investors can bring claims against the host states.⁶⁴

⁶² We note, of course, that agricultural trade is still heavily regulated. The point is that agricultural trade is increasingly moving towards "market-oriented" policies under international trade law.

⁶³ Sources of investment law include international custom and treaty law. See *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* (Raymond Doak Bishop, James Crawford & W. Michael Reisman eds., 2005).

⁶⁴ Andreas F. Lowenfeld, *Investment Agreements and International Law*, 42 *COLUM. J. TRANSNAT'L L.* 123 (2003). The International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations commission on International Trade Law (UNCITRAL) are the primary fora that adjudicate investor-state arbitrations.

BITs reduce the risks for foreign investors committing capital to politically and economically unstable developing countries.⁶⁵ Unsurprisingly, many of the top land lessor states have signed investment treaties with “capital-exporting” states in recent years.⁶⁶

Investment law, unfortunately, does not confront the agency problem described above. Under international law, recognized governments—corrupt or uncorrupt, democratic or undemocratic—are the agents that enter into treaties on behalf of the states.⁶⁷ International law does not have a mechanism to single out “unqualified” (unrepresentative) states and to strike down their land lease agreements as “illegitimate.” And even if it did, neither party to an investment treaty is likely to have the incentive to make the arguments. Because the victims—present land users and future citizens—are not part of the process,⁶⁸ BITs entered into to encourage and protect international investments are hardly the vehicle for policing land leases. Land grabs cannot be policed effectively by a bilateral regime that focuses exclusively on the interests of the two states and foreign investors.⁶⁹

Trade law provides a potentially more effective framework. Like international investment law, international trade law functions under a state-centric model. The difference is that trade law exists in a multilateral context. The multilateral nature of the trade regime allows third party states to influence the strategic choices of other countries. In particular, WTO rules may be flexible enough to allow third party member states to limit their imports of agricultural products from regions where land grabs have given way to chronic food insecurity. As will unfold in the discussion below, we suggest that third party states could play a role in disincentivizing land grabs while still resorting to measures that are WTO-consistent.

4.2 *A Hypothetical: Rice Growing in Angola*

Rules regulating the flow of agricultural products constitute a rapidly evolving field of international trade law. Below, we provide a hypothetical fact pattern to illustrate how trade law may impact the way that the international community can regulate

⁶⁵ See William J. Moon, *Essential Security Interests in International Investment Agreements*, 15 J. INT'L ECON. L. 481 (2012).

⁶⁶ For example, Ethiopia has entered into agreements with India (2007), Spain (2009), the United Kingdom (2009); The Democratic Republic of Congo has entered into agreements with India (2010), Italy (2006). See United Nations Conference on Trade and Development, *Country-specific Lists of BITs*, <http://archive.unctad.org/Templates/Page.asp?intlItemID=2344&lang=1> [hereinafter List of BITs].

⁶⁷ See M. J. PETERSON, *RECOGNITION OF GOVERNMENTS: LEGAL DOCTRINES AND STATE PRACTICE* 1–2 (1997).

⁶⁸ David Collins, *Alternative Dispute Resolution for Stakeholders in International Investment Law*, 15 J. INT'L ECON. L. 673, 674 (2012).

⁶⁹ Efforts to create a multilateral investment regime, like the Multilateral Agreement on Investment, have been proposed, although they have failed thus far. See David Singh Grewal, *Network Power and Global Standardization: The Controversy over the Multilateral Agreement on Investment*, 36 METAPHILOSOPHY 128 (2005).

land grab issues. We then explore various sources within international trade law and provide a doctrinal analysis of how the international community may regulate land grabs.

Imagine that a United Kingdom-based private corporation (Company A) enters into an agreement with Angola to lease 25,000 hectares of land for 50 years. Company A plans to grow rice on the land and export it to European supermarkets.⁷⁰ The investment is governed by the Angola-United Kingdom Bilateral Investment Treaty signed on July 4, 2000 and customary international law.⁷¹

Angola's central government benefits from procuring a source of income that would otherwise not have been available. Company A benefits from securing arable land at a discounted price. Even after calculating for the various risks in investing in a politically unstable region (e.g., potential for regime change, crime rate, dangers from land mines left over from previous conflicts), the foreign investor calculates that the benefits of the investment outweigh the associated costs. The United Kingdom may even be complicit in the transaction, for Company A may be an important domestic constituent.

In order to make a profit, Company A must now export Angolan rice outside to Europe; thus the relevance of trade law. WTO law does not itself directly address land lease agreements. However, the possibility of political action by third parties depends on whether the WTO rules are flexible enough for member states to police the trans-shipment of the Angolan rice. That third party might be (for example) Norway, where widespread media coverage of the land grab phenomenon has led many Norwegians to become sensitized to the human costs of purchasing agricultural products imported from Angola. Provided they know where the rice comes from, Norwegians may choose not to buy rice produced on land that was taken away from local farmers who now suffer from acute food insecurity. The success of consumer action is dependent on state imposed labeling regimes that are regulated by WTO law. The Norwegian government might also decide to impose import restrictions on Angolan rice produced on grabbed land—another activity regulated by WTO law.⁷² Both of these actions would make it more difficult for Company A to sell agricultural produce in the global market. This would not only make Company A's investment less profitable, it would also serve the deterrent purpose of preventing land transactions in the future.

We argue in the following paragraphs that neither of these strategies ought to be taken as WTO-inconsistent or in violation of international trade law as it is currently constituted. The WTO makes exception for regulations in support of public safety and these exceptions are of obvious relevance to food security. In arguing for

⁷⁰ This hypothetical is based on an actual transaction between Lonrho (a U.K.-based company) and Angola in 2009. See GRAIN 2012 Report, *supra* note 11, at 2.

⁷¹ The Angola-United Kingdom BIT, technically, has been signed but has not entered into force. See List of BITs, *supra* note 66.

⁷² Third party states may also address the issue through food aid. For an excellent commentary on the link between food security and food aid, see Ruosi Zhang, *Food Security: Food Trade Regime and Food Aid Regime*, 7 J. INT'L ECON. L. 565 (2004).

this conclusion, we make one as-yet controversial assumption: that harm occurring outside of a state's territory can legitimately serve as the foundation of a justifiable defense for adopting regulation domestically. We first provide a general overview of how international trade law works and then turn to the relevant doctrines.

4.3 *The Law of the World Trade Organization*

Established in 1995, the WTO exists pursuant to a complex network of treaties and agreements derived from consensus-based multilateral negotiations. By the end of 2011, the WTO had 157 member states, and WTO rules governed 95% of world trade.⁷³ In order to counteract tendencies to free ride, the WTO system relies on reciprocal concessions rather than unilateral liberalization. The negotiations produce both general rules that apply to all states that are party to the WTO as well as particular commitments of individual member states. Schedules of commitments include specific tariff concessions, which create the maximum tariff level that a state can levy without compensation.⁷⁴

The WTO agreements are enforced by the Dispute Settlement Body. As a key component of the rules based system, independent arbiters form adjudicatory Panels that interpret WTO agreements under customary rules of treaty interpretation. The rulings of Panels are reviewable by the Appellate Body, and the decisions are published, creating a quasi-precedential legal system. The WTO has been noted as one of the strongest and most effective international institutions.⁷⁵

5 **WTO Law and Food Security: Doctrine and Possibilities**

Below, we identify two sources within WTO law that may allow intervention by third party states and their citizens to regulate the transshipment of agricultural products. These are, (1) labeling laws, which depend for their efficacy on political commitments of consumers and (2) import restrictions.

⁷³ Editorial, *Russia as a WTO Member*, THE JAPAN TIMES, Jan. 16, 2012.

⁷⁴ LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT (John H. Jackson, William J. Davey & Alan O. Sykes, Jr. eds., 5th ed. 2008).

⁷⁵ Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011). See also Juscelino F. Colares, *The Limits of WTO Adjudication: Is Compliance the Problem?*, 14 J. INT'L ECON. L. 403 (2011).

5.1 *Labeling Laws*

WTO members who import food grown in the land lessor state may use domestic labeling regimes to tap into consumer preferences. Labeling regimes harness consumer preference by providing the information consumers need to make informed decisions about their purchases. Consumers who are opposed to speculative investments at the expense of local producers can only take effective action if they are able to identify the origin or the social conditions surrounding the production of the problematic goods.

The need for information about the product implicates trade law, which regulates state labeling regimes. While private and industry-driven labeling regimes—which are not regulated by the WTO—may also be used, they lack consistency and an enforcement mechanism.⁷⁶ In this section, we discuss the legality of two broad categories of labeling laws that may be adapted by third party states: country-of origin labelling regimes and social labelling regimes.

Country-of-origin labelling would require retailers to specify where certain goods were produced. Under WTO rule of origin laws, a product is conferred the status of origin where it is wholly obtained.⁷⁷ Social labelling refers to the use of labelling regimes to promote certain social rights and values in the international marketplace. For instance, by labelling agriculture as “land grab safe”, third party states may mobilize consumer awareness in the marketplace to “tax” goods that do not meet certain production process requirements.⁷⁸ Success under both regimes would require convincing the public that they do not want to eat food that was grown on land once used for subsistence agriculture and to support violations of the right to food abroad.

Under WTO law, state-imposed labeling regulations are considered technical regulations governed by Annex 1.1 of the Agreement on Technical Barriers to Trade (TBT Agreement).⁷⁹ Article 2 of the TBT Agreement in turn, governs technical regulations. Article 2.1 of the Agreement instructs members to ensure that products imported from the territory of any Member be accorded treatment “no less favorable than that accorded to like products of national origin and to like products originating in any other country.”⁸⁰ Article 2.2 sets out certain obligations that the WTO

⁷⁶ See Jessica Karbowski, Note, *Grocery Store Activism: A WTO Compliant Means to Incentivize Social Responsibility*, 49 VA. J. INT'L L. 727, 740–41 (2009).

⁷⁷ See Joseph A. Lanasa III, *Rules of Origin and the Uruguay Round's Effectiveness in Harmonizing and Regulating Them*, 90 AM. J. INT'L L. 625 (1996).

⁷⁸ Both are imperfect measures. Country-of-origin labelling is likely to be overbroad, since it would require labelling on goods from a particular state regardless of the conditions surrounding its production. Social labelling avoids this problem but lacks a bright-line standard, given that it is difficult to develop rules on what would constitute as “land grab” safe goods.

⁷⁹ See Appellate Body Report, *European Communities—Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 Oct. 2002, DSR 2002:VIII, 3359, para. 176.

⁸⁰ Agreement on Technical Barriers to Trade, art. 2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TBT Agreement].

members must respect in preparing, adopting or applying technical regulations. The provision, in particular, requires WTO members to adapt technical regulations without “creating unnecessary obstacles to international trade.”⁸¹

Country-of-origin labelling laws need to meet certain nexus requirements in order to be WTO-consistent. In *U.S.-Country of Origin Labeling Requirements (U.S.-COOL)*, the Panel assessed that certain mandatory country of origin labeling provisions in the U.S. Agricultural Marketing Act of 1946 as amended by the 2008 Farm Bill imposed an unnecessary extra cost for the Canadian and Mexican livestock industries and were therefore inconsistent with WTO obligations.⁸² While the Panel in *U.S.-COOL* determined that the particular U.S. regulation, as applied to the facts at hand, was WTO-inconsistent, country-of-origin labelling was found in principle to rest on legitimate objectives within the meaning of Article 2.2.⁸³

The Appellate Body decision, circulated on June 29, 2012, affirmed that a policy objective of providing consumers with information as to origin may be a legitimate objective within the meaning of TBT Agreement Article 2.2.⁸⁴ Nevertheless, the Appellate Body held that the particular U.S. regulatory regime in question violated Article 2.1, given that the detailed and extensive recordkeeping and verification requirements imposed on upstream producers and processors were not necessarily conveyed to consumers.⁸⁵

Costly recordkeeping and verification requirements, in other words, had no nexus to the stated objective of providing consumers with more information. This lack of correspondence was central to the Appellate Body’s analysis because those regulations *unnecessary* for achieving the stated objective—providing information to consumers—had a detrimental impact on the competitive opportunities of imported livestock. In essence, country-of-origins labelling laws will be consistent with WTO law provided that the detrimental impact on imported products stems from a legitimate regulatory distinction instead of unlawful discrimination.

Social labelling laws, likewise, need to meet certain requirements in order to be WTO-consistent. In *U.S.-Measures Concerning Importation, Marketing and Sale of Tuna and Tuna Products (U.S.-Tuna II)*, Mexico brought a claim challenging the legality of the U.S. regulatory regime that established the conditions for the use of a “dolphin-safe” label on canned tuna sold in the United States.⁸⁶ While the Appellate Body decision, rendered in May 2012, found that the labelling regime—whose

⁸¹ *Id.*

⁸² Panel Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R (Nov. 18, 2011).

⁸³ Article 2.2 of TBT Agreements provides a non-exhaustive list of legitimate objectives: “security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.” *Id.*

⁸⁴ Appellate Body Report, *United States—Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012) [hereinafter U.S.-COOL Appellate Body Decision].

⁸⁵ *Id.* at para. 439.

⁸⁶ Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R (May 16, 2012).

purpose was to provide information to consumers and contribute to the protection of dolphins by ensuring fishing fleets do not catch tuna in a manner that adversely affects dolphins—had a legitimate objective,⁸⁷ it struck down the U.S. labelling laws by reasoning that it was not calibrated appropriately to meet its stated objective.⁸⁸ The U.S. regulatory regime in question prohibited tuna caught in the Eastern Tropical Pacific from qualifying as "dolphin safe" tuna, whereas tuna caught in other oceans could qualify for "dolphin safe", even though dolphins had in fact been killed in the process of catching tuna in those oceans.⁸⁹ This led the Panel to conclude (and the Appellate Body to uphold) that the detrimental impact of the U.S. labelling law on Mexican tuna vendors did not stem exclusively from the legitimate regulatory objective.

Applied to the "land grab" context, social labelling laws adapted by a third party state are more likely to be found WTO-inconsistent if the regulatory regime singles out a region plagued with land grabbing problems. For instance, if Norway mandated labelling on rice produced in Sub-Saharan Africa while making labelling optional for rice grown in Southeast Asia—where "land grabbed" rice is also prominently grown and exported—Norway's labelling laws would be more likely to be found as WTO-inconsistent. By the same token, laws that uniformly require labelling on goods imported from "land grabbed" regions are more likely to be found WTO-consistent.

Assuming no backtracking—that WTO law continues to move in this direction—labeling regimes that allow consumer action serve as one means of influencing land grab states and investors. But the difficulties in using labeling laws to ground consumer boycotts should not be underestimated. First, agricultural products are easily substitutable goods. For instance, if Company A has trouble selling Angolan rice to Norwegian consumers, it is still possible that it can find other importers to buy the product. Second, labeling regimes are likely only to be effective when a significant number of consumers, in a significant number of states, adopt the regime.⁹⁰

The WTO regime, therefore, does not so much *solve* the food security problem as it allows third party state action. While only a partial solution, even that would be a substantial contribution. This is especially the case because compliance with labelling laws by itself has a significant commercial impact on the private sector. While labeling by itself is a relatively costless activity for the state, labeling regulations that require verification force retailers and producers to segregate and monitor products, which cause them to incur substantial additional costs.⁹¹ For instance, it is estimated that the U.S. labelling regime on livestock adopted in 2008 imposed

⁸⁷ *Id.* at paras. 341–42.

⁸⁸ *Id.* at para. 232.

⁸⁹ *Id.* at para. 297.

⁹⁰ Labeling laws also carry the risk of being used as a protectionist instrument. See Bona Cheyne, *Proportionality, Proximity and Environmental Labelling in WTO Law*, 12 J. INT'L ECON. L. 927 (2009).

⁹¹ See Alison L. Saswka & William A. Kerr, *Challenging US Country of Origin Labelling at the WTO: The Law, the Issues and the Evidence*, CATPRN Trade Policy Brief 2011–05 (Mar. 2011).

hundreds of millions of dollars in increased transportation and handling costs to the Canadian beef industry, causing a steep decline in U.S. imports of Canadian beef.⁹² If WTO law were held to prohibit all country of origin labelling regimes this would make consumer activism very nearly impossible.

5.2 *Import Restrictions: Extraterritorial Application of GATT Article XX*

Governments might also decide to restrict imports from countries that endure food insecurity as a result of engaging in large-scale acquisitions and leases of land. Whether this is a viable strategy under the WTO regime depends on the proper interpretation of GATT Article XX.

Imposing restrictions on the import of goods is generally inconsistent with WTO agreements. Specifically, Article 4.2 of the Agreement on Agriculture prohibits the use of agriculture-specific non-tariff measure, which can take shape in the form of “quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing procedures, voluntary export restraint agreements and non-tariff measures maintained through state-trading enterprises.”⁹³ However, states may justify import restrictions if they fit under the rubric of one of the exceptions provisions.⁹⁴ The GATT Agreement Article XX is the general exceptions clause that may be invoked to justify measures that would otherwise be inconsistent with WTO law. Legitimate objectives include measures that are designed to protect human life or health, conserve exhaustible natural resources, and protect public morals, among others.⁹⁵

Ordinarily, the Article XX exception pertains to conditions in the country that is imposing the import restriction. Measures that are defended on the basis that they were designed to protect human life, for instance, most typically would do so in the state that was imposing the import restriction. For example, Norway might place restrictions on the import into Norway of agricultural products believed to be contaminated by bacteria or by pesticide residue. The question remains, however,

⁹² Janyce McGregor, *Canada Wins U.S. Trade Fight Over Meat Labeling*, CBC News Nov. 18 2011.

⁹³ World Trade Organization, *Agriculture: Explanation*, available at http://www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm

⁹⁴ *Id.* (“Article 4.2 of the Agreement on Agriculture does not prevent the use of non-tariff import restrictions consistent with the provisions of the GATT or other WTO agreements which are applicable to traded goods generally (industrial or agricultural). Such measures include general exceptions (Article XX of GATT)”).

⁹⁵ XX(a) and XX(b) seem most relevant in the food security context. Article XX(a) concerns measures that are “necessary to protect public morals,” while Article XX(b) addresses measures that are “necessary to protect human, animal or plant life or health.” See General Agreement on Tariffs and Trade 1994, art. XX, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994].

whether Norway might restrict importation of goods into Norway as a means of improving conditions in Angola. For that is what is at stake in the land grab context.

Can Norway justify an import restriction on the basis of its extraterritorial consequences? We see two reasons why state imposed import restrictions may be permissible under WTO jurisprudence. First, Article XX does not textually impose territorial limits to the objectives identified as legitimate. Second, human health concerns constitute “vital importance” and therefore are to given privileged treatment under the Appellate Body’s ruling in *Korea-Beef*.⁹⁶ The issue of land grabs may trigger a “vital interest” since it has direct bearing on accessibility to food and basic livelihood.

Turning first to the question of territorial limits, two pre-WTO era GATT disputes touched upon this question. In *U.S.-Restrictions on the Imports of Tuna (Tuna I)*, the United States had imposed import restrictions on tuna from Mexico on the grounds that Mexican tuna fishing methods harmed dolphins in the Eastern Pacific Tropical Ocean. The dispute panel found that the U.S. could not impose measures to protect interests extraterritorially.⁹⁷ This categorical prohibition on “extraterritorial interests” was relaxed in *U.S.-Restrictions on the Imports of Tuna (Tuna II)*,⁹⁸ however, where the panel ruled that the U.S. could impose extraterritorial measures so long as they were not intended to coerce change in the policies of other states.⁹⁹ Neither decision was ultimately adopted, but the decisions still attracts a lot of attention because of its implications on environmental disputes.¹⁰⁰

The Appellate Body in *U.S.-Shrimp* returned to the extraterritoriality question when it asked whether the United States might impose an import ban on shrimp that were caught by using technology adversely affecting sea turtles. The Appellate Body left the question open as to “whether there [was] an implied jurisdictional limitation in article XX(g), and if so, the nature or extent of that limitation.”¹⁰¹ The Appellate Body was able to avoid explicitly addressing the extraterritoriality ques-

⁹⁶ In *Korea-Beef*, the Appellate Body indicated that “the more vital or important those common interests or values are, the easier it would be to accept as “necessary” a measure designed as an enforcement instrument. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:1, 5 (adopted Jan. 10, 2001). See also Michael Ming Du, *Autonomy in Setting Appropriate Level of Protection Under the WTO Law: Rhetoric or Reality?*, 13 J. INT’L ECON. L. 1077, 1094 (2010).

⁹⁷ Panel Report, *United States—Restrictions on Imports of Tuna*, WT/DS21/R (Sept. 3, 1991) (hereinafter *Tuna I*).

⁹⁸ GATT Panel Report, *United States—Restrictions on Imports of Tuna*, DS29/R, 16 June 1994, unadopted. *Tuna II* mentioned here refers to a GATT-era case adjudicated in 1994 and should not be confused with the WTO decision rendered in 2012.

⁹⁹ Panel Report, *United States—Restrictions on Imports of Tuna*, WT/DS29/R, 5.15 (adopted June 16, 1994) (hereinafter *Tuna II*).

¹⁰⁰ World Trade Organization, *Mexico etc Versus US: ‘Tuna-Dolphin,’ available at http://www.wto.org/english/tratop_e/envir_e/edis04_e.htm.*

¹⁰¹ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, DSR 1998:VII, 2755, 133 (adopted Nov. 6, 1998 [hereinafter *U.S.-Shrimp*]).

tion because the migratory turtles passed through the U.S. waters.¹⁰² The facts were also limited in one other way: the ruling was specific to XX(g)—measures relating to the conservation of exhaustible natural resources. It is not clear whether the reasoning articulated by the Appellate Body would be applicable to other provisions carved out in Article XX, such as protection of human health.

If an Article XX defense may be raised for extraterritorial concerns, the defense must be analyzed in sequential steps.¹⁰³ A WTO adjudicatory body must first assess whether a measure falls into one of the valid objectives specified in Article XX. The second step asks whether the measure was “necessary” or “relating to” the legitimate objectives. This step determines whether an alternative measure (that is valid under WTO law and achieves the same goals as the measure at hand) is reasonably available. If a WTO-consistent alternative is reasonably available, then the measure cannot be justified.

If these two conditions are satisfied, the measure is subject to a good faith test, under what is known as the “chapeau analysis”.¹⁰⁴ Here, the WTO must scrutinize the possibility of bad intent on the part of the member state invoking Article XX. A valid measure may not be “a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or “a disguised restriction on international trade.”¹⁰⁵ All three steps must be satisfied for an import restriction measure that would otherwise be unlawful to be justifiable under Article XX.

The extraterritorial application of Article XX, nevertheless, is an unsettled legal issue.¹⁰⁶ It is also a heated one, considering that it has broad implications for the capacity of the international trade regime to internalize human rights and environmental norms. Holding that an issue taking place in another sovereign state may justify the invocation of the Article XX would hand third party states (especially ones with market power) a powerful tool to influence the internal affairs of other sovereign states.

But there are further risks associated with allowing extraterritorial application of Article XX. Doing so might encourage member states to invoke the general exceptions clause to engage in disguised protectionist policies. Under our hypothetical, the U.S. government might impose import restrictions on Angolan rice not because it conceives restrictions to be necessary for the protection of “human health,” but rather to support its own rice farmers. That said, under the state-centric framework underlying international law, third party intervention may be one of the few ways to address important moral concerns associated with the land grab phenomenon.

¹⁰² SARAH JOSEPH, *BLAME IT ON THE WTO: A HUMAN RIGHTS CRITIQUE* 106 (2011).

¹⁰³ U.S.-Shrimp, *supra* note 101.

¹⁰⁴ *Id.* at para. 158.

¹⁰⁵ GATT 1994, *supra* note 95, art. XX.

¹⁰⁶ See Salmon Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 102–06 (2001); Asif H. Qureshi & Malcolm D. Evans, *Extraterritorial Shrimps, NGOs and the WTO Appellate Body*, 48 INT’L & COMP. L.Q. 199 (1999).

6 Conclusion

The land grab issue implicates profound emotional considerations: sovereignty over natural resources, including land; property ownership in a context highly evocative of past injustice; food and fear of having none; and endemic underdevelopment, with its implications of dependency and powerlessness. Which vision predominates—the virtues of capitalism or the preservation of farming on a human scale—remains to be seen.

Alarmingly, the history of a liberal trade regime in the food security context is not reassuring. During the Irish famine in the 1840s, food was being exported from Ireland to the more affluent England, when millions of Irish were starving to death.¹⁰⁷ In 1877–1878 grain merchants' preference to export wheat to Europe instead of relieving starved people in India drove many areas the country into a full-scale famine.¹⁰⁸

The present context provides little reason for confidence in free trade, either. Land transactions are neither voluntary nor compensated and the most probable explanation for their popularity with central government officials is the improved opportunities for corruption that they provide. Insistence on free trade in a context where the state can appropriate at will what is essentially private land makes little sense.

WTO law has some recognition of the primacy of health and security over free trade, but it was not devised with an understanding that threats to food security could be day-to-day issues. The WTO and its academic commentators still mainly see agricultural products as commodities.¹⁰⁹ Yet, for many of the poor, they are first and foremost the means of human survival. For the free trade paradigm to prevail, the liberal property regime should go “all the way down.” Where it does not—as here—then we need to reconsider the paradigm as a whole.

¹⁰⁷ Amartya Sen, *Review of Late Victorian Holocausts by Mike Davis*, N.Y. TIMES, Feb. 18, 2001.

¹⁰⁸ See MIKE DAVIS, *LATE VICTORIAN HOLOCAUSTS: EL NIÑO FAMINES AND THE MAKING OF THE THIRD WORLD* (2000).

¹⁰⁹ The express objective of the Agreement on Agriculture was to make the agricultural sector more market oriented by reducing domestic support and export subsidies. See JOSEPH A. MCMAHON, *THE WTO AGREEMENT ON AGRICULTURE* 10–13 (2006).

From Threat to Opportunity? Problems with Codes of Conduct for Land Grabbing

Saturnino M. Borras and Jennifer C. Franco

Abstract In this chapter, we argue that the idea of a Code of Conduct (CoC)-framed response to the global land grab—a generic formulation that includes a variety of specific mechanisms such as the “Principles for Responsible Agricultural Investments” (RAI) and a variety of existing voluntary multistakeholder roundtables on different crops—veers away from questioning the fundamental roots of land-grabbing, i.e., the existing industrial pattern of food and energy production and consumption controlled by Transnational Corporations (TNCs), while engaging in the problematic notion of “win-win” scenarios. In our view, a CoC-framed response to land-grabbing is likely to facilitate, not block, further land-grabbing and thus should not be considered, even as a second-best approach. Some may argue that the idea of a CoC, despite its inherent weaknesses, should still be considered as a possible second-best, pragmatic approach on the grounds that large-scale land-grabbing is inevitable in the current economic climate and political-institutional context. Yet we contend that land-grabbing is not inevitable, that it can be prevented, and that concerted efforts should be undertaken to stop it.

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1 Introduction

The past decades have seen the emergence of a “corporate social responsibility agenda” in response to public and activist criticism of “the impact of transnational corporations (TNCs) in developing countries and on the environment.”¹ This agenda has emerged against the backdrop of shifting perceptions of how the market, the state, and civil society function and ought to function.² One prominent version of this agenda has been the World Bank’s advocacy of “good governance” as a “persuasive ethical power that allows for [corporate] self-regulation, making it possible for governments to intervene less intrusively and more efficiently in society.”³ Voluntary adherence by corporations to good business practices and ethical behavior is a cornerstone of this advocacy, and its most recent incarnation arises in the arena of rural development, focusing on access to land and taking the form of proposals for a generic “code of conduct” for land deals.⁴

A convergence of global crises (financial, environmental, energy, food) in recent years has been contributing to a dramatic reevaluation of and rush to control land, especially land located in the South. Transnational and national economic actors from various business sectors (oil and auto, mining and forestry, food and chemical, bioenergy, etc.) are eagerly acquiring (or declaring their intention to acquire) large swaths of land on which to build, maintain, or extend large-scale extractive and agri-industrial enterprises.

By all accounts, (trans)national transactions involving large volumes of land in the South are on the rise. Various estimates place the total lands already transacted at upwards of 200 million hectares, with the Oxfam 2011 report claiming the highest estimate at 227 million hectares.⁵ Although just how much land has actually changed hands remains unclear, initial evidence suggests a trend that is likely to continue. Many of the reported transactions are real; others as yet remain only paper allocations, while still others are more speculative in nature.⁶ Many are TNC-

¹ Peter Utting, *The Struggle for Corporate Accountability*, 39 DEV. & CHANGE 959, 959 (2008).

² Bridget O’Laughlin, *Governing Capital? Corporate Social Responsibility and the Limits of Regulation*, 39 DEV. & CHANGE 945, 946 (2008).

³ Id. at 946.

⁴ See, e.g., U.N. FOOD & AGRIC. ORG. [FAO] ET AL., PRINCIPLES FOR RESPONSIBLE AGRICULTURAL INVESTMENT THAT RESPECTS RIGHTS, LIVELIHOODS AND RESOURCES (2010); Joachim von Braun & Ruth Meinzen-Dick, “Land Grabbing” by Foreign Investors in Developing Countries: Risks and Opportunities, IFPRI POLICY BRIEF 13, at 2–3 (2009).

⁵ OXFAM INTERNATIONAL, LAND AND POWER (2011); John Vidal, *Fears for the World’s Poor Countries as the Rich Grab Land to Grow Food*, THE GUARDIAN, July 3, 2009; *Asia: Land Grabs Threaten Food Security*, IRINNEWS.ORG; see also LORENZO COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENTS AND INTERNATIONAL LAND DEALS IN AFRICA (2009); GRAIN, SEIZED! THE 2008 LAND GRAB FOR FOOD AND FINANCIAL SECURITY (2008).

⁶ In Mozambique, for example, the government leased thirty thousand hectares of land to Procana for sugarcane (ethanol) production for a ninety-nine year term. The land was already long occupied by subsistence farmers and pastoralists and had also been named the resettlement site for families that were displaced by the expansion of the Limpopo National Park. DANIEL RIBEIRO &

driven; others are (foreign) government-driven. But, almost always, the transactions involve close partnerships (or collusion) between foreign and domestic investors and the national governments that rule over the lands in question, with the latter playing a key facilitative role in instituting the enabling environment to make the transactions possible or brokering the deals themselves.

The phenomenon first came to light in the global food-versus-fuel controversy that exploded when basic food prices spiked in 2007–2008 amidst a global boom in biofuels production.⁷ Initiated by government-business alliances in the North through the setting of mandatory biofuel blending quotas in the transport sector, the biofuel boom has proceeded with the active participation of national governments in the South in anticipation of increased demand for energy crops.⁸ Governments in Latin America, Africa, and Asia have been brokering international biofuel-related agreements and facilitating land deals to enable TNCs to gain access to land needed to produce biofuel feedstocks for export. In many cases, the land in question is formally classified as state-owned public land and leased by the state to corporate biofuels producers. The alarm was raised by civil society groups and transnational networks, many already mobilized against the corporate-led biofuel boom, who then linked the biofuel boom to the threat it posed to rural communities and ecosystems.⁹ The term “global land grab” came into use and the by-now-familiar, iconic image of corporations and governments enclosing the commons, dispossessing peasants, and ruining environments gained new traction.

However, the main narrative shaping this trend is undergoing its own transformation as it gets absorbed into mainstream development-policy currents. The dominant storyline of land-grabbing as a threat has slowly ceded ground to a new story line—that of the contemporary land deals as a potential opportunity for rural

NILZA MATAVEL, *JATROPHA! A SOCIO-ECONOMIC PITFALL FOR MOZAMBIQUE* 10 (2009); Jennifer Franco et al., *Assumptions in the European Union Biofuels Policy: Frictions with Experiences in Germany, Brazil and Mozambique*, 37 *J. PEASANT STUD.* 661 (2010). Other examples can be found in the Cerrado region of Brazil, an extremely high biodiversity area that has seen massive expansion of sugarcane monocropping for ethanol in recent years. *See id.* Many more examples can be found in the online industry news outlet *BIOFUELS DIGEST*, <http://www.biofuelsdigest.com>, as well as in reports produced by transnational activist networks such as Friends of the Earth and GRAIN. *See, e.g.,* The Food Crisis and the Global Land Grab Blog, <http://farmlandgrab.org>.

⁷ On the biofuel boom controversy, see, e.g., SOFIA MONSALVE SUÁREZ ET AL., *AGROFUELS IN BRAZIL: REPORT OF THE FACT-FINDING MISSION ON THE IMPACTS OF PUBLIC POLICIES ENCOURAGING THE PRODUCTION OF AGROFUELS ON THE ENJOYMENT OF THE HUMAN RIGHTS TO FOOD, WORK AND THE ENVIRONMENT AMONG THE PEASANT AND INDIGENOUS COMMUNITIES AND RURAL WORKERS IN BRAZIL* (2008); Eric Holt-Giménez & Annie Shattuck, *The Agrofuels Transition: Restructuring Places and Spaces in the Global Food System*, 29 *BULL. SCI., TECH. & SOC'Y* 180 (2009).

⁸ Perhaps the most aggressive mandatory targeting has been by the European Union, which legislated in early 2009 that twenty percent of all energy used in the EU and ten percent of each Member State's transport fuel must come from renewable sources by the year 2020, with most of this expected to come from biofuels. *See* Franco et al., *supra* note 6.

⁹ *See, e.g.,* GRAIN, *supra* note 5. Civil society groups of course are highly differentiated—by class base, ideology and politics. Their analysis of global land grabbing and its causes and consequences may have some similarities but are also significantly differentiated.

development, if they can be harnessed properly so as to minimize or avoid possible negative social and environmental effects. Prominent players promoting this emerging narrative are the World Bank, the International Food Policy Research Institute (IFPRI), most national governments in the South and North, and some bilateral development institutions. Positions within and between these institutions vary greatly, but the common denominator seems to be the assumption that large-scale land investments are potentially good if managed appropriately. Part and parcel of the shift in perspective is a growing emphasis on bringing “multiple stakeholders” together to institute a generic type of an international “code of conduct” (CoC) for transnational land transactions, as a key step toward crafting broader “win-win” development outcomes, although the discourse itself continues to evolve.¹⁰

By CoC we refer to a broad range of “voluntary corporate self-regulatory” instruments. We use the term “code of conduct” and the abbreviation “CoC”, to designate all types of “voluntary corporate self-regulatory” mechanisms that are popular today, including the various types of voluntary multi-stakeholder roundtables in oil palm and soya, and those that may emerge in the future. The main CoCs discussed in relation to land grabs, and described in this piece, are the set of principles for *Responsible Agricultural Investments* or RAI Principles proposed by the World Bank, United Nations Food and Agriculture Organization (FAO), International Fund for Agricultural Development (IFAD) and United Nations Conference on Trade and Development (UNCTAD), and the Code of Conduct proposed by IFPRI. CoCs should be differentiated from (inter)governmental regulatory mechanisms, such as the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forest in the Context of National Food Security*, negotiated within the UN Committee on Food Security (CFS) and adopted in May 2012. There is a clear tension and competition between these two broad types of regulatory frameworks. The *Voluntary Guidelines* are grounded in a human rights framework and were elaborated with the active participation of both government and civil society organizations. While a number of international institutions have officially endorsed the *Voluntary Guidelines* as the key regulatory mechanism for land grabs, proponents of CoCs remain relevant and powerful, and should not be dismissed. It is not entirely improbable that those who support CoCs may officially endorse the *Voluntary Guidelines* while trying to reshape them and their implementation. The outcome of the consultation and negotiation process that will be undertaken within the CFS in the 2012–2014 period to further elaborate new principles for responsible agroinvestment is also uncertain. For this reason, our focus in this chapter is on the critique of the CoC approach to land grabs.

The main argument we develop in this chapter is that, although an international CoC, or voluntary corporate self-regulatory mechanism, may be a worthy idea in

¹⁰ Alongside “code of conduct,” the phrase “principles of responsible large-scale land acquisition” is also being deployed. But even if the term used by its proponents is not always (or even any longer) “code of conduct” per se, the basic idea is essentially the same. The core notion that this kind of approach offers a “win-win solution” continues to characterize the endeavor, as it has from the start.

principle, this does not necessarily mean that it is a worthy idea in practice. In this instance, our basic objection to the idea of a CoC for land deals is not simply that it is not sufficiently pro-poor in orientation. Rather, our objection is that such a CoC is not essentially pro-poor in the sense of proceeding from a social-justice driven analysis of the causes of (rural) poverty and the need to protect and advance (rural) poor people's land access and property interests. A social-justice-driven analysis would link the causes of rural poverty to the current TNC-controlled global system of food-feed-fuel production, distribution, and consumption, and its negative social and environmental impacts. It would then ground the search for solutions in the fundamental aim of protecting and advancing the land access and property interests of working poor people. In our view, any effort to link high standards of business practice with ethical behavior in (trans)national land deals is unlikely to produce truly pro-poor outcomes if the primary aim of the land transfer is not categorically to protect and advance the land-access and property interests of working poor people.¹¹ Unfortunately, the primary aims of the CoC for land deals lie elsewhere.

2 “Making a Virtue out of Necessity”: The Dominant Narrative of Land-Grabbing

For the advocates of a CoC, the starting point for the analysis of contemporary land-grabbing or land deals is not the complex political economy question of “who has [or ought to have] what rights, to which land, for how long, and for what purposes.”¹² Nor is their starting point the variable kinds of “development” that may be envisioned by communities linked to the lands targeted by investors. Instead, the starting point of advocates of a CoC is a certain vision of successful national capitalist economic development, along with an implicit belief that rural poverty is the result of poor developing countries' failure to follow this particular path. From this perspective, the main issue to be grappled with is not a land problem, but an investment problem—finance-poor countries saddled with anemic rural economies that need, but have not been able to attract, more investment in their agricultural sectors.

According to proponents of a CoC, more investments in this sector would create new farm and off-farm jobs, boost smallholder incomes (through contract-growing schemes), facilitate transfers of new technologies in production and processing (including biotechnology), increase production of food crops for both domestic and overseas consumption, build up infrastructure and improve access to basic services (e.g., health and education) in rural areas, and open up new export opportunities to earn foreign exchange.

¹¹ Our understanding of a truly pro-poor land policy is discussed in more detail elsewhere. See Saturnino Borrás, Jr. & Jennifer C. Franco, *Contemporary Discourses and Contestations Around Pro-Poor Land Policies and Land Governance*, 10 J. AGRARIAN CHANGE 1 (2010).

¹² John F. Richards, *Introduction to LAND, PROPERTY, AND THE ENVIRONMENT 1* (John F. Richards ed., 2002)..

Given this view of the “problem,” the phenomenon of land grabbing takes on a the character of an opportunity, rather than a threat. This argument clearly frames the CoC proposal put forward by IFPRI in April 2009, for example: “Because of the urgent need for greater development in rural areas and the fiscal inability of the developing-country governments to provide the necessary infusion of capital, large-scale land acquisitions can be seen as an opportunity for increased investment in agriculture.”¹³

One of the explanations most often given for why there are not enough investments coming into these rural economies is the lack of clear land property rights, which discourages potential investors. In recent decades, mainstream development institutions have become increasingly oriented toward the promotion of (usually individual) private property rights in land through mechanisms deemed to be financially and administratively efficient.¹⁴ Driven in part by this orientation’s obsession with technical land mapping, new satellite imagery has revealed the existence of a large supply of “reserve agricultural land” in many of the same regions where rural poverty is most concentrated, especially Africa, but also parts of South America and Asia.¹⁵ This “reserve” land in particular, it is believed, could be tapped to attract more investments in the agricultural sector, and indeed, some of it is already being tapped through the new land deals.

Meanwhile, during the debates over the controversial issue of the promotion of biofuels through mandatory targeting polices, the notion of the existence of much “reserve agricultural land” (located mainly in the South) gained unprecedented prominence in biofuels policymaking in the European Union, for example.¹⁶ This notion refers to land considered by investors (or potential investors) and their allies (in government, business, and the scientific-academic community in both the North and the South) to be idle, marginal, or degraded.¹⁷ Such characterizations have profound policy significance because they appear to lessen the possible conflicts between local food production and other land uses, especially those involving agricultural exports. There is a growing belief that such land could be rehabilitated if brought under cultivation, especially in ways that make use of recent biotechnological innovations that are already (or soon will be) available for both food and energy crop production and processing.¹⁸ This idea in particular serves to make these land deals seem less predatory and more beneficial for local communities and environments in the host nations.¹⁹

While it has been in the past (and often still is) taken for granted by governments and investors alike that the lands involved in these deals are empty and/or unused,

¹³ Von Braun & Meinzen-Dick, *supra* note 4, at 2.

¹⁴ Borras & Franco, *supra* note 11, at 3.

¹⁵ COTULA ET AL., *supra* note 5, at 59–60; WORLD BANK, RISING INTEREST IN LAND (2010).

¹⁶ Commission Directive 2009/28/EC, 2009 O.J. (L 140) 16 (E.U.).

¹⁷ See COTULA ET AL., *supra* note 5, at 62.

¹⁸ RENEWABLE FUELS AGENCY, THE GALLAGHER REVIEW OF THE INDIRECT EFFECTS OF BIOFUELS PRODUCTION 66 (2008).

¹⁹ See Franco et al., *supra* note 6.

Table 1 What are the “risks” of land grabs according to proponents of the new narrative?

World Bank risks	IFPRI risks
Neglect of land users	Loss of livelihoods
Short-term speculation	Failure to keep promises (local jobs, facilities, compensation)
Corruption	Absence of consultation (with affected communities)
Environmental harm	Violent conflict over rights
Polarization and instability	Loss of subsistence and safety-net functions of existing land uses
	Loss of biodiversity, carbon stocks
Undermining food security	Long-term ecological sustainability problems

Joachim von Braun & Ruth Meinzen-Dick, “*Land Grabbing*” by *Foreign Investors in Developing Countries: Risks and Opportunities*, IFPRI Policy Brief 13, at 2 (2009); see also Klaus Deininger, *Land Grabbing: International Community Response*, Presentation at Utrecht University (July 2009) (notes on file with author).

many academic research papers, policy studies, and activist reports have shown that this is not the case. This finding has been confirmed by the UN Committee on Food Security (CFS) High Level Panel of Experts’ (HLPE) Report on *Large-Scale Land Investment* released in July 2011. The notion of “reserve agricultural land” appears to be broad and ambiguous enough to accommodate all those who see its economic potential, even if they hold diverse interpretations of its social and environmental importance. In this context, ironically, the idea of a CoC for land deals reflects the increasing political weight of recognizing the continuing and actual social and environmental significance of land that may be labeled as marginal, idle, or degraded.

One of the most distinctive features of this dominant narrative is precisely its insistence upon the need to recognize the potential impacts of new investments on vulnerable segments of the rural population and on fragile ecosystems. This is clear in IFPRI’s proposal:

In some cases, the land leases are justified on the basis that the land being acquired by the foreign investor is “unproductive” or “underutilized.” In most instances, however, there is some form of land use, often by the poor for purposes such as grazing animals and gathering fuel wood or medicinal plants. These uses tend to be undervalued in official assessments because they are not marketed, but they can provide valuable livelihood sources to the poor. Large-scale land acquisitions may further jeopardize the welfare of the poor by depriving them of the safety-net function that this type of land and water use fulfills.²⁰

Such problems can be managed on this view, however. Foreign direct investment through large-scale land acquisitions is still seen as the answer despite the “risks”; in fact, on this view, it is because of the risks that some kind of management mechanism is needed. What is important to note here is that the implications of contemporary land deals for people and environments are (re)framed as side effects of an essentially beneficial cure—they are risks that can be managed in order to make possible a larger good. They are not taken as direct impacts that are so severe and unjust that they call into question the very validity of the cure—e.g., the land deals themselves or the development model being pursued through this type of foreign direct investment (Table 1).

²⁰ Von Braun & Meinzen-Dick, *supra* note 4, at 2.

Table 2 IFPRI's proposal for a CoC in land deals

Transparency in negotiations	Existing local landholders must be informed and involved in negotiations over land deals. Free, prior, and informed consent is the standard to be upheld. Particular efforts are required to protect the rights of indigenous and other marginalized ethnic groups. The media and civil society can play a key role in making information available to the public.
Respect for existing rights	Those whose land is taken should be compensated and rehabilitated to an equivalent livelihood. The standards of the World Commission on Dams provide an example of such policies.
Sharing of benefits	The local community should benefit, not lose, from foreign investment in agriculture. Leases are preferable to lump-sum compensation because they provide an ongoing revenue stream when land is taken away for other uses. Contract farming or out-grower schemes are even better because they leave smallholders in control of their land but still deliver output to the outside investor. Explicit measures are needed for enforcement if agreed-upon investment or compensation is not forthcoming.
Environmental sustainability	Careful environmental impact assessment and monitoring are required to ensure sound and sustainable agricultural production practices that guard against depletion of soils, loss of critical biodiversity, increased greenhouse gas emissions, or significant diversion of water from other human or environmental uses.
Adherence to national trade policies	When national food security is at risk (for instance, in case of an acute drought), domestic supplies should have priority. Foreign investors should not have the right to export during an acute national food crisis.

Joachim von Braun & Ruth Meinzen-Dick, *"Land Grabbing" by Foreign Investors in Developing Countries: Risks and Opportunities*, IFPRI Policy Brief 13, at 3–4 (2009).

How then can these “risks” be managed or even avoided? For those who recognize them but still see the need to encourage foreign direct investment in the form of big land deals, one element of successful risk avoidance or management involves ensuring the proper policy environment in the host countries. Both the World Bank and IFPRI give attention to the larger policy environment, and in similar ways. A beneficial policy environment would include: well-defined land rights and authorities, with an emphasis on a private property rights system; clear identification of land that is available and clear mechanisms for transfer of public land rights; improved investment climates through rule of law and contract security; evidence-based agricultural policies in relation to incentives, markets, technologies, and rural infrastructure; facilitation of contract-growing and out-grower schemes; enhanced market information systems; improved knowledge and extension services (including rural banking); and decentralized (community-based) negotiation. None of these items is new; many have been on the agenda of mainstream development institutions for years.

What is new is the other element of the above-mentioned idea of risk management: an international CoC that would govern the making and keeping of transnational land deals in ways that protect local people and environments, while still allowing them to be profitable in the conventional sense. This is the “magic bullet” in this particular narrative on land-grabbing: the inauguration of an international “code

of conduct” mechanism, whereby all “stakeholders” can come together and make agreements based on predefined principles of acceptable behavior and outcomes. Here, the proposal put forward by IFPRI, captured in the table below, is illustrative (Table 2).

This type of two-pronged approach (favorable policy environment plus an international CoC), it is declared, offers the best chance for the big land deals to lead to “win-win” outcomes for all concerned. A win-win outcome is one in which the development needs of both the resource-poor countries and resource-rich countries are met, while at the same time the investors’ needs and interests (i.e. profits) are served and poor people’s incomes and livelihoods are enhanced. What the resource-poor countries need are secure supplies of food and fuel in order to sustain their current patterns of food consumption and production. What the resource-rich countries need are new investments in agriculture that would create jobs, support small farmers, and bolster exports. What investors need is an improved, clear, stable, and secure investment climate (indeed, clear property rights to secure investments). In this way, as IFPRI puts it, “virtue” can be made out of “necessity.”²¹

In theory, the application of a CoC in this context might seem to be relevant and beneficial, or at the very least, harmless. One might expect that applying the technique in this case would not do any further harm than is already being done by the illicit land grabs themselves. Would it not be beneficial for society to bring untapped (or under-tapped) land under cultivation if it could be done in ways that do not undermine local rights, threaten local food security, or harm the environment? Would it not be useful to have clarification on land ownership and use rights? And would it not be useful to have agreement on different stakeholders’ responsibilities (and not just their rights)? If the essential value of institutions is that they establish rules where previously there were none, thus making it possible to regulate behavior and outcomes, thereby establishing order out of chaos, then would not the current global land rush be just the kind of situation where instituting a CoC would be especially appropriate?

We now turn to some of the problematic aspects of this proposed win-win formula as a response to the global land rush and offer some of our preliminary doubts and concerns.

3 Problems, Doubts, and Concerns

First, proposals for a CoC for land deals necessarily operate within and seek to sustain or extend the existing global industrial agro-food and energy complex. Positing a CoC as an overarching framework in response to globalized land-grabbing therefore does not address serious problems associated with the extractive mining of land (and water) in the South to meet the food and energy demands of industrialized countries and to sustain corporate profits. It explicitly or implicitly assumes that

²¹ See *id.* at 3.

there is no fundamental problem with existing industrial food and energy production and consumption patterns tightly controlled by TNCs. It ignores the possibility that the food and energy investments brought about by the recent mega land deals will not solve the food and energy crises in the world and might even worsen them. At the same time, it a priori dismisses the possibility of other development pathway options and ignores the clamor of those who believe that other pathways are possible—and better—and are either working toward or attempting to actualize them.²²

Second, the CoC is being promoted in tandem with the notion of the existence of “reserve agricultural land,” combined with images of agri-industrial systems playing a beneficial role in restoring degraded land to health, utilizing marginal land more fully, and reinvigorating idle land. In addition to new satellite imagery (which does not picture people or their historical land-based social relations and livelihood practices), the assumption of “reserve land” is often based on standard nation-state claims derived from official census data about land use and land property relations, which are notoriously unreliable in many countries, for a variety of reasons.²³ The very notion of “reserve” more or less automatically renders such land, by definition, “available,” amenable to, and appropriate for transformation into global granaries or new oil wells. And in the process, other possible or actual uses are rendered “illegible”—a term we borrow from James Scott, who examined how state officials reinterpret diverse local societies in order to facilitate central state regulation and administration.²⁴ Historically, “seeing like a state” has involved simplifying observed (local) social practices:

[L]ocal practices of measurement and landholding were “illegible” to the state in their raw form. They exhibited a diversity and intricacy that reflected a great variety of purely local, not state, interests. That is to say, they could not be assimilated into an administrative grid without either being transformed or reduced to a convenient, if partly fictional, shorthand.²⁵

Accepting the notion of reserve agricultural land necessarily consigns existing local land-based social relations and practices that are diverse and distinct to being

²² Several transnational and global-regional networks of poor peasants and small farmers have embraced the alternative vision of food sovereignty, with their member organizations working toward achieving this vision, albeit with varying degrees of progress and success to date. The most prominent agrarian justice movement working along these lines is La Vía Campesina. See La Vía Campesina, <http://www.viacampesina.org> (last visited Apr. 8, 2010). Meanwhile, similar trends can be seen in other kinds of networks, especially those working with an environmental justice orientation, such as the African Biodiversity Network and Friends of the Earth. Some of these same groups have also begun discussing the notion of “energy sovereignty” in response to the fact that many areas where rural poverty is most concentrated often suffer from lack of access to national electricity grids as well. This is the case even in countries where energy produced through mega-dams, coal-mining, or large-scale monocropping is mostly exported or diverted to cities for industrial use, as in Mozambique, for example.

²³ See, e.g. Rachel Nalepa & Dana Marie Bauer, *Marginal Lands: the Role of Remote Sensing in Constructing Landscapes for Agrofuel Development*, 39 J. PEASANT STUD. 403, 403–22 (2012).

²⁴ See JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 24 (1998).

²⁵ *Id.* (emphasis added).

vestiges of the past—to be acknowledged, but in the end, not worthy of being taken seriously enough to protect and advance into the future. They simply do not “fit” the economic development grid envisioned by today’s proponents of a CoC; they are not the beneficiaries of the “responsible agricultural investment” that is envisioned.

Instead, based on past experience, what we can expect from this kind of framing of land is more dispossession in the name of transforming “marginal” land into economically productive spaces. When the Philippine government promised 1.4 million hectares of “marginal” lands to China, they were referring to areas officially catalogued as “public” (and therefore considered marginal), but in fact populated by both indigenous and non-indigenous communities engaged in a variety of land-based livelihoods. Elsewhere, it is traditional land-extensive pastoralist livelihoods that tend to be subsumed under the category of “marginal” land, as in the case of the Procana sugarcane ethanol project in Mozambique.²⁶ The expansion into the already fragile Amazon frontier by soya monocropping is also being justified partly in the name of making “marginal” lands economically “productive,” as if no other use or purpose could be considered productive or sufficiently productive.²⁷ Moreover, the rehabilitation of so-called “degraded” lands often comes in the form of industrial monocropping that is portrayed as environmentally friendly, but actually undermines the lands ecologically (e.g., industrial tree monocropping, including palm oil and eucalyptus plantations, is now often referred to as “reforestation”).

Third, advocates of a CoC argue that without clear land property rights (usually taken as individual and private), the “risk” of dispossession is high. Implicit here is a belief that having formal land property rights (usually individual and private land rights) removes this risk and serves as a guarantee that people will not be displaced and dispossessed by these large-scale land deals. Such a view converges with years of mainstream advocacy for the privatization of the remaining commons and formalization of land rights, targeting public lands worldwide.

Yet this view is deeply flawed. There is much evidence to show that formal land property rights are no guarantee against dispossession, and they even often appear

²⁶ See Borras & Franco, *supra* note 11, at 19.

²⁷ See e.g., Brenda Balleti, *Neo-developmentalism and the Struggle for Territory in the Lower Brazilian Amazon*, 39 J. PEASANT STUD. 551, 551–572 (2012). For general comment on this transformation, see Saturnino M. Borras, Jr. & Jennifer C. Franco, *The Politics of Contemporary (Trans)national Commercial Land Deals: Competing Views, Strategies and Alternatives*, 13, 17–20 (Oct. 30, 2009), (unpublished manuscript prepared for Agrarian Studies Colloquium Series, Yale University), available at <http://www.yale.edu/agrarianstudies/papers/08borras.pdf>. It is difficult in the current policy climate to find specific examples, since many companies have begun “green-washing” their public statements. For example, Cargill, which has been quite controversial for its expansion of soy monocropping into the Amazon rainforest, has stated that it is “supporting cutting-edge research on how to rehabilitate degraded lands for agricultural use to increase production and reduce habitat loss.” CARGILL, 2007 CORPORATE CITIZENSHIP REVIEW: FINDING THE RIGHT BALANCE 12 (2007). Elsewhere in that report, the company implies that expansion is occurring in areas that were already deforested and that, in light of Brazil’s “strict” Forest Code, it is working with small farmers by supplying them with soybean for crushing to restore old pasture to forest. *Id.* Although this not an explicit justification of expansion by working to make the marginal more productive, it comes as close as one might expect from a company that is under fire from social and environmental justice activists.

at the leading edge of it. The introduction of formal land property rights first requires answering in practice (in power-differentiated settings marked by conflicting interests) the complex series of questions posed earlier in this discussion—who has (or should have) what rights to which land for how long and for what purposes.²⁸ Formal land property rights are contested terrain, since they involve decisions about who counts and who does not. Introducing formal rights for indigenous landholders is not necessarily pro-poor in and of itself; but it does “recalibrate the arena of struggle.”²⁹ Gaining legal recognition of poor people’s land rights has never alone guaranteed that they will actually be respected and protected in the courts or on the ground; for the rural poor, there remains a difficult and contested process involving struggles to actually claim those rights and “make them real” in fact.³⁰

In short, formal-legal land rights are formulated, interpreted, disputed, and implemented by numerous state and non-state actors with their own interests and embedded in power structures at multiple levels, and thus can (and more often than not do) lead to outcomes that cannot be considered pro-poor.³¹ Neither categorically pro-poor outcomes, nor even “win-win” outcomes, are ever guaranteed.

Clear land property rights (private or otherwise) have certainly not guaranteed win-win outcomes in many of the land deals, nor have they automatically protected the rural poor from various forms of dispossession or “adverse incorporation” into the food-fuel production enclaves. In Mozambique, the rural poor have very clear land rights based on Land Law 1997, but as the Procana case shows, they can still be expelled from their land.³² In Brazil, the expansion of sugarcane ethanol production has swallowed some land reform settlements, specifically in the São Paulo.³³ In Indonesia, clearer property rights requirements in contract farming schemes do not always lead to the bright promise of oil palm plantation expansion.³⁴

As Cotula and Vermeulen argue, using empirical material from Africa, clear and secure land property rights are necessary but not sufficient to guarantee protection of rural poor land rights.³⁵ We agree. But we would also add another critical point:

²⁸ See Richards, *supra* note 12 and accompanying text.

²⁹ SUZANA SAWYER & EDMUND TERENCE GOMEZ, U.N. RES. INST. SOC. DEV., TRANSNATIONAL GOVERNMENTALITY AND RESOURCE EXTRACTION: INDIGENOUS PEOPLES, MULTINATIONAL CORPORATIONS, MULTILATERAL INSTITUTIONS AND THE STATE 3 (2008).

³⁰ There is a growing literature on the difficult challenges of “making rights real” in the case of land. See, e.g., Ben Cousins, *How Do Rights Become Real? Formal and Informal Institutions in South Africa’s Land Reform*, 28 INT’L DEV. STUD. BULL. 59 (1997) (discussing land reform in South Africa); Jennifer C. Franco, *Making Land Rights Accessible: Social Movements and Political-Legal Innovation in the Rural Philippines*, 44 J. DEV. STUD. 991 (2008) (discussing land reform in the Philippines).

³¹ See Borras & Franco, *supra* note 11.

³² See Franco, *supra* note 30.

³³ Based on Borras’s field observation in the state of Sao Paulo in 2008.

³⁴ For a range of outcomes on recent oil palm contract farming in Indonesia, both favorable and unfavorable to the rural poor, see John McCarthy, *Processes of Inclusion and Adverse Incorporation: Oil Palm and Agrarian Change in Sumatra, Indonesia*, 38 J. PEASANT STUD. 821, 821–50 (2010).

³⁵ Lorenzo Cotula & Sonja Vermeulen, *Over the Heads of Local People: Consultation, Consent and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa*, 37 J. PEASANT STUD.

secure property rights should not a priori, only or always, mean private property rights; in many parts of the world, an inductive approach is needed that is based on a deep understanding of the societies where intervention is targeted and “makes socially legitimate occupation and use rights, as they are currently held and practiced, the point of departure for both their recognition in law and for the design of institutional frameworks for mediating competing claims and administering land.”³⁶

Fourth, the assumption that land transactions among “multi-stakeholders” that are formal and transparent, and, to the extent possible, decentralized-localized, are the solution to avoid negative consequences of current mega land deals is only partly correct. Certainly, any land deal should at least be transparent, but transparency does not necessarily guarantee pro-poor outcomes. Transparency is not the same as accountability, and transparent transactions do not necessarily guarantee accountability, especially to poor “stakeholders”.³⁷ This insight partly helps to explain the rise of a (trans)national accountability movement in recent years.³⁸

Moreover, the question of representation of social groups, especially in rural communities in the South, is problematic, uneven, and politically contested—whether negotiations are transparent or not.³⁹ In many places, a minority elite section of a community often claims to represent the poor even when it does not. On many occasions in many countries, local elites forge formal contracts with investors in the name of their communities despite having no real consultative process and mandate. Often in such situations, the rural poor have little opportunity to set the record straight, while other, more powerful, stakeholders have little interest in ensuring that oppositional voices are even heard, much less taken into consideration, if doing so could mean scuttling the deal altogether. Different social groups join the negotiation table with different degrees of political power. The power of unorganized pastoralists with no organized mobilization and negotiation experience is likely to be no match for transnational companies and government bureaucrats.

Finally, the World Bank has a special bias towards decentralized-localized negotiations, as explained by Klaus Deininger.⁴⁰ But it is at the local level that local elites and bureaucrats who stand to gain in new investments can easily manipulate negotiation processes and where local communities of the poor can easily be isolated from their potential national allies. The persistence of widespread chronic rural poverty points to the need to make social justice-driven rural democratization a major focus of inquiry, advocacy, and policy intervention.⁴¹ The idea of a CoC makes an end

899, 899–916 (2010).

³⁶ Ben Cousins, *More Than Socially Embedded: The Distinctive Character of “Communal Tenure” Regimes in South Africa and Its Implications for Land Policy*, 7 J. AGRARIAN CHANGE 281 (2007).

³⁷ See Jonathan Fox, *Introduction*, in THE CHALLENGES OF RURAL DEMOCRATISATION: PERSPECTIVES FROM LATIN AMERICA AND THE PHILIPPINES (Jonathan Fox ed., 1990).

³⁸ Utting, *supra* note 1, at 960.

³⁹ See generally THE CHALLENGES OF RURAL DEMOCRATISATION, *supra* note 36.

⁴⁰ Deininger, *supra* note 21.

⁴¹ See JENNIFER FRANCO, TRANSNATIONAL INST., RURAL DEMOCRATISATION: (RE) FRAMING RURAL POOR POLITICAL ACTION (2008) (building on the work of THE CHALLENGES OF RURAL DEMOCRACY, *supra* note 36); John Gaventa, *Exploring Citizenship, Participation and Accountability*, 33 IDS BULL.

run around the much deeper issue of democratizing the rural political arena, including development-related decision-making that profoundly affects people's lives, by imposing one particular view of appropriate economic development as the end goal.

Fifth, inherent in a CoC is the voluntary nature of agreements. Violations are difficult to pin down; violators are impossible to make accountable. Even where there is formal adherence by the parties concerned to the principles of free, prior, and informed consent (FPIC), these principles are rarely observed and enforced in practice, and it would take much political power, time, and resources to ensure that they were. Sawyer and Gomez have observed the paradox that, simultaneously with an increase in and institutionalization of international treaties, voluntary guidelines, and FPIC principles intended to protect indigenous peoples, there have been unprecedented violations of the rights of indigenous peoples and the penetration of their territories worldwide.⁴²

Sixth, "partnership" is also a key concept in a CoC. It comes in many component forms, including state/private-sector/civil-society partnerships, which are assumed to promote transparency and build win-win outcomes into any land deals. But such a notion of partnership is usually based on a depoliticized and unrealistic vision of engagement between various actors that strips them of possibly conflicting interests and attempts to place them on equal footing. Imagining equal footing and complementary interests where none exist is more likely than not to lead to the poor losing out. Another type of partnership is the "TNC-farmer" partnership that may come in the form of contract farming, where peasant producers are incorporated into the global agri-industrial food/energy complex through a variety of contractual arrangements. It is perhaps the most commonly cited type of incorporation of poor peasants and small farmers into large-scale agri-industrial schemes and is thought to result in win-win scenarios. Over time and in many diverse settings, however, this has proved not to be the case. Instead, such arrangements generally result in processes and outcomes that mainly favor the transnational companies, while, in some instances, they have even become an excuse to engage in forest clearing and monocropping. This is not to say that the idea of a "contract" is bad per se. Yet, the terms of the contract and the general development model within which such a contract is forged may be highly problematic. From that perspective, the insertion of small producers into global value chains through a variety of channels and organizations (including a Chayanovian notion of "vertical integration" linked to a different kind of development model) is to be distinguished from TNC-led contract farming

1 (2002). Here, rural democratization is understood as a long and difficult process that involves struggles to build social and political organizations capable of representing the diverse interests of the rural poor and amplifying their voices in public policy processes, including development-related decision making that affects their lives. It involves struggles to increase state accountability to excluded or marginalized members of the rural working poor population. This includes struggles to effectively claim their rights and the right to decide what kind of development is to be pursued in their name. From this perspective, "development" may still be the answer to rural poverty, but it is equally important who defines what kind of development and for what purposes development is pursued.

⁴² SAWYER & GOMEZ, *supra* note 29, at 17.

schemes. The current mainstream advocacy for small farms to be inserted into the TNC-controlled global “food regime” is what we want to criticize here.

In short, part and parcel of the idea of a CoC is an uncritical belief in the basic beneficence of formalistic and legalistic measures such as clearer contracts, clearer and more secure property rights (usually interpreted as private and individual rights), transparent contracting, FPIC, and state-civil society partnership. Each of these, in itself, is not necessarily bad; each could have merit depending on a particular context. But none is inherently good in that none can guarantee truly pro-poor outcomes. In the absence of a clear framework and process that insists on prioritizing truly pro-poor outcomes, the weaknesses of these various elements are more likely to be reinforced when framed within a win-win, voluntary CoC as the response to the global land grab.

4 Conclusions

The idea of a CoC-framed response to the global land grab phenomenon—a generic formulation that includes a variety of specific mechanisms such as the RAI and a variety of existing voluntary multistakeholder roundtables on different crops—veers away from questioning the fundamental roots of land-grabbing, i.e., the existing industrial pattern of food and energy production and consumption controlled by TNCs, while engaging in the problematic notion of win-win scenarios. In our view, for all the reasons outlined above, a CoC-framed response to land-grabbing is likely to facilitate, not block, further land-grabbing and thus should not be considered, even as a second-best approach. Some may argue that the idea of a CoC, despite its inherent weaknesses, should still be considered as a possible second-best, pragmatic approach on the grounds that large-scale land grabbing is inevitable in the current economic climate and political-institutional context. Yet we contend that land grabbing is not inevitable, that it can be prevented, and that concerted efforts should be undertaken to stop it. Doing so, however, will require an appropriate (re)alignment of political forces at the international, national, and local levels, mobilized within a human rights framework.

In our view, prioritizing truly pro-poor outcomes requires adopting a human rights-based approach, and taking seriously the right to food and the right to land. Elsewhere we have elaborated on the need to specify the key features of a human-rights framed, categorically pro-poor land policy framework, which are also relevant here. Two of these key features are protection or transfer of land-based wealth in favor of the poor and transfer of land-based political power. A pro-poor land policy framework must also be: (i) class-conscious to ensure the policy (or measures) benefits the landless and near-landless working classes; (ii) historical so as to allow a “social justice” framework to be fully developed; (iii) gender-sensitive to promote the distinct right of women to their own land rights; (iv) ethnicity-sensitive to promote the distinct right of ethnic groups (and other race and caste-related groupings) to their territorial claims as peasants and as peoples; (v) productivity-increasing to

support more intensive land and labor use; (vi) livelihood-enhancing to support the building of diverse and sustainable livelihoods; and finally (vii) rights-securing to advance the rights of poor people to occupy and use land for purposes and in ways of their own choosing.⁴³

A human rights-based framework has fundamental differences with the more corporate-controlled and profit-driven CoC framework. First, it calls into question the broader pattern of food-energy production and consumption that drives the current global land grab. Second, it embeds an analysis of it within the dynamics of multi-class and group power relations in affected communities. Third, it opposes displacement/dispossession as well as adverse incorporation of poor people into the emerging agri-industrial food-energy enclaves in the Global South. And finally, a comprehensive human rights-based framework sets a high bar for evaluating processes and their outcomes.

⁴³ Borras & Franco, *supra* note 12; see also Jennifer Franco, *Pro-Poor Policy Reforms and Governance in State/Public Lands: A Critical Civil-Society Perspective*, 1 LAND REFORM 8 (2009).

Part III
Governing for Better Food Systems

International Economic Law and the Right to Food

Carmen G. Gonzalez

Abstract Food insecurity is a product of poverty rather than food scarcity. Its origins lie in economic policies that undermine the livelihoods of small farmers in developing countries and exacerbate North-South inequality. This chapter examines the historic and contemporary practices that contribute to food insecurity in the global South, and analyzes the role of international economic law in perpetuating these practices. The chapter concludes with a variety of concrete measures that the international community might take through law and policy to promote the fundamental human right to food.

1 Introduction

The right to food is recognized as a fundamental human right in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the United Nations Convention on the Rights of the Child.¹ Notwithstanding the obligation of states to respect, protect, and fulfill this right, the number of chronically undernourished people in the world soared to 1.02 billion in

¹ See Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/10, art. 25 (Dec. 12, 1948); United Nations Convention on the Rights of the Child, arts. 24 & 27, 1577 U.N.T.S. 3 (Nov. 20, 1989); International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A, art. 11 (Dec. 16, 1966), *reprinted* in 6 I.L.M. 360 (1967).

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2009 before declining to approximately 925 million in 2010.² Although food insecurity affects millions in the global North, the vast majority of the world's malnourished people reside in Asia, Africa, Latin America, the Pacific, and the Caribbean.³

The food crisis of 2008 propelled the issue of food security to the center of public debate. From 2006 through 2008, skyrocketing food prices thrust over 100 million additional people into the ranks of the malnourished, and provoked food riots across the globe.⁴ The immediate causes of the food crisis included adverse weather, high oil prices, rising world-wide meat consumption, growing demand for grain-based biofuels, and financial speculation in global commodity markets.⁵ The United Nations Food and Agriculture Organization (FAO) also reports that the food crisis was provoked primarily by escalating demand for agriculture products (notably demand for grain-based biofuels) rather than shrinking supply.⁶ High food prices coincided with bumper cereal harvests in major food-producing nations and with hefty profits by the transnational corporations that dominate global food and agro-chemical markets.⁷

Although food insecurity is a function of poverty rather than food scarcity, the Group of 8 (G-8) industrialized nations, the World Bank, and the International Monetary Fund (IMF) responded to the 2008 food crisis with supply-oriented solutions (such as food aid and proposals to boost food production).⁸ Despite a welcome emphasis on reinvestment in agriculture, and on supporting small-holder farmers in particular, the international community failed to address the deeper structural causes

² See U.N. FOOD & AGRIC. ORG. [FAO], *THE STATE OF FOOD INSECURITY IN THE WORLD 2009*, 11 (2009) [hereinafter *FAO, STATE OF FOOD INSECURITY 2009*] (estimating the number of malnourished people at 1.02 billion in 2009); U.N. FOOD & AGRIC. ORG. [FAO], *THE STATE OF FOOD INSECURITY IN THE WORLD 2010*, 9 (2010) [hereinafter, *FAO, STATE OF FOOD INSECURITY 2010*] (lowering the estimate of malnourished people in light of the recovery of the global economy after the economic crisis of 2008–2009). The FAO did not provide an estimate for the number of malnourished people in 2011 because it was reviewing its methodology for calculating undernourishment. See U.N. FOOD & AGRIC. ORG. [FAO], *THE STATE OF FOOD INSECURITY IN THE WORLD 2011*, 10 (2011) [hereinafter *FAO, STATE OF FOOD INSECURITY 2011*]. If high and volatile agricultural commodity prices persist, it appears likely that the total number of chronically undernourished people in the world will once again rise.

³ See *FAO, STATE OF FOOD INSECURITY 2010*, *supra* note 2, at 10. Food insecurity has also been growing in the United States. According to the U.S. Department of Agriculture, 14.6% of American households experienced periods of food insecurity in 2008— a significant increase from 11.1% in 2007. See MARK NORD ET AL., U.S. DEP'T OF AGRIC., *HOUSEHOLD FOOD SECURITY IN THE UNITED STATES, 2008*, ECONOMIC RESEARCH REPORT NO. 83 iii (2009).

⁴ See U.N. FOOD & AGRIC. ORG. [FAO], *THE STATE OF AGRICULTURAL COMMODITY MARKETS 6*, 9 (2009) [hereinafter, *FAO, STATE OF AGRICULTURAL COMMODITY MARKETS 2009*].

⁵ See *id.* at 15; Anuradha Mittal, U.N. Conference On Trade and Development [UNCTAD], *The 2008 Food Price Crisis: Rethinking Food Security Policies*, G-24 Discussion Paper No. 29, at 3–8 U.N. Doc. UNCTAD/GDS/MDP/G24/2009/3 (June 2009).

⁶ See *FAO, STATE OF AGRICULTURAL COMMODITY MARKETS 2009*, *supra* note 4, at 16.

⁷ See *id.* at 23; ERIC HOLT-GIMENEZ, INST. FOR FOOD AND DEV. POLICY/FOOD FIRST, *THE WORLD FOOD CRISIS: WHAT'S BEHIND IT AND WHAT WE CAN DO ABOUT IT*, FOOD FIRST POLICY BRIEF NO. 16, 6 (2008); Geoffrey Lean, *Rising Prices Threaten Millions with Starvation, Despite Bumper Crops*, *THE INDEP.*, March 2, 2008.

⁸ See Mittal, *supra* note 5, at 16–18.

of food insecurity in the global South, including inequities in the rules governing international trade, ill-advised economic reforms imposed by international financial institutions, financial speculation on global commodity markets, biofuels policy, and the dominance of transnational corporations in global food markets.

This chapter examines the historic and current policies and practices that have contributed to food insecurity in the global South. It analyzes the impact of international economic law on the patterns of trade and production that perpetuate food insecurity, and recommends concrete measures that the international community might take through law and regulation to promote the fundamental human right to food. Section 2 provides a short introduction to the right to food framework and its implications for international trade, investment, and finance. Section 3 places the current food crisis in historical perspective by discussing the trade and aid policies that laid the foundation for food insecurity in the global South from colonialism until the early 1980s. Section 4 explains how food insecurity was exacerbated by the free market reforms implemented in the global South in the last three decades pursuant to structural adjustment programs mandated by international financial institutions and to multilateral and bilateral trade agreements. Section 5 discusses the impact on food security of the financial crisis, the climate crisis, and the growing acquisition of agricultural lands in the global South by foreign investors. Section 6 describes concrete steps that states could take to respect, protect and fulfill the right to food, both nationally and globally. Section 7 concludes with a variety of proposals to better integrate human rights law, environmental law, and international trade and investment law, so as to create a more enabling global environment for the realization of the right to food.

2 Applying the Right to Food Framework to Trade, Investment, and Finance

The International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the “fundamental right of everyone to be free from hunger” and requires state parties to:

take, individually and through international co-operation, the measures, including programs, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.⁹

Nations are obligated to respect the right to food by making sure that state action does not interfere with the ability of people to procure food for their own consump-

⁹ ICESCR, *supra* note 1, at art. 11(2).

tion either by growing it or purchasing it. As such, the state is obligated to ensure that agricultural policies do not deprive farmers of their livelihoods.¹⁰ The state must also protect the right to food by taking measures to prevent third parties from depriving people of the means to either grow food or purchase food. This means that the state is obligated to ensure that economically powerful third parties do not deprive small farmers of access to food by displacing them from food production.¹¹ Finally, states must fulfill the right to food by providing vulnerable populations with jobs or with the resources to grow or purchase their own food.¹²

All states, even those not a party to the ICESCR, are obligated to protect the human right to food pursuant to the Universal Declaration of Human Rights, which is widely regarded as part of customary international law or as a codification of general principles of law reflected in the national constitutions of a large number of countries in various regions and legal systems of the world.¹³ Other human rights principles also protect aspects of the right to food. For example, the right to food is protected through Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to life,¹⁴ and has been interpreted authoritatively as requiring states to adopt affirmative measures to eliminate malnutrition.¹⁵ Additionally, Article 1 of both the ICESCR and the ICCPR prohibit states from interfering with a population's means of subsistence.¹⁶

The 1996 World Food Summit (WFS) focused the attention of the international community on food insecurity, and the WFS Plan of Action requested clarification of the scope and content of the right to food.¹⁷ In response, the U.N. Committee on Economic, Social, and Cultural Rights (CESCR) developed General Comment 12, which spells out for the first time the extraterritorial dimensions of the right to food by explaining that:

¹⁰ See Michael Windfuhr, *The World Food Crisis and the Right to Adequate Food*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS 130, 148 (Mark Gibney & Sigrun Skogly eds., 2010).

¹¹ See *id.*

¹² See *id.*

¹³ See Universal Declaration of Human Rights, *supra* note 1, at art. 25; BERTA ESPERANZA HERNÁNDEZ-TRUYOL & STEPHEN J. POWELL, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS 56–57 (2009); Olivier De Schutter, *A Human Rights Approach to Trade and Investment Policies*, in THE GLOBAL FOOD CHALLENGE: TOWARDS A HUMAN RIGHTS APPROACH TO TRADE AND INVESTMENT POLICIES 14, 15 (2009). See also Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT'L L. 691, 780–91 (2006) (using human rights treaties, humanitarian law, U.N. resolutions, multi-state declarations, constitutional rights, and domestic jurisprudence to support the treatment of the right to food as customary international law—apart from the Universal Declaration of Human Rights).

¹⁴ See International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171, art. 6(1) [hereinafter ICCPR].

¹⁵ See Office of the High Commissioner for Human Rights, General Comment No. 6: The Right to Life, para. 5 (April 30, 1982).

¹⁶ See ICESCR, *supra* note 1, at art. 1; ICCPR, *supra* note 14, at art. 1.

¹⁷ See Windfuhr, *supra* note 10, at 138.

In the spirit of article 56 of the Charter of the United Nations . . . , States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. 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.¹⁸

In other words, when states negotiate international agreements, such as bilateral and multilateral trade and investment agreements, they have an obligation to ensure that these agreements do not violate the right to food of vulnerable populations in other nations. They must also ensure that third parties subject to their jurisdiction and control, such as transnational corporations, do not violate the right to food in other countries. Finally, states that are members of the IMF, the World Bank, and regional development banks must ensure that the policies and practices of these institutions do not violate the right to food.¹⁹ The following three sections discuss the various historic and contemporary factors that have contributed to the non-compliance of states with their right to food obligations.

3 The Historic Roots of Food Insecurity in the Global South (Post WWII-1980s)

As a consequence of the plantation-based production and trade patterns imposed under colonialism, most developing countries entered the world economy at independence as exporters of agricultural commodities and consumers of imported manufactured goods.²⁰ Specialization in agricultural exports is economically disadvantageous due to the volatility of world market agricultural prices and to the declining terms of trade for primary commodities vis-à-vis manufactured goods.²¹ In other words, countries that export agricultural products cannot count on steady revenue streams for investment, and must sell increasing amounts of their output to world markets in order to purchase the same amount of manufactured products.²² Agro-export specialization also diverts prime agricultural lands from food production to cash crop production, favors large landholders who can produce significant

¹⁸ See U.N. Comm. on Econ., Social and Cultural Rights, General Comment 12: The Right to Adequate Food, para. 36 U.N. Doc. E/C.12/1999/5 (May 12, 1999).

¹⁹ See generally Windfuhr, *supra* note 10, at 152–54. See also Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights (Sept. 28, 2011). Adopted by experts in international law and human rights law at a gathering convened by Maastricht University and the International Commission of Jurists, the Maastricht Principles seek to clarify the extraterritorial obligations of states to realize economic, social, and cultural rights.

²⁰ See CARY FOWLER & PAT MOONEY, SHATTERING: FOOD, POLITICS, AND THE LOSS OF GENETIC DIVERSITY 40–41 (1996); E.M. YOUNG, WORLD HUNGER 41–42 (1997).

²¹ See JAMES M. CYPHER & JAMES L. DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT 86 (1997); PETER ROBBINS, STOLEN FRUIT: THE TROPICAL COMMODITIES DISASTER 2–3, 7–15 (2003).

²² See CYPHER & DIETZ, *supra* note 21, at 172.

volumes of export commodities, and frequently consigns small farmers to poverty by relegating them to fragile, ecologically marginal lands.²³

The structural disadvantage of agro-export specialization is relevant to food security at the national level because the most food-insecure developing countries are net agricultural exporters who depend on food imports to satisfy domestic nutritional needs.²⁴ Adverse weather, pest infestations, and market price fluctuations can depress export earnings and deprive these countries of the revenues necessary to finance food imports.²⁵ For example, many agro-exporting developing countries were harmed by the 2008 food price increases because they are net food importers and because the price of imported food staples (such as cereals and oilseeds) rose far more dramatically than the price of the products that these countries export (such as coffee, cocoa, cotton, and rubber).²⁶

The trade and aid policies of wealthy countries in the aftermath of World War II exacerbated rural poverty in the global South and deprived many developing countries of the resources needed for economic diversification. In the post-war period, the United States and Western Europe provided generous subsidies to their agricultural producers and utilized both tariff and non-tariff import barriers to protect them from foreign competition.²⁷ By contrast, most developing countries imposed taxes on agricultural producers to finance industrialization and lacked the resources to provide farmers with significant subsidies.²⁸

The 1947 General Agreement on Tariffs and Trade (1947 GATT) did little to curb Northern agricultural protectionism because it largely exempted agriculture from the GATT's trade liberalization obligations.²⁹ Negotiated at a time when most developing countries were under colonial rule, the 1947 GATT favored the interests of the global North at the expense of the global South.³⁰ While the global North ben-

²³ See FOWLER & MOONEY, *supra* note 20, at 95–96; JAMES WESSEL, *TRADING THE FUTURE: FARM EXPORTS AND THE CONCENTRATION OF ECONOMIC POWER IN OUR FOOD SYSTEM* 166–67 (1983); YOUNG, *supra* note 20, at 66.

²⁴ See CHRISTOPHER STEVENS ET AL., *THE WTO AGREEMENT ON AGRICULTURE AND FOOD SECURITY* 14 (2000); U.N. FOOD & AGRIC. ORG. [FAO], *THE STATE OF AGRICULTURAL COMMODITY MARKETS 2004*, 19 (2004) [hereinafter FAO, *STATE OF AGRICULTURAL COMMODITY MARKETS 2004*].

²⁵ See FAO, *STATE OF AGRICULTURAL COMMODITY MARKETS 2004*, *supra* note 24, at 12–13; CYPHER & DIETZ, *supra* note 21, at 86; PETER ROBBINS, *STOLEN FRUIT: THE TROPICAL COMMODITIES DISASTER* 2–3, 7–15 (2003); YOUNG, *supra* note 20, at 41–42.

²⁶ See FAO, *STATE OF AGRICULTURAL COMMODITY MARKETS 2009*, *supra* note 4, at 10, 27–29.

²⁷ See *THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986–1992)* 141, 155–56 (Terence P. Stewart ed., 1993) [hereinafter *GATT URUGUAY ROUND*]; M. Ataman Aksoy, *Global Agricultural Trade Policies*, in *GLOBAL AGRICULTURAL TRADE AND DEVELOPING COUNTRIES* 37 (M. Ataman Aksoy & John C. Beghin eds., 2004).

²⁸ See *GATT URUGUAY ROUND*, *supra* note 27, at 154–57; Aksoy, *supra* note 27, at 37.

²⁹ See Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 *COLUM. J. ENVTL. L.* 433, 440–45 (2002); Fiona Smith, *Regulating Agriculture in the WTO*, 7 (2) *INT'L J. LAW IN CONTEXT* 233, 234 (2011).

³⁰ See PHILIPPE CULLET, *DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW* 60 (2003); Faizel Ismail, *Rediscovering the Role of Developing Countries in GATT before the Doha Round*, 1 *L. & DEV. REV.* 49, 50, 55 (2008).

efited from the 1947 GATT's reduction of tariffs on manufactured goods, the global South was harmed by various GATT exemptions that enabled developed countries to heavily subsidize the agricultural sector and to limit or exclude imports of textiles, clothing, and agricultural products from their less developed counterparts.³¹ In response to sustained pressure from developing countries, the 1947 GATT was amended several times in order to foster greater access by the global South to Northern markets and to enable developing countries to promote industrialization through the protection of infant industries.³² However, the amendments were often couched in non-binding language, proved unwieldy and unworkable, and frequently excluded the very products of greatest interest to developing countries.³³ In short, the 1947 GATT succeeded in reducing tariffs on manufactured goods, but permitted agricultural protectionism to flourish in the United States and Western Europe.

One of the consequences of agricultural subsidies was a glut of food on U.S. markets, which prompted the federal government to dispose of its surplus production in developing countries as food aid pursuant to U.S. Public Law 480 (the so-called "Food for Peace Program").³⁴ This practice exacerbated food insecurity in the global South by depressing agricultural commodity prices and undermining the livelihoods of poor farmers; at the same time, the import barriers maintained by the United States and other wealthy nations deprived developing countries of the foreign exchange earnings necessary to finance imports and promote industrialization.³⁵

The next major milestone in the transformation of Southern agriculture was the Green Revolution. Funded by the Ford and Rockefeller Foundations, the Green Revolution sought to reduce world hunger by increasing global crop yields.³⁶ International crop breeding institutions developed new varieties of rice, wheat, and corn that produced higher yields than traditional varieties in response to the application of synthetic fertilizers and controlled irrigation.³⁷

While the Green Revolution was a tremendous success from the standpoint of food production, it often intensified poverty and inequality in the global South.³⁸

³¹ See YONG-SHIK LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM 107–10 (2006); Gonzalez, *supra* note 29, at 440–46; Ismail, *supra* note 30, at 58–59.

³² See Ismail, *supra* note 30, at 65–67.

³³ See LEE, *supra* note 31, at 37–38.

³⁴ See Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. §§ 1691–1736e (1982); Food for Peace Act of 1966, Pub. L. No. 89–808, § 3(c), 80 Stat. 1526 (codified at 7 U.S.C. §§ 1427, 1431, 1431b, 1446a–7, 1691–1736e (1982)); WESSEL, *supra* note 23, at 29–31, 52–55, 168–76.

³⁵ See Carmen G. Gonzalez, *Markets, Monocultures, and Malnutrition: Agricultural Trade Policy Through an Environmental Justice Lens*, 14 MICH. ST. J. INT'L L. 345, 361 (2006).

³⁶ See GORDON CONWAY, THE DOUBLY GREEN REVOLUTION: FOOD FOR ALL IN THE 21ST CENTURY 44 (1997); KEITH GRIFFIN, ALTERNATIVE STRATEGIES FOR ECONOMIC DEVELOPMENT 144 (2d ed., 1990).

³⁷ See CONWAY, *supra* note 36, at 47–52, 61.

³⁸ See *id.* at 69–72; FOWLER & MOONEY, *supra* note 20, at 58–59; KEITH GRIFFIN, THE POLITICAL ECONOMY OF AGRARIAN CHANGE: AN ESSAY ON THE GREEN REVOLUTION 51–52 (1974); YOUNG, *supra* note 20, at 72. Approximately 80% of the published reports on the Green Revolution concluded

First, the Green Revolution disproportionately benefited wealthy farmers because many poor farmers could not afford the synthetic fertilizers, chemical pesticides, and irrigation equipment necessary to achieve high yields.³⁹ Second, by increasing world food production, the Green Revolution depressed agricultural commodity prices, rendering many small farmers destitute.⁴⁰

The Green Revolution also produced serious environmental degradation in the global South, as farmers abandoned ecologically sustainable low-input agricultural practices in favor of uniform seeds, chemical fertilizers, and synthetic pesticides.⁴¹ The environmental consequences of this dramatic shift to industrial agriculture included loss of soil fertility, depletion of aquifers, agrochemical contamination of surface waters and groundwater, loss of ecosystem biodiversity, loss of traditional food crops, increased pesticide-related illness, and narrowing of the genetic base of the world's food supply.⁴²

Ecosystem biodiversity and food crop diversity are essential to food security for at least three reasons. First, highly diverse ecosystems are more resilient to environmental perturbations (such as droughts, heavy rains, and outbreaks of new pests that may be associated with climate change) and provide a wide range of "free" ecosystem services (such as pest control, pollination, and enhanced soil fertility).⁴³ Second, cultivating diverse crops and diverse genetic varieties protects against devastating losses in the event of extreme weather events and pest infestations because some varieties will resist adverse conditions to which other varieties might succumb.⁴⁴ Third, modern plant breeders depend on traditional plant varieties and wild plants to furnish the fresh germplasm that can be used to produce crops capable of withstanding a variety of environmental stresses and of serving as new food sources.⁴⁵ The expansion of industrial agriculture exacerbated the vulnerability of national and global food supplies to catastrophic crop failure (akin to the Irish po-

that it had a negative impact on poverty and inequality. See Donald K. Freebairn, *Did the Green Revolution Concentrate Incomes? A Quantitative Study of Research Reports*, 23 *WORLD DEV.* 265 (1995).

³⁹ See Carmen G. Gonzalez, *Trade Liberalization, Food Security, and the Environment: The Neoliberal Threat to Sustainable Rural Development*, 14 *TRANSNAT'L L. & CONTEMP. PROB.* 419, 442–43 (2004).

⁴⁰ See GRIFFIN, *supra* note 36, at 158; Gonzalez, *supra* note 39, at 443–44.

⁴¹ See FOWLER & MOONEY, *supra* note 20, at 75–76, 130–31; LORI ANN THRUPP, *LINKING BIODIVERSITY AND AGRICULTURE: CHALLENGES FOR SUSTAINABLE FOOD SECURITY* 35 (1997).

⁴² See CONWAY, *supra* note 36, at 86–104; FOWLER & MOONEY, *supra* note 20, at 63–81; THRUPP, *supra* note 41, at 32–33.

⁴³ See THOMAS PRUGH, *NATURAL CAPITAL AND HUMAN ECONOMIC SURVIVAL* 58–62, 66–69 (1995); U.N. ENV'T PROGRAMME [UNEP], *THE ENVIRONMENTAL FOOD CRISIS: THE ENVIRONMENT'S ROLE IN AVERTING FUTURE FOOD CRISES* 66 (Christian Nellemann et al. eds., 2009); David Tilman, *Biodiversity and Ecosystem Functioning*, in *NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS* 93, 104–06 (Gretchen C. Daily ed., 1997).

⁴⁴ See FOWLER & MOONEY, *supra* note 20, at 47.

⁴⁵ See PRUGH, *supra* note 43, at 64–65; UNEP, *THE ENVIRONMENTAL FOOD CRISIS*, *supra* note 43, at 74; Norman Myers, *Biodiversity's Genetic Library*, in *NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS*, *supra* note 43, at 255, 256–63.

tato famine) by narrowing the number of food crops cultivated, reducing the genetic diversity within these cultivated crops, and degrading ecosystem services.⁴⁶

In short, Northern trade and aid policies laid the groundwork for food insecurity in the global South by reinforcing economically disadvantageous agro-export specialization, by maintaining developing countries in a structurally disadvantageous position in the world economy, and by promoting agricultural production systems that increased ecological vulnerability and reliance on costly, environmentally harmful agricultural inputs.

4 Double Standards in World Agricultural Trade (1980s-present)

The debt crisis of the 1980s inaugurated a series of economic reforms that increased the structural vulnerability of developing countries to food insecurity. As a consequence of significant petroleum price increases by the Organization of Petroleum Exporting Countries (OPEC) in the early 1970s, many developing countries borrowed money from commercial banks to finance the importation of fuel and petroleum-based agricultural inputs.⁴⁷ When additional oil price increases in 1979–1980 caused interest rates to skyrocket at a time of plummeting agricultural commodity prices, many developing countries were unable to repay their debts.⁴⁸ By the mid-1980s, two-thirds of African countries and nearly three-quarters of Latin American countries had agreed to implement structural adjustment programs mandated by the World Bank and the IMF as conditions for receiving new loans or restructuring existing debt.⁴⁹

Under these structural adjustment programs, developing countries were required to expand agricultural commodity exports in order to maximize the revenues available to service the foreign debt.⁵⁰ The aggressive shift to export production diverted land from food crops to cash crops, increased dependence on food imports, and inflicted serious environmental damage by accelerating the expansion of chem-

⁴⁶ See PRUGH, *supra* note 43, at 81–84; Carmen G. Gonzalez, *Climate Change, Food Security, and Agrobiodiversity: Toward a Just, Resilient, and Sustainable Food System*, 22 FORDHAM ENV'T'L. LAW. REV. 493, 495–500 (2011) (describing the consequences of declining food crop diversity); Keith Aoki, *Intergenerational Equity and Global Food Supply—Past, Present, and Future* 2011 WIS. L. REV. 399, 423–42 (2011) (discussing how the legal regimes governing intellectual property rights and plant genetic resources have commodified and privatized plant genetic resources and narrowed the genetic base of the world's food system).

⁴⁷ See SUSAN GEORGE, *A FATE WORSE THAN DEBT: THE WORLD FINANCIAL CRISIS AND THE POOR* 28–29 (1990); RICHARD PEET ET AL., *UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO* 71 (2003).

⁴⁸ See GEORGE, *supra* note 47, at 28; PEET ET AL., *supra* note 47, at 72–75.

⁴⁹ See PEET ET AL., *supra* note 47, at 75.

⁵⁰ See GEORGE, *supra* note 47, at 59–60; JOHN MADELEY, *FOOD FOR ALL: THE NEED FOR A NEW AGRICULTURE* 117 (2002); YOUNG, *supra* note 20, at 43.

ical-intensive industrial agriculture.⁵¹ This economic strategy ultimately depressed the export earnings of developing countries by glutting world markets with competing export commodities from multiple debtor nations.⁵²

Structural adjustment also introduced a double standard that continues to plague world agricultural trade: protectionism for the wealthy and free markets for the poor. As a condition of debt restructuring, developing countries were required to adopt a standard recipe of free market economic reforms, including the reduction of tariffs, the elimination of non-tariff import barriers, and the curtailment of government subsidies, social safety nets, and other forms of assistance to local farmers.⁵³ However, developed countries continued to subsidize and protect their agricultural producers.⁵⁴ As a consequence of structural adjustment, agricultural products from the global North flooded developing country markets at prices far below the local price of production—devastating rural livelihoods, depressing domestic food production, and accelerating migration to urban areas.⁵⁵ The vulnerability of developing country farmers was compounded by the elimination of agricultural input and food subsidies, the curtailment of subsidized credit, the reduction of extension services, and the withdrawal of the public sector from agricultural marketing.⁵⁶ Indeed, structural adjustment initiated several decades of disinvestment by Southern governments in rural development, thereby aggravating poverty, landlessness, and food insecurity.

The World Trade Organization (WTO) Agreement on Agriculture (AoA) purported to mitigate some of these inequities in international agricultural trade and to “establish a fair and market-oriented agricultural trading system.”⁵⁷ The goals of the AoA were threefold: (i) to expand market access by reducing tariff and non-tariff import barriers; (ii) to reduce export subsidies; and (iii) to reduce trade-distorting domestic subsidies.⁵⁸

The AoA’s market access provisions required WTO members to convert quantitative restrictions and other non-tariff barriers into tariffs, and to reduce these over time.⁵⁹ However, in the absence of specific guidelines on how to conduct this conversion, the majority of developed countries engaged in “dirty tariffication,” the

⁵¹ See Mittal, *supra* note 5, at 13–15; STRUCTURAL ADJUSTMENT PARTICIPATORY REVIEW INT’L NETWORK (SAPRIN), THE POLICY ROOTS OF ECONOMIC CRISIS AND POVERTY: A MULTI-COUNTRY PARTICIPATORY ASSESSMENT OF STRUCTURAL ADJUSTMENT 124–26 (2002) [hereinafter SAPRIN].

⁵² See BELINDA COOTE, THE TRADE TRAP 34–35 (1992); GEORGE, *supra* note 47, at 60–61; MADELEY, *supra* note 50, at 154–55; ROBBINS, *supra* note 25, at 29–30.

⁵³ See MICHEL CHOSSUDOVSKY, THE GLOBALISATION OF POVERTY 62–63 (1997); GEORGE, *supra* note 47, at 52.

⁵⁴ See Gonzalez, *supra* note 35, at 365.

⁵⁵ See MICHAEL E. CONROY ET AL., A CAUTIONARY TALE: FAILED U.S. DEVELOPMENT POLICY IN CENTRAL AMERICA 14 (1996); MADELEY, *supra* note 50, at 120.

⁵⁶ See JOHN MADELEY, HUNGRY FOR TRADE: HOW THE POOR PAY FOR FREE TRADE 77 (2000); Mittal, *supra* note 5, at 8–11; SAPRIN, *supra* note 51, at 116–18.

⁵⁷ Agreement on Agriculture, pmbl. 2, Apr. 15, 1994, 1867 U.N.T.S. 410 [hereinafter AoA].

⁵⁸ See Gonzalez, *supra* note 29, at 452–58 (analyzing the main provisions of the Agreement on Agriculture).

⁵⁹ AoA, *supra* note 57, Arts. 4.2 (requiring the replacement of quantitative restrictions and other non-tariff measures by tariffs) and 4.1 (requiring the gradual reduction of these tariffs).

adoption of tariffs far more trade restrictive than the non-tariff barriers they replaced.⁶⁰ In addition, because the AoA required a 36% *average* reduction in the agricultural tariffs of developed countries over the agreement's implementation period (subject to a 15% minimum reduction on each individual tariff), countries were able to select which individual tariffs to reduce.⁶¹ Developed countries typically protected their food processing industries by applying the highest tariffs to processed agricultural products, thereby reinforcing the South's agro-export specialization by making it difficult to diversify into higher value-added products.⁶²

The AoA also required WTO members to reduce certain trade-distorting domestic subsidies, and to refrain from introducing new forms of domestic support beyond *de minimis* levels.⁶³ However, the AoA exempted from the subsidy reduction obligations the very types of support most commonly used by developed countries.⁶⁴ In addition, the AoA perpetuated the global North's trade-distorting agricultural subsidies by selecting a period of extremely high subsidies as the baseline for subsidy reduction commitments (1986–1988).⁶⁵ The agricultural subsidies maintained by the United States and the European Union remain one of the key stumbling blocks in the Doha Round of WTO negotiations.⁶⁶

Finally, in sharp contrast to the WTO Agreement on Subsidies and Countervailing Measures (which prohibits export subsidies),⁶⁷ the AoA sought to reduce export subsidy levels by specific percentages during the agreement's implementation period, and prohibited the introduction of new export subsidies.⁶⁸ In so doing, the AoA institutionalized the competitive advantage of agricultural producers in developed countries by legitimating the export subsidies of the global North (subject to reduction over time) while restricting the ability of the global South to utilize export subsidies for the first time.⁶⁹ Export subsidies have not been entirely phased out, and they are particularly harmful to developing countries because they artificially lower the price of imported food and displace local food production.⁷⁰

⁶⁰ See Gonzalez, *supra* note 29, at 460–61.

⁶¹ See *id.* at 461.

⁶² See *id.* at 461–62.

⁶³ See Olivier De Schutter, *International Trade in Agriculture and the Right to Food*, in ACCOUNTING FOR HUNGER: THE RIGHT TO FOOD IN THE ERA OF GLOBALISATION 137, 146–47 (Olivier De Schutter & Kaitlin Y. Cordes, eds. 2011).

⁶⁴ See Gonzalez, *supra* note 29, at 465–67.

⁶⁵ See *id.* at 467–68.

⁶⁶ See Stephen Castle & Mark Landler, *After 7 Years, Talks Collapse on World Trade*, N.Y. TIMES, July 20, 2008; John W. Miller, *Trade Talk Impasse Prompts a Plan B*, WALL ST. J., Apr. 28, 2011.

⁶⁷ Agreement on Subsidies and Countervailing Measures, art. 3.1(a) (prohibiting export subsidies, but exempting agricultural products covered by the AoA).

⁶⁸ See Gonzalez, *supra* note 29, at 463–64.

⁶⁹ See *id.* at 464–65; De Schutter, *supra* note 63, at 147.

⁷⁰ See De Schutter, *supra* note 63, at 147; Boyan Konstantinov, *Invoking the Right to Food in the WTO Dispute Resolution Process: The Relevance of the Right to Food in the Law of the WTO*, in ACCOUNTING FOR HUNGER: THE RIGHT TO FOOD IN THE ERA OF GLOBALISATION, *supra* note 63, at 218.

In sum, the AoA enabled the global North to continue to subsidize and protect the agricultural sector while the global South liberalized trade under the auspices of structural adjustment programs mandated by the IMF and the World Bank. As developing countries lowered tariff barriers, local farmers were exposed to ruinous competition from highly subsidized Northern agribusiness.⁷¹ While doing little to constrain Northern protectionism, the AoA did constrain the ability of developing countries to raise tariffs in order to protect rural livelihoods and national food security from these devastating surges of cheap imported food. Under the AoA, only countries that engaged in tariffication are authorized to impose additional tariffs (known as “special safeguard measures”) in response to import surges.⁷² Since most developing countries had already eliminated non-tariff barriers pursuant to the economic reforms mandated by the IMF and the World Bank, they did not engage in tariffication and are therefore not entitled to utilize special safeguard measures to protect the livelihoods of small farmers.⁷³

This double standard in the rules governing international agricultural trade has facilitated the “dumping” of agricultural commodities produced by Northern agribusiness on the local markets of the global South at highly subsidized prices, thereby undercutting small farmers and exacerbating food insecurity by discouraging local food production.⁷⁴ The resulting decline in domestic food production has rendered developing countries increasingly dependent on highly volatile international markets to satisfy national nutritional needs. In the course of a few decades, developing countries that were once self-sufficient in food were transformed into net food importers through liberalization commitments undertaken pursuant to structural adjustment programs, the AoA, and bilateral and regional free trade agreements.⁷⁵

The FAO and the Organization for Economic Cooperation and Development (OECD) predict that price levels and volatility will remain high for at least the next decade.⁷⁶ As food prices continue to rise, net food-importing developing countries are being buffeted by the soaring cost of imported food. In 2011, for example, the world import food bill reached nearly \$ 1.3 trillion—the highest recorded level and

⁷¹ See Gonzalez, *supra* note 39, at 466–67.

⁷² See Gonzalez, *supra* note 29, at 462–63.

⁷³ See *id.* at 462–63, 479–80.

⁷⁴ See SOPHIA MURPHY ET AL., INST. FOR AGRIC. TRADE & POLICY [IATP], WTO AGREEMENT ON AGRICULTURE: A DECADE OF DUMPING 1 (2005); ACTIONAID, THE IMPACT OF AGRO-EXPORT SURGES IN DEVELOPING COUNTRIES 8 (2008).

⁷⁵ See ACTIONAID, *supra* note 74, at 8–10; see also Carmen G. Gonzalez, *An Environmental Justice Critique of Comparative Advantage: Indigenous Peoples, Trade Policy, and the Mexican Neoliberal Economic Reforms*, 32 U. PA. J. INT’L L. 723 (2011) (analyzing the impact on the Mexican corn sector of the trade liberalization commitments undertaken pursuant to the North American Free Trade Agreement); James Thuo Gathii, *The Neoliberal Turn in Regional Trade Agreements*, 86 WASH. L. REV. 421 (2011) (examining the role of bilateral and regional trade agreements in promoting neoliberal economic reforms in the global South).

⁷⁶ See FAO, STATE OF FOOD INSECURITY 2011, *supra* note 2, at 12–13; ORGANIZATION FOR ECONOMIC CO-OPERATION & DEV. [OECD] & U.N. FOOD & AGRIC. ORG. [FAO], AGRICULTURAL OUTLOOK 2011–2020, 1 (2011).

the highest recorded yearly increase.⁷⁷ The least developed countries have been particularly hard hit, experiencing a rise in food purchase expenses of over one third in 2011 relative to 2010.⁷⁸ While Article 16 of the AoA requires WTO members to take certain measures to counteract the negative effects on net food-importing developing countries of price increases caused by trade liberalization, WTO members have failed to comply with this obligation due to a lack of political will as well as ambiguities in the applicable requirements.⁷⁹

Finally, the redirection of agricultural production toward foreign rather than local markets has increased the market power of the multinational grain traders, agrochemical corporations, seed manufacturers, and supermarket chains that dominate the global food system.⁸⁰ The market power of these transnational corporations has distorted world market agricultural prices.⁸¹ For example, three companies control 82% of all U.S. corn exports.⁸² The top three agrochemical corporations control approximately half of the global agrochemical market, and the top ten control nearly 90% of that market.⁸³ From the thousands of seed companies and breeding institutions that existed decades ago, ten companies now control over two thirds of global proprietary seed sales.⁸⁴ A handful of international supermarket chains (including Walmart, Carrefour, Tesco, and Metro Group) increasingly determine upstream commodity prices and product quality standards.⁸⁵

Domination of agricultural markets by a small number of agribusiness conglomerates enables these companies to manipulate market prices to their advantage at the expense of small farmers and consumers in the global North as well as the global South.⁸⁶ In addition, these agri-food corporations frequently dictate

⁷⁷ See U.N. FOOD & AGRIC. ORG. [FAO], FOOD OUTLOOK—NOVEMBER 2011, 146 (2011).

⁷⁸ See *id.* at 1.

⁷⁹ See De Schutter, *supra* note 63, at 148, 164–66. Article 16 of the AoA provides that WTO members shall take the measures set forth in the Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least-Developed and Net Food-Importing Developing Countries (the Marrakesh Decision). The measures consist of food aid; technical and financial assistance to improve agricultural productivity; agricultural export credits; and short-term financing to permit developing countries to maintain normal levels of commercial imports. See Uruguay Round Agreement: Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (1994).

⁸⁰ See generally COLIN SAGE, ENVIRONMENT AND FOOD 20–65 (2011) (describing the structure of the global agri-food system).

⁸¹ See RAJ PATEL & SANAZ MEMARSADDEGHI, AGRICULTURAL RESTRUCTURING AND CONCENTRATION IN THE UNITED STATES: WHO WINS? WHO LOSES?, FOOD FIRST POLICY BRIEF NO. 6, 34–36 (2003); PETER M. ROSSET, FOOD IS DIFFERENT: WHY WE MUST GET THE WTO OUT OF AGRICULTURE 45–49 (2006) (describing the concentration of U.S. agriculture); Timothy A. Wise, *The Paradox of Agricultural Subsidies: Measurement Issues, Agricultural Dumping, and Policy Reform* 8–9, 24 (Global Dev. & Env't Inst. Working Paper No. 04–02, 2004).

⁸² See ROSSET, *supra* note 81, at 46.

⁸³ See ETC GROUP, WHO OWNS NATURE? 4, 15 (2008).

⁸⁴ *Id.* at 4, 12.

⁸⁵ See SAGE, *supra* note 80, at 54–62.

⁸⁶ See generally SOPHIA MURPHY, MANAGING THE INVISIBLE HAND: MARKETS, FARMERS AND INTERNATIONAL TRADE 21–29, 32 (2002); PATEL & MEMARSADDEGHI, *supra* note 81, at 34–36; ROSSET, *supra*

the agricultural research agenda, and have used their considerable political influence to persuade U.S. government officials to support biofuels as the solution to climate change, to promote genetic engineering as the solution to the food crisis, and to demand greater access to developing country markets in bilateral and multilateral trade negotiations while maintaining generous agricultural subsidies in the domestic market.⁸⁷

In sum, the global food crisis is not a problem of food supply but the consequence of policies imposed on the global South by international aid, trade, and financial institutions. These policies have benefited the transnational food industry at the expense of the world's most vulnerable populations. As a consequence, billions of small farmers in the global South have been driven off their land and into urban slums at a rate that vastly exceeds the availability of urban employment.⁸⁸ The industrialization and corporate domination of agricultural production has also had negative impacts in the global North, including the demise of family farms; the impoverishment of rural communities; the economic exploitation of agricultural workers in large-scale farming operations and of workers in the food processing and confined animal feeding operation industries; the pollution of air, water, land and food with pesticides and chemical fertilizers; high levels of farmworker pesticide poisoning; widespread soil erosion; depletion of freshwater resources; and the loss of species and ecosystems.⁸⁹ By encouraging the overconsumption of cheap, processed food, Northern agricultural subsidies, which typically benefit the wealthiest farmers, have also contributed to the increasingly worldwide epidemic of obesity and diet-related disorders that disproportionately affect the poor.⁹⁰

5 Climate Change, the Financial Crisis, and the Global Land Rush

The climate crisis and the financial crisis have only exacerbated the threats to food security outlined above. The bursting of the U.S. housing bubble in 2007 shifted speculative investment into agricultural commodities and contributed significantly

note 81, at 46–48; BILL VORLEY, *FOOD, INC.: CORPORATE CONCENTRATION FROM FARM TO CONSUMER* (2003); Wise, *supra* note 81, at 8. For a graphic representation of the power dynamics in the global food system, see SAGE, *supra* note 80, at 58, Fig. 2.4.

⁸⁷ See ETC GROUP, *supra* note 83, at 5; ROSSET, *supra* note 81, at 41–51.

⁸⁸ See e.g., ROBIN HAHNEL, *THE ABCS OF POLITICAL ECONOMY* 189–190 (2002).

⁸⁹ See generally THE FATAL HARVEST READER: THE TRAGEDY OF INDUSTRIAL AGRICULTURE (Andrew Kimbrell, ed., 2002); ROBERT GOTTLIEB & ANUPAMA JOSHI, *FOOD JUSTICE* 13–38 (2010).

⁹⁰ See NORMAN MYERS & JENNIFER KENT, *PERVERSE SUBSIDIES: HOW TAX DOLLARS CAN UNDERCUT THE ENVIRONMENT AND THE ECONOMY* 48–50 (2001); MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 62–63, 100–108 (2007); SAGE, *supra* note 80, at 239–41.

to the 2008 spike in food prices.⁹¹ In the first 6 months of 2008, institutional investors such as hedge funds, pension plans, and sovereign wealth funds poured an estimated \$ 318 billion into commodity markets, causing food prices to skyrocket and sparking worldwide social unrest.⁹² This influx of speculative investment was made possible by the deregulation of Over The Counter (OTC) derivatives following the passage of the U.S. Commodity Futures Modernization Act in 2000.⁹³ As a consequence of this statute and of the decisions of the Commodity Futures Trading Commission, OTC derivatives (including commodity index funds) were exempted from regulatory oversight.⁹⁴ While food prices have stabilized, the failure of governments to regulate speculation in agricultural commodity markets poses ongoing risks to food security by increasing market volatility and by permitting the periodic formation of speculative bubbles.⁹⁵

Food security is also threatened by climate change, which will disrupt global food production by increasing the severity and frequency of droughts, floods, and tropical storms, depressing the productivity of global fisheries, and exacerbating water scarcity.⁹⁶ Climate change is anticipated to depress agricultural yields by as much as 28 % in Africa, 24 % in Latin America, and 19 % in Asia by 2080.⁹⁷ Climate change also contributes to the world-wide loss of biodiversity by accelerating the extinction of species and the loss of ecosystem services vital to food production.⁹⁸

Notwithstanding their negligible contribution to climate change, the world's poorest countries will be disproportionately affected due to their dependence on agricultural production, their vulnerable geographic locations, and their limited resources for adaptation and for response to natural disasters.⁹⁹ The most adverse consequences will be suffered by poor farmers with limited access to water and productive land.¹⁰⁰

Ironically, agriculture is also one of the greatest contributors to global warming. Agriculture is responsible for approximately one third of global greenhouse gas emissions, making the agricultural sector the single largest source of anthropogenic

⁹¹ See Peter Wahl, *The Role of Speculation in the 2008 Food Price Bubble*, in THE GLOBAL FOOD CHALLENGE, *supra* note 13, at 68, 70.

⁹² See Frederick Kaufman, *How Goldman Sachs Created the Food Crisis*, FOREIGN POL'Y (Apr. 27, 2011); Wahl, *supra* note 91, at 68, 70–71.

⁹³ See OLIVIER DE SCHUTTER, U.N. SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, BRIEFING NOTE 2, FOOD COMMODITIES SPECULATION AND FOOD PRICE CRISES 5 (Sept. 2010).

⁹⁴ See *id.* at 5–6.

⁹⁵ See Wahl, *supra* note 91, at 75–76.

⁹⁶ See Anthony Nyong, *Climate Change Impacts in the Developing World: Implications for Sustainable Development*, in CLIMATE CHANGE AND GLOBAL POVERTY: A BILLION LIVES IN THE BALANCE? 47–51 (Lael Brainard et al. eds., 2009).

⁹⁷ See WILLIAM R. CLINE, GLOBAL WARMING AND AGRICULTURE: ESTIMATES BY COUNTRY 79 (2007).

⁹⁸ See Nyong, *supra* note 96, at 50–51.

⁹⁹ See RUCHI ANAND, INTERNATIONAL ENVIRONMENTAL JUSTICE: A NORTH-SOUTH DIMENSION 35–41 (2004).

¹⁰⁰ See U.N. FOOD & AGRIC. ORG. [FAO], CLIMATE CHANGE, WATER, AND FOOD SECURITY 16 (2011).

greenhouse gas (GHG) emissions.¹⁰¹ While industrial agriculture is one of the largest contributors to climate change, small-scale sustainable agriculture can play a significant role in climate change mitigation and adaptation.¹⁰² Sustainable agricultural or agroecology integrates natural pest, nutrient, soil, and water management technologies into the production process while decreasing the use of synthetic fertilizers and pesticides.¹⁰³ Sustainable agriculture reduces GHG emissions by minimizing fossil fuel-based agricultural inputs and increases carbon sequestration in soils.¹⁰⁴ Sustainable agriculture can also play an important role in climate change adaptation by enhancing resilience to floods, drought, and pests through the cultivation of diverse crop varieties and through measures designed to boost the soil's organic matter and water retention ability. There is a growing consensus among policy-makers at the international level that promoting sustainable agriculture is necessary to address the environmental and food security challenges of the 21st century.¹⁰⁵ Sustainable agriculture has produced significant increases in agricultural yields in Asia, Africa, and Latin America while enhancing environmental quality, reducing dependence on external inputs, and protecting the traditional agroecological knowledge of small farmers and indigenous communities.¹⁰⁶

¹⁰¹ See JESSICA BELLARBY ET AL., COOL FARMING: CLIMATE IMPACTS OF AGRICULTURE AND MITIGATION POTENTIAL 16 (2008). According to the Intergovernmental Panel on Climate Change, the next largest emitter is the energy supply sector, which is responsible for 25.9% of anthropogenic greenhouse gas emissions. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE [IPCC], CLIMATE CHANGE 2007: SYNTHESIS REPORT 36, FIG. 2.1 (2007).

¹⁰² See WORKING GROUP ON CLIMATE CHANGE AND DEVELOPMENT, OTHER WORLDS ARE POSSIBLE: HUMAN PROGRESS IN AN AGE OF CLIMATE CHANGE 40–42 (Nov. 2009); INTERNATIONAL TRADE CENTRE (UNCTAD/WTO) & RESEARCH INSTITUTE OF ORGANIC AGRICULTURE (FiBL), ORGANIC FARMING AND CLIMATE CHANGE 21 (2007) [hereinafter, ORGANIC FARMING AND CLIMATE CHANGE].

¹⁰³ See JULES N. PRETTY, REGENERATING AGRICULTURE: POLICIES AND PRACTICES FOR SUSTAINABILITY AND SELF-RELIANCE 8–13 (1995).

¹⁰⁴ See ORGANIC FARMING AND CLIMATE CHANGE, *supra* note 102, at 7–8.

¹⁰⁵ See generally INTERNATIONAL ASSESSMENT OF AGRICULTURAL KNOWLEDGE, SCIENCE AND TECHNOLOGY FOR DEVELOPMENT [IAASTD], AGRICULTURE AT A CROSSROADS: SYNTHESIS REPORT (2009); UNITED NATIONS ENVIRONMENT PROGRAMME [UNEP], THE ENVIRONMENTAL FOOD CRISIS: THE ENVIRONMENT'S ROLE IN AVERTING FUTURE FOOD CRISES (Christian Nellemann et al. eds., 2009) [hereinafter UNEP, THE ENVIRONMENTAL FOOD CRISIS]; U.N. CONFERENCE ON TRADE AND DEV. [UNCTAD] & U.N. ENV'T PROGRAMME [UNEP], ORGANIC AGRICULTURE AND FOOD SECURITY IN AFRICA (2008).

¹⁰⁶ See generally U.N. General Assembly, Report Submitted by the Special Rapporteur on the Right to Food, Olivier De Schutter, Agro-Ecology and the Right to Food, U.N. Doc. A/HRC/16/49 (20 December 2010); UNCTAD & UNEP, *supra* note 105; Jules Pretty et al., *Resource Conserving Agriculture Increases Yields in Developing Countries*, 40 ENV'TL SCI. & TECH 1114 (2006); INT'L FUND FOR AGRIC. DEV. [IFAD], THE ADOPTION OF ORGANIC AGRICULTURE AMONG SMALL FARMERS IN LATIN AMERICA AND THE CARIBBEAN (2003); NICHOLAS PARROTT & TERRY MARSDEN, THE NEW GREEN REVOLUTION: ORGANIC AND AGROECOLOGICAL FARMING IN THE SOUTH (2002); Jules N. Pretty, *Reducing Food Poverty by Increasing Sustainability in Developing Countries*, 95 AGRIC. ECOSYSTEMS & ENV'T 217 (2003); Jules N. Pretty & Rachel Hine, *The Promising Spread of Sustainable Agriculture in Asia*, 24 NAT. RESOURCES F. 107 (2000); Jules N. Pretty, *Can Sustainable Agriculture Feed Africa New Evidence on Progress, Processes and Impacts*, 1 ENV'T, DEV. & SUSTAINABILITY 253 (1999).

Regrettably, the growing awareness of the relationship among climate change, industrial agriculture, and food insecurity has not resulted in concerted action to promote the transition to sustainable agriculture. Instead, the United States and the European Union have responded to climate change by promoting the production of biofuels—a policy that has driven up food prices and reduced production of other food crops.¹⁰⁷ The emphasis on biofuels has also created new linkages between the price of oil and the price of food: when oil prices rise, demand for biofuels increases, thereby raising food prices.¹⁰⁸ Paradoxically, the production of certain biofuels may result in greater greenhouse gas emissions than conventional fossil fuels. For example, the emissions resulting from corn ethanol production in the United States (including the emissions resulting from cultivating corn and processing it into corn starch) may actually exceed fossil fuel emissions by more than 10%.¹⁰⁹ When corn cultivation shifts to developing countries, the emissions are even greater as rainforests and peatlands are converted into agricultural lands.¹¹⁰

The biofuels boom, the climate crisis, and increasing food prices have spawned a new threat to food security: an explosion of transactions for the sale or long-term lease of agricultural lands in the global South.¹¹¹ These so-called “land grabs” have been prompted by the desire of investing countries to guarantee food supplies at a time of market volatility, to offset domestic shortages of arable land and irrigation water, and to tap into the growing demand for biofuels through offshore production.¹¹² The burgeoning demand for timber and other raw materials and the emerging markets for carbon credits from reduced deforestation have also accelerated the acquisition of forested lands.¹¹³ Africa is the primary target of these land acquisitions, but there have been significant sales and long-term leases of land in Asia and Latin America.¹¹⁴ The land is being acquired by national elites who serve as go-betweens for foreign enterprises, by private companies from the global North, and

¹⁰⁷ See FAO, STATE OF AGRICULTURE COMMODITY MARKETS 2009, *supra* note 4, at 19–21; Mittal, *supra* note 5, at 6–8.

¹⁰⁸ See FAO, STATE OF FOOD INSECURITY 2011, *supra* note 2, at 12–13; SAGE, *supra* note 80, at 224–25.

¹⁰⁹ U.N. FOOD & AGRIC. ORG. [FAO], THE STATE OF FOOD AND AGRICULTURE; BIOFUELS: PROSPECTS, RISKS AND OPPORTUNITIES 55–59 (2008); see also Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24,904, 25,043, tbl.VI.C.1–2, tbl. VI.C.1–3 (proposed May 26, 2009) (to be codified at 40 C.F.R. pt. 80).

¹¹⁰ See U.N. ENV'T PROGRAMME [UNEP], TOWARDS SUSTAINABLE PRODUCTION AND USE OF RESOURCES: ASSESSING BIOFUELS 67–68 (2009).

¹¹¹ See generally WARD ANSEEUW ET AL., LAND RIGHTS AND THE RUSH FOR LAND (2012); LORENZO COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA (2009); Alexandra Spieldoch & Sophia Murphy, *Agricultural Land Acquisitions: Implications for Food Security and Poverty Alleviation*, in LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND 39, 39 (Michael Kugelman & Susan L. Levenstein eds., 2009) [hereinafter “LAND GRAB?”].

¹¹² See Michael Kugelman, *Introduction to LAND GRAB?*, *supra* note 111, at 2; Spieldoch & Murphy, *supra* note 111, at 41–42.

¹¹³ See WARD ANSEEUW ET AL., LAND RIGHTS AND THE RUSH FOR LAND 26–27 (2012).

¹¹⁴ See *id.* at 23.

by investors from middle-income countries, including China, India, South Korea, Qatar, and Saudi Arabia.¹¹⁵

The primary purpose of these “land grabs” is to satisfy the food and energy needs of the investor’s home country by shifting the use of land and water in the host state from local production to the cultivation of agricultural products for the home market.¹¹⁶ These transactions pose a number of risks in the host state, including interference with local food production; diversion, degradation or depletion of the local water supply; and dispossession of those whose livelihoods depend on access to these lands and resources.¹¹⁷ For example, small farmers, pastoralists, and fisherfolk whose property rights are not recognized by government officials may be expelled by foreign investors or by local elites eager to sell or lease these lands to foreign investors.¹¹⁸ Indeed, even farmers possessing formal title may be persuaded or coerced to sell vast tracts of productive land for export-oriented agricultural production despite chronic domestic food insecurity.¹¹⁹ The substitution of labor-intensive subsistence production with export-driven chemical-intensive industrial agriculture may depress domestic food availability, increase poverty by reducing rural employment, accelerate agrochemical contamination of water supplies, diminish agrobiodiversity, deplete the land through intensive cultivation, and divert or exhaust water resources needed by local communities.¹²⁰

National and international legal frameworks frequently exacerbate the risks posed by the global land rush. Absent any international contracts or treaties, foreign investors would be treated just like domestic investors under domestic law.¹²¹ However, contracts between the foreign investor and the host state and bilateral investment treaties (BITs) between the host state and the foreign investor’s home state may give the foreign investor additional rights not guaranteed to the local population, including water rights, land tenure rights, tax incentives, and the right to export the agricultural commodities produced.¹²² According to the World Bank, deficiencies in the domestic legislation of many developing countries, coupled with weak enforcement capacity, have made it difficult to protect the rights of local com-

¹¹⁵ See *id.* at 21.

¹¹⁶ See Howard Mann, *Foreign Land Purchases for Agriculture: What Impact on Sustainable Development?* 1 (U.N. Dept. of Econ. & Soc. Aff., Sustainable Development Innovation Briefs, Issue 8, Jan. 2010).

¹¹⁷ See Spieldoch & Murphy, *supra* note 111, at 43–48.

¹¹⁸ See Raul Q. Montemayor, *Overseas Farmland Investments—Boon or Bane for Farmers in Asia?*, in *Land Grab?*, *supra* note 111, at 101–102; Olivier De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARV. INT’L L.J. 503, 524, 537 (2011).

¹¹⁹ See Montemayor, *supra* note 118, at 101–103.

¹²⁰ See Ruth Meinzen & Helena Markelova, *Nuance: Toward a Code of Conduct in Foreign Land Deals*, in *LAND GRAB?*, *supra* note 111, at 74; Montemayor, *supra* note 118, at 102–105; Spieldoch & Murphy, *supra* note 111, at 46–47.

¹²¹ See CARIN SMALLER & HOWARD MANN, *A THIRST FOR DISTANT LANDS: FOREIGN INVESTMENT IN AGRICULTURAL LAND AND WATER* 14 (Int’l Inst. for Sustainable Dev., 2009).

¹²² See *id.*

munities.¹²³ In the absence of strong domestic legislation, the rights of the foreign investor under the investment contracts and BITs may trump those of local stakeholders.¹²⁴

The contract between the host state and the foreign investor will generally establish the legal framework for the investment. The contract will typically specify the price, the amount and location of the land, the duration of the purchase or lease, the law applicable to the contract, and the means of resolving disputes.¹²⁵ Many investment contracts also contain “stabilization” clauses that require the host state to compensate the foreign investor for any economic losses arising from the host state’s modification of the regulatory framework applicable to the investment.¹²⁶ This has the effect of “freezing” the law applicable at the time of the investment to the detriment of the local community. For example, the prospect of having to compensate the foreign investor for any subsequent changes in the law may dissuade the host state from reallocating water rights to address the needs of small subsistence farmers, from limiting food exports at times of critical food shortages, and from enhancing environmental and labor standards as the country’s regulatory framework evolves.¹²⁷ Breaches of the investment contract are usually subject to international arbitration.¹²⁸

Bilateral investment treaties between the host state and the investor’s home state provide additional protections to the foreign investor beyond those contained in the investment contract. Among the most common BIT provisions are the requirement of national treatment; the prohibition against expropriation without compensation; fair and equitable treatment (also known as international minimum standards of treatment); the right to export the products produced; and the investor-state arbitration mechanism allowing the foreign investor to commence arbitration against the host state in the event of a breach of the BIT.¹²⁹ These provisions frequently curtail the ability of the host state to protect the human rights of its citizens. For example, the national treatment obligation requires the host state to provide no less favorable treatment to foreign investors than domestic investors “in like circumstances.”¹³⁰ If an arbitration tribunal concludes that large-scale foreign-owned commercial farming operations and small-scale domestic farmers are “in like circumstances,” then the host state might not be able to adopt legislation favoring small-scale producers in order to protect domestic food security, conserve agrobiodiversity, and en-

¹²³ See KLAUS DEININGER & DEREK BYERLEE, RISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS? 97–98 (2011).

¹²⁴ See Mann, *supra* note 116, at 2.

¹²⁵ See *id.* at 4.

¹²⁶ See generally LORENZO COTULA, REGULATORY TAKINGS, STABILIZATION CLAUSES AND SUSTAINABLE DEVELOPMENT, OECD GLOBAL FORUM ON INTERNATIONAL INVESTMENT (March 27–28, 2008) (analyzing several types of stabilization clauses and their implications for sustainable development).

¹²⁷ See Mann, *supra* note 116, at 3–4.

¹²⁸ See SMALLER & MANN, *supra* note 121, at 10.

¹²⁹ See *id.* at 11–13.

¹³⁰ See *id.* at 11.

hance adaptation to climate change.¹³¹ Furthermore, the fair and equitable treatment obligation requires the host state to honor the “legitimate expectations” that may arise from the investment contract or other government commitments.¹³² If the investment contract does not address the issue of water rights, an arbitration tribunal might conclude that the investor’s “legitimate expectation” of water for irrigation overrides the current or future needs of the local community for potable water, small-scale farming, and other uses.¹³³ In the event that the host state reallocates water rights to address the needs of its citizens, the foreign investor may be able to seek compensation before an arbitration tribunal on the basis of both expropriation and breach of the fair and equitable treatment standards.¹³⁴ Finally, the right to export products could require the host state to compensate the foreign investor in the event that the host state imposes export restrictions to address global food price increases or domestic food shortages—even if these export restrictions are otherwise permissible under international trade law.¹³⁵

In short, inadequate regulation of commodity markets, misguided efforts to address climate change, and one-sided investment agreements have exacerbated the problem of food insecurity in the global South. The remainder of this chapter examines potential solutions to these deeply vexing problems.

6 The Way Forward: Steps to Respect, Protect and Fulfill the Right to Food Globally

It is now well established that food insecurity is a product of poverty rather than food scarcity. As Amartya Sen pointed out in his pioneering work on poverty and famines, the underlying causes of world hunger are poverty and inequality, including inequality in access to land and other productive resources, lack of income to purchase food on the market, and lack of employment opportunities.¹³⁶ Indeed, the world’s food supply has kept pace with population growth for several decades.¹³⁷ There is currently sufficient food to meet global nutritional needs, but many households are simply too poor to purchase the food that is available.¹³⁸

The world’s poor and undernourished households are concentrated in the rural areas of the global South. Approximately 75% of the developing world’s poor re-

¹³¹ *See id.*

¹³² *See id.* at 12.

¹³³ *See Mann, supra* note 116, at 3.

¹³⁴ *See SMALLER & MANN, supra* note 121, at 16–17.

¹³⁵ *See Mann, supra* note 116, at 4.

¹³⁶ *See generally* AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* (1981).

¹³⁷ *See* SAGE, *supra* note 80, at 72; FRANCES MOORE LAPPE ET AL., *WORLD HUNGER: TWELVE MYTHS* 9 (1998); CONWAY, *supra* note 36, at 4–5.

¹³⁸ *See* HOLT-GIMENEZ, *supra* note 7, at 16–17; Lean, *supra* note 7.

side in rural communities.¹³⁹ The majority are small farmers who produce at least 70% of the world's food and whose livelihoods depend on marketing their agricultural products.¹⁴⁰ These farmers suffer when trade or aid policies depress food prices,¹⁴¹ but most did not benefit from the recent food price increases because the poorest farmers are net buyers of food and because prices for inputs (such as seeds and fertilizer) skyrocketed as well.¹⁴²

Phasing out agricultural subsidies in industrialized countries will improve food security in developing countries by eliminating export dumping and thereby encouraging greater food self-sufficiency. However, it is unlikely that slashing Northern agricultural subsidies will be sufficient to enable developing countries to comply with their right to food obligations unless these reforms are accompanied by strategies to strengthen small-scale agriculture and promote sustainable farming practices. Even the World Bank has acknowledged that achieving food security requires the "redistribution of purchasing power and resources" toward those who suffer from chronic food insecurity.¹⁴³ What is required, thus, is a fundamental reorientation of policy at the national and international levels toward targeted and thoughtful regulatory strategies designed to respect, protect and fulfill the human right to food.

First, governments must reinvest in the agricultural sector and redirect resources toward small farmers and toward the protection of the natural resource base necessary for food production. In recent decades, the diminished role of Southern governments in agricultural production has left poor farmers without social safety nets and has deprived the agricultural sector of badly needed infrastructure, technology, education, credit, insurance, input subsidies, price supports, and marketing assistance.¹⁴⁴ International financial institutions must support renewed investment in Southern agriculture and the targeting of resources toward small farmers and toward sustainable food production. This recommendation is consistent with the findings of an independent, multi-stakeholder agricultural assessment initiated by the World Bank and the FAO and approved by 58 governments in Johannesburg,

¹³⁹ See Thomas Hirsch et al., *Deepening the Food Crisis? Climate Change, Food Security and the Right to Food*, in *THE GLOBAL FOOD CHALLENGE*, *supra* note 13, at 84; INT'L FUND FOR AGRIC. DEV., *RURAL POVERTY REPORT 2001: THE CHALLENGE OF ENDING RURAL POVERTY* (2001); U.N. FOOD & AGRIC. ORG. [FAO], *THE STATE OF FOOD INSECURITY IN THE WORLD 2003*, 16 (2003) [hereinafter FAO, *STATE OF FOOD INSECURITY 2003*].

¹⁴⁰ See ETC GROUP, *WHO WILL FEED US?* 1 (Nov. 2009); KEVIN WATKINS & JOACHIM VON BRAUN, *TIME TO STOP DUMPING ON THE WORLD'S POOR* 2 (2003).

¹⁴¹ See, e.g., WESSEL, *supra* note 23, at 168; *Harvesting Poverty: The Unkept Promise*, N.Y. TIMES, Dec. 30, 2003, at A20.

¹⁴² See FAO, *STATE OF AGRICULTURAL COMMODITY MARKETS 2009*, *supra* note 4, at 34–35; Olivier De Schutter, U.N. Special Rapporteur on the Right to Food, Background Document to Report of the Special Rapporteur on the Right to Food: Mission to the World Trade Organization, delivered to the Human Rights Council, U.N. Doc. A/HRC/10/005/Add.2 (Feb. 4, 2009).

¹⁴³ See WORLD BANK, *POVERTY AND HUNGER: ISSUES AND OPTIONS FOR FOOD SECURITY IN DEVELOPING COUNTRIES* 10–11 (1986).

¹⁴⁴ See Mittal, *supra* note 5, at 9–11; Ha-Joon Chang, *Rethinking Public Policy in Agriculture: Lessons from History, Distant and Recent*, 36 J. PEASANT STUD. 477, 478, 480–81 (2009).

South Africa, in April 2008.¹⁴⁵ The assessment recognizes the important role of small-scale diversified farming as a means of addressing poverty, food security and conservation of agrobiodiversity, and calls for a systemic redirection of investment toward the needs of small farmers and toward the protection of natural resources.¹⁴⁶

Second, governments should transition from agro-export specialization to a more diversified economic base capable of generating steady and reliable revenue streams. As explained in Section 3, the world's most food insecure developing countries are those that export a narrow range of tropical commodities, and are thereby subject to chronically sluggish export earnings and market volatility that make it difficult to afford increasingly expensive imported food. Economic history teaches us that nearly all industrialized countries (including the United States, France, the United Kingdom, Germany, and Japan) achieved economic prosperity through the use of a broad range of protectionist measures, such as subsidies, tariffs, and state financing of major industries.¹⁴⁷ Unfortunately, the current WTO framework precludes developing countries from utilizing many of the development strategies deployed in the past by the global North to promote those industries most likely to enhance long-term economic well-being.¹⁴⁸ A key demand of developing countries in multilateral and regional trade negotiations should therefore be a regime of asymmetrical obligations that authorizes poor countries to use tariffs and subsidies to promote economic diversification and industrialization while restricting protectionism in wealthy countries.

Third, multilateral and bilateral trade agreements should give developing countries the policy flexibility to utilize an appropriate mix of tariffs and subsidies to encourage domestic food production, protect the livelihoods of small farmers, promote rural development, and encourage environmentally friendly cultivation techniques. As an initial matter, the governments of developing countries should make aggressive use of the existing exceptions in the WTO Agreement on Agriculture that exempt certain forms of support to low-income farmers from subsidy reduction commitments.¹⁴⁹ In addition, trade agreements should give developing countries greater latitude to use tariffs and other import barriers for food security purposes as well as the right to exclude from trade agreements those agricultural commodities of greatest importance to domestic nutritional needs and rural livelihoods (such as corn in Mexico). Indeed, these were among the demands put forth by a coalition of developing countries and by non-governmental organizations during the Doha

¹⁴⁵ See IAASTD, *supra* note 105, at vii.

¹⁴⁶ *Id.* at 379, 411, 497.

¹⁴⁷ See HA-JOON CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* 40–60 (2008); HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* 19–51, 59–66 (2002).

¹⁴⁸ See LEE, *supra* note 31, at 9–13.

¹⁴⁹ See AoA, *supra* note 57, at art. 7; Gonzalez, *supra* note 29, at 481–82; Tobias Reichert, *Agricultural Trade Liberalization in Multilateral and Bilateral Trade Negotiations*, in *THE GLOBAL FOOD CHALLENGE*, *supra* note 13, at 29, 33.

Round of WTO negotiations.¹⁵⁰ In response to these demands, the December 2008 draft modalities for agriculture proposed that developing countries be permitted to exempt from their tariff reduction commitments certain Special Products (SPs) related to food security, rural development and livelihood security. The draft modalities also proposed a Special Safeguard Mechanism (SSM) that would enable developing countries to raise tariffs in the event of market disruptions caused by either unduly low-priced imported products or surges in import volumes.¹⁵¹ Although the Doha Round negotiations have stalled, it is important that multilateral and bilateral trade agreements provide developing countries with the policy space to rebuild the agricultural sector, to protect small farmers from devastating import surges, to nurture higher value-added food processing industries, and to promote sustainable agriculture.

Fifth, because national elites may lack the political will to avail themselves of flexible terms and broad exceptions in trade agreements, human rights law remains an important vehicle through which social movements can expose and challenge violations of the right to food.¹⁵² It is therefore essential to negotiate binding legal instruments that clarify the scope and content of states' right to food obligations within their own borders and extraterritorially.

Sixth, international regulation is necessary to discipline the oligopolistic power of transnational agribusiness and to hold corporations accountable to internationally agreed standards. By ignoring the distortions caused by market concentration in the agricultural sector while reducing the ability of the state to intervene on behalf of farmers and consumers, the free market policies promoted by international trade and financial institutions reinforce the economic dominance of transnational agribusiness at the expense of the poor in the developing world.¹⁵³ Thus, in addition to phasing out Northern subsidies and import barriers, it is essential to develop international legal regimes to curb the anti-competitive practices of transnational corporations, to regulate the extraterritorial conduct of these corporations, and to subject them to liability in international or domestic tribunals for human rights violations.¹⁵⁴

¹⁵⁰ See Reichert, *supra* note 149, at 34–35.

¹⁵¹ See generally WTO, Revised Draft Modalities for Agriculture, Special Session TN/AG/W/4/Rev. 4 (Dec. 6, 2008) (summarizing the progress made in the WTO agriculture negotiations since July 2008 and discussing the SP and SSM flexibility mechanisms); see also Alan Matthews, *The Impact of WTO Agricultural Trade Rules on Food Security and Development: An Examination of Proposed Additional Flexibilities for Developing Countries*, in RESEARCH HANDBOOK ON THE WTO AGRICULTURE AGREEMENT 104, 109–19 (Joseph A. McMahon & Melaku Geboye Desta, eds., 2012) (explaining the disputes between developed and developing countries over the SP and SSM mechanisms).

¹⁵² See Gonzalez, *supra* note 75, at 784–85 (discussing the failure of Mexican policy-makers to avail themselves of exceptions in the North American Free Trade Agreement to shield small farmers from the impacts of U.S. agricultural subsidies and the deployment of human rights law by indigenous activists to influence the behavior of the Mexican state).

¹⁵³ See Gonzalez, *supra* note 39, at 489–92.

¹⁵⁴ See, e.g., Carmen G. Gonzalez, *Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology*, 19 GEO. INT'L ENVTL. L. REV. 583, 637–39 (2007) (discussing efforts to regulate corporate anti-competitive behavior within the WTO frame-

Seventh, foreign acquisition of Southern agricultural lands should be carefully regulated to make sure that these transactions benefit local communities, uphold the fundamental human right to food, and utilize natural resources in a sustainable manner. The first step is to strengthen the domestic law of the host state, including property law, water rights law, environmental law, tax law, and the laws governing foreign direct investment, and to ensure that the host state has the capacity to enforce these laws.¹⁵⁵ In addition, international investment agreements should impose substantive human rights and environmental obligations on the foreign investor and the foreign investor's home state.¹⁵⁶

Finally, while an analysis of potential regulatory approaches to commodity speculation and biofuels is beyond the scope of this chapter, it is important to recognize that the realization of the right to food requires decisive measures to prevent the formation of speculative bubbles¹⁵⁷ as well as thoughtful and deliberate reassessment of biofuels legislation in the United States and the European Union in order to develop socially just and ecologically sustainable solutions to the climate and energy crises.

7 Towards Integrating Trade, Environment and Human Rights

The realization of the right to food globally will require a holistic re-conceptualization of international law that integrates human rights, environmental protection, and trade and investment law rather than relegating them to separate spheres. Such a vision is premised on the hierarchical superiority of human rights norms and regards trade and investment as means toward the accomplishment of human rights and environmental objectives rather than as ends in themselves.¹⁵⁸ This chapter concludes by discussing two distinct approaches to the integration of trade, environment, and human rights.

One way to address the fragmentation of international law is to integrate environmental protection and human rights into the existing framework of trade and

work); ALICE DE JONGE, *TRANSNATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY IN THE GLOBAL BUSINESS ENVIRONMENT* 91–117, 146–82 (2011) (exploring how domestic and international law might be reformed to hold corporations liable for harms caused by their extraterritorial activities).

¹⁵⁵ See SMALLER & MANN, *supra* note 121, at 9.

¹⁵⁶ See *id.* at 9–13.

¹⁵⁷ See Wahl, *supra* note 91, at 76–77 (recommending that trade in food on the spot or derivative markets be limited to registered traders and that highly speculative activities such as short-selling be prohibited); INST. FOR AGRIC. TRADE POL'Y [IATP], *COMMODITIES MARKET SPECULATION: THE RISK TO FOOD SECURITY AND AGRICULTURE* 10–11 (2008) (proposing national and global regulatory strategies to address agricultural commodity market speculation).

¹⁵⁸ See HERNÁNDEZ-TRUYOL & POWELL, *supra* note 13, at 284–88; Gonzalez, *supra* note 154, at 626–28; De Schutter, *supra* note 142, at 15–16.

investment agreements. What follows is an illustrative but by no means exhaustive list of measures to accomplish this objective.

First, states should expressly include human rights and environmental protection as objectives of trade and investment agreements rather than raising these claims defensively for the first time before dispute resolution tribunals. This commitment to human rights and environmental protection should inform the negotiation of each and every term of international economic agreements.

Second, trade and investment agreements should contain a hierarchy of norms clause that gives priority to human rights and environmental obligations in the event of a conflict with the terms of trade and investment agreements.¹⁵⁹ Such an approach is not unprecedented. The North American Free Trade Agreement (NAFTA), for example, contains a conflict of norms provision that gives hierarchical superiority to certain enumerated environmental treaties in the event of a conflict with NAFTA provisions.¹⁶⁰

Third, trade and investment agreements should contain broad human rights and environmental exceptions designed to give the contracting parties maximum flexibility to regulate in the public interest. Such exceptions are widely used in the area of trade and investment law and include, among others, the exceptions contained in GATT Article XX.¹⁶¹ Dispute resolution panels should construe these exceptions expansively rather than adopting the least trade restrictive interpretation. Indeed, as one observer, suggests, “trade rules should be interpreted so as to least encroach upon human rights.”¹⁶²

Fourth, countries should require *ex ante* human rights and environmental impact assessments of all trade and investment agreements in order to identify and address any potential negative impacts. The assessment should be performed as early as possible in the negotiation process and should involve extensive public participation and consultation. The assessment should disaggregate the impact according to gender, race, ethnic origin, geographic region, and other variables so as to better evaluate the distribution of gains and losses from the trade and investment agreement.¹⁶³ In the United States, for example, Executive Order 13,141 (1999) requires environmental review of trade agreements.¹⁶⁴ However, Executive Order 13,141 is deficient in several respects, including its failure to require review of extraterrito-

¹⁵⁹ See Gonzalez, *supra* note 154, at 626–28.

¹⁶⁰ See North American Free Trade Agreement, art. 104, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

¹⁶¹ See HERNÁNDEZ-TRUYOL & POWELL, *supra* note 13, at 282–83.

¹⁶² See Kerstin Mechlem, *Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture*, 10 MAX PLANCK YEARBOOK OF U.N. LAW 127, 174 (2006).

¹⁶³ See De Schutter, *supra* note 142, at 23–24. See also, Olivier De Schutter, U.N. Special Rapporteur on the Right to Food, *Report of the Special Rapporteur on Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, delivered to the General Assembly*, U.N. Doc. A/HRC/19/59/Add.5 (Dec. 19, 2011); CTR. FOR INT’L. ENV’T’L LAW, EIAs IN PRACTICE: POTENTIAL LESSONS FOR HUMAN RIGHTS IMPACT ASSESSMENT (June 2010).

¹⁶⁴ See Exec. Order No. 13,141, 64 Fed. Reg. 63,169 (Nov. 16, 1999).

rial and human rights impacts and failure to mandate the periodic review of trade agreements already in place. Nevertheless, this Executive Order represents a good starting point.

Fifth, trade and investment agreements should contain simplified waiver procedures in the event that these agreements should subsequently be found to conflict with human rights and environmental considerations.¹⁶⁵ Such waiver provisions have been used under the WTO framework, most recently to waive limitations imposed upon the least developed countries by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in cases of national medical emergencies.¹⁶⁶ Trade and investment agreements should also contain sunset clauses, akin to Article 20 of the WTO Agreement on Agriculture.¹⁶⁷ Such clauses should require *ex post* evaluation of these agreements' human rights and environmental impacts and renegotiation of the trade and investment agreements taking into account the results of the evaluation.¹⁶⁸

Finally, trade and investment agreements should address the structural inequities that perpetuate poverty and food insecurity in the global South. In addition to phasing out Northern agricultural subsidies, trade agreements should permit poor countries to utilize tariffs, subsidies and other protectionist measures to diversify their economies and end their debilitating dependence on the export of primary commodities. Only a regime based on special and differential treatment that reduces protectionism in the North while creating greater policy space for development in the South can enable food insecure developing countries to overcome the colonial legacy.¹⁶⁹ Furthermore, multilateral and bilateral investment agreements should specify the rights and obligations of the foreign investor, the host state, and the home state – with human rights and sustainable development as the express overarching objectives.¹⁷⁰ This approach could be used to impose standards of conduct on transnational corporations, to require the home country of the foreign investor to more closely monitor and regulate the extraterritorial activities of its companies, and to expand the rights of victims of environmental and human rights abuses.¹⁷¹ Such agreements could serve as important elements of developing countries' regulatory strategy with respect to the growing number of "land grabs" in the global

¹⁶⁵ See De Schutter, *supra* note 142, at 23.

¹⁶⁶ See *id.*

¹⁶⁷ See AoA, *supra* note 57, at art. 20.

¹⁶⁸ See De Schutter, *supra* note 142, at 25.

¹⁶⁹ See Gonzalez, *supra* note 35, at 374.

¹⁷⁰ See AARON COSBEY ET AL., INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, INVESTMENT AND SUSTAINABLE DEVELOPMENT: A GUIDE TO THE USE AND POTENTIAL OF INTERNATIONAL INVESTMENT AGREEMENTS 29–35 (2004). The IISD has drafted a model investment agreement and an accompanying handbook with numerous suggestions on ways to balance investor rights and host country policy space. See <http://www.iisd.org/investment/model/> (model agreement); see also http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf (accompanying handbook).

¹⁷¹ See COSBEY ET AL., *supra* note 170, at 29–35; HOWARD MANN, INT'L INST. FOR SUSTAINABLE DEV., INTERNATIONAL INVESTMENT AGREEMENTS, BUSINESS AND HUMAN RIGHTS: KEY ISSUES AND OPPORTUNITIES 13–15 (2008).

South. In addition, developing countries should reject “economic stabilization” clauses in investment contracts between the host state and the foreign investor that insulate foreign investors from lost profits associated with subsequent changes in the host state’s laws (such as laws imposing environmental standards or placing limits on the export of food).¹⁷² Such clauses may impair the host state’s ability to comply with its human rights and environmental obligations or subject the country to substantial penalties for fulfilling these obligations.

Many of the recommendations set forth above will encounter fierce resistance to the extent that they curtail the power of transnational agribusiness. Indeed, the Doha Round of WTO negotiations has been at an impasse since 2008 due to conflicts between developed and developing countries over Northern agricultural subsidies, over the purpose and design of the SP and SSM flexibilities, and over developed countries’ demands for additional liberalization of the industrial and service sectors of major developing countries above and beyond the drastic tariff cuts contained in the December 2008 draft negotiation texts.¹⁷³

However, even if the gridlock in the WTO negotiations could be overcome, it is not clear that a more balanced version of the AoA, with its single-minded emphasis on lowering trade barriers to facilitate export production, will necessarily benefit the small farmers who constitute the vast majority of the world’s food insecure population. For example, even if Northern agricultural subsidies were eliminated, small farmers in poor countries cannot compete with agricultural producers in wealthy and middle-income countries whose productivity levels are far higher due to economies of scale, mechanization, better infrastructure, and access to credit and technology. Similarly, market prices will continue to favor large-scale industrial agriculture to the extent that markets fail to internalize its environmental costs (including loss of agrobiodiversity, declining soil fertility, pollution and depletion of water resources, and greenhouse gas emissions from petroleum-dependent production processes) and fail to reward the positive environmental externalities associated with small-scale sustainable agriculture, such as soil and water conservation, stewardship of agrobiodiversity, and carbon sequestration. Reducing trade barriers and providing greater policy flexibility to developing countries will also not address the distortions in global agricultural markets that enable a small number of transnational corporations to retain the bulk of consumer food dollars while paying farmers low prices for their agricultural output. In addition, climate change, population growth, biofuels cultivation, commodity market speculation, and growing meat consumption in middle-income developing countries will place additional stress on food production, resulting in higher food prices, greater volatility, and the restriction of exports during times of crisis. Because access to food is determined by purchasing power, it is dangerous for poor countries and marginalized communities to depend primarily on increasingly volatile global markets to satisfy their nutritional

¹⁷² See De Schutter, *supra* note 142, at 18–19; SMALLER & MANN, *supra* note 121, at 10.

¹⁷³ See Matthews, *supra* note 151, at 125–28; Martin Khor, *The Blame Game Still Stalling Doha Round of WTO Talks*, CHINA POST, March 1, 2011.

needs. As international agricultural markets become less reliable, greater national self-sufficiency may be necessary to realize the fundamental human right to food.

Rather than tinkering with the export-oriented WTO framework, it may be more productive to develop an alternative approach to the integration of international law through a global food convention grounded in the concept of food sovereignty. Developed by a transnational alliance of small farmers, landless laborers, and indigenous peoples known as La Vía Campesina, the concept of food sovereignty refers to democratic national and local control over food production in a manner that addresses poverty and hunger, preserves rural livelihoods, and protects the environment.¹⁷⁴ Food sovereignty represents a rights-based approach to the problem of food security that seeks to strengthen the participation of civil society in food policy and to promote national and local self-determination.¹⁷⁵ Under a food sovereignty regime, states and rural communities would have the autonomy to establish their own food and agricultural policies as long as these policies did not harm third countries.¹⁷⁶

A global food convention premised on food sovereignty may be preferable to a reformed AoA for several reasons: (1) it would explicitly recognize that food must be treated differently from other commodities because it is essential to human life and has significant implications for the health of the planet's ecosystems; (2) it would make the right to food and the protection of the environment the overriding objectives of the convention rather than treating them as narrow and ill-defined exceptions to trade liberalization commitments; (3) it would seek to promote national food self-sufficiency by increasing domestic food production and decreasing reliance on volatile international markets; (4) it would tackle the underlying causes of food insecurity by reversing decades of disinvestment in the agricultural sector and channeling resources to the small-scale farmers who suffer from chronic food insecurity and serve as stewards of the planet's agrobiodiversity; (5) it would foster and finance collaborative research and coordinated policy-making on the multiplicity of links between food production and the environment, including the impact of agriculture on the planet's biodiversity, soils, freshwater resources, and climate and the potential role of agriculture in climate change mitigation and adaptation; (6) it would codify the national and extraterritorial obligations of states with respect to the right to food; (7) it would integrate in one regime (in a framework treaty and several protocols) the substantive trade, aid, investment, competition, commodity trading, environmental, food safety, intellectual property, and other rules necessary to enable states to take individual and collective measures to fulfill the right to

¹⁷⁴ See PETER M. ROSSET, *FOOD IS DIFFERENT: WHY WE MUST GET THE WTO OUT OF AGRICULTURE* 34–35 (2006); Flavio Luiz Schieck Valente & Ana María Suárez-Franco, *Human Rights and the Struggle Against Hunger: Laws, Institutions, and Instruments in the Fight to Realize the Right to Adequate Food*, 13 *YALE HUM. RTS. & DEV. L.J.* 435, 452–53 (2010).

¹⁷⁵ See Valente & Suárez-Franco, *supra* note 174, at 453; Peter Halewood, *Trade Liberalization and Obstacles to Food Security: Toward a Sustainable Food Sovereignty*, 43 *MIAMI INTER-AM. L. REV.* 115, 134–35 (2012).

¹⁷⁶ Mohsen al Attar, *The Transnational Peasant Movement: Legalising Freedom from Want*, 8 *NEW ZEALAND YEARBOOK OF INT'L LAW* 107, 131 (2010).

food; (8) it would introduce incentives at the national and international level to promote the transition to sustainable agriculture (possibly drawing upon existing fair trade and eco-labeling schemes); and (9) a global food convention would establish a compliance mechanism to permit citizen enforcement of its provisions rather than relying on the good will of states to make use of policy flexibility in trade and investment agreements. Indeed, a food policy convention would seek to democratize food policy and would specify the procedural obligations of states with respect to access to information, public participation, and access to justice.

A global food convention is an extremely ambitious undertaking and would undoubtedly be opposed by the same forces that have derailed the WTO agriculture negotiations. However, it would likely appeal to a broad constituency of consumer groups, small farmers, indigenous peoples, human rights activists, environmentalists, animal rights activists, public health advocates, food justice and development non-governmental organizations, and other public-spirited individuals and social movements that have become increasingly aware of the crisis in the global food system. While the WTO agriculture negotiations are generally dominated by corporate and governmental actors, inaccessible to civil society, and mired in unintelligible jargon, the demand for a food convention, if framed by a compelling narrative of social justice, may help create the national and international grassroots mobilization necessary to defeat the corporate-dominated free trade agenda and lay the groundwork for socially just and environmentally sustainable food systems that respect, protect, and fulfill the fundamental human right to food.

The Right to Food, Farmers' Rights and Intellectual Property Rights: Can Competing Law Be Reconciled?

Hans Morten Haugen

Abstract This chapter analyzes the relationships between three fields of law: intellectual property rights, the right to food and farmers' rights. It reviews the development of the right to food under international law, from its recognition in the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), to the more recent development of tools to advise states on how to best promote the realization of the right to food, including when states are negotiating trade and investment agreements with chapters on intellectual property protection. It then explores the emerging issue of farmers' rights, with particular reference to the detailed requirements to realize farmers' rights in the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). While acknowledging that the World Trade Organization's 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets high standards of intellectual property protection, which can sometimes be in conflict with rights held under the ICESCR and ITPGRFA, the chapter nevertheless argues that there are several provisions of the TRIPS Agreement that states could make use of in order to expand their policy space, and thereby better ensure the rights of food producers. It illustrates examples of states using this policy space, such as the Indian Protection of Plant Varieties and Farmers' Rights Act of 2001. Ultimately, this chapter argues that tensions between TRIPS, on the one hand, and the ICESCR and the ITPGRFA, on the other, can only be reduced by a more coherent implementation of the relevant treaties.

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1 Introduction

Strong tensions exist between the application of intellectual property rights to genetic resources and the realization of other rights recognized by international law, such as the human right to food and farmers' rights. The right to food, recognized in the 1948 Universal Declaration of Human Rights, seeks to ensure that all individuals have access to adequate food, while farmers' rights, which emerged in the late 1980s as an alternative to plant breeders' rights, recognize the contribution of farmers as stewards and innovators of agricultural biodiversity. Intellectual property in genetic resources grants exclusive rights to use certain genetic resources to holders of patent rights and plant breeder's rights.

The tensions exist in many areas. Some tensions concern the impact of intellectual property rights in genetic material on farmers themselves. Patenting of plant genetic resources encourages agricultural monopolization at the expense of small-scale farmers. Selective licensing by intellectual property rights holders can limit the distribution to such farmers of crucial resources like seeds.¹ Widespread patenting of plants and animals can also threaten the equitable sharing of benefits arising from the utilisation of plant genetic resources for food and agriculture. For example, many patents have been granted on information and knowledge already in the public domain.² Other tensions center on how intellectual property rights impact the conservation and use of genetic resources, which in turn impacts farmers' rights and the realization of the right to food. Strengthening of intellectual property rights protection over plant genetic material tends to go together with increased emphasis on monocropping and marketing of particular seeds with certain characteristics. One such characteristic is pesticide resistance.³ As agriculture becomes more commercially oriented, it becomes more difficult for farmers to practice traditional agriculture, even if no farmer is formally prevented from doing so. At the same time, many informal seed markets continue to provide plants with a broader genetic base,

¹ For more information, see the submission from the government of Germany in International Treaty on Plant Genetic Resources for Food and Agriculture Governing Body, *Compilation of Views and Experiences on the Implementation of Farmers' Rights Submitted by Contracting Parties and Relevant Organizations* IT/GB-4/11/Inf. 6, at 7 (Dec. 2010). See also EUROPEAN GROUP ON ETHICS IN SCIENCE AND NEW TECHNOLOGIES TO THE EUROPEAN COMMISSION, *ETHICS OF MODERN DEVELOPMENTS IN AGRICULTURAL TECHNOLOGIES* 59 (Opinion No. 24, 2008).

² See Charles R. McManis, *Fitting Traditional Knowledge Protection and Biopiracy Claims into the Existing Intellectual Property and Unfair Competition Framework*, in *INTELLECTUAL PROPERTY AND BIOLOGICAL RESOURCES* (Burton Ong ed., 2004) (reviewing some of these patents); see also CHARLES R. McMANIS, *BIODIVERSITY AND THE LAW: INTELLECTUAL PROPERTY, BIOTECHNOLOGY AND TRADITIONAL KNOWLEDGE* (2007).

³ Studies identified by Haugen highlight how both plants, weeds and insects develop resistance to pesticides, such as herbicides and insecticides. See HANS MORTEN HAUGEN, *TECHNOLOGY AND HUMAN RIGHTS: FRIENDS OR FOES? HIGHLIGHTING INNOVATIONS APPLYING TO NATURAL RESOURCES AND MEDICINE* 125 (2012).

and programs for developing and strengthening local seed banks and encouraging participatory plant breeding are promoted in different ways.⁴

This chapter analyzes these tensions by exploring the scope of the most relevant provisions of the various international instruments that protect the right to food, farmers' rights, and intellectual property rights over genetic resources respectively. The right to food is recognized in the International Covenant on Economic, Social and Cultural Rights (ICESCR; 160 state parties). Farmers' rights are recognized under the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA; 127 state parties plus EU). Intellectual property rights over genetic resources for food and agriculture are protected under the International Convention for the Protection of New Varieties of Plants (UPOV Convention; 71 state parties), but also under the World Trade Organization (WTO) Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS; 160 state parties). Although the UPOV Convention regulates plant variety protection in a much more detailed manner than TRIPS does, TRIPS is analyzed here because it establishes strict minimum requirements for national implementation, regulates all widely recognized categories of intellectual property rights,⁵ and is ratified by a high number of developing countries.⁶ In addition, tensions between TRIPS and ITPGRFA are worth exploring because the latter is to be implemented "consistent with the adequate and effective protection of intellectual property rights."⁷ The restriction is repeated in TRIPS itself, which states that measures taken for public policy objectives, including for socio-economic and technological development, public health and nutrition, must be "consistent with the provisions of this Agreement."⁸ However, this chapter contends that possibilities do exist within TRIPS to uphold farmers' rights and the right to food while remaining TRIPS-compliant.⁹

⁴ For more information, see chapter five in particular of REGINE ANDERSEN & TONE WINGE, FRIDTJOF NANSEN INST., *SUCCESS STORIES FROM THE REALIZATION OF FARMERS' RIGHTS RELATED TO PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE* (2008). See also REGINE ANDERSEN & TONE WINGE EDs., *REALISING FARMERS RIGHTS TO CROP GENETIC RESOURCES* (2013).

⁵ See Agreement on Trade-Related Aspects of Intellectual Property Rights art. 27.3(b), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS].

⁶ Note, however, that the 33 member states that belong to the category of least-developed countries are currently not required to comply with TRIPS, see World Trade Organization [WTO], *IP/C/64, Extension of the Transition Period Under Article 66.1 for Least-Developed Country Members, Decision of the Council for TRIPS of 11 June 2013*, para. 1 (Jun. 11, 2013). The extension period is 1 July 2021.

⁷ International Treaty on Plant Genetic Resources for Food and Agriculture art. 13.2(b)(iii), Nov. 3, 2001, S. Treaty Doc. No. 110.19 [hereinafter ITPGRFA]. Similar wording is found in the Convention on Biological Diversity arts. 16(3) & 16(5), June 5, 1992, 1760 U.N.T.S. 79, 31 I.L.M. 818.

⁸ TRIPS, *supra* note 5, at art. 8(1).

⁹ This should not exclude the possibility of amending the TRIPS Agreement (proposals by states point to Article 29 on Conditions on Patent Applicants) to ensure that obligations of other treaties are better reflected in TRIPS. An amendment has already been agreed for Article 31 of TRIPS, on compulsory license for the purposes of producing and exporting pharmaceutical products to states with insufficient or no manufacturing capacities in the pharmaceutical sector. Still, it has not been approved by the required 2/3 of WTO member states. Therefore, it has the status of a waiver.

Hence, it is possible to reconcile these different treaties and the principles that underlie them. This chapter argues that tensions between TRIPS, on the one hand, and the ICESCR and the ITPGRFA, on the other hand, can only be reduced by a more coherent implementation of the relevant treaties.

This chapter begins with an introduction to the provisions of the ICESCR that address the right to food and the provisions in the ITPGRFA that address farmers' rights. It also analyzes how the TRIPS agreement governs the application of intellectual property rights to genetic material. Section 3 analyzes some of the areas of tension between these treaties, and discusses treaty conflict and reconciliation. Section 4 identifies two main approaches to reducing the tensions, namely monetary benefit-sharing and the introduction of so-called *sui generis* ("of its own kind") laws for effective protection of plant varieties, as required by TRIPS Article 27.3(b).

2 Competing International Law?

Under the Vienna Convention on the Law of Treaties, Article 30, treaties may be incompatible, if they relate to the same subject matter. Even if the ICESCR, the ITPGRFA and the TRIPS, regulate different fields of law, they do relate *inter alia* to farmers' access to seeds and genetic materials; in other words the same subject matter. A detailed description of how access to seeds and genetic materials are addressed in the three treaties will now be provided. It will be shown that, both the ICESCR and the ITPGRFA have relatively few prohibitions and commandments, suggesting that the traditional approach to addressing treaty conflict may not be applicable here.

2.1 *The Right to Food and the International Covenant on Economic, Social and Cultural Rights*

Although the ICESCR was adopted in 1966, a proper understanding of its provisions has only emerged in the last decade¹⁰ and little theorizing has yet been done on how or if the ICESCR speaks to the preservation of plant and genetic resources. One framework that has developed for understanding the rights set forth in the ICESCR—and the right to food in particular—is the "Respect, Protect, Fulfill"

¹⁰ As an example, the right to benefit from scientific progress and its applications was negotiated with the UNESCO saying that it "would amplify the meaning of the provision". U.N. Commission on Hum. Rts. para. 19, ECOSOC Records, 14th Session, Supplement No. 4., E/CN.4/669 (1952). However, this only happened in 2009 when the Venice Statement was adopted. See HAUGEN, *supra* note 3, at 30–34. For the codification of the right to benefit from scientific progress and its applications, see International Covenant on Economic, Social and Cultural Rights art. 15.1(b), G.A. Res. 2200A U.N. Doc. A/RES/21/2200A (Dec. 16, 1966) [hereinafter ICESCR].

typology.¹¹ According to this framework, a state's obligation to the right to food requires it to avoid interfering with the right, to prevent others from interfering with the right, and to provide an enabling environment for the full realization of the right to food, including—if required—the provisioning of food to families in urgent need.

The ICESCR recognizes the right to food in two paragraphs: in Article 11.1, as an element of the right to an adequate standard of living, and in Article 11.2, as the fundamental right to be free from hunger. Article 11.2 contains more elaboration on the measures that states are to take in order to respect, protect, and fulfill the right to food.¹² Subparagraph (a) of Article 11.2 specifies that states should:

take, individually and through international co-operation, the measures, including specific programmes, which are needed [t]o improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge ... in such a way as to achieve the most efficient development and utilization of natural resources.

Thus, the ICESCR provides that state parties to the convention must take measures to improve methods of food distribution in addition to improving measures of food production. It recognizes that it is not only the aggregate production of food that matters, but how the situation for the most food insecure is affected.

ICESCR Article 11.2(a)'s emphasis on measures for the improved methods of production of food must imply that the state has certain obligations with regard to farmers who are not adequately served by the private sector, due to limited purchasing power. Commercial agricultural inputs may not be affordable for many farmers, putting them at risk of becoming indebted to and/or highly dependent on commercial actors. The scope of these obligations are not, however, easy to draw. A relevant paragraph of the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, negotiated under the auspices of the Food and Agriculture Organization of the United Nations (FAO) by states who are both parties and non-parties to the ICESCR, says: "States should promote agricultural research and development, in particular to promote basic food production with its positive effects on basic incomes and its benefits to small and women farmers, as well as poor consumers."¹³ In brief, states are encouraged to get involved in the development and distribution of food-producing resources—such as seeds—so as to enhance the overall food production by farmers,¹⁴ and in particular, the situation of farmers who may not be able to afford all the inputs needed.

¹¹ See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rts. [CESCR], *General Comment No. 12: The Right to Adequate Food*, U.N. Doc. E/C.12/1999/5 (May 12, 1999).

¹² Space does not allow for an in-depth analysis of this provision. *But see* HANS MORTEN HAUGEN, *THE RIGHT TO FOOD AND THE TRIPS AGREEMENT – WITH A PARTICULAR EMPHASIS ON DEVELOPING COUNTRIES' MEASURES FOR FOOD PRODUCTION AND DISTRIBUTION* 130–50 (2007).

¹³ U.N. Food & Agric. Org. [FAO], *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* para. 8.4 (2004). *See also id.* at para. 8.5 (discussing access to research results enhancing food security); *id.* at para. 8.12 (mirroring ITPGFRA Article 9.2).

¹⁴ See U.N. Special Rapporteur on the Right to Food, *Report of the Special Rapporteur on the Right to Food, Olivier De Schutter, Seed policies and the Right to Food: Enhancing Agrobiodiversity and Encouraging Innovation, delivered at the 64th Session of the General Assembly*, U.N.

Two other provisions of the ICESCR are of particular relevance to our discussion here. ICESCR Article 1(2) states: “All peoples may, for their own ends, freely dispose of their natural wealth and resources ... In no case may a people be deprived of its own means of subsistence.” ICESCR Article 25 states: “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.” These provisions imply that there must be no impediments in access to and use of food-producing resources like plant genetic resources for indigenous peoples.¹⁵

2.2 Farmers’ Rights in the International Treaty on Plant Genetic Resources for Food and Agriculture

Although the concept of “farmers’ rights” was recognized in a FAO Conference resolution as early as 1989, it was not until the ITPGRFA entered into force in 2004 that farmers’ rights became a part of international law. Farmers’ rights recognize the contribution of farmers to the global pool of genetic resources and seek to enable farmers to continue their work as both stewards and innovators of agricultural biodiversity. The FAO has defined farmers’ rights as “the rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources, particularly those in the centres of origin/diversity.”¹⁶

2.2.1 Article 9 and Article 13 of the ITPGRFA

Articles 9 and 13 of the ITPGRFA are particularly interesting when it comes to the relationship between farmers and plant genetic materials. Article 9.1 of the ITPGRFA recognizes farmers’ “enormous contribution ... for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.” By referring to “development,” the Article explicitly recognizes the selection and breeding efforts of farmers.

ITPGRFA Article 9.2 specifies three farmers’ rights that states should take measures to protect and promote, all relating to plant genetic resources for food and

Doc. A/64/170 (July 23, 2009); Olivier De Schutter, *The Right of Everyone to Enjoy the Benefits of Scientific Progress and the Right to Food: From Conflict to Complementarity*, 33 HUM. RTS. Q. 304 (2011). The Report by the U.N. Secretary-General on Agricultural Technology for Development (A/68/2013) paras. 36–37 Admits that such Involvement by States is too Limited.

¹⁵ Art. 1(2) cannot, however, be read so as to give a right for indigenous peoples to reject the inclusion of plant genetic resources in the Multilateral System of the ITPGRFA. The obligations of the ITPGRFA concerning free exchange of the resources included in the Multilateral System must be understood to be *lex specialis*.

¹⁶ U.N. Food & Agric. Org. [FAO], Report of the Conference of FAO, Twenty-Seventh Session, Appendix E, at art. 2.4 (1993).

agriculture: (a) an intellectual property right in traditional knowledge; (b) the right to equitably participate in sharing benefits resulting from the utilization of plant and genetic resources; and (c) the right to participate in making decisions relating to the conservation and sustainable use of such resources. The term “including” applies in the introductory part of Article 9.2 and implies that this is not an exhaustive list of elements that constitute farmers' rights. The Article is introduced by the phrase “In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation”. This introductory language implies that it is up to each and every state to decide when, whether, and how to take measures aimed towards realizing farmers' rights.¹⁷

Article 9.3 affirms the rights that farmers have over their farm-saved plant genetic material. The full text of the Article reads: “Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.” The limiting phrase “subject to national law and as appropriate” restricts the general application of this prescription. On the other hand, the paragraph uses the term “right” to describe farmers' relationships to their plant genetic material, in contrast to the analogous provision of the UPOV 1991 (International Union for the Protection of New Varieties of Plants) Convention, which only provides that farmers should be “permitted” to use their farm-saved propagating material.¹⁸

While Article 9 clearly recognizes the importance of farmers' rights, there is no requirement in ITPGRFA that there must be a system in place at the national level to ensure adequate protection of traditional knowledge relevant to plant genetic resources for food and agriculture. Within the overall reporting requirements for states, however,¹⁹ the Compliance Committee can identify the lack of measures taken towards the realization of farmers' rights when considering state reports.²⁰

Article 13 of the ITPGRFA, which deals with benefit-sharing, does not allow for a similar deference. Article 13 states that benefits “shall be shared fairly and

¹⁷ Anke Van Den Hurk, *The Seed Industry, Plant Breeding and the International Treaty on Plant Genetic Resources for Food and Agriculture*, in *PLANT GENETIC RESOURCES AND FOOD SECURITY: STAKEHOLDER PERSPECTIVES ON THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE* 171 (Christine Frison, Francisco López & Jose Esquinas-Alcázar eds., 2011) (arguing that this qualification is a reason why the breeding sector “could support the text of Article 9”).

¹⁸ The last part of UPOV 1991 Article 15.2 reads: “permit farmers to use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 14(5)(a)(i) or Article 14(5)(a)(ii) [on essentially derived varieties].” International Convention for the Protection of New Varieties of the Plants March 19, 1991, S. Treaty Doc. No. 104–17 (1995). This provision is most frequently referred to as “farmers' privilege.” The strength of this UPOV provision is restricted by being introduced by the term “optional exception.”

¹⁹ ITPGRFA Governing Body, *Resolution 2/2011– Procedures and Operational Mechanisms to Promote Compliance and Address Issues of Non-compliance*, Annex, sec. v (2011).

²⁰ *Id.*, at para. 3 (which only requires the Compliance Committee to present to the Governing Body a “synthesis on the basis of the reports that it has considered ... and may submit recommendations”).

equitably” and describes what forms of benefit-sharing are to take place. As will be shown below, these benefits are to flow primarily to farmers who conserve and sustainably utilize plant genetic resources for food and agriculture. Despite the fact that Article 13 specifies higher requirements for states than Article 9, Article 9 can serve as important inspiration and guide when adopting domestic legislation.

2.3 Intellectual Property Rights, Genetic Resources, and the TRIPS Agreement

The TRIPS Agreement section on patent rights and plant variety protection is the most relevant piece of international law when analyzing the application of intellectual property law to genetic resources. The patent provisions of the TRIPS Agreement apply to “any inventions, whether products or processes, in all fields of technology”.²¹ They establish minimum standards of protection, with detailed provisions for enforcement. They also mandate strong sanctions in cases of non-compliance with rulings by the WTO Dispute Settlement Body. Despite its general orientation towards strict intellectual property enforcement, the TRIPS Agreement has some characteristics that give it certain flexibilities.²² First, it contains explicit references to the social objectives of intellectual property protection (Article 7), as well as the principles that should guide such protection (Article 8). Second, the requirements of the TRIPS Agreement’s provisions on plant variety protection (Article 27.3(b)) are relatively flexible and certainly less detailed and restrictive than the requirements of the UPOV Convention. Third, the scope of the TRIPS agreement’s exceptions provision (Article 30), “other use” provision (Article 31), and revocation/forfeiture provision (Article 32) could be quite broad; they have not been fully clarified by the WTO’s dispute settlement system.

2.3.1 Social Objectives of Intellectual Property Law

Article 7 (“Objectives”) and Article 8 (“Principles”) are found in Part 1 of TRIPS (General Provisions and Basic Principles). These two provisions state that intellectual property protection shall contribute to—and not impede—the realization of important public policy objectives. Article 8.1 states that WTO members may “adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological

²¹ TRIPS, *supra* note 5, at art. 27.1.

²² See World Trade Organization, Ministerial Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2, at paras. 4–5 (2001) (identifying TRIPS provisions that provide for flexible implementation, including Article 6 (exhaustion), Article 7 (objectives), Article 8 (principles), Article 31 (basis for granting compulsory licenses), and Article 31(b) (defining national emergency or other circumstances of extreme urgency)).

development". In principle, this formulation can be seen as encompassing a broad range of measures relating to food production, conservation, distribution and consumption, and, in particular, measures taken to ensure farmers' access to and unimpeded use of improved seeds. In practice, however, the scope of Article 8.1 is potentially limited by the requirement that any such "measures must be consistent with the provisions of this Agreement." To this day, interpretative guidance on these two provisions is lacking. No dispute settlement reports have sought to clarify these provisions, though the 2001 Declaration on the TRIPS Agreement and Public Health stated clearly that "each provision of the TRIPS Agreement shall be read in the light of the object and purpose of the Agreement as expressed, in particular, in its objectives [Article 7] and principles [Article 8]."²³ It must be noted here that the much criticized 2010 Anti-Counterfeiting Trade Agreement (ACTA) says that TRIPS "Articles 7 and 8 shall apply, *mutatis mutandis* ["with the necessary changes having been made"], to this Agreement",²⁴ which indicates that those negotiating the ACTA acknowledge that there has been a development in the understanding of the scope of TRIPS Article 7 and 8.

2.3.2 Flexible National Requirements

The TRIPS Agreement provides countries flexibility in designing domestic protections for intellectual property rights through Article 27.3(b), which states "Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof." Thus, TRIPS only requires that states establish a system for plant variety protection that is "effective". In the view of the author, a plant variety protection system can be considered effective if (i) the right encompasses certain commercial actions applying to the protected varieties; (ii) the general WTO principles of national treatment and most-favored nation apply; and, (iii) administrative and legal procedures are in place to enforce the rights. Although some authors contend that to be effective, a protection system must not exclude any plant varieties,²⁵ the present author disagrees with this requirement because UPOV 1978 specifies in Article 2.2 that: "Each member State of the Union may limit the application of this Convention within a genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use." This exception contained in UPOV 1978 could be included in national laws for the protection of plant varieties, rather than requiring that all varieties be subject to pro-

²³ *Id.* at para. 5(a).

²⁴ Anti-Counterfeiting Trade Agreement, at art. 2.3. See also Alison Slade, *Articles 7 and 8 of the TRIPS Agreement: A Force for Convergence within the International IP System*, 14 J. OF WORLD INTELL. PROP. 413 (2011) (noting that this provision confirms the relevance of TRIPS Article 7 and 8). For more clarification on TRIPS Article 7 and 8, see Peter K. Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 Hous. L. Rev. 979 (2009).

²⁵ DAN LESKIEN & MICHAEL FLITNER, INT'L PLANT GENETIC RESOURCES INST. (IPGRI), INTELLECTUAL PROPERTY RIGHTS AND GENETIC RESOURCES: OPTIONS FOR A SUI GENERIS SYSTEM (1997).

tection. This could apply to varieties that have substantially lower yield if replanted, which might leave farmers in a vulnerable situation if they depend on resowing from their harvests; or to varieties containing genes that prevent any reproduction (so-called genetic use restriction technology), which are currently not sold.²⁶

A number of systems for protecting plant varieties are available to states that are compatible with TRIPS. These include Plant Breeders' Rights (PBRs), which emerged in Europe in the early 1960s as alternative to patent protection, regulated by the UPOV Convention. The original UPOV Convention of 1961 has subsequently been updated three times, so there are currently four different Acts of the UPOV Convention. Any state that today wants to join UPOV must comply with UPOV 1991.

Although a former WTO Director-General publicly stated that the TRIPS requirements on plant variety protection could be met by implementing UPOV 1978 or UPOV 1991,²⁷ this is not required by the TRIPS Agreement, which only requires that the protection shall be effective. Therefore, in order to have both flexibility and predictability in the national implementation of Article 27.3(b) of TRIPS, states should be encouraged to adopt legislation for plant variety protection independent of UPOV 1991. We will come back to various effective *sui generis* legislations below.

2.3.3 Exceptions Under TRIPS

The TRIPS agreement provides a number of exceptions to the otherwise stringent protection of intellectual property rights, which could form a basis for provisions in national legislation. However, TRIPS Articles 30 through 32, which set forth the agreement's exceptions and limitations provisions, have been not been fully clarified by the WTO's dispute settlement panels or its Appellate Body.²⁸

A first exception contained in TRIPS allows for national legislation to comply with the TRIPS Agreement while "taking account of the legitimate interests of third parties."²⁹ This exception permits states to enact "innocent infringer" provisions, like the one included in India's Plant Variety Protection Act, which reads in Article

²⁶ An example of a national legislation prohibiting such technology is the India Protection of Plant Varieties and Farmer's Rights Act, No. 53 of 2001, which was revised in 2005 to read in Art. 18. (1)(c): "Every application for registration under section 14 shall be accompanied by an affidavit sworn by the applicant that such variety does not contain any gene or gene sequence involving terminator technology".

²⁷ Peter Sutherland, *Seeds of Doubt: Assurance on "Farmers' Privilege"*, TIMES OF INDIA, Mar. 15, 1994, at 16. For a more comprehensive overview, see REGINE ANDERSEN, GOVERNING AGROBIODIVERSITY. PLANT GENETICS AND DEVELOPING COUNTRIES 197–208 (2008), analyzing the relationship between TRIPS/UPOV and ITPGRFA.

²⁸ Rob Howse & Ruti G. Teitel, *Global Justice, Poverty and the International Economic Order*, in THE PHILOSOPHY OF INTERNATIONAL LAW 447 (Samantha Besson & John Tasioulas eds., 2010) (arguing that "certain narrow developed country interests managed to largely capture the interpretative space with respect to TRIPS.").

²⁹ See TRIPS, *supra* note 5, at art. 30.

42(i): “a right established under this Act shall not be deemed to be infringed by a farmer who at the time of such infringement was not aware of the existence of such right.”³⁰ Such a provision would take into account the legitimate interests of farmers by exempting them from liability when patented plants are present on their fields without their knowledge, or when patented, herbicide-resistant plants develop into a weed problem on their lands.³¹ Other national laws provide different safeguards. For example, the Canadian Patent Act includes a provision that permits any person to ask for a declaration by the Federal Court stating that “any process used or ... article made ... does not or would not constitute an infringement of the exclusive property or privilege.”³² The Canadian Act thus provides affirmative, preemptive relief for parties that are not willing to risk a lengthy trial for alleged infringement.

A second exception provides for national laws to permit the use of patented material without the authorization of the patent-holder in specific circumstances.³³ This exception describes when and how states can specifically decide to authorize parties other than the patent-holder to provide the patented product on the market, or to use it for public non-commercial use. TRIPS provides, however, that the patentee must be compensated when a compulsory license is granted. U.S. law has provisions for public non-commercial use of patented material, including plant varieties³⁴ and Brazilian law authorizes the granting of compulsory licences on the basis of the public interest.³⁵

While rarely understood as an exceptions provision, the revocation and forfeiture³⁶ provision of TRIPS also addresses state decision-making regarding specific

³⁰ For a proposal of having a similar provision in the patent law of a developed country, see CANADIAN BIOTECHNOLOGY ADVISORY COMMITTEE, *PATENTING OF HIGHER LIFE FORMS AND RELATED ISSUES: REPORT TO THE GOVERNMENT OF CANADA BIOTECHNOLOGY MINISTERIAL COORDINATING COMMITTEE 14* (2002).

³¹ Herbicide-resistant volunteer canola plants escaping from the fields where they were grown has been identified as constituting a potential weed problem for farmers in Canada. See ROYAL SOCIETY OF CANADA, *ELEMENTS OF PRECAUTION: RECOMMENDATIONS FOR THE REGULATION OF FOOD BIOTECHNOLOGY IN CANADA; AN EXPERT PANEL REPORT ON THE FUTURE OF FOOD BIOTECHNOLOGY 129* (2001).

³² The Canadian Patent Act reads: “Where any person has reasonable cause to believe that any process used or proposed to be used or any article made, used or sold or proposed to be made, used or sold by him might be alleged by any patentee to constitute an infringement of an exclusive property or privilege granted thereby, he may bring an action in the Federal Court against the patentee for a declaration that the process or article does not or would not constitute an infringement of the exclusive property or privilege.” Patent Act, R.S.C., ch. P-4, art. 60(2) (1985) (Can.).

³³ See TRIPS, *supra* note 5, at art. 31(b).

³⁴ Legislation in the United States allows for the issuing of compulsory licenses concerning uses of patents, copyrights or plant variety certificates, when the use is by or for the government of the United States of America. See 28 U.S.C. § 1498(a), (b) & (d) (U.S.).

³⁵ Presidential Decree on Compulsory Licensing, Decree No. 3.201 of Oct. 6, 1999 (Brazil). Article 2.2 defines as falling within the public interest: “public health, nutrition, protection of the environment, as well as those of primordial importance to the technological or social and economic development of this country.”

³⁶ Revocation can take place if it is found that the patentability requirements were not met, in other words actions taking place before the grant of the patent, while forfeiture relates to actions after the patent was granted, such as non-payment of fees or abuses.

patents.³⁷ The provision provides that “an opportunity for judicial review of any decision to revoke or forfeit a patent shall be available.”³⁸ This provision must be read in conjunction with the Paris Convention for the Protection of Industrial Property, which regulates compulsory licenses and forfeiture and revocation of patents in greater detail than TRIPS.³⁹ TRIPS Article 2.1 says in part: “Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).” As clarified by the former Director-General of the World Intellectual Property Organization (WIPO), the relevant provisions of the Paris Convention do not restrict revocation or forfeiture of patents to cases involving abuse of patents; hence, the Paris convention does not rule out revocation or forfeiture of patents based on public interest.⁴⁰ Because Article 32 articulates no requirements for *when* revocation or forfeiture can be applied, specifying only the required remedy of judicial review *if* such measures are taken, it suggests that TRIPS does not prohibit states from authorizing patent revocation or forfeiture in order to protect prevailing public interests.⁴¹ Ensuring adequate nutrition or avoiding the uncontrolled spread of an invasive crop which damages harvests are examples of public interests. India’s Patent Act is an example of national legislation that authorizes revocation in service of the public interest, if “a patent or the mode in which it is exercised is mischievous to the State or generally prejudicial to the public”.⁴²

While TRIPS provisions give a certain space for flexible implementation, it should be noted that many states have not made adequate use of these flexibilities, either because the options have not been adequately promoted or because many

³⁷ See TRIPS, *supra* note 5, at art. 32.

³⁸ *Id.*

³⁹ Paris Convention for the Protection of Industrial Property, March 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305, in Article 5A(3)-(4) specifies the proceedings for the forfeiture or revocation of a patent. Revocation is also regulated by TRIPS Article 62.4 and 62.5. See TRIPS, *supra* note 5.

⁴⁰ GEORGE H. C. BODENHAUSEN, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY AS REVISED AT STOCKHOLM IN 1967, at 70 (1968); see also Jayashree Watal, *Implementing the TRIPS Agreement on Patents: Optimal Legislative Strategies for Developing Countries*, in COMPETITIVE STRATEGIES FOR THE PROTECTION OF INTELLECTUAL PROPERTY 111 (O. Lippert ed., 1999).

⁴¹ Compare Wanda Werner, *Article 32*, in WTO – TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, MAX PLANCK COMMENTARIES ON WORLD TRADE LAW, VOL 7 (Peter T. Stoll, Jan Busche & Karen Arend eds., 2009) (arguing that this measure is “permissible only as a last resort after the grant of the compulsory license” and that “[m]embers must follow the procedure laid down in ... Paris Convention [Article 5A(4)] when revoking a patent in the public interest”), with Watal, *supra* note 40, at 111 (arguing that “the conditions and time limits of Article 5A do not apply if the public interest, rather than abuse of patent, is the basis of revocation”).

⁴² The Patents Act in India also provides for revocation in a number of circumstances: Article 66 is the general revocation provision, Article 65 is a revocation provision applying to atomic energy, and Article 89 allows for revocation in cases of non-working of patents. See The Patents Act, No. 39, Acts of Parliament 1970 (Ind.).

governments fear ending up before the WTO's dispute settlement system because of inadequate protection of intellectual property rights.⁴³

3 The Character of the Treaties and Treaty Conflict

It is evident that the three treaties, which constitute the backbone of this chapter, serve widely different interests. While the realization of the right to food requires making improved goods physically accessible and economic affordable, the realization of patent rights is about limiting the accessibility to these improved goods. The TRIPS Agreement promotes the interests of technology producers and commercial breeders; the ITPGRFA is more concerned with the interests of farmers and breeders working in the public sector; and the ICESCR establishes a minimum standard for a dignified life.

While acknowledging widespread criticism of the patent system and its effects, this chapter takes the view that a well-functioning patent system could, in the long term, have overall positive impacts on the realization of human rights. This is because exclusive rights provide predictability, and allow for more investments in research and in the process of developing inventions into marketable products. In brief, "by slowing down the diffusion of technical progress", a patent system "ensures that there will be more progress to diffuse."⁴⁴ For such positive effects to emerge, however, there have to be adequate social, education, infrastructure, competition and technology policies in place. Within a human rights approach, the typology of respect, protect and fulfill as well as the high threshold for adopting retrogressive measures,⁴⁵ implies that the state must make every effort to ensure that impediments to the realization of human rights are removed.

Both the ICESCR and the ITPGRFA have relatively few prohibitions and commandments; rather, they emphasize the taking of appropriate measures.⁴⁶ This suggests that the traditional (narrow) approach to understanding treaty conflict—which

⁴³ Annette Kur, *Limitations and Exceptions Under the Three-steps Test – How Much Room to Walk the Middle Ground?*, in *INTELLECTUAL PROPERTY IN A FAIR TRADE SYSTEM: PROPOSALS FOR REFORM OF TRIPS* 246, 249 (Annette Kur & Marianne Levin eds., 2011) (finding that "the panels' restrictive approach towards limitations and exceptions has no justification in TRIPS."). *But see* Henning Grosse Ruse-Khan, *Assessing the Need for a General Public Interest Exception in the TRIPS Agreement*, in *INTELLECTUAL PROPERTY IN A FAIR TRADE SYSTEM: PROPOSALS FOR REFORM OF TRIPS* 183 (Annette Kur & Marianne Levin eds., 2011) (finding that the TRIPS exceptions provisions "does not allow anything close to the policy space available in Art. XX GATT and Art. XIV GATS").

⁴⁴ JOAN G. ROBINSON, *THE ACCUMULATION OF CAPITAL* 87 (3rd ed., 1971).

⁴⁵ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rts. [CESCR], *General Comment No. 3: Nature of States Parties Obligations (Art. 2, para. 1 of the Covenant)*, para. 9, U.N. Doc. E/C.12/1999/5 (Dec. 14, 1990).

⁴⁶ Both the ICESCR Article 11 and the ITPGRFA Articles 10 through 13 specify in great detail what measures the states are to take by applying the verb "shall", while ITPGRFA Article 9 is somewhat weaker by applying the verb "should".

only recognizes conflict when one treaty mandates what another treaty prohibits—is not appropriate when analyzing the relationship between these two treaties and treaties regulating intellectual property rights.⁴⁷ A more appropriate approach is to recognize that conflicts with the ICESCR and the ITPGRFA arise when another treaty, such as the TRIPS Agreement, impedes the effective taking of some of the measures they prescribe.⁴⁸ For example, if a state is to fully comply with the TRIPS Agreement, it must give patent owners the rights to prevent others from making, using, offering for sale, selling, or importing the patented material, in accordance with TRIPS Article 28.1. Doing so might make it more difficult for the state to effectively take the measures prescribed in the ICESCR and the ITPGRFA. When considering the extent to which intellectual property treaties may impede the taking of the measures prescribed in the ICESCR and the ITPGRFA, three concerns must be acknowledged. First, economic law treaties—a category that includes intellectual property treaties—have stronger enforcement mechanisms than other treaties such as human rights conventions, which have no sanction mechanisms. Second and related to the first concern, the fear of being subject to a dispute arising from an alleged breach of a treaty with “teeth” can lead to a “regulatory chill.”⁴⁹ In other words, states may fail to use treaty-based flexibilities due to fear of simply being accused of breach. Third, the economic costs of implementing an intellectual property law treaty, which requires the establishment of adequate institutions and recruiting of relevant staff, are considerable in the short and medium term, in part due to higher product costs and license fees.⁵⁰ Because of these costs, many poor countries fail to benefit from the potential advantages of the implementation of stronger intellectual property regimes.

Despite the weaker status of treaties with no “teeth”, and despite the fact that there is no hierarchy in international law, the Vienna Convention on the Law of Treaties grants treaties of a humanitarian character, including human rights treaties

⁴⁷ For a criticism of the narrow definition of conflict, see Erich Vranes, *The Definition of "Norm Conflict" in International Law and Legal Theory*, 17 EUR. J. INT'L L. 395 (2006). For a clarification of the difference between the incompatible and inconsistent concepts and conflicting norms, see HAUGEN, *supra* note 12, at 336–43 (reviewing the principles for determining treaty conflict).

⁴⁸ Vranes makes no distinctions between prescriptive and prohibitive norms. Vranes, *supra* note 48. The present author rather concurs with the definitions provided by Piyabutr Bunaramueang, *Normative Dynamics of Competition Laws*, U. THAI CHAMBER COM. L. R. 1 (2010) (“Prescriptive norms attempt to achieve a certain behavior; prohibitive norms seek to prevent one from doing something; and permissive norms endow one with the legal right to do certain things.”).

⁴⁹ The term regulatory chill appeared first in the context of environmental regulation; see HAKAN NORDSTROM & SCOTT VAUGHAN, *TRADE AND ENVIRONMENT*, WTO SPECIAL STUDIES 4 (1999).

⁵⁰ See KEITH E. MASKUS, INST. FOR INT'L ECON., *INTELLECTUAL PROPERTY RIGHTS IN THE GLOBAL ECONOMY* (2000) (calculating that a GDP per capita level of 7750 US dollars is generally required if the country in question can be expected to benefit from a stronger patent system); KEITH E. MASKUS, INT'L CTR. ON TRADE AND SUSTAINABLE DEV., *ENCOURAGING INTERNATIONAL TECHNOLOGY TRANSFER*, ISSUE PAPER NO. 7, 26 (2004) (confirming prior calculation, by showing that strengthened patent protection enhances investments and licensing, but only for middle-income and large developing countries).

such as the ICESCR, certain protections not accorded to other treaties.⁵¹ Moreover, the rights of specific groups such as farmers and indigenous peoples are increasingly recognized in international law.⁵² How can states be encouraged to take effective measures towards the progressive realization of the right to food and the protection of farmers' rights, while acknowledging the economic and other constraints they are facing? In the following section, with particular attention to the flexibilities contained in TRIPS, we will analyze ways that the ICESCR and the ITPGRFA may be reconciled with intellectual property treaties. The discussion will focus on two complementary approaches: the implementation of monetary benefit-sharing schemes and flexibilities in the national implementation of intellectual property regimes.

4 Reconciling Competing Law

4.1 Monetary Benefit-sharing Under the ITPGRFA

Legal scholars seeking to identify potential synergies between intellectual property and human rights have emphasized the potential of equitable benefit-sharing.⁵³ Benefit-sharing seeks to redistribute and provide for the fair and equitable sharing of benefits derived from the utilization and commercialization of genetic resources. There are multiple types of benefit sharing, including monetary, information, technology and capacity-building sharing.⁵⁴ The following section analyzes whether benefit-sharing can be a tool for reconciling the tensions between TRIPS and the ITPGRFA and the ICESCR.

Benefit sharing is an integral part of the ITPGRFA and is a means of distributing the outcome of both commercialization of the plant genetic resources and breeding

⁵¹ Vienna Convention on the Law of Treaties art. 60.5, May 23, 1969, 1155 U.N.T.S. 331 (“Paragraphs 1 to 3 [regarding termination or suspension of the operation of a treaty as a consequence of its breach] do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character”).

⁵² United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc.A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007). Article 31.1 of the Declaration states: “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora”. *Id.* at art. 31.1.

⁵³ Peter K. Yu, *Intellectual Property and Human Rights in the Non Multilateral Era*, 64 FLA. L. REV. 1043 (2012) (linking benefit-sharing to self-determination, the right to development, the right to cultural participation, and the right to benefit from scientific advancements); *see also* Kal Raustiala, K. & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277, 292 (2004) (emphasizing the centrality of benefit-sharing, noting that the CBD introduces benefit-sharing “through several controversial provisions”).

⁵⁴ ITPGRFA, *supra* note 7, at arts. 13.2(a)-(d). The Multilateral System is established by Articles 10 through 13 in the ITPGRFA and is encompassed by the crops listed in Annex 1 of the ITPGRFA.

that has not led to commercialization. A number of ITPGRFA Articles explicitly specify that the private sector should be involved in raising money for benefit-sharing.⁵⁵ The emphasis in ITPGRFA Article 9.2(b) is on equitable participation by local and indigenous communities and farmers in benefit-sharing and no obligation for the private sector is specified.

The ITPGRFA outlines three non-monetary and one monetary form of benefit-sharing. As observed by one author: “Non-monetary benefits have been more important than monetary ones in many contracts.”⁵⁶ Non-monetary benefits include access to seeds and propagating material, participatory plant breeding, and strengthening of farmers’ seed systems, including local gene banks and improved market access.⁵⁷ Monetary benefit-sharing is the easiest form to register and compare over time, and is the focus of this section.

The requirement for parties to pay a portion of their earnings from the sale of genetic materials is found in Article 13.2(d)(ii) of the ITPGRFA. Under this article any recipient, for instance a company, of plant genetic material who subsequently commercializes this genetic material and restricts the availability of the genetic material for further research and breeding “shall pay ... [to the Trust Account set up by the Governing Body of the ITPGRFA] an equitable share of the benefits arising from the commercialization of that product”. The term “shall pay” indicates that the monetary benefit-sharing obligation is absolute. Commercialization is generally understood to refer to the registering of intellectual property protection. The ITPGRFA specifies that material from the Multilateral System, established by Articles 10 through 13 in the ITPGRFA and encompassing the crops listed in Annex 1 of the ITPGRFA, can be subject to intellectual property protection, but not in the form the material was received from the Multilateral System.⁵⁸ This implies that genetic material that has been subject to some form of modification *can* be subject to intellectual property protection.

The requirement for the Governing Body to set up the Benefit-sharing Fund is established through Article 19.3 of the ITPGRFA.⁵⁹ The Benefit-sharing Fund

⁵⁵ *Id.* at art. 13.2(d) (“commercial benefit-sharing, through the involvement of the private and public sectors...”); *id.* at art. 18.4(f) (“Voluntary contributions ... by ... the private sector”); see also *id.* at art. 19.3(j).

⁵⁶ DAVID VIVAS-EUGUI, BRIDGING THE GAP ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES IN WIPO’S INTERGOVERNMENTAL COMMITTEE (IGC) 11 (2012).

⁵⁷ ANDERSEN & WINGE, *supra* note 4, at 31.

⁵⁸ ITPGRFA, *supra* note 7, at art. 12.3(d) (“not claim any ... rights that limit the facilitated access to the plant genetic resources ... in the form received”); *id.* at 12.3(f) (“Access to plant genetic resources for food and agriculture protected by intellectual and other property rights shall be consistent with relevant international agreements, and with relevant national laws”).

⁵⁹ Note that the term applied in the ITPGRFA is “Trust Account”, and that the Fund is also referred to as “the mechanism”. *Id.* at art. 19.3(f). Article 6.7 of the Standard Material Transfer Agreement (SMTA), contained in International Treaty on Plant Genetic Resources for Food and Agriculture Governing Body, *Report Of The Governing Body Of The International Treaty On Plant Genetic Resources For Food And Agriculture IT/GB-1/06/Report*, Appendix G (2006), refers to this mechanism, but Article 6.11 and Annex 4 to the SMTA provide for a “crop-based payments under the alternative payments scheme.” According to Esquinas-Alcázar et al., this crop-based payment is

is meant to be used to support three kinds of projects: (1) on-farm conservation and management of plant genetic resources; (2) sustainable use; and (3) information exchange, technology transfer and capacity building. The Benefit-sharing Fund supports the general obligation of member states under ITPGRFA Article 13.3 to ensure that monetary benefits arising from plant genetic resources flow to farmers in developing countries and countries with economies in transition. This Fund may also be used to promote farmers' rights, in accordance with Article 9.2(b) of the ITPGRFA, recognizing the right to equitably participate in sharing benefits.

A crucial tool for implementing the ITPGRFA is the Standard Material Transfer Agreement (SMTA), which is entered into between a provider (for instance a gene bank) and a receiver (a research institute or a company) before the actual transfer of the said plant genetic material.⁶⁰ The SMTA also says that a recipient commercializing a product based on material obtained through such an SMTA shall pay 1.1 % of the net sales, minus 30 % to the Benefit-sharing Fund.⁶¹ In cases where a product is not commercialized the recipient is still encouraged to make a payment to the Fund.

Whether these payment obligations are substantial or not can partly be answered by comparing these obligations with alternative approaches taken at the national level. For example, the Thailand Plant Varieties Protection Act requires that 20 % of the income derived from commercialization of a plant variety be shared with the persons who conserve or develop the variety, of which 60 % shall be shared with the community where the variety is found (in other words 12 % of the income).⁶² In comparison, the benefit-sharing requirement set by the ITPGRFA's Governing Body thus represents a relatively modest percentage of total incomes, but it nevertheless represents a potentially substantial income for farming communities.

In January 2012, the ITPGRFA Governing Body launched a second round of projects supported by the Benefit-sharing Fund, approving a total of 19 projects that jointly received USD 6 million, bringing the total number of projects supported by the Fund to 30.⁶³ The projects cover on-farm conservation and use, broadening of

more attractive for the industry than the standard payment. See Christine Frison, Francisco López & Jose Esquinas-Alcázar, *Introduction*, in PLANT GENETIC RESOURCES AND FOOD SECURITY, *supra* note 17, at 16. See also Carlos M. Correa, *An Innovative Option for Benefit-sharing Payment Under the International Treaty on Plant Genetic Resources for Food and Agriculture: Implementing Article 6.11 Crop-Related Modality of the Standard Material Transfer Agreement*, in PLANT GENETIC RESOURCES AND FOOD SECURITY, *supra* note 17 (arguing that SMTA Article 6.11 is better than SMTA Article 6.7, as the former is easier to comply with for recipients, and as the latter will not result in immediate and substantial payments to the mechanism).

⁶⁰ Article 12.4 of the ITPGRFA provides the mandate for the subsequent negotiations in the Governing Body on the content of SMTA.

⁶¹ ITPGRFA Governing Body, *supra* note 59, at 74 (Appendix G, Annex 2) & 69 (Appendix G, Article 6.7). For an assessment of the various income losses for the breeding sector, estimated to be approximately 30 per cent, see Anke van den Hurk, *The Seed Industry: Plant Breeding and the International Treaty on Plant Genetic Resources for Food and Agriculture*, in PLANT GENETIC RESOURCES AND FOOD SECURITY, *supra* note 17, at 169.

⁶² Thailand Plant Varieties Protection Act, B.E. 2542 (1999), sec. 49.

⁶³ The 19 Projects can be found at <http://www.planttreaty.org/content/Call-Proposals-2010-2011> (Oct. 7, 2013).

a crop's genetic basis through introgression of local wild species, and characterization, genetic enhancement and revitalization of certain crops.⁶⁴ For example, the Peermade Development Society in India has received funds for the conservation, dissemination and popularization of location specific farmer-developed varieties through the establishment of village level enterprises.⁶⁵ The Governing Body has stated that its objective is to generate USD 116 million for the Benefit-sharing Fund within a five-year period.⁶⁶ A resolution from the Governing Body meeting in 2011 welcomed "the excellent progress in ... mobilizing USD 10 million in the first eighteen months."⁶⁷ These funds are both payments in accordance with the requirements of the SMTA and voluntary contributions in accordance with ITPGRFA Article 18.4(f). Hence, monetary benefit-sharing is taking place, even if there is a potential for considerable increases in such transfers.

In order to be consistent with human rights principles, benefit-sharing must be fully participatory and involve benefits beyond the financial.⁶⁸ The ITPGRFA includes such a comprehensive understanding of benefit-sharing: all the four distinct forms of benefit-sharing recognized by ITPGRFA Article 13.2 must be based on the farmers' communities expressed wishes. Hence, the ITPGRFA's benefit-sharing scheme could serve as a model for national legislation. For ITPGRFA to take up this role, it is especially important that two requirements recognized by the ITPGRFA are fulfilled in any system designed to equitably share benefits with farming communities. First, there must be adequate and informed participation by the farmers, as required by ITPGRFA Article 9.2(c). Second, there must be adequate recognition of the contributions of farming communities to the development of plant genetic resources, as included in ITPGRFA Article 9.2(a).

However, benefit-sharing is no panacea. In general, indigenous peoples and local farming communities are not demanding intellectual property protection for their genetic resources and associated traditional knowledge. Rather, they are concerned with the effective enjoyment of their human rights, including the right to self-determination and rights over their land, and recognition of their cultural heritage. As noted by Vivas-Eugui, benefit-sharing "only comes after these two first priorities."⁶⁹ Based on these observations, it seems obvious that benefit-sharing must not replace the substantive human rights of indigenous peoples and other communities

⁶⁴ ITPGRFA Governing Body, *Approval of the First Projects Under the Benefit-sharing Fund*, IT/GB-3/09/Inf. 11, at 5–6 (2009).

⁶⁵ *Id.* at 5.

⁶⁶ ITPGRFA Governing Body, *Report of the Governing body of the International Treaty on Plant Genetic Resources for Food and Agriculture*, IT/GB-3/09/Report, at 32 (2009) [containing Res 3/2009, Implementation of the funding strategy of the treaty].

⁶⁷ ITPGRFA Governing Body, *Report of the Governing body of the International Treaty on Plant Genetic Resources for Food and Agriculture*, IT/GB-4/11/Report, at 31 (2011) [containing Res 3/2011, Implementation of the funding strategy of the treaty]. All resolutions on the funding strategy can be found in ITPGRFA Governing Body, *Funding Strategy for the Implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture* (2011).

⁶⁸ U.N. FOOD & AGRIC. ORG. [FAO], FOCUS ON: RIGHT TO FOOD AND INDIGENOUS PEOPLES (2007).

⁶⁹ VIVAS-EUGUI, *supra* note 56, at 25.

that depend on their natural surroundings for their survival. Benefit-sharing could, however, provide useful supplements to these rights.

4.2 Using National Legislative Space to Best Promote the Right to Food and Farmers' Rights

National legislation, through the policy space left open in TRIPS, is crucial to enable states to reconcile competing interests, and ensure the protection of farmers' rights and the right to food. A number of tools exist that states could use to protect patent rights, breeders' rights and farmers' rights while moving towards the realization of the right to food at the national level.

First, when negotiating international investment or trade agreements, states can ensure, through human rights impact assessments, "that the conclusion of any trade or investment agreement does not impose obligations inconsistent with their pre-existing international treaty obligations."⁷⁰ This is particularly important because such agreements have separate chapters on intellectual property rights, with provisions that tend to set higher standards for the protection of intellectual property rights than the requirement of TRIPS.

Second, states, and in particular developing countries, may adopt specific provisions to promote plant breeding and farmers' rights,⁷¹ and protect the rights of certain populations such as indigenous peoples. As reported by the United Nations Development Programme, however, "very few countries" have adopted intellectual property laws that take into account the interests of indigenous peoples and farmers.⁷²

Third, states can navigate intellectual property norms by putting certain provisions into free trade agreements. For example, a recent trend among states is to include disclosure obligations in free trade agreements, most of which already contain a chapter on intellectual property.⁷³ Disclosure obligations can provide a number of benefits. While recognizing that a total ban on patenting of genetic material is not likely, requiring anyone applying for a patent for genetic material to disclose information on the origins of such material will make the state more able to comply with its obligation to protect farmers and indigenous peoples. Adequate information can allow for an assessment of whether the relevant laws and regulations were complied

⁷⁰ Oliver De Schutter, U.N. Special Rapporteur on the Right to Food, *Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements*, U.N. Doc. A/HRC/19/59/Add.5, at principle 2 (Dec. 19, 2011).

⁷¹ U.N. DEVELOPMENT PROGRAMME [UNDP], TOWARDS A BALANCED 'SUI GENERIS' PLANT VARIETY REGIME: GUIDELINES TO ESTABLISH A NATIONAL PVP LAW AND AN UNDERSTANDING OF TRIPS-PLUS ASPECTS OF PLANT RIGHTS (2008); THE WORLD BANK, INTELLECTUAL PROPERTY RIGHTS: DESIGNING REGIMES TO SUPPORT PLANT BREEDING IN DEVELOPING COUNTRIES (2006); LAURENCE R. HELFER, FAO, INTELLECTUAL PROPERTY RIGHTS IN PLANT VARIETIES (2004).

⁷² UNDP, *supra* note 71, at 6.

⁷³ VIVAS-EUGUI, *supra* note 56, at 20–21 (noting that European Free Trade Agreement (EFTA) agreements, in particular, establish strong obligations).

with and give much improved possibilities for adequate benefit-sharing. India has successfully challenged both patents and other intellectual property rights wrongfully granted on genetic material originating from India,⁷⁴ and non-governmental organizations are bringing cases of alleged misappropriation before appeal bodies. As a result, granted patents have been cancelled (revoked) by the patent offices.⁷⁵

Finally, national legislation on patent protection could include innocent infringer-provisions, that for instance exempt a farmer from liability if the farmer “was not aware” that he was infringing a given right, as well as provisions allowing for revocation of patents for purposes of serving crucial public interests, such as if the patented plant is found to be invasive so that it totally replaces other crops. National legislation could also be used for excluding inventions from patentability, in accordance with Article 27.2 and Article 27.3 of TRIPS. For example, legislation could exclude from patentability any genetically modified open-pollinated plants, since there is a risk that these plants might spread into the wild. This is allowed under TRIPS Article 27.2, which provides for exclusion of patentability in order to “protect human, animal or plant life or health or to avoid serious prejudice to the environment.”⁷⁶ On the protection of plant varieties, states could utilize to the fullest the flexibility provided by the TRIPS Agreement with regard to establishing an “effective” *sui generis* system, by choosing alternatives to joining UPOV, for example. Several Asian states, like India, Thailand and Malaysia (see below) have chosen other options rather than joining UPOV.

The following section explores the ways in which national legislation could be harnessed to counterbalance some of the tensions of increased intellectual property law by recognizing and supporting farmers’ right as well as the right to food for all. Specifically, it will review several states, which have adopted their own effective *sui generis* systems to promote and protect these rights.

4.2.1 Farmers’ Rights in National Legislation

A number of countries have recognized farmer’s rights in their national legislation. Four countries, Malaysia, Thailand and India, highlighted in a United Nations Development Programme study,⁷⁷ and Portugal,⁷⁸ provide an interesting case study

⁷⁴ For a list of examples, see McManis, *supra* note 2.

⁷⁵ For a review of patents that were later revoked, see *id.* For more recent revocation decisions in the European Patent Office, on broccoli and tomatoes, respectively, see Decision by the Enlarged Board of Appeal of Dec. 9, 2010, G 0002/07 (OJ EPO 2012, 130) and G 0001/08 (OJ EPO 2012, 206).

⁷⁶ See UNDP *supra* note 71, at 13–14 (listing grounds for excluding plant varieties from protection).

⁷⁷ *Id.*

⁷⁸ ANDERSEN & WINGE, *supra* note 4 (presenting success stories of the realization of farmers’ rights).

into the different ways farmers have been granted rights to plant genetic resources under national laws.⁷⁹

The India *Protection of Plant Varieties and Farmers' Rights Act of 2001* (Act 53) recognizes farmers' rights in parallel to breeders' rights. This parity is emphasized in the first provision of the Act's chapter on farmers' rights, which reads that the two categories of rights should be treated in a "like manner" (Section 39.1(i)), implying that such farmer-bred varieties are eligible for registration with the National Register of Plant Varieties. Hence, farmers are equally recognized as being breeders. The Act says that breeders' rights could be granted to whole communities, when they "have contributed significantly to the evolution of [a plant] variety" (Sect. 41.2). The Act also creates a benefit-sharing program, whereby rewards for contributions to developing a plant variety are granted from the Gene Fund (Sect. 26, 41, 45). These rewards can either be used to diversify production, or be directed towards further breeding efforts.

As other studies have recognized, India's 2001 Act is a prime example of how national legislation can be implemented to realize the right of farmers to save, use, exchange and sell farm-saved seed.⁸⁰ Three provisions of the Act on the use of seeds should be highlighted in this respect. First, farmers are allowed to sell the farm produce including the seed of a protected variety (Sect. 39.1(iv)). Second, farmers can claim compensation if the propagating material fails to perform as expected (Sect. 39.2). Third, an "innocent infringement" provision protects farmers who use propagating material without knowing that it is protected (Sect. 42).⁸¹ These provisions allow farmers to increase both their resource base and their freedom to operate.

The Malaysian *New Plant Varieties Act of 2004* (Act 634) specifies that "a farmer or group of farmers, local community or indigenous people who have carried out the functions of a breeder" can be among persons who may apply for plant breeders' rights over a plant variety.⁸² The Act also specifies the scope of breeders' rights, requiring that a variety must be new, distinct and identifiable if farmers or indigenous communities are to be granted plant breeders rights, but new, distinct, uniform, and stable (DUS) if any other breeders are to be granted such rights.⁸³ The Act's provision on breeders' rights thus seeks to realize farmers' rights as understood in Article 9 of the ITPGRFA, but it is difficult to assess how the situation for farmers and

⁷⁹ It should additionally be noted that there are also African states (Namibia, Uganda, and Ethiopia) which have adopted legislation recognizing the rights of farming communities, based on the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources, adopted by the Organization of African Unity (OAU) in 2000. JULIANA SANTILLI, *AGROBIODIVERSITY AND THE LAW: REGULATING GENETIC RESOURCES, FOOD SECURITY AND CULTURAL DIVERSITY* 232 (2012).

⁸⁰ Tonge Winge, Regine Andersen and Anitha Ramanna-Pathak *Combining Farmers' Rights and Plant Variety Protection in Indian Law*, in *REALISING FARMERS' RIGHTS TO CROP GENETIC RESOURCES* (Regine Andersen and Tonge Winge, Eds., 2013).

⁸¹ See *supra* note 30 and accompanying text.

⁸² Malaysian New Plant Varieties Act of 2004 (Act 634), sec. 13.1(d) (Malay.).

⁸³ *Id.* at sec. 14(2) & 14(1).

indigenous communities have actually been improved as a result of these provisions of the Malaysian Act.

The Thailand *Plant Varieties Protection Act of 1999* (Act 2542) has a Chapter entitled “Protection of Local Domestic Plant Varieties.” The Act defines a “local domestic plant variety” as a “variety existing only in a particular locality” or a “variety not registered as a new plant variety”.⁸⁴ These are varieties that do not comply with the DUS requirements, but are nevertheless important to protect. As seen above twelve percent of the profits should be allocated to the community from where the plant variety is taken.⁸⁵ In principle, this amount can be considerable, but in practice no benefits have yet materialized.⁸⁶

Finally, the Portuguese *Decree-Law on Autochthonous Plant Material* (No. 118/2002) applies to plant varieties *not* protected by intellectual property rights. It creates a system for registering varieties in the national Register of Plant Genetic Resources, where the applicant, who can be either public or private, individual or corporate, must have a document issued by the competent municipal chamber affirming their “fitness to protect the interests” of the geographical area in which the local variety is most widely found.⁸⁷ In other words, this does not have to be a new variety. Registration lasts for ten years, with possibilities for unlimited renewal, as long as certain conditions are met. Most pertinently to farmers’ rights, the Decree-Law provides for registration of more than genetic material; under Sect. 3.2, the Decree-Law protects traditional knowledge associated with plant material against reproduction and commercial/industrial use, provided that this knowledge is registered. In other words, the Decree-Law confers intellectual property-like rights to traditional knowledge, which is evidenced by the fact that it uses the term “owner” to refer to those who register traditional knowledge (Sect. 3.3) as well as those who register plant genetic material (Sect. 7.1).

Although these four laws differ, all recognize that breeding efforts by farmers should qualify for some kind of protection. Only the Indian Act, however, takes a comprehensive approach. As noted by Andersen and Winge: “The practice of saving, using, exchanging and selling seeds may well exist elsewhere, but India is the only country so far where a law has been passed establishing and securing Farmers’ Rights to this extent.”⁸⁸ The benefit-sharing provision of the Thai Act also deserves

⁸⁴ Thailand Plant Varieties Protection Act of 1999 (Act 2542), sec. 43 (Thail.).

⁸⁵ *Id.* at sec. 49. The author is not aware of extraordinarily high incomes resulting from the commercialization of any variety developed by farmers, but high incomes are reported from many wild species that have been used for developing new medicines. See, e.g., Peter Jaszi & Martha Woodmannsee, *Beyond Authorship: Refiguring Rights in Traditional Culture and Bioknowledge*, in SCIENTIFIC AUTHORSHIP: CREDIT AND INTELLECTUAL PROPERTY IN SCIENCE 200–201 (Mario Biagioli & Peter Galison eds., 2003).

⁸⁶ There has still not been any Ministerial Regulation on the profit-sharing agreement, implying that no farmers have been able to claim benefits under the benefit-sharing agreement. Pawarit Lertdhamtewe, *Thailand’s Plant Protection Regime: A Case Study in Implementing TRIPS*, 7 J. INTEL. PROP. L. & PRACTICE 186, 192 (2012).

⁸⁷ Decree-Law No. 118/2002 of 20 April (Autochthonous plant material), arts. 9.2 & 9.1(a) (Port.).

⁸⁸ ANDERSEN & WINGE, *supra* note 4, at 14.

special emphasis, even if it has not yet been adequately implemented. Among the four states, all are WTO members but neither India, Malaysia or Thailand are UPOV members. India applied for membership in UPOV, but it was not accepted due to the content of its 2001 Act. As we have seen, TRIPS leaves much more discretion to states as compared to UPOV when it comes to the protection of plant varieties.

The four national legislations on plant varieties discussed in this chapter may provide useful guidance for other states, particularly if they are in the process of joining TRIPS or negotiating a bilateral free trade agreement. Moreover, these laws provide a more level playing field than legislation which only provides rights for formal breeders and which requires neither disclosure nor benefit-sharing. It must also be noted that recognition of farming communities' efforts can be done by a range of laws not fully explored in this chapter, including laws protecting geographical indications, which are addressed by TRIPS Article 22.⁸⁹

5 Conclusion

Neither the ICESCR provisions recognizing the right to food, nor the ITPGRFA provisions calling for the realization of farmers' rights, can be read to imply a general rejection of intellectual property rights.⁹⁰ Yet, the implementation of patent rights legislation and the enforcement of certain patents implicate serious human rights concerns. How should these concerns be addressed?

Even among those who advocate a stronger role for human rights in the interpretation of intellectual property laws, there is no general agreement on how human rights can best direct the patent system. Some commentators argue that more emphasis on human rights can restore social values and the social dimension back to the patent system.⁹¹ Others argue that human rights can serve as a counterbalance

⁸⁹ SHASHANK MAURIA, ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING IN INDIA 7 (Apr. 21, 2010) (listing those agricultural goods that are registered as geographical indications in India, with a requirement to share benefits with farmers); see also Ritika Banerjee & Mohar Majumdar, *In the Mood to Compromise? Extended Protection of Geographical Indications Under TRIPS Article 23*, 6 J. INTELL. PROP. L. & PRAC. 657 (2011) (discussing the extension of the scope of TRIPS Article 23 beyond wines and spirits).

⁹⁰ Peter K. Yu, *Intellectual Property and the Information Ecosystem*, 1 MICH. ST. L. REV. 1 (2005) (identifying the mutual recognition of the right to benefit from scientific advancements and the rights of the authors relating to their intellectual works, as outlined in the Universal Declaration of Human Rights Article 27— see also ICESCR Article 15.1— as a basis for identifying reconciliation or reduced tensions). The ITPGRFA does not reject intellectual property in general, but says in Article 12.3(d) that intellectual property rights shall not be claimed over any genetic resources in the form received from the MLS.

⁹¹ Daniel J. Gervais, *Intellectual Property and Human Rights: Learning to Live Together*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 17 (Paul L. C. Torremans ed., 2008); Christophe Geiger, *The Constitutional Dimension of Intellectual Property*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 131 (Paul L. C. Torremans ed., 2008).

against the patent system, by acting as limitations or constraints on patent rights.⁹² Still others argue that human rights should be acknowledged, but should not be introduced into operative intellectual property provisions, in order to preserve the instrumentalist or utilitarian function of patent rights.⁹³

This chapter has shown that, when adopting measures for the protection of intellectual property rights, it is crucial that states ensure protection of the right to food and farmers' rights. While *economic* and *social* human rights—such as the right to food—and *property* rights may work in different directions, they can be reconciled. States can adopt a number of measures to ensure public health and nutrition that are compatible with TRIPS, and promote the “public interest in sectors of vital importance to their socio-economic and technological development” (as specified in TRIPS Article 8.1). A number of lessons can be learned from our discussion on benefit-sharing and national legislation for the protection of farmers' rights.

Benefit-sharing schemes, as developed under the ITPGRFA, could provide an interesting avenue for reconciling conflicting rights. Such schemes could also be interestingly replicated at the national level. However, monetary benefit sharing can only provide a limited answer to the negative impacts of patenting, such as increasing agricultural monopolization at the expense of small-scale farmers and selective licensing by property rights holders that might limit the distribution of seeds. In addition, benefit-sharing is often not the priority of farming and indigenous communities fighting for their right to self-determination, land and natural resources.

In such a context, this article shows, national legislation can make the difference. Yet, in order to provide adequate policy space to ensure that genetic resources are adequately managed for farmers, local communities and indigenous peoples, domestic legislation on farmers' rights must be formulated as explicitly as possible. Unlike legislation on immaterial property protection which tends to be very explicit, both concerning substantive protection and procedural requirements, the rights of traditional breeders and farming communities tend to be formulated in general terms, hence making it more difficult to determine the exact content of the rights, and to have the rights enforced before national courts, if necessary. In addition, exception provisions in immaterial property rights legislation should be applied so as to strengthen those provisions that outline rights for farmers and indigenous peoples in relevant legislation addressing genetic resources.

⁹² Ruth L. Okediji, *The Limits of Development Strategies at the Intersection of Intellectual Property and Human Rights*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA (Daniel J. Gervais ed., 2007); Geertrui Van Overwalle, *Human Rights' Limitations in Patent Law*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX (Willem Grosheide ed., 2010); Charles R. McManis, *Human Rights as a Constraint on Intellectual Property Rights: the Case of Patent and Plant Variety Protection Rights, Genetic Resources and Traditional Knowledge*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX (Willem Grosheide ed., 2010); Gervais, *supra* note 91, at 131.

⁹³ J. Koopman, *Human Rights Implications of Patenting Biotechnological Knowledge*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS 575 (Paul L. C. Torremans ed., 2008); R. C. Dreyfuss, *Patents and Human Rights: Where is the Paradox?*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX 90 (Willem Grosheide ed., 2010) (calling for a “shift in focus from rights to pragmatics”).

The Reform of the Committee on World Food Security: The Quest for Coherence in Global Governance

Olivier De Schutter

Abstract The global surge in prices of food commodities in 2007–2008 led governments to identify gaps in the global governance of food security as a major obstacle to the realization of the right to food. The reform of the Committee on World Food Security, completed at the end of 2009, was to remedy that: its objectives were to introduce more consistency across policy areas, and to serve as an inclusive platform for a modest form of monitoring by peer review, and for collective learning. The reform is an ambitious one. But it is most remarkable for its recognition that unless food security policies are informed by the views of the victims of hunger and permanently tested and revised, they shall fail: participation and experimentalism are therefore key components of the new mechanism that has been established. Combating hunger and malnutrition is a complex task, and it can only be achieved through multiyear strategies and coordinated efforts at different levels and in different sectors: this chapter explores whether the reform, that has now entered its implementation phase, can meet the challenge it has set for itself.

1 Introduction

The reform of the Committee on World Food Security (CFS) is perhaps the single most significant development in the area of global food security in recent years. Initially established in 1974 following the first World Food Conference as an intergovernmental committee within the United Nations Food and Agriculture Organization (FAO), the CFS was reformed in 2009 with an aim to become “the foremost inclusive international and intergovernmental platform for a broad range of committed stakeholders to work together in a coordinated manner and in support of country-led processes towards the elimination of hunger and ensuring food security and

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nutrition for all human beings.”¹ This reformation was grounded in the recognition that governments will only manage to make true progress towards food security if they accept to work in a bottom-up fashion, by learning not only from one another’s experiences, but also from the experience of those who are on the frontline of combating hunger—the international agencies and the non-governmental organizations—and the victims of hunger themselves.

The CFS acknowledged the status of food security as a global public good,² requiring that countries work with one another more closely in order to remove the structural causes of hunger, and overcome the current sectorialization of the various trade, development, and agricultural policies that, directly or indirectly, have an impact on access to food, but that are often dealt with in separate fora. The CFS reform, in this sense, addresses what lawyers call the “fragmentation of international law”, which leads to inconsistencies in global governance between policies in areas such as trade, development cooperation, agriculture and climate change mitigation.

The reform of the CFS was a reaction to global events. Indeed, the realization that governments should join efforts and improve consistency across different policy areas came as a result not of a theoretical reflection, but of a sudden shock that took many observers by surprise. The “shock” was, of course, the sudden surge in the prices of agricultural commodities on international markets that began in late 2007, reaching its peak in June 2008.³ This “shock” and its aftermath made clear that the current path of management in the global food system was not working.

This paper explores the model of global governance espoused by the CFS, how it came about and how it could provide an innovative way to overcome the challenge of fragmentation in international law. This chapter begins in Section 2 by examining the numerous factors that underpinned the global food prices crisis, and the reasons why the crisis was interpreted as requiring greater and better coordinated international action in order to achieve global food security. In Section 3, this chapter discusses the fragmentation of global governance and its impact on the right to food. It addresses the historical and ongoing failure of governments to overcome policy incoherence for the realization of the right to adequate food as a symptom, or

¹ Comm. on World Food Sec. [CFS], Reform of the Committee on World Food Security para. 4, U.N. Doc. CFS:2009/2Rev. 2 (Oct. 2009).

² The notion of global public goods emerged a decade ago in the work of the United Nations Development Programme (UNDP) to highlight the need for greater cooperation across States in a context of increased interdependencies. See PROVIDING GLOBAL PUBLIC GOODS: MANAGING GLOBALIZATION (I. Kaul, P. Conceição, K. Le Goulven & R. U. Mendozaeds., 2003). The developments discussed in this chapter to a certain extent reflect the recognition that food security has acquired such a status in international discourse: the global food price crisis of 2008 was a major turning point in this regard.

³ These evolutions are reflected in the real value of the FAO’s extended Food Price Index, which the FAO has updated since 1990 (base 100) based on the weighted average of a total of 55 commodity price quotations falling into six groups (meat, dairy, cereals, oils and fats, and sugar). Between 2000 and 2005, the Food Price Index increased moderately at a rate of 1.3% per year. The rate of increase then reached 15% in 2006, and continued to climb in 2007 and 2008, resulting in a peak in June 2008 (224); the average price level in 2008 was 200. For the latest food price indexes, see U.N. Food & Agric. Org. [FAO], *FAO Food Price Index*, available at <http://www.fao.org/worldfoodsituation/wfs-home/foodpricesindex/en/>.

an illustration, of the broader problem of the misalignment between various international regimes and human rights.

The need for more consistency has now been widely recognized, and Section 4 of this chapter discusses a range of proposals that have been made to overcome this fragmentation. It argues however, that these proposals remain insufficient. Indeed, they limit themselves to seeking to ensure a harmonious functioning of the international economic order as it is, rather than exploring ways in which transformative policies could be put in place to reform the existing order to support the poorest countries' efforts to diversify their economies and to make progress towards human development.

Finally, Section 5 puts forward the various elements—substantive, institutional, governance—of the model of governance espoused by the CFS. In addition to describing the recent experience of the CFS and what I call the “Rome model”, this section discusses how the CFS could make a decisive contribution to the global governance of food security, if it manages to combine monitoring with learning, and succeeds in becoming a tool for convergence of policies as well as a learning platform for governments.

2 The Significance of the Global Food Prices Crisis of 2007–2008

The global food prices crisis of 2007–08 provoked a sober re-examination of the approaches to hunger and malnutrition that had prevailed in the past. It led many governments to acknowledge that underlying the immediate causes of the agricultural commodity price increases were a number of structural factors, that could only be addressed through improved international cooperation. The global food price crisis was, ultimately, a failure of global governance.

There are numerous factors that underpinned the global food prices crisis. The first factor was a history of nearly forty years of inadequate investment in small-scale agriculture in developing countries. In Latin America and several countries in South Asia, a "Green Revolution" was launched in the 1960s and 1970s, which relied on a technological approach to increasing yields and on a highly capitalized form of agriculture involving massive irrigation, mechanization of agricultural production, a reliance on external inputs—chemical fertilizers and pesticides—and the distribution of high-yielding seeds developed in public agricultural research centers. Yet, despite their impressive success in increasing yields and in improving food availability, Green Revolution policies failed to reduce rural poverty and inequality. These policies generally favored producers with the most land and capital, and access to the best transport infrastructure, rather than the poorest farmers living on the most marginal land and practicing small-scale types of farming.⁴ In a context

⁴ For a sample of these critical views of the “Green Revolution”, see ELENITA DANO, UNMASKING THE NEW GREEN REVOLUTION IN AFRICA: MOTIVES, PLAYERS AND DYNAMICS (2007); ERIC HOLT-GIMENEZ & RAJ PATEL, FOOD REBELLIONS! CRISIS AND THE HUNGER OF JUSTICE (2009); VANDANA SHIVA, THE VIOLENCE OF THE GREEN REVOLUTION: THIRD WORLD AGRICULTURE, ECOLOGY, AND POLITICS (1991).

dominated by a fear of shortages along with rapid population growth, the insistence on enhancing agricultural production efficiency, and on increasing protein-calorie availability per capita, was perhaps understandable. But it has been forty years since the Green Revolution was launched in India and Pakistan and we now have learned that it was a mistake not to give the same degree of consideration to issues of access and distributive justice, and to the specific needs of small-scale farming households.

The second factor was state-led agricultural development in the service of industrialization. A number of developing countries put in place import substitution policies in the 1960s and 1970s, in order to speed up industrialization and reduce the dependency on imports of foreign technologies. These policies typically included high tariffs and quotas against imports of manufactured products as well as subsidies for domestic industrial producers. But for agricultural producers these policies often meant having to sell agricultural goods at low prices (as a form of subsidy to the urban populations), or having to export (often raw commodities) in order for the government to have access to foreign currencies, while at the same time, having to buy imported inputs (machinery and fertilizers in particular) at higher costs.⁵ Farmers were drafted into this massive catching up effort. They were grouped into state-led cooperatives; they were often told what to grow, and how to do it, and they were obliged, or strongly encouraged, to sell at prices set by the State. In exchange, they were supported by extension services (of variable quality and reliability), and the luckiest were provided with certain basic inputs, including sometimes high-yielding varieties of seeds.⁶ But they were also often the captives of a predatory state that used them for its own purposes. In order to buy political support from cities and to build their nascent industries—what Lipton famously described as the “urban bias”⁷—governments typically paid very low prices for the crops produced. This resulted in massive rural poverty and accelerated rural migration.⁸ While agricultural development was led by the State, many State institutions were characterized by corruption, political clientelism, and mismanagement.⁹

⁵ See, e.g., HA-JOON CHANG, *BAD SAMARITANS: RICH NATIONS, POOR POLICIES, AND THE THREAT TO THE DEVELOPING WORLD* SECRETS 22–23 (2007).

⁶ See Johan F.M. Swinnen, Anneleen Vandeplass & Miet Maertens, *Liberalization, Endogenous Institutions, and Growth: A Comparative Analysis of Agricultural Reforms in Africa, Asia and Europe*, 24 *THE WORLD BANK ECON. REV.* 412, 418–19 (2010). On seeds specifically, see e.g., Jagtar S. Dhiman et al., *Improved Seeds and Green Revolution*, 11 *J. OF NEW SEEDS* 65, 65 (2010) (describing the role of the Punjab Agricultural University in the development of improved varieties/hybrids of crops, and in the supply of these varieties to farmers).

⁷ MICHAEL LIPTON, *WHY POOR PEOPLE STAY POOR: A STUDY OF URBAN BIAS IN WORLD DEVELOPMENT* (1977).

⁸ See, e.g., MARTIN MEREDITH, *THE STATE OF AFRICA: A HISTORY OF FIFTY YEARS OF INDEPENDENCE* 279–80 (2005).

⁹ For a strong indictment of these policies, see ROBERT H. BATES, *MARKETS AND STATES IN TROPICAL AFRICA* (1981); see also Anne O. Krueger, Maurice Schiff & Alberto Valdés, *THE POLITICAL ECONOMY OF AGRICULTURAL PRICING POLICY* (1991); WORLD BANK, *WORLD DEVELOPMENT REPORT 1983* (1983); Anne O. Krueger, Maurice Schiff & Alberto Valdés, *Agricultural Incentives in Developing Countries: Measuring the Effect of Sectoral and Economywide Policies*, 2 *WORLD BANK ECON. REV.* 255 (1988); Anne O. Krueger, *Government Failures in Development*, 4 *J. ECON. PERSP.* 9

The third major factor was “structural adjustment”. Implemented in the 1980s, structural adjustment policies aimed at improving the macro-economic conditions of a number of low income developing countries and to achieve a better balance of public budgets, in order for these heavily indebted countries to continue to have access to international financial markets. But the impacts on the agricultural sector were often devastating.¹⁰ The removal of subsidies to agricultural producers and the dismantling of extension services were shocks many smaller farmers were unable to bare.¹¹ And the lowering of import tariffs (dictated by trade liberalization as part of the package of adjustment reforms) exposed the less competitive food producers of developing countries to the dumping of agricultural products from rich countries, at often highly subsidized prices, on their own domestic markets.¹² The net result of the policies of the 1980s was that inequality and poverty in the rural areas further increased.¹³ Indeed, at the same time that the downsizing of the State under structural adjustment made it almost irrelevant to the rural poor by the 1990s, both official development assistance (ODA) and private investment moved away from agriculture.

(1990) (denouncing the naïveté of the often idealized view of the State among development economists). The comparative studies coordinated by Krueger, Schiff, and Valdés review the distortions in agricultural subsidies that, in many developing countries, negatively impacted farmers in the 1960s and 1970s, until into the mid-1980s.

¹⁰ For assessments, see *BEYOND ECONOMIC LIBERALIZATION IN AFRICA: STRUCTURAL ADJUSTMENTS AND THE ALTERNATIVES* (Kidane Mengisteab & B. Ikubolajeh Logan eds., 1995); *THE IMPACT OF STRUCTURAL ADJUSTMENT ON THE POPULATION OF AFRICA* (Aderanti Adepoju ed., 1989); *STRUCTURAL ADJUSTMENT & AGRICULTURE: THEORY & PRACTICE IN AFRICA & LATIN AMERICA* (Simon Commander ed., 1989); Jane Harrigan & Paul Mosley, *Evaluating the Impact of World Bank Structural Adjustment Lending: 1980–1987*, 27 *J. DEV. STUD.* 63 (1991).

¹¹ See Howard Stein, *World Bank Agricultural Policies, Poverty and Income Inequality in Sub-Saharan Africa*, *CAMBRIDGE J. REGIONS ECON. & SOC'Y* 1, 1 & 9 (2010). Stein concludes that:

The market approach to agriculture has exacerbated poverty in rural areas and likely contributed to worsening income equality ... Richer farmers have access to credit, storage, and transportation. In contrast, poor farmers were penalized in the new system due to the removal of fertilizer subsidy, a lack of infrastructural support and access to extension and few marketing and storage options. Poor farmers are also less able to bargain effectively with private traders or use transportation or storage capacities to improve the timing and location of their sales.

Id. Other assessments have been more positive: see, e.g., Lawrence H. Summers & Lant H. Pritchett, *The Structural-Adjustment Debate*, 83 *AM. ECON. REV.* 383, 385 (1993) citing Maurice Schiff & Alberto Valdes, *The Plundering of Agriculture in Developing Countries* (1992). In this well-known paper, Summers and Pritchett summarize and debate the findings of the World Bank Review of Adjustment Lending. See *World Bank, Country Econ. Dep't, Policy and Research Series No. 22, ADJUSTMENT LENDING AND MOBILIZATION OF PRIVATE AND PUBLIC RESOURCES FOR GROWTH* (1992).

¹² See DAVID HALLAM, U.N. FOOD AND AGRICULTURAL ORGANIZATION [FAO], *THE STATE OF AGRICULTURAL COMMODITY MARKETS: 2009* (2009).

¹³ Comparing the data available for nineteen Sub-Saharan African countries for the period 1980–2000, Stein concludes that “nearly 75% of all countries witnessed a worsening of income distribution with an overall mean decline for the total sample of 14% to around 50.” Stein, *supra* note 11, at 2. He notes that the increase in inequality particularly affected the rural poor—small-scale farmers who suffer structural disadvantages in the agricultural markets. *Id.*

Donors did not see the agricultural sector as offering a strong potential for development: the share of ODA resources devoted to agriculture declined from 18% in 1979 to 3.5% in 2004, and it declined in absolute terms from \$8 billion (in 2004 dollars) in 1984 to \$3.4 billion in 2004.¹⁴ And the private investors were unwilling to fill in the gaps. Despite the entry into force in 1995 of the Agreement on Agriculture as part of the agreements establishing the World Trade Organization, (WTO) producers in many developing countries still faced high barriers impeding access to the high-value markets of Organisation for Economic Co-operation and Development (OECD) countries.¹⁵ Why would private-sector businesses invest in agriculture in developing countries, where they would face highly unequal competition from producers located elsewhere, and where access to markets was so limited?¹⁶

It is this catalogue of structural failures that policymakers were suddenly faced with, when the global food prices crisis awoke them in the spring of 2008. Neither investment and trade policies, nor development cooperation and food aid policies, had been geared towards achieving food security in the developing world. What these policies had created instead was a huge dependency trap—low-income, food-deficit countries producing raw materials for the West, and addicted to buying heavily subsidized food on international markets in order to feed their growing populations, worsening as a result the situation of their own food producers. This had to change.

3 The Fragmentation of Global Governance and Its Impact on the Right to Food

The global food prices crisis initiated a global debate on how to improve global governance in order to strengthen food security. Many observers came to realize that the fragmentation of global governance in food and agriculture—its separation into different and sometimes conflicting regimes—was a major obstacle, that needed to be overcome urgently. It became clear to many, in particular, that the trade regime—as institutionalized since 1994 under the umbrella of the WTO—was ill-suited to what was required to achieve real food security, creating the wrong set of

¹⁴ WORLD BANK, *WORLD DEVELOPMENT REPORT 2008: AGRICULTURE FOR DEVELOPMENT* 41 (2008).

¹⁵ For a review of these obstacles and what would be required to overcome them, see *REFORMING AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES, KEY ISSUES FOR A PRO-DEVELOPMENT OUTCOME OF THE DOHA ROUND* (Alex F. McCalla & John Nash eds., 2007); see also Special Rapporteur on the Right to Food, Olivier De Schutter, *Mission to the World Trade Organisation*, U.N. Doc. A/HRC/10/005/Add.2 (Dec. 22, 2008).

¹⁶ As Hafez Ghanem notes:

Because global production levels are technically sufficient and because world food prices have long been low and stable, investment in agriculture has been steadily declining since the 1970s. As a result, the rate of growth of agricultural capital stock (ACS) in the world fell from 1.1% in 1975–1990 to 0.50% in 1991–2007.

Hafez Ghanem, *World Food Security and Investment in Agriculture*, INT'L ECON. BULL. (2009).

incentives for many developing, net-food-importing countries. In the international economic order inherited from the Bretton Woods Agreements of 1944 and perpetuated by the establishment of the WTO half a century later, the reduction or elimination of trade barriers was supposed to enhance the redistributive capabilities of each State vis-à-vis its own citizens, leading the regulatory State at the domestic level to complement trade liberalization at the international level. That is the essence of “embedded liberalism”¹⁷: the idea that through the expansion of trade and the deepening of the international division of labor, economic growth will be fueled and countries will be able to finance social protection and create employment at home.

This idealized view presents a number of major weaknesses, however, that are particularly visible in the area of food and agriculture. A major problem is that this view grossly underestimates the tension between the short term and the long term considerations that guide States in the commitments they make to remove barriers to trade. For the deepening of the international division of labor, though it may bring about certain immediate benefits, may not work in favor of the long-term development of poor countries, and their ability to promote the full realization of human rights. In the 1950s, working under the leadership of Raúl Prebisch, the United Nations Economic Commission for Latin America already expressed the concern that countries that export raw commodities may have to export increasing volumes in order to import the manufactured products, with a higher added technological value, that they are unable to produce themselves. Thus, *in the long term*, the removal of barriers to trade, which accelerates the specialization of each country into the kind of production in which it has a comparative advantage, will not benefit the least industrialized countries. That, in essence, is what later came to be known as the Prebisch-Singer thesis of deteriorating terms of trade. It leads to the idea that international trade, replicating the patterns of colonialism, may in fact accentuate the dependency of developing countries on the former colonial powers, and make it impossible for these countries to overcome the obstacles to development. These views were recently revived, with some variations, by economists such as Ha-Joon Chang and Erik Reinert, who note that rich countries have become rich thanks to the protection of their nascent industries, and that they now preach free trade to developing nations because, having climbed up the ladder of development, free trade has become in their interest.¹⁸ Globalization, these economists remark, has benefited the countries—such as Brazil, China, South Korea or India—which carefully sequenced trade liberalization, and which built an industry and a services sector behind trade barriers before opening up to trade.

The point is *not* that raw commodities shall always sell cheap, and higher-added-value products dear: as the boom in commodities over the past ten years has shown,

¹⁷ John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order*, 36 INT. ORG. 379 (1982).

¹⁸ See HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* (2002); HA-JOON CHANG, *BAD SAMARITAN: THE GUILTY SECRETS OF RICH NATIONS & THE THREAT TO GLOBAL PROSPERITY* (2007); ERIK S. REINERT, *HOW RICH COUNTRIES GOT RICH AND WHY POOR COUNTRIES STAY POOR* (2007).

such an evolution of the terms of trade is by no means inevitable. The problem is the risk that specialization entails. For developing countries that did not diversify their economies and whose industrial sector was still too weak at the time when their economies opened up to global trade, it has often meant the relegation to a permanent status of underclass nations.¹⁹ The process was accelerated during the 1980s and 1990s, during which, as we have seen, they were forced to pursue macro-economic policies that would reduce the size of the public sector and integrate their economies to global trade, under what came to be known as the “Washington consensus”.²⁰

The search for an alternative to the “Washington consensus” has now begun. We have come to realize that countries cannot effectively pursue progressive welfare policies at home, if the international environment is not reshaped in accordance with their needs—and the infinite postponement of that objective is increasingly seen as one key reason why social progress and the realization of human rights at the domestic level are so slow. The Outcome Document on the implementation of the Millennium Development Goals that the General Assembly adopted by consensus on September 22, 2010 notes in this regard:

We recognize that the increasing interdependence of national economies in a globalizing world and the emergence of rules-based regimes for international economic relations have meant that the space for national economic policy, that is, the scope for domestic policies, especially in the areas of trade, investment and international development, is now often framed by international disciplines, commitments and global market considerations. It is for each Government to evaluate the trade-off between the benefits of accepting international rules and commitments and the constraints posed by the loss of policy space.²¹

This constitutes an acknowledgment of a “double-bind” problem: while countries are bound to comply with their human rights commitments at home, they are discouraged from doing so in practice (even though they may not be prohibited from doing so in theory) because the international environment has not been transformed to favor this.

The food prices crisis of 2008 shed light on the impacts of the international division of labor on the ability for low-income countries to move towards the full realization of the right to food: indeed, that was probably the main lesson drawn from the crisis. In order for States to successfully implement national right to food strategies, it has now become clear, two conditions should be fulfilled. First, agricultural policies should achieve a balance between the support going to export-led agriculture and the support to small-scale food producers producing for themselves,

¹⁹ See JOSEPH E. STIGLITZ & ANDREW CHARLTON, *FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT* 17 (rev. ed., 2007) (“To date, not one successful developing country has pursued a purely free market approach to development. In this context it is inappropriate for the world trading system to be implementing rules which circumscribe the ability of developing countries to use both trade and industry policies to promote industrialization”).

²⁰ The expression was coined by the economist John Williamson, who has since repudiated it. John Williamson, *The Washington Consensus Revisited* (Development Thinking and Practice Conference, Sept. 3–5, 1996).

²¹ Keeping the Promise: United to Achieve the Millennium Development Goals, G.A. Res. 65/1, para. 37, U.N. Doc. A/RES/65/L.1 (Sept. 22, 2010).

their families and their communities. Supporting the local production of food crops is not only a way to reduce the dependency of the country on food imports, and thus the vulnerability of the country to price shocks on international markets; it is also a means to raise incomes in rural areas, where the majority of the extremely poor still often reside.²² Second, jobs must be created in the industry and services sectors, in order to absorb the excess workforce migrating from the rural areas. Ideally thus, what is required is a complementarity between these different sectors (agriculture, industry and services): small-scale, family agriculture should be supported in order to reduce rural poverty; but in addition, in what Irma Adelman famously called “agriculture-led industrialization”, it may both ensure a market for the local producers of manufactured goods and service-providers, and should allow the growth of a food processing industry, and associated services, that contribute to the strengthening of local food systems.²³

How could such national strategies for the realization of the right to food be encouraged? Which kind of global governance in food and agriculture would be required for such strategies to be successful? Section 4 of this chapter examines the various alternatives to the “Washington consensus” that have been put forward in an attempt to deal with the current fragmentation of global governance—itsself both the result and the cause of the fragmentation of international law.²⁴

4 Overcoming Fragmentation

4.1 Fragmentation Organized: The “Geneva consensus”

One alternative to the current state of fragmentation has been proposed by Pascal Lamy, the Director general of the WTO, who refers to it as the “Geneva consensus”. The notion was inaugurated in a speech delivered by Lamy in Santiago de Chile, on January 30, 2006. He stated:

We cannot ignore the costs of adjustment, particularly for the developing countries, and the problems that can arise with the opening up of markets. These adjustments must not be relegated to the future: they must be an integral part of the opening-up agenda. We must

²² If we take into account not only its own growth performance but also its indirect impact on growth in other sectors, agriculture is 3.2 times more effective at reducing the number of very poor people (defined as those living below a USD one-per-day PPP poverty line) in low-income and resource-rich countries, at least in the absence of strong inequality. See Luc Christiaensen, Lionel Demery & Jesper Kuhl, *The (Evolving) Role of Agriculture in Poverty Reduction—An Empirical Perspective* (United Nations University, World Institute for Development Economics Research, Working Paper No. 2010/36, 2010).

²³ Irma Adelman, *Beyond Export-Led Growth*, 12 *WORLD DEV.* 937 (1984).

²⁴ Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, para. 8, U.N. Doc.A/CN.4/L.702, (July 18, 2006); B. Simma, *Self-Contained Regimes*, 16 *NETHERLANDS YEARBOOK INT’L LAW* 111 (1985).

create a new “Geneva consensus”: a new basis for the opening up of trade that takes into account the resultant cost of adjustment. Trade opening is necessary, but it is not sufficient in itself. It also implies assistance: to help the least-developed countries to build up their stocks and therefore adequate productive and logistical capacity; to increase their capacity to negotiate and to implement the commitments undertaken in the international trading system; and to deal with the imbalances created between winners and losers from trade opening—imbalances that are the more dangerous to the more fragile economies, societies or countries. Building the capacity they need to take advantage of open markets or helping developing countries to adjust is now part of our common global agenda. Part of this challenge falls under the WTO; but the WTO’s core role is trade opening, we lack the institutional capacity to formulate and lead development strategies. The challenge to humanise globalization necessarily involves other actors in the international scene: IMF/WB and the “United Nations family.”²⁵

The Geneva consensus is an understanding of international governance in which a division of labor is encouraged between various international agencies: the WTO should focus on trade, the International Labour Organisation should promote international labor standards, the World Health Organisation should support public health and the Office of the High Commissioner for Human Rights and other human rights bodies should push for compliance with human rights. This view is popular among many governments and international agencies alike because, rather than providing an impetus of change, it offers an elegant justification for the status quo. Indeed, the “Geneva consensus” does not take into account the very different leverage that each of these agencies can exercise on their member States, although they differ widely among themselves both in their ability to adopt rules and to enforce them. In addition, the “Geneva consensus” underestimates the risk of conflicts between regimes, because of the strong overlaps that exist between the different issues that are of international concern. What we need is not more separation, but instead more consistency across policy areas that cannot be considered in isolation.

The failure of the current trade regime to contribute to food security illustrates the risks of thinking about these policy areas in isolation. There is general agreement that the current regime of international trade has not worked for the benefit of smallholders in developing countries, who form the majority of those who are hungry in the world today. It is largely as a result of the very unfair regime imposed on agriculture in developing countries that the domestic agricultural sector in these countries has been unable to attract investment over the past thirty years. This results in a vicious cycle in which the agricultural sector, because it faces unfair competition, further loses competitiveness, leading many poor countries to increased dependency on food imports. One could argue, as Lamy does, that this tendency towards greater dependency on food imports, and the failure to invest in domestic food production, are the result of trade policies that countries have deliberately chosen to adopt in the interest of providing low-priced food to their population. It is true that the lowering of import tariffs by low-income countries is generally not required

²⁵ Pascal Lamy, World Trade Organization [WTO], *Humanising Globalization* (Jan. 30, 2006). See also the speech of Pascal Lamy upon being conferred the doctorate honoris causa by the University of Geneva at its 450th anniversary on June 5, 2009: Pascal Lamy, World Trade Organization [WTO], *Globalization and Trade Opening Can Promote Human Rights* (June 5, 2009).

under the schedule of commitments of these countries under the Agreement on Agriculture. But this misalignment between policies nevertheless is attributable to an international economic environment in which, instead of supporting poor countries to feed themselves and invest in domestic food production to combat rural poverty, rich countries choose instead to feed poor countries—actively contributing to a dependency for which the recipient countries now pay such a high price. And there are other measures that States adopt in order to comply with the Agreement on Agriculture that may conflict with the requirements of the right to food. For example, in some instance low-income countries renounce stabilizing prices through the establishment of food reserves because that would go beyond the flexibilities allowed under the forms of support that fall under the "Green Box".²⁶ More generally, WTO disciplines may restrict the policy space, particularly for countries seeking to pursue active industrial policies, thus making it more difficult for them to pursue a development path that will allow them to achieve the progressive realization of human rights.²⁷

4.2 *Fragmentation Overcome: Building Bridges Across Regimes*

So, the solution cannot be a division of labor between institutions, because the different policy areas cannot be artificially isolated from one another. Might the solution to the problem of the “double-bind” then reside in mechanisms aimed at building bridges between otherwise self-contained regimes, each with their own norms and dispute-settlement mechanisms, and relatively autonomous both vis-à-vis each other and vis-à-vis general international law? For instance, commitments under the WTO framework may be interpreted, to the fullest extent possible, so as to be compatible with general international law, as well as with the rules of any treaty applicable in the relationships between the parties to the dispute.²⁸ Is this a satisfactory safeguard against the risks entailed by fragmentation?

Unfortunately, these stop-gaps do not provide a satisfactory answer to situations of real conflict which no conform interpretation could avoid. Nor do they address the “chilling effect” that the stipulations of trade agreements may cause,

²⁶ See, on these difficulties, Olivier De Schutter, *International Trade in Agriculture and the Right to Food*, in ACCOUNTING FOR HUNGER: THE RIGHT TO FOOD IN THE ERA OF GLOBALISATION 137 (Olivier De Schutter & Kaitlin Cordes eds., 2011); OLIVIER DE SCHUTTER, U.N. SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, BRIEFING NOTE 4, WORLD TRADE ORGANISATION AND THE POST-GLOBAL FOOD CRISIS AGENDA (Nov. 2011).

²⁷ See Alisa DiCaprio & Kevin P. Gallagher, *The WTO and the Shrinking of Development Space: How Big is the Bite?*, 7 J. World Investment & Trade 781 (Oct. 2006). For a general assessment of the compatibility between WTO disciplines and human rights, see SARAH JOSEPH, BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE (2011); JAMES HARRISON, THE HUMAN RIGHTS IMPACT OF THE WORLD TRADE ORGANISATION (2007).

²⁸ The Appellate Body of the WTO takes the view that commitments under the WTO framework cannot be treated “in clinical isolation” from general international law. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline (United States v. Brazil and Venezuela)*, WT/DS2/AB/R (May 20, 1996).

when States do not know whether or not any particular measure they take, in order to comply with their human rights obligations, will be considered acceptable by the other Parties or instead expose them to retaliation, particularly when they seek to adopt measures which, although not strictly required by human rights treaties, nevertheless would contribute to the progressive realization of human rights.

But there is a further, and deeper, reason why this approach—overcoming fragmentation by building bridges—fails. It is one thing to avoid the risk of conflicts between regimes; but it is quite another to reshape international law to enable States to achieve objectives, such as human development or the realization of human rights, that we deem paramount. Eliminating or even reducing the risk of conflicts is not enough: what we must achieve is changing the incentives structures that States face. The next section explores how we can reshape international regimes to converge towards the full realization of human rights: if the ability for States to fulfill the right to food depends on an enabling international environment, then how can this task be conceived?

5 The Role of Human Rights in Shaping International Regimes: the Rome Model

We may take as our departure point the promise of the right to development, under the banner of which a first attempt to reshape international regimes in accordance with the requirements of human rights was launched. The idea of a right to development was first expressed by Kéba M'Baye in his 1972 inaugural lesson to the International Institute for Human Rights²⁹ and then explored by Philip Alston for the UN Secretary-General in 1978, in a study prepared at the request of the Commission on Human Rights.³⁰ The study emphasized both that measures adopted at domestic and international levels should be mutually supportive and that the realization of the right to development should be based on participation at all levels.³¹ In 1986, after five years of discussions within a Working Group established by the Commission on Human Rights,³² the UN General Assembly adopted the Declaration on the Right to Development, defining it as “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 and

²⁹ KÉBA M' BAYE, LE DROIT AU DÉVELOPPEMENT COMME UN DROIT DE L'HOMME, LEÇON INAUGURALE DE LA TROISIÈME SESSION D'ENSEIGNEMENT DE L'INSTITUT INTERNATIONAL DES DROITS DE L'HOMME (July 3, 1972), reproduced in 5 REVUE DES DROITS DE L'HOMME 503 (1972).

³⁰ United Nations Commission on Human Rights, Res. 4 (XXXIII) (Feb. 4, 1977).

³¹ The Secretary-General, *Report of the Secretary-General: The International Dimensions of the Right to Development as a Human Right in Relation with Other Human Rights Based on International Co-Operation, including the Right to Peace, Taking into Account the Requirements of the New International Economic Order and the Fundamental Human Needs*, U.N. Doc. E/CN.4/1334 (Jan. 2, 1979).

³² United Nations Commission on Human Rights, Res. 36 (XXXVII) (March 11, 1981).

fundamental freedoms can be fully realized”.³³ Since then, various working groups, task forces and independent experts have been trying to identify ways to overcome obstacles to the realization of the right to development, and to define criteria that would measure progress in its fulfillment.³⁴ However, all potential advances stumbled on the apparently insurmountable oppositions between rich and poor countries, concerning issues such as the need for a new international instrument or the use of indicators. The stalemate is now almost complete. While we need not abandon the vision of the right to development, we may need to redefine how to get there.

The way forward, I suggest, has three components. First, there is a substantive component to this project: it involves the reference to human rights and the use of indicators based on human rights to measure progress done both at national and at international levels. Second, there is an institutional component: it consists in the establishment of fora where all relevant actors could strengthen coordination in order to ensure that the policies they adopt converge towards the full realization of human rights. Third, there is a governance component: it involves the adoption of action plans that ensure that we make progress, at reasonable speed, towards that objective. To a large extent, it is these tools that the Committee on World Food Security, following its reform, seeks to rely upon, to ensure that the international environment can better enable the efforts developed at domestic level to realize the right to food³⁵: it is in that attempt that the true significance of the CFS reform lies.

5.1 *The Substantive Component*

First, human rights should be re-established as the reference through which progress is measured at national and international levels. This means relying on human rights indicators rather than, for instance, on macro-economic indicators or on development indicators alone. To a large extent, this is already the task performed by various human rights bodies and experts.³⁶ Building on what exists should therefore be

³³ Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/RES/41/128 (Dec. 4, 1986) (adopted with only one negative vote from the United States and eight abstentions).

³⁴ For an excellent and well-informed account of the history, by one key actor in this process, see STEPHEN P. MARKS, *THE POLITICS OF THE POSSIBLE. THE WAY AHEAD FOR THE RIGHT TO DEVELOPMENT* (Dialogue on Globalization, Friedrich Ebert Stiftung, June 2011).

³⁵ The Reform Document of the Committee on World Food Security states that “The CFS will strive for a world free from hunger where countries implement the voluntary guidelines for the progressive realization of the right to adequate food in the context of national food security”. CFS, *supra* note 1, at para. 4.

³⁶ On the use of indicators to measure compliance with human rights, see Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement*, 23 HUM. RIGHTS Q. 1062, 1062–1097 (2001); Todd Landman, *Measuring Human Rights, Practice and Policy*, 26 HUM. RIGHTS Q. 906, 906–931 (2004); Gauthier de Beco, *Measuring Human Rights: Underlying Approach*, 3 E.H.R.L.R. 266, 266–278 (2007); Bronwyn Anne Judith Welling, *International Indicators and Economic, Social, and Cultural Rights*, 30 HUM. RIGHTS Q. 933, 933–958 (2008); Ann Janette Rosga & Margaret Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT’L L. 253, 253–315 (2009). A synthesis is provided by T. LANDMAN & E. CARVALHO, *MEASURING HUMAN RIGHTS* (2010).

achievable. Where more needs to be done, however, is in effectuating the position shift referred to above, from human rights imposing duties on States to human rights reshaping the international regimes. This means identifying which human rights duties can be imposed on international organizations, both within and outside the United Nations system, and developing mechanisms that can hold them accountable.³⁷ It means developing tools to ensure that transnational corporations are aware of their human rights responsibilities.³⁸ And it means ensuring that States comply not only with their human rights obligations towards individuals and groups on their national territory, but also with their so-called “extraterritorial” human rights obligations.

Over the past ten years, significant progress has been made on all these fronts. International organizations are increasingly developing mechanisms to ensure their accountability towards human rights, and the special procedures of the Human Rights Council have occasionally contributed to ensuring that international organizations take human rights into account.³⁹ Transnational corporations are aware that they are now expected to respect human rights, and to ensure that they have a positive impact on their realization.⁴⁰ Most recently, on September 28, 2011, a group of experts adopted the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights.⁴¹ These Principles contribute to the progressive development of the international law of human rights by clarifying the human rights obligations of States both as they relate to their conduct that produces effects on the enjoyment of human rights outside of the States’ territories, and as they relate to “obligations of a global character that are set out in the Charter

³⁷ See, for a review of the challenges and tools available, ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANISATIONS (Jan Wouters et al. eds., 2010).

³⁸ See generally TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS (Olivier De Schutter ed., 2006).

³⁹ See e.g., United Nations Special Rapporteur on the Right to Health, Paul Hunt, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Addendum: Missions to the World Bank and the International Monetary Fund in Washington, D.C. (20 October 2006) and Uganda (4–7 February 2007)*, U.N. Doc. A/HRC/7/11/Add.2 (March 5, 2008); United Nations Special Rapporteur on the Right to Food, Olivier De Schutter, *Report of the Special Rapporteur on the Right to Food, Addendum: Mission to the World Trade Organization, (25 June 2008)*, U.N. Doc. A/HRC/10/5/Add.2 (Feb. 4, 2009).

⁴⁰ See especially, United Nations Special Representative of the Secretary-General, John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Transnational Corporations and Other Business Enterprises and Human Rights, Protect, Respect and Remedy: A Framework for Business and Human Rights*, U.N. Doc. A/HRC/8/5 (April 7, 2008); United Nations Special Representative of the Secretary-General, John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Transnational Corporations and Other Business Enterprises and Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (March 21, 2011). Referring to this framework, the OECD Guidelines on Multinational Enterprises were revised in 2011, strengthening their human rights component.

⁴¹ See Olivier De Schutter, et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084 (2012) (including the full text of the Principles).

of the United Nations and human rights instruments to take action, separately, and jointly through international cooperation, to realize human rights universally”.⁴² It is also to this enterprise that the Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements, developed by this author in his official capacity as the United Nations Special Rapporteur on the right to food, seek to contribute when States are negotiating or ratifying such agreements.⁴³

As these norms and procedures develop, human rights gradually can turn into what Buchanan and Keohane call a “global public standard” to assess the normative legitimacy of global governance institutions—i.e., the “right to rule” of these institutions, which cannot ensure compliance with their decisions unless they are perceived as legitimate by those, including States, to whom such decisions are addressed.⁴⁴

Even apart from the preeminent position that they occupy in the original project of the United Nations, human rights possess three features that make them particularly suited to this goal. First, they are *relatively incomplete*. They are sufficiently precise to provide a focal point⁴⁵ for deliberations as to how to build international regimes—how to regulate trade, how much to protect foreign investors, or how to allocate responsibilities in combating climate change; yet they are vague enough not to preempt the result of these deliberations. They thus allow true ownership by the actors, primarily States, who contribute to the establishment of international regimes. As Buchanan and Keohane note, any standard of legitimacy should allow for a “principled, informed deliberation about moral issues into the standard of legitimacy itself”⁴⁶: that is precisely what human rights allow, at least as adequately as other potential candidates such as, “sustainable development”, “green growth”, or “development goals”.

A second advantage of human rights is that they are both *legal rules*, binding upon States and, in some respects, on non-State actors, and *ideals*. The legitimacy that human rights confer therefore includes the element of legality, without being

⁴² See *id.* at Principle 8(b).

⁴³ United Nations Special Rapporteur on the Right to Food, *Report of the Special Rapporteur on the Right to Food, Addendum: Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements* U.N. Doc. A/HRC/19/59/Add.5 (Dec. 19, 2011).

⁴⁴ Allen Buchanan & Robert Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405 (2006). In their contribution, Buchanan and Keohane refer to human rights as one of the substantive criteria that are relevant in assessing the legitimacy of global institutions: such institutions, they write, “must not persist in committing serious injustices. If they do so, they are not entitled to our support. On our view, the primary instance of a serious injustice is the violation of human rights”. *Id.* at 419. That refers to what they call the “minimal moral acceptability” of global institutions. My position places the bar higher: it is that global governance institutions should be assessed primarily by the contribution they make to the realization of human rights.

⁴⁵ On the idea of a focal point that allow actors to negotiate based on certain baseline expectations, see chapter 3 of THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1960).

⁴⁶ Buchanan & Keohane, *supra* note 44, at 421. See also *id.* at 427 (“Because what constitutes appropriate accountability is itself subject to reasonable dispute, the legitimacy of global governance institutions depends in part upon whether they operate in such a way as to facilitate principled, factually informed deliberation about the terms of accountability”).

reducible to that element. Human rights are violated or they are complied with, but that simple dichotomy, which is the language of lawyers, never exhausts their significance: for human rights can always be improved upon. Our quest for the full realization of human rights is one in which we permanently learn and test the means we use against the ends that human rights are supposed to define.

A third advantage of human rights is that they effectively correspond to the requirements of moral cosmopolitanism, the idea that citizens in rich countries owe duties to those living in poor countries. Human rights are not simply norms that regulate the relationships between States, built on States' interests. Rather, they are the legal embodiment of the idea that, as Thomas Pogge writes, "every human being has a global stature as the ultimate unit of moral concern".⁴⁷ Human rights are held by each individual, wherever he or she finds him- or herself to be, and all States are duty-bound to refrain from conduct that might lead to a violation of the rights of that individual. Because they can ground an obligation to support each individuals' access to certain basic needs, a condition for the effective enjoyment of human rights, human rights provide a foundation for a duty of States to work collaboratively towards the fulfillment of these basic needs.

5.2 *The Institutional Component*

A second component of this strategy consists in creating fora where different international actors—governments of course, but also international agencies and transnational networks of civil society organizations—can work together to ensure that their policies converge, rather than undermining each others' efforts. It is precisely into this kind of forum that the CFS was transformed, through the 2009 reform.⁴⁸ The CFS includes as members all governments, who are encouraged to participate at the Ministerial level, "insofar as possible representing a common, inter-ministerial governmental position".⁴⁹ Participants in the mechanism—which have the same rights as members except with respect to voting and decision taking—include the representatives of UN agencies and bodies with a specific mandate in the field of food security and nutrition and representatives of other relevant UN System bodies whose overall work is related to attaining food security, nutrition, and the right to food such as the Special Rapporteur on the Right to Food, the Office of the High Commissioner on Human Rights, the World Health Organization, the United Nations Children's Fund, the United Nations Development Programme, and the Standing Committee on Nutrition; civil society and non-governmental organizations; international agricultural research centers; the World Bank, the International Monetary Fund, regional development banks and the WTO; and the private sector and philanthropic foundations active in the area of food security.⁵⁰

⁴⁷ THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 169 (2002).

⁴⁸ See above, text corresponding to note *supra* 1.

⁴⁹ CFS, *supra* note 1, at para. 9.

⁵⁰ *Id.* at para. 11.

The structuring of civil society at the global level was a key success factor during the discussions that led to the reform of the CFS, as well as in the implementation phase. In 1993, the *Vía Campesina* was established as a transnational network of farmers' organizations, explicitly as a counterweight to the dominance of the agricultural policies agenda intent on pushing for globalization as a solution, at the expense of the least competitive food producers, particularly from the global South.⁵¹ The alternative paradigm of food sovereignty, which emerged from the global peasants' movement,⁵² was put forward at the World Food Summits in 1996 and 2002, leading to the establishment of the International Planning Committee on Food Sovereignty, a large platform of some 45 peoples' networks and NGOs linked to at least 800 organizations in the world.⁵³ Therefore, when the proposal of reforming the CFS was put forward, it was supported not only by many developing countries hoping to avoid the global response to the food price crisis being set by the G8, but also by a well-organized, structured movement within civil society, which for the first time came to be officially included in discussions concerning global food security.⁵⁴ Following the CFS reform, civil society movements and organizations created an International Food Security and Nutrition Civil Society Mechanism to facilitate involvement of civil society organizations in the CFS, while preserving the principle of autonomy, i.e., the self-organization of civil society.⁵⁵ This not only strengthens civil society's ability to influence discussions within the CFS. It also ensures that commitments made within the CFS will be tracked, thanks to the monitoring by the organizations involved. It encourages national-level civil society organizations to hold their governments accountable in the shaping of agricultural policies at home. And it significantly enhances the legitimacy of the outcomes of the discussions held within the CFS.

The CFS is expected to provide a platform for discussion and coordination to strengthen collaborative action among its members and participants, including to "promote greater policy convergence and coordination ... through the development of international strategies and voluntary guidelines on food security and nutrition

⁵¹ See generally Annette Aurélie Desmarais, *The Power of Peasants: Reflections on the Meanings of La Via Campesina*, 24 J. RURAL STUD. 38 (2008); TRANSNATIONAL AGRARIAN MOVEMENTS CONFRONTING GLOBALIZATION (Saturnino Borras et al. eds., 2008).

⁵² Steven Suppan, *Food Sovereignty in an Era of Trade Liberalisation: Are Multilateral Means Towards Food Sovereignty Feasible?*, GLOBAL SECURITY & COOPERATION Q. 9 (2003).

⁵³ On these developments, see NORA McKEON & CAROL KALAFATIC, STRENGTHENING DIALOGUE: UN EXPERIENCE WITH SMALL FARMER ORGANISATIONS AND INDIGENOUS PEOPLES 17 (UN, Non-Governmental Liaison Service, 2009); NORA McKEON ET AL., PEASANT ASSOCIATIONS IN THEORY AND PRACTICE (United Nations Research Institute for Social Development, 2004).

⁵⁴ See Jessica Duncan & David Barling, *Renewal Through Participation in Global Food Security Governance: Implementing the International Food Security and Nutrition Civil Society Mechanism to the Committee on World Food Security*, 19 INT'L J. SOC. AGRIC. & FOOD 143, 144 ("By including civil society actors as official participants on the Committee, the CFS is championing a model of enhanced participation at the level of international policy-making, finding new ways to engage those civil society actors who have been located, previously, at the margins of official food security debates").

⁵⁵ See Comm. on World Food Sec. [CFS], *Proposal for an International Food Security and Nutrition Civil Society Mechanism for Relations with CFS*, CFS:2010/9 (2010).

on the basis of best practices, lessons learned from local experience, inputs received from the national and regional levels, and expert advice and opinions from different stakeholders”, and to provide support and advice to countries and regions.⁵⁶ In a second phase of its work, it should, in particular, promote accountability by “developing an innovative mechanism, including the definition of common indicators, to monitor progress towards these agreed upon objectives and actions”; and implement a *Global Strategic Framework for Food Security and Nutrition*, conceived as a flexible, “rolling” document that can be regularly updated on the basis of new information and new priorities, “in order to improve coordination and guide synchronized action by a wide range of stakeholders”.⁵⁷

Collective learning and monitoring for results are two key components of the work of the CFS.⁵⁸ Collective learning should be promoted by the sharing of experiences across countries and regions, a process for which the CFS can serve as a platform. In addition, in order to ensure that it would make decisions based on the best scientific evidence available and in order to facilitate the move towards a consensus, the CFS established a High-Level Panel of Experts (HLPE). Like the Intergovernmental Panel on Climate Change, the role of the HLPE is not to produce new scientific evidence, but to assess the existing evidence available in order to guide policy-makers. The reports of the HLPE should allow the members and participants of the CFS to shift their understanding of the causes of food insecurity and of the remedies it calls for.

Gradually, the CFS should thus enter into what the organizational learning theories refer to as “double loop learning”—not only improving policies in the light of whether existing policies succeed or fail, but also revising the objectives pursued, and the definition of success and failure itself, on the basis of the evidence provided and of the alternative framings of the question of food security present within the Committee.⁵⁹ The various parties involved in the CFS each have their own views, shaped by diverse historical experiences and ideologies, about where hunger and malnutrition stem from, and what should be done about them. Only by agreeing to question these presuppositions, and by accepting that the framing by each of the questions to be addressed may not be the only framing possible, can true collective learning take place.

⁵⁶ CFS, *supra* note 1, at para. 5.

⁵⁷ *Id.* at para. 6.

⁵⁸ For initial proposals made in this regard during the reform process of the CFS, see UNITED NATIONS SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD, OLIVIER DE SCHUTTER, COORDINATING, LEARNING, MONITORING: A NEW ROLE FOR THE COMMITTEE ON WORLD FOOD SECURITY (2009).

⁵⁹ On “double-loop learning”, see especially Chris Argyris, *Single-Loop and Double-Loop Models in Research on Decision Making*, 21 ADMIN. SCI. Q. 363 (1976); CH. ARGYRIS, REASONING, LEARNING AND ACTION: INDIVIDUAL AND ORGANISATIONAL (1982); CHRIS ARGYRIS, KNOWLEDGE FOR ACTION: A GUIDE TO OVERCOMING BARRIERS TO ORGANIZATIONAL CHANGE (1993).

5.3 *The Governance Component*

A third component of a comprehensive strategy to overcome the current fragmentation of global governance in order to ensure convergence towards the objective of realizing the right to food, consists in the adoption of action plans defining a calendar of actions to be taken, allocating responsibilities across actors, and defining indicators allowing progress to be measured and increasing accountability. This is what, in the context of the realization of the right to food at a global level, the *Global Strategic Framework for Food Security and Nutrition* could achieve.⁶⁰ The reason why this matters, is because what is needed is more than the *ad hoc* reaction to discrete violations of rights by specific measures: what is needed is a sustained and multi-year effort towards a transition, that can channel existing international regimes towards a direction that is better conducive to the full realization of human rights. Action plans are a way to overcome the gap between the “what” and the “how”: they are important, not just for the end vision they propose, but for the identification of the pathways towards that vision. They bridge the gap between relatively small changes to the system that, in isolation, are unable to make a significant difference, and changes so broad that they seem impossible to achieve.

For such action plans to succeed, they should include appropriate indicators and benchmarks and a monitoring of the choices made by policy-makers. This can constitute a powerful incentive to integrate long-term considerations into decision-making, and to effectively implement the roadmap that has been agreed upon. It is always tempting for the proponents of business-as-usual to dismiss as utopian proposals that are so far-reaching that they seem to be revolutionary in nature, and to dismiss other proposals as so minor and insignificant that they will not really make a difference. We must move beyond this false opposition. What matters is not each of the policy proposals considered in isolation, whether reformist or more revolutionary. It is the pathway that matters: the sequence of measures that, step by step, may lead to gradually moving beyond the existing fragmentation of international law and of global governance.

Such action plans should not be seen simply as a new form of rule-making, prescribing objectives and how to get there. They are also a learning device. They should be permanently revised in light of the implementation problems faced by governments. In this iterative process, in which implementation feeds back into the formulation of guidelines set at a global level, the tools that are recommended should be gradually improved in order to achieve effective results; the definitions of the objectives themselves may have to be revisited and the paradigms under which actors operate may, in time, need to be challenged and revised. Learning and monitoring become indistinguishable in a process that is both top-down and bottom-up, and in which any recommendations addressed to States or other actors are provisional, subject to the reservation that other ways of making progress towards agreed

⁶⁰ The first version of the *Global Strategic Framework for Food Security and Nutrition* was adopted at the 39th session of the CFS, held in Rome between 15 and 20 October 2012.

upon objectives may in fact be more appropriate in certain settings, and that the objectives are amenable to change.⁶¹

6 Conclusion

A high level of ambition, in many ways, characterizes the reform of the Committee on World Food Security. In order to align trade, investment, development cooperation and food aid, with the realization of the right to adequate food, it seeks to bring together not only governments, but a wide range of international agencies who should agree on a common agenda of action: the objective is, ultimately, to avoid repeating the failures of the past, where a lack of convergence across these different policy areas frustrated the achievement of outcomes. In order to improve monitoring and accountability, the reform encourages a modest form of peer review, by the exchange of regional and country experiences, and by the adoption of guidelines brought together in the *Global Strategic Framework for Food Security and Nutrition*. In order to build legitimacy and improve the quality of the information on the basis of which decisions are made, the reform involves civil society organizations. This also ensures that the positions adopted by governments shall be known, and their conduct assessed according to the standards they profess publicly to set for themselves. A new breed of international governance is emerging, in which civil society, the private sector, international agencies, are co-authors with governments of international law.

But for all its ambitions, the reform of the CFS is still most remarkable for its modesty: its procedures make it into a searching mechanism, seeking to learn from both successes and failures, and involving those most affected by food insecurity, in order to identify true solutions. While overcoming the current fragmentation of international law and global governance is a necessary condition for supporting the realization of the right to food at domestic level, it shall not be sufficient: it must be complemented by a constant search for experiments that work. If, through combining monitoring with learning the CFS can become a tool for convergence of policies as well as a learning platform for governments, it shall have succeeded.

⁶¹ There is an ample literature on learning in organizations on which this paragraph draws, and to which my contribution to the reform process of the CFS was heavily indebted. See in particular for a discussion of various learning-based theories of governance, REFLEXIVE GOVERNANCE: REDEFINING THE PUBLIC INTEREST IN A PLURALISTIC WORLD (Olivier De Schutter & J. Lenoble eds., 2010). For an illustration of the how such an approach can shed light on the approach of an international organization, see EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION: TOWARDS A NEW ARCHITECTURE (Ch. F. Sabel & J. Zeitlin eds., 2010). While learning can consist in one actor simply improving the instruments he uses to pursue certain objectives, “double-loop” learning consists, as already noted, in the objectives themselves being re-examined (see above, text corresponding to *supra* note 60); “triple-loop” learning would consist in an actor rethinking the core values by which he defines his identity and project. On “triple-loop” learning, see JOOP SWIERINGA & ANDRÉ F.M. WIERDSMA, BECOMING A LEARNING ORGANIZATION (1992).

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