In this chapter, the effect of WTO rules on the enjoyment of the right to food is examined. The human right to food will first be described, followed by an overview of current statistics regarding world hunger. The biased impact of current international trade rules on agricultural trade between developed and developing States, which was raised in Chapter 5, will be analysed in fuller detail. Problems regarding free trade and agriculture are then examined, such as the detrimental effects of volatile markets, cartels and specialization, and the alternative path of empowering small farmers is explored. The impact of TRIPS on the right to food is then analysed, before moving to the chapter’s conclusions with recommendations for relevant WTO reforms.

Much of the analysis in this chapter focuses on whether WTO rules and free trade policies generally are producing or are likely to produce an environment in which States, particularly developing States, can discharge their obligations with regard to the right to food. Thus, the analysis largely concerns the instrumental relationship between WTO rules and free trade to human rights protection, rather than direct implementation of the right to food.

A. The Right to Food

The right to food is recognized in Article 11 of the ICESCR. Article 11(1) generally guarantees the right to an adequate standard of living for a person and his/her family, including ‘adequate food’. States must take appropriate steps to realize the right, ‘recognizing to this effect the essential importance of international cooperation based on free consent’. Article 11(2) specifically concerns the right to food and reads:

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, 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.
In General Comment 12, the Committee on Economic, Social and Cultural Rights confirmed that the right to food entails, for all, ‘physical and economic access at all times to adequate food or means for its procurement’.¹ Food must be available in a quantity and of a quality ‘sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture’.² Availability means that food must be accessible ‘either for feeding oneself directly from productive land or other natural resources, or for well functioning distribution, processing and market systems’ which can ensure that food reaches those who need it, rather than only those who can afford it.³

As with all human rights, States must respect, protect, and fulfil the right to food. As with all economic, social, and cultural rights, there is a minimum core content to the right to food:⁴ its core content essentially consists of ensuring that people within jurisdiction are ‘free from hunger’.⁵ If a State lacks the resources to guarantee this minimum standard, it must demonstrate that it has sought international assistance to ‘ensure the availability and accessibility of the necessary food’.⁶

Of particular relevance to States as Members of the WTO, General Comment 12 states at paragraph 36:

States should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to food. In implementing this commitment, States parties should take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements when relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end.

General Comment 12 thus endorses the notion of extraterritorial obligations owed by a State to the people of another State. This notion is discussed in Chapter 8. Indeed, an obligation regarding international cooperation is stressed within Article 11 itself.

Related to the right to food is the concept of ‘food security’, which is defined by the FAO as follows:

Food security exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life.⁷

Enjoyment of food security is a key component of the right to food, to which the Committee has added a requirement that food be accessible for both present and future generations, is a key component of the right to food.⁸

---

² Ibid, para 8. ³ Ibid, para 12. ⁴ See Chapter 1, text after note 81.
⁵ General Comment 12, above n 1, para 17. ⁶ Ibid.
⁷ Rome Declaration on World Food Security and World Food Summit Plan of Action, 17 November 1996 (Rome, Italy).
⁸ General Comment 12, above n 1, para 7.
Finally, national strategies regarding the right to food should be implemented in accordance with core human rights principles: ‘accountability, transparency, people’s participation, decentralization, legislative capacity and the independence of the judiciary’.⁹ Thus, food policies should not be dictated or overly influenced by remote international bodies, or foreign countries, to which a State’s people have little input.

General Comment 12 was essentially endorsed by the intergovernmental Council of the Food and Agricultural Organization (FAO) when it adopted the Voluntary Guidelines on the Right to Food.¹⁰ Given its endorsement by governments, these Guidelines are vested with significant authoritative status.

World hunger statistics

As of 2009, the figures regarding world hunger are truly distressing. The Millennium Development Goals Report of 2009 stated that 17 per cent of the population in developing countries were undernourished (including 29 per cent of those in sub-Saharan Africa), while 26 per cent of children in the developing world are underweight.¹¹ Indeed, ‘one third of child deaths worldwide are attributable to under-nutrition’.¹² Overall, more than a billion people live in hunger.¹³

This desperate picture was exacerbated by the advent of a World Food Crisis of 2007–2008. During this period world food prices soared due to a variety of factors. Oil price hikes caused rises in the prices of transportation, as well as agricultural inputs such as pesticides and fertilizers.¹⁴ Commodities speculation caused price rises unrelated to the supply and demand of the agricultural commodities in question.¹⁵ Increased production of biofuels, discussed below, led to diversion of food crops and therefore higher prices brought about by greater scarcity. Weather-related events, such as ongoing drought in Australia, a key grain producer, generated smaller grain harvests, again leading to higher prices.

The higher prices, ironically, could have assisted the poor as poor farmers might have been able to take advantage of the high selling prices. Indeed, large gains in food trade balances were experienced by Russia, Kazakhstan and Argentina, as well as some other developing States, particularly in South America and South-East Asia. However, large food trade imbalances arose in Africa and Southern Asia.¹⁶ Most poor farmers were not in a position to take advantage of the opportunities

---

⁹ Ibid, para 23.
¹⁰ FAO, Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security (FAO, Rome, 2005) 5–7.
¹² Ibid, 12.
afforded by higher produce prices due to an inability to afford necessary inputs, such as fertilizer and oil, and the suddenness of, and their consequent unpreparedness for, the price rises. Rather, many farmers suffered in their capacity as consumers of food.

A real tragedy regarding hunger is that there is, presently, enough arable land to provide for food for everybody. In 2005, the then Special Rapporteur on the Right to Food, Jean Ziegler, stated:

According to the FAO, the planet could already produce enough food to provide 2,100 kcals per person per day to 12 billion people (double the existing world population). The pervasive nature of hunger and its spike during the World Food Crisis is and was not caused by a lack of food supply. Certainly, serious threats to food supply, particularly in the form of climate change, loom large on the horizon. Nevertheless, it is scandalous that vast numbers suffer and die of malnutrition while huge amounts of food are wasted. Large percentages of post-harvest crops spoil in developing States due to a lack of storage facilities and poor means of transport. This anomaly regarding supply existing alongside hunger arises on an international and a national basis: India for example has a trade surplus in food and yet is home to 231 million starving people. Given that the problem currently lies with distribution rather than supply, it is arguable that the MDGs, in aiming only to halve hunger by 2015, are outrageously under-ambitious. The problem is that the hungry are generally unable to afford food at prevailing prices, and are therefore bypassed in the food distribution chain. The solution is to find a way to deliver food to the hungry who cannot presently afford it, even if it is physically available.

However, this ‘solution’ is not as simple as it may appear, given that half of the undernourished are in fact smallholder farmers, who have become or have remained poor due to poor prices for their produce and an inability to take

---

¹⁷ Ibid, para 28.
¹⁹ FIAN and others, above n 15, Introduction, 3.
²¹ See Peggy Oti-Boateng, Losses and Wastes in the Food Chain (FAO, Rome, 2001). A study from the University of Arizona from 2004 indicates that 40–50% of food which is ready for harvest in the US is wasted, as is 14% of household food purchases. See Jeff Harrison, ‘Study: Nation Wastes Nearly Half its Food’, UA News, 18 November 2004 <http://uanews.org/node/10448> accessed 22 September 2010. See also Carin Smaller and Sophia Murphy, Bridging the Divide: a human rights vision for global food trade (Institute of Agriculture and Trade Policy, Geneva, 2008) 5.
²⁴ Special Rapporteur on the Right to Food, above n 14, n 8, citing UN Millennium Project, Halving Hunger: It can be done, summary version of the report of the task force on hunger (The Earth
advantage of sporadic higher prices (such as those available in 2007–2008). The current Special Rapporteur on the Right to Food, Olivier De Schutter, recently described smallholders as ‘the single most important group of those who are food insecure in the world today’²⁵. In order to preserve the interests and rights of those farmers, any delivery of food in the form, for example, of food aid or unduly cheap exports must not be done in such a way as to deprive such farmers of viable markets in which to earn their livelihoods.

B. Trade and Food

In order to examine the effect of international trade rules on the right to food, it is necessary to first analyse its effect in the agricultural arena, the source of food.

WTO agricultural rules

As noted in Chapter 5, WTO rules presently permit developed States to protect their agricultural markets to the detriment of those in developing States by way of high tariffs and continued subsidies. These issues are further discussed below. These issues are instrumentally related to human rights protection, as they impact on the capacity of States to fulfil their obligations regarding the right to food.

Agriculture was excluded from GATT until the adoption of the Agreement on Agriculture (AoA) in 1995 as part of the WTO package. For several decades prior to 1995, the EU and US in particular had extensively subsidized their agricultural industries, largely in competition with each other.²⁶ Developing States used different mechanisms to intervene and support their own agricultural sectors. However, these programmes were forcibly dismantled from the 1980s onwards due to loan conditionalities imposed by the IMF and World Bank, the international financial institutions (IFIs). During the Uruguay round negotiations, the EC and US were largely concerned with and influenced by each other: the interests of the developing world were a back seat concern.

All this meant that the WTO’s AoA was primarily designed to accommodate the agricultural trade interests of the major industrialized countries. It hardly addressed the specific needs of developing countries with food security problems, including the need to support and promote agriculture.²⁷

²⁶ Tobias Reichert, ‘Agricultural Trade Liberalization in Multilateral and Bilateral Trade Negotiations’ in FIAN and others, above n 15, 31.
The WTO and the Right to Food

The AoA contains the following provisions regarding the troublesome issue of subsidies. Developed states are permitted to provide support for 5 per cent of the total value of agricultural goods per annum, while developing States are permitted to provide support for 10 per cent of such product. Few developing States can afford to reach their minimum threshold, while all developed States can.²⁸ Beyond those minimum thresholds, members are obliged to reduce levels of support for domestic agriculture, known as Aggregate Measures of Support (AMS) or ‘amber box’ measures. Developed States had to reduce domestic support by 20 per cent, and developing States had to reduce such subsidies by 13.3 per cent, from the levels of support provided in 1986–1988. No WTO member can introduce new types of domestic support. These rules in fact benefit developed States, which had much greater levels of domestic support during that base period.²⁹ Export subsidies must be reduced, and new export subsidies cannot be introduced if they did not exist in a base period of 1986–1990. As developing States did not have export subsidies in this period, they are precluded from introducing such subsidies yet they must tolerate competition from subsidized agricultural exports from developed countries.³⁰

Some types of support, known as ‘blue box’ or ‘green box’ subsidies, are exempt from AoA rules so there are no obligations to reduce them. Blue box subsidies are amber box subsidies coupled with a condition that recipient farmers limit their production, so they should discourage overproduction which distorts world trade. Developing States cannot generally afford such subsidies, and there is no restriction on exporting blue box products.³¹ Green box subsidies are deemed to be non-trade distorting or minimally trade distorting, and must comply with conditions in Annex 2 of the AoA. Such subsidies may for example be designed to promote agricultural research, food security, environmental protection, and rural infrastructure. They may also involve ‘decoupled’ direct payments to and income support for farmers, that is payments that are not linked to production rates. The blue and green boxes have proven controversial as it is argued that these subsidies in fact have significant protectionist effects,³² and that the EU and the US in particular have manipulated the box designations to maintain current spending levels.³³ Indeed, while AMS measures have reduced significantly since the advent of the AoA, no significant reduction is evident when using the alternative OECD measurement of protectionist support measures, the production support estimate (PSE).³⁴

³¹ De Schutter, above n 13, 14.
³² FAO, above n 28, 8 and 32.
³⁴ FAO, above n 28, 30–1. See also Wolf, above n 27, 216; Joseph E Stiglitz and Andrew Charlton, Fair Trade for All (Oxford University Press, New York, 2005) 50.
Amber box measures will be likely to be significantly reduced upon conclusion of the Doha round, and a timetable laid out for elimination of export subsidies. However, trade distortions will remain due to continued use and abuse of the green and blue boxes, as there are no serious indications that those boxes will be disciplined after the Doha round. Doha round proposals are discussed in Chapter 8.

The AoA does not combat ‘tariff escalation’.\textsuperscript{35} Processed agricultural commodities are subjected to higher ‘escalating’ tariffs than raw or primary goods. The UNDP in 2005 reported:

In Japan tariffs on processed food products are 7 times higher than on first-stage products; in Canada they are 12 times higher.\textsuperscript{36}

Tariff escalation encourages developing States to concentrate on primary agrarian production, while further refinement and processing of products takes place elsewhere. A large component of the price of commodities such as coffee and cocoa reflects post-harvest processing such as roasting of coffee beans or grinding of cocoa, which largely occurs in richer countries.\textsuperscript{37} This perverse tariff structure discourages nations from developing secondary agricultural industries and higher level industrial capacities.\textsuperscript{38} Essentially, tariff escalation helps to prevent, and is arguably designed to prevent, developing States from climbing the ladder of development.\textsuperscript{39}

The AoA rules permit the North to protect its agricultural markets from competitive growers in the South through the use of high tariffs and subsidies. Worse still, Northern protectionism deprives Southern agriculture of other markets, and even competes, unfairly, with local farmers in their own markets. For example, Wouter Vandenhole has written a compelling case for the harm caused in developing States by EU sugar subsidies which have not only blocked imports from developing States, but have also caused overproduction, so sugar is exported to developing States, destroying local markets.\textsuperscript{40}

Overproduced subsidized Northern produce are one of the main causes of import surges, which hurt local producers as they reduce demand and lower prices.\textsuperscript{41} A study by the South Centre of import surges in 56 developing States found that 16 per cent of agricultural imports were imported under a surge. The


\textsuperscript{38} Hunter, above n 35, 312. See also Oxfam, above n 37, 102–3.

\textsuperscript{39} De Schutter, above n 13, 13. See also Wolf, above n 27, 213–14; Stiglitz and Charlton, above n 34, 125.

\textsuperscript{40} Wouter Vandenhole, ‘Third states obligations under the ICESCR: a case study of EU sugar policy’ (2007) 76 Nordic Journal of International Law 73. See also Report of the Special Rapporteur on the right to food, Jean Ziegler, above n 18, para 51.

surges disproportionately affected the poorest States: surges affected 23 per cent of agricultural imports in LDCs and 21 per cent of imports in Small and Vulnerable Economies.⁴² The frequency of surges is also confirmed in the Import Surge Briefs of the FAO.⁴³

The AoA is probably not the main reason why developing States are unable to combat import surges. The tariff bindings for agricultural products in developing States are generally in the very high band of 50 to 100 per cent,⁴⁴ though the bound rates for acceding States are far lower.⁴⁵ Since the 1980s, IFI conditionality has forced many developing States to maintain far lower applied rates to their Uruguay round bound rates. Since the 1990s, regional and bilateral trade treaties have also imposed stronger constraints on developing States.⁴⁶ Indeed, the IMF has intervened to prevent the defensive raising of tariffs to combat these surges.⁴⁷ Current Doha proposals would effectively remove flexibility from many developing States.⁴⁸

Unfair trade measures which harm local markets under the WTO may be challenged under the provisions regarding dumping (Article VI GATT and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994). ‘Dumping’ arises where goods are exported at a lower price than their normal value, causing injury to the competing local industries. However, the export and local prices of a product may well be the same if all of its production is subsidized. In any case, dumping rules have proven to be too cumbersome and complicated to provide an appropriate remedy for developing States against import surges.⁴⁹ The complexity of dumping rules plays into the hands of developed States, who have the expertise and facilities to comply with the requirements for anti-dumping measures.⁵⁰

A more promising defensive route for developing States, perhaps, is to use the Agreement on Subsidies and Countervailing Measures (SCM) to combat subsidies.⁵¹ The SCM prohibits certain subsidies and renders other subsidies ‘actionable’ if they cause injury to local industry. Under Article 13 of the AoA, subsidies

---

⁴² South Centre, *The Extent of Agricultural Import Surges in Developing Countries: What are the Trends?* (November 2009, Geneva).

⁴³ These papers are available via <http://www.fao.org/corp/google_result/en/?cx=018170620143701104933%3Aaq82jfsfba7w&q=import+surges&cof=FORID%3A9#1075> accessed 22 September 2010.

⁴⁴ Reichert, above n 26, 32.

⁴⁵ Ibid, 32.

⁴⁶ Ibid, 33. See also Chapter 9, text at note 72–90.

⁴⁷ Armin Paasch, ‘World Agricultural Trade and Human Rights: Case Studies on Violations of the Right to Food of Small Farmers’ in FIAN and others, above n 15, 39, cites at 43–4 the example of Ghana in 2003, which was apparently convinced by the IMF not to raise its rice tariff from 20% to 25% to combat an import surge, even though the higher rate was well under its WTO tariff binding.

⁴⁸ Reichert, above n 26, 36. See Chapter 9, Part B.

⁴⁹ Smaller and Murphy, above n 21, 18.


⁵¹ See also Article XVI GATT.
B. Trade and Food

which complied with AoA requirements were not subject to challenge under the SCM until 1 January 2004. That ‘peace clause’ has expired so agricultural subsidies are now challengeable under the SCM.

In 2006, a report was prepared for the US congress on the threat to US farm subsidies posed by the expiration of the peace clause. The report concluded that many of the subsidies were vulnerable, but added:

some trade specialists argue that numerous new WTO challenges of U.S. farm support are unlikely. They contend that challenges require intense effort, the financial costs are high, and the broader geopolitical consequences may far outweigh any potential trade gains. Few developing countries have the needed resources for a challenge. In addition, there is the inherent risk that, if the challenge fails, the effort could legitimize those very programs targeted for discipline.⁵²

This author is not aware of any WTO case where agricultural subsidies have been found in breach of the SCM but not the AoA, so the expiration of the peace clause has not yet yielded substantive legal consequences. Therefore, the relationship between the complex requirements of a challenge under the SCM and the subsidies permitted under the AoA remains unclear. However, ongoing litigation by Canada in respect of US corn subsidies could yield some answers.⁵³ Furthermore, there are signs that some Northern countries are seeking a new peace clause in the Doha round in return for further reductions of amber box subsidies.⁵⁴

In 2002, prior to expiry of the peace clause, Brazil successfully challenged certain US cotton subsidies in United States—Subsidies on Upland Cotton.⁵⁵ The relevant subsidies were found not to comply with AoA requirements and thus were not protected by the peace clause: they were consequently prohibited or actionable under the SCM. Similarly, EU sugar export subsidies were found in 2002 to breach AoA requirements in EU—Export Subsidies on Sugar.⁵⁶ However, in both cases, the relevant subsidy schemes were recast in attempts to technically comply with AoA and SCM requirements, causing continuing harm to foreign markets. Indeed, the US’s ‘corrective’ measures have been found not to satisfy its obligations, so massive countermeasures by Brazil were authorized by an arbitrator in 2009,⁵⁷ many years after the launch of the litigation. The EU’s sugar policies continue to harm

---

⁵³ United States—Subsidies and other Domestic Support for Corn and other Agricultural Products, WTO doc. WT/DS357/1 (8 January 2007) (Request for Consultations by Canada).
⁵⁴ See Chakravarthi Raghavan, ‘Did Schwab mean the US to have a Peace Clause Plus?’ TWN Info Service on WTO and Trade Issues, 24 July 2008.
⁵⁷ United States—Subsidies on Upland Cotton—Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, WTO doc. WT/DS267/ARB/1 and WT/DS267/ARB/2 (31 August 2009) (Decision by the Arbitrator). See also Chapter 3, text at n 78.
the livelihoods of cane farmers in the developing world.⁵⁸ The outcomes of these successful instances of litigation against Northern subsidies are not encouraging for developing States, especially the poorest who are incapable of retaliating with consequential countermeasures.⁵⁹

Another protective measure that could perhaps be used against import surges is the use of safeguards under Article XIX GATT and the Agreement on Safeguards. Safeguards permit temporary restrictions on imports in order to give a competing local industry some time to adjust.⁶⁰ For a variety of reasons, these provisions have been of little use to protect developing States from subsidized imports. A State seeking to use a safeguard must prove that an unexpected surge of imports has caused serious harm to its like industry. In proving causation, that State must separate out harms caused by other factors, and explain why those other factors have not caused the harm sought to be remedied by the safeguard. These proof requirements are very onerous.⁶¹ Furthermore, given the frequency of surges, it is difficult to maintain that they are unforeseen or unexpected. Finally, safeguards can only be imposed if trade compensation is given to affected States, which clearly restricts the capacities of poorer States to impose safeguards.

A special safeguards mechanism is contained in Article 5 of the AoA, whereby safeguards can be implemented without having to prove serious injury to local industry. However, it only applies to products that had been ‘tariffied’ (that is, subject to tariffs) prior to the AoA. As most developing States had used other protectionist mechanisms such as quotas, the safeguard is not available to them.⁶² Only 39 WTO members, including 22 developing States, have reserved the right to use such safeguards.⁶³ They have rarely been used by developing States, possibly due to their rigid and overly complex nature.⁶⁴ In contrast, EU states have commonly used this safeguard mechanism.⁶⁵

Doha negotiations stalled in July 2008 over proposals, particularly from India, regarding a new special safeguard mechanism (SSM) to protect food security and smallholder livelihoods in developing countries.⁶⁶ The main points of contention were the conditions that trigger the SSM, and the rate of protective tariffs that can be imposed under the SSM. The Hong Kong Ministerial Declaration

---

⁶² Dommen, above n 29, 36; Report of the Special Rapporteur, above n 28, para 23.
⁶⁴ FAO, ‘A Special Safeguard Mechanism for developing countries’ (undated) (Trade Policy Briefs on issues related to WTO negotiations on agriculture, No 9) 2.
⁶⁵ South Centre, above n 42, 2.
indicated that the trigger could relate to a surge of imports in terms of volume, which would affect demand, or a significant drop in the price of an agricultural import. In July 2008, however, a draft put forward by WTO Director-General, Pascal Lamy seemed to link the two requirements, meaning that the SSM would rarely be applicable unless both conditions were present. Regarding the rate of protective tariffs which can be imposed under the SSM, the July draft introduced new and severe limits on the circumstances in which a tariff could rise above pre-Doha levels (that is, above the current tariff ceilings imposed after the Uruguay round). There are no like requirements for use of the normal safeguard under the Safeguards Agreement. Indeed, many proposed constraints on the SSM, such as the proposal to limit it to no more than 2.5 per cent of tariff lines in a 12-month period, impose conditions above and beyond those applicable to normal safeguards.

A final issue under WTO agricultural rules concerns the extent to which States can impose non-tariff barriers to trade under the TBT and especially the SPS Agreements. Smallholders are finding it increasingly difficult to comply with the SPS standards imposed by developed States. At the same time, SPS standards are important in protecting the right to health of consumers. SPS standards should be negotiated fairly between North and South, and should not impose unduly rigorous standards. This issue was discussed in Chapter 4.

Developed country subsidies predate the AoA. However, the AoA has not done enough to control those subsidies, representing a failure in the Uruguay bargain, given it was (along with the Agreement on Textiles and Clothing) the effective quid pro quo for the North in return for agreement by the South on GATS and TRIPS. The AoA has reduced Northern subsidies, but they remain at very high levels, and current Doha round proposals suggest that subsidies will simply shift boxes rather than be effectively reduced. The structure of the AoA is on occasion blatantly unfair, for example in the use of arbitrary base periods for calculation periods which benefit the North. While tariffication of agricultural goods has not removed significant policy space for developing States, that policy space is constrained by IFI conditionality or other (bilateral and regional) arrangements: remaining

---

69 Khor, above n 68, paras 15–16.
72 See Chapter 5, Part C.
flexibilities under WTO law will be significantly reduced under current Doha proposals. Finally, ‘defence’ mechanisms such as anti-dumping laws, countervailing measures against subsidies, and safeguards are currently inadequate shields for developing States against subsidized Northern imports.

C. Food and Trade: An Uneasy Combination

Given the present inadequacy in WTO rules regarding agriculture, further and fairer agricultural liberalization is unsurprisingly one of the main demands of developing countries in the Doha round. Certainly, agricultural liberalization would benefit the agricultural industries in Russia, Brazil and Argentina, as well as States in the Cairns group, which contain many of the world’s food insecure people. However, many developing countries do not have a comparative advantage in agriculture. Agricultural liberalization could be counterproductive or even disastrous for some of the poor in developing countries, and could have detrimental effects on enjoyment of the right to food.

Inequities in trade and lack of investment in agriculture have transformed former exporting countries into importing countries. Whereas developing States had an agricultural trade surplus of US$7 billion per annum in the 1960s, they had a food trade deficit of US$11 billion by 2001. Many African States have become net food importers after being net food exporters up until the 1970s. To be sure, this process of poor countries evolving into net food importers began before the advent of the WTO. Trade liberalization in the 1980s was forced upon many developing States by loan conditions imposed by the IFIs along with reductions in government support for farmers: the combined effect wiped out local agricultural industries which could not compete with subsidized imports from the North.

A reversal of the status of food importer to self-sustainability or even food exporter cannot be expected to happen even if trade rules are now ‘fixed’ to reduce global agricultural protectionism. Even if Northern subsidies were abolished, the huge differences in productivity between the mechanized long-protected farms of the North and the more rudimentary long-neglected agricultural operations in many parts of the South would hardly create a level playing field: UNCTAD

73 The Cairns group consists of a mixture of developed and developing States with strong agricultural sectors: Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, the Philippines, South Africa, Thailand, and Uruguay.


75 Special Rapporteur on the Right to Food, above n 14, Annex 1, n 56, citing the FAO; see also IAAKSTD, above n 20, 455.

76 Special Rapporteur on the Right to Food, above n 28, para 21. See also South Centre, above n 42, 1; FAO, above n 28, 17.

77 Reichert, above n 26, 31; De Schutter, above n 13, 17.
reported in 2006 that the productivity of farmers in LDCs was less than one per cent of those in the North.⁷⁸

For rich States that are net food importers, such as Saudi Arabia and Qatar, continued dependence on food imports is sustainable due to their purchasing power: they are attractive markets for food sellers.⁷⁹ However, dependence on food imports is not sustainable for poor countries. As noted below, agricultural markets are extremely volatile, so such countries suffer when prices rise, as occurred during the recent food crisis. They are also vulnerable to export embargoes. For example, certain rice exporting States, such as China and Vietnam, reduced exports in order to ensure their own food security during the World Food Crisis, gravely affecting food supplies in poorer rice importing States. The incentive to sell to poor countries did not outweigh those States’ understandable concern to feed their own people. The development of self-sustaining food supplies by poor States is therefore highly desirable, in order to ensure the enjoyment of the right to food by their populations.⁸⁰ Yet such a strategy, which would necessarily involve increased protectionism on the part of the States with the most vulnerable food sectors, cuts against the grain of WTO disciplines and negotiations.

**Subsidized imports and food aid**

Some developing countries are dependent on imports for food and have limited resources to purchase food.⁸¹ Many such States have therefore relied for food supply on cheap subsidized Northern imports. Of course, these imports harm the competitiveness of Southern farmers. Nevertheless, the removal of subsidized imports by way of further liberalization is of considerable concern to net food-importing developing countries.⁸² These potential negative effects of the AoA were acknowledged in the 1993 *Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Program on Least Developed and Net Food-Importing Developing Countries*.⁸³ However, while that document is characterized by sympathy and recommendations, it introduces no binding obligations.⁸⁴ 'There is no mechanism

---

⁷⁹ De Schutter, above n 13, 10. Even so, such States are taking measures to preserve their own food security by buying up land in poorer States, particularly in Africa, to grow food for their own peoples, perhaps at the expense of consumers in the latter countries. See, eg, John Vidal, ‘How food and water are driving a 21st century African land grab’ *The Guardian* (London), 7 March 2010.
⁸⁰ HE Mamadou Sanou, Minister for Trade of Burkina Faso, stated that self-sustainability was probably the only way of ensuring food security for poor nations such as his own during an NGO side event at the Geneva Ministerial, 2 December 2009. See also De Schutter, above n 13, 18.
⁸¹ See also ‘WTO List of Net Food Importing Developing Countries’, G/AG/5/Rev.6, 10 April 2003.
⁸⁴ Hunter, above n 35, 312–4; Dommen, above n 29, 33; Breining-Kaufman, above n 82, 368.
within the WTO to monitor systematically the impact of the AoA reform process on the ‘Net Food Importing Developing Countries’.⁸⁵

Similar concerns may be raised regarding food aid. Food aid should be designed to fulfil the nutritional needs of deprived States. However, food aid can be abused to serve commercial interests rather than the interests of the hungry. At the Hong Kong Ministerial, WTO Members reiterated the need to eliminate the abuse of food aid whilst guaranteeing the maintenance of genuine emergency food aid, but the details must still be worked on.⁸⁶

Guideline 15 of FAO’s Voluntary Guidelines outlines the balance that should be achieved in food aid programmes thus:

15.1 Donor States should ensure that their food aid policies support national efforts by recipient States to achieve food security, and base their food aid provisions on sound needs assessment, targeting especially food insecure and vulnerable groups. In this context, donor States should provide assistance in a manner that takes into account food safety, the importance of not disrupting local food production and the nutritional and dietary needs and cultures of recipient populations. Food aid should be provided with a clear exit strategy and avoid the creation of dependency. Donors should promote increased use of local and regional commercial markets to meet food needs in famine-prone countries and reduce dependence on food aid [emphasis added].

15.4 The provision of international food aid in emergency situations should take particular account of longer-term rehabilitation and development objectives in the recipient countries, and should respect universally recognized humanitarian principles.

It is preferable if donors procure food from local or regional markets,⁸⁷ rather than send food from their own countries. Such procurement will assist local and regional producers, and is more likely to be culturally appropriate. The food can be delivered faster with lower transport costs.⁸⁸ However, US legislation requires that 75 per cent of its food aid be procured from US markets, be packed and processed in the US, and transported by US ships.⁸⁹ The food is also delivered by contracted US-based NGOs. Food aid programmes should be designed to alleviate a food crisis and facilitate sustainable food security in the target State, rather than to promote commercial interests in the donating or exporting country by removing unwanted surpluses.⁹⁰

Trade efficiency and food

There are a number of reasons why the ‘efficiency’ gains driven by trade liberalization are not appropriate in the area of food. Trade efficiency denotes that solvent

---

⁸⁵ Report of the Special Rapporteur on the right to food, above n 28, para 15.
⁸⁶ Hong Kong Declaration, above n 67, para 6. See also Howse and Teitel, above n 61, 65–7.
⁸⁹ Ibid, 2.
⁹⁰ Ibid, 1.
consumers purchase products (or services) at an optimum price from sellers, who make profits to sustain and grow their business. Trade literature emphasizes that markets will divert to those who sell for less.⁹¹ At the same time however, markets also divert to those willing to pay more.⁹² For example, land will be used to cultivate and feed livestock for meat to satisfy the more expensive tastes of a growing South East Asian middle class, rather than to grow staple foods for the poor and the hungry.⁹³ There is a finite amount of arable land, particularly given the environmental consequences of clearing more land for farming, so production of ‘expensive’ agricultural products, including the rearing of livestock which is much more resource intensive than the growing of vegetables, leads to the lesser production of cheaper staples.⁹⁴ Yet food is a necessity of life, unlike most products and services.⁹⁵ From a human rights point of view, those who are too poor to purchase food cannot be excluded from the food market in the same way that they can be excluded from the markets for cars or television sets. In the wake of the World Food Crisis, former US President Bill Clinton, who presided over the US’s final negotiation of and ratification of the WTO Agreements, admitted in 2008 that the world, including his administration, ‘blew it’ by treating food as if it was an ordinary commodity.⁹⁶

Agricultural activities are commercial activities, but they are also truly multifunctional, serving purposes beyond the production of commodities such as the promotion of human welfare (nutrition, livelihoods, sustaining rural communities), traditional cultural practices (for example, hunting, gathering, food rituals), and provision of environmental and ecological services, such as the management of forests.⁹⁷ Agricultural management systems must be devised so as to serve these multifunctional purposes, rather than be based only on economic criteria.⁹⁸ While the AoA acknowledges ‘non-trade’ concerns in some of its provisions, such as food security and environmental protection, overall it ‘clearly fits into a programme of trade liberalization in agricultural products’, with food security and other non-trade aims to be achieved by support rather than by any retreat from liberalizing measures.⁹⁹

---

⁹² De Schutter, above n 13, 10–11.
⁹⁴ Similarly, food production competes with other uses of land, such as golf courses, hotels, and urbanization in general. See James A Paul and Katarina Wahlberg, *A new era of world hunger?— the Global Food Crisis Analyzed* (Friedrich Ebert Stiftung, New York, August 2008) 3.
⁹⁵ The market ethic promoted by WTO rules also poses problems with regard to other essential goods or services, such as life-saving medicines (see Chapter 7) and provision of water (see Chapter 5).
⁹⁸ IAAKSTD, above n 20, 50.
⁹⁹ Special Rapporteur on the Right to Food, above n 28, para 14.
Only a small percentage of food, estimated at 15 per cent of food grown, is actually traded across borders.¹⁰⁰ Yet ‘international trade and investment requirements dictate food and agricultural policies’.¹⁰¹ However, international agricultural markets suffer from a number of flaws apart from the anomalies in current trade liberalization arrangements discussed above. These flaws include: volatile markets with predominantly low prices for primary goods, concentration of market power, problems caused by the focus on export crops compared to food staples, and problems caused by specialization and intensive mono-cropping. These issues are now discussed in turn.

**Volatile markets**

Agricultural commodities markets have generally delivered poor and erratic returns to producers over the last three decades,¹⁰² partly due to chronic over-production.¹⁰³ These markets suffer from a number of factors which defy the application of orthodox economic theories regarding supply and demand.¹⁰⁴ It is difficult to tailor supply to demand due to the vagaries of climatic conditions, and the fact that it is not easy to simply ‘move land in and out of production’¹⁰⁵ to suit market conditions. It is also expensive to store food, especially for poorer farmers, who cannot therefore stockpile produce until market conditions are more advantageous.¹⁰⁶

The so-called ‘cobweb effect’ may explain some of the structural reasons for inherent agricultural volatility. Producers choose which crops to grow during the planting season, four to six months prior to harvest. They will often plant large amounts of high priced crops, and less of low priced crops. If all producers adopt that strategy, there will be an overabundance of the high priced crops come harvest time, so their price will drop, and a shortage of the low-priced crop, so its price will rise. This problem is exacerbated when markets are global.¹⁰⁷

Low prices mean that farmers cannot make a decent living. Price hikes are too unpredictable for those farmers to take advantage of, so they suffer again as consumers with sudden rises in food prices. As noted above, poor States which are net food importers cannot afford sudden price rises. At the Hong Kong Ministerial, the problems caused by unstable commodities markets were acknowledged, yet no solid commitments in that regard were made.¹⁰⁸

---

¹⁰⁰ De Schutter, above n 13, 43.
¹⁰¹ Smaller and Murphy, above n 21, 8; IAAKSTD, above n 20, 454.
¹⁰² See generally IAAKSTD, above n 20, 454, 458; Report of the Special Rapporteur on the Right to Food, above n 70, para 18; Kurwijila, above n 70, 82.
¹⁰³ Von Braun, above n 70, 30–1; Mazoyer, above n 87, Section 2.3.
¹⁰⁴ See also Report of the Special Rapporteur on the Right to Food, above n 28, para 21; Wolf, above n 27, 206.
¹⁰⁵ Sophia Murphy, ‘WTO Agreement on Agriculture: Suitable Model for a Global Food System?’ (2002) 7 Foreign Policy in Focus 3.
¹⁰⁶ Murphy, above n 93, 5.
¹⁰⁷ De Schutter, above n 13, 24–5.
¹⁰⁸ See Hong Kong Declaration, above n 67, para 55.
In general, price stability and managed production, along with sustainable methods of production, must be promoted to combat excessive market volatility.¹⁰⁹ The WTO cannot shut its eyes to such widespread market failures with human consequences. In order to do so, certain barriers to trade and the free market will have to be promoted. For example, state trading enterprises may have a significant role to play in stabilizing markets,¹¹⁰ lending market muscle to farmers, and in fact providing robust competition to dominant agribusiness conglomerates,¹¹¹ whose market power is discussed directly below. Such state-run marketing boards would, however, have to avoid the inefficiency and corruption that has beset such institutions in the past, particularly in developing countries.¹¹²

It is difficult to reconcile such methods of price stabilization with free markets. International commodities agreements, which seek to stabilize prices and supply of particular commodities, and which clearly restrict free trade, are permitted under Article XX(h) GATT.¹¹³ However, such agreements probably need to be mandatory rather than merely permitted in order to avoid the undermining of the agreements by non-participants.¹¹⁴ Furthermore, the parameters of the WTO rules regarding commodities agreements, which cut against the grain of the free trade ethos of WTO rules, are not clear. Hence, the African Group in the WTO suggested in 2006 that the rules regarding commodities agreements be clarified as part of the Doha negotiations.¹¹⁵

**Cartelization**

Agricultural trade is dominated by large-scale single-crop farms owned by multinational agribusiness companies.¹¹⁶ Indeed, many commodities markets are dominated by only a few multinational corporations (MNCs). In its World Development Report of 2008, the World Bank stated that when the percentage of business held within an industry by its top four companies (CR4 rating) is over 40 per cent, ‘market competitiveness begins to decline’.¹¹⁷ It reported that coffee had a CR4 rating of 40 per cent while the rating for coffee roasting was 45 per cent. There was a CR4 rating of 40 per cent for international traders of cocoa, 51 per cent for coffee grinders, and 50 per cent for confectionary manufacturers. Three companies controlled 80 per cent of the tea market.¹¹⁸

---

¹⁰⁹ Murphy, above n 93, 29.
¹¹⁰ FAO, above n 28, 35–6; Wolf, above n 27, 206.
¹¹¹ See Murphy, above n 93, 38.
¹¹³ See also Article XI(2)(b) and XXXVI(4).
¹¹⁴ Mehmet Arda, ‘Global Mechanisms Relevant to Small-Scale Farmers in Liberalised Trade Environment’ in Tiina Huvio, Jukka Kola, and Tor Lundström (eds), above n 70, 189–92; Reichert, above n 26, 30.
¹¹⁶ Breining-Kaufman, above n 82, 368; Wolf, above n 27, 206.
¹¹⁸ Ibid, 136.
The growth of global supply chains benefits smaller farmers by connecting them to global markets.¹¹⁹ However, cartelization within these supply chains has led to severe power imbalances between producers and buyers, allowing the latter to exercise effective monopsony power to drive down prices paid to producers.¹²⁰ The price received by farmers for their produce now accounts for a tiny proportion of the value of the final product for consumers, which instead increasingly reflect inputs by and the profits of others further up the chain, such as wholesalers, processors, retailers,¹²¹ and other add-ons, such as the costs of a lease on a retailer’s premises.¹²² The Special Rapporteur on the Right to Food, Olivier De Schutter, stated in 2008:

The World Bank has noted... that... the share of the retail price retained by coffee-producing countries Brazil, Colombia, Indonesia and Viet Nam accounting for 64 per cent of global production declined from a third in the early 1990s to 10 per cent in 2002, while the value of retail sales doubled. It also calculated that the developing countries’ claim on value added in agricultural commodities declined from around 60 per cent in 1970–1972 to around 28 per cent in 1998–2000.¹²³

Other powerful players also now play a role in agricultural markets, further shifting profits and influence away from producers.¹²⁴ Farmers are dependent on certain inputs such as fertilizers and machinery in order to harvest a decent crop. These markets are also overly concentrated, with the World Bank reporting a CR4 ratio of 60 per cent in the agrochemicals business in 2004.¹²⁵ Furthermore, farmers buy these inputs at retail prices yet sell their produce at wholesale prices to commodity buyers.¹²⁶

Commercial farming now relies on genetically modified seeds, which are owned by companies, and cannot legally be replanted without their permission. Some of these seeds decline in their productivity, so farmers must eventually purchase new seeds rather than save seeds for replanting. Alternatively, farmers may become tied to certain seed companies by contracts, which may be concluded without meaningful equality of bargaining power.¹²⁷ As an indicator of unfortunate market dominance, Monsanto reportedly controls 41 per cent of the commercial maize market and 25 per cent of soybean seeds globally.¹²⁸

¹¹⁹ De Schutter, above n 13, 30.
¹²⁰ UNDP, above n 36, 142–3; Department of Foreign Affairs and Trade (DFAT)], Globalisation: Keeping the Gains (Commonwealth of Australia, Canberra, 2003) 47, 50.
¹²¹ The Special Rapporteur on the Right to Food reported in 2008 that 10 retailers shared 24% of the global market: above n 14, para 36. ¹²² Ibid, para 36; Oxfam, above n 37, 161.
¹²⁴ IAAKSTP, above n 20, 465–6; Arda above n 114, 177 at 182.
¹²⁶ Report of the Special Rapporteur on the Right to Food, above n 14, para 36.
¹²⁸ Murphy, above n 93, 6.
Supermarkets are also ‘consolidating distribution and retail markets on every continent’, and now dominate final retail sales of agricultural products.\(^\text{129}\) The quality demands of supermarkets are very difficult for smallholders to comply with, regarding, for example, uniformity of produce and volume.\(^\text{130}\) While quality control of food products is of course important, some of these standards relate to less important marketing issues such as ‘the look’ of a product. Furthermore, the standards are imposed at the whim of the supermarket with little consultation with farmers.\(^\text{131}\) The private source of these standards indicates that governments have not seen such standards as necessary to protect consumers. However, the private source also means that the standards are not challengeable under the SPS Agreement.\(^\text{132}\) Finally, these retail industries are characterized by a high degree of concentration and consequent market power.\(^\text{133}\)

As the gap between prices paid to producers and profits reaped by agribusiness and other players, such as retailers and processors, grows, small farmers simply cannot compete. For example, the increased demand by agribusiness and big farmers for land in order to cultivate export crops threatens the security of tenure of smaller farmers, and there have been instances of forced eviction and expropriation with inadequate (or no) compensation.\(^\text{134}\) There is also a vast gap in terms of the respective access to relevant business information of the two groups.\(^\text{135}\) In the result, smallholders are either driven out of business and deprived of their livelihoods, or they struggle on, adding to the ranks of the world’s hungry.

Problems regarding private monopolies are ‘conspicuously absent’ from binding ameliorating WTO initiatives.\(^\text{136}\) Trade is hardly free in the absence of free competition. At the least, the permitting of monopolies undermines one strong rationale for free trade: lower prices for consumers.\(^\text{137}\) Indeed, ‘analyses that have been used to bolster the case for further trade liberalisation… assume that markets function competitively (ignoring vertical integration within value chains that can limit competition)’.\(^\text{138}\) Instead, there is a danger that agricultural liberalization without the opening up of competition in the sector simply replaces ‘border protections with cartels’.\(^\text{139}\) Domestic competition policy in developed States is largely concerned with protecting consumers from monopoly producers, rather than protecting offshore consumers or producers from the monopoly or monopsony power of MNCs based in their territory.\(^\text{140}\)

\(^{129}\) Ibid, 6.  
\(^{130}\) Kurwijila, above n 70, 85; Arda, above n 114, 180.  
\(^{131}\) Murphy, above n 93, 14. 
\(^{132}\) Arda, above n 114, 184 and 195. See also Chapter 4, Part D.  
\(^{134}\) Report of the Special Rapporteur on the Right to Food, above n 70, para 34.  
\(^{135}\) Von Braun, above n 70, 22.  
\(^{136}\) UNDP, above n 36, 139.  
\(^{137}\) See Paasch, above n 47, 44. 
\(^{138}\) IAAKSTD, above n 20, 455.  
\(^{139}\) Murphy, above n 93, 29.  
\(^{140}\) See Report of the Special Rapporteur on the Right to Food, above n 25, para 35; Murphy, above n 93, 32; Smaller and Murphy, above n 21, 14. See also Daniel J Gifford and Robert J Kudrle,
Attempts to introduce competition policy into the WTO failed at the Singapore Ministerial of 1996. The focus of those discussions had been on promoting foreign competition against local firms in domestic markets, rather than on curbing the power of certain MNCs in global markets.¹⁴¹ Instead, mechanisms must be introduced to guard against abuse of market power by the agribusiness sector, the providers of inputs such as seeds, and supermarkets.¹⁴² Otherwise trade liberalization will disproportionately favour such entities, which are already in the best position to take advantage of the dismantling of global barriers, and widen the gap to their impoverished competitors.¹⁴³ At the least, relevant WTO committees should seek information on the extent of market power exerted by certain firms, just as they routinely seek such information on the practices of State trading enterprises.¹⁴⁴ Indeed, the fact that the latter information is sought, while the former is not, reflects the WTO’s inherent suspicion of the public sector, compared to its inherent and occasionally misplaced faith in the private sector.

Export orientation

Export orientation in agriculture has prompted switches from subsistence products to non-food cash crops, such as coffee, cocoa, and tobacco: conversion to cash crops has in many cases weakened local food security.¹⁴⁵ Agribusiness corporations, which dominate the market, are more likely to be ‘concerned with profitable trade than with local-level food security’.¹⁴⁶ The diversion of resources from food can transform a country into a net food importing country,¹⁴⁷ with all of the vulnerabilities associated with that status.

Furthermore, an export emphasis promotes investment in areas which are linked to facilities which are necessary for the transportation of goods, such as ports and airports. There has however been a concomitant lack of investment and provision of infrastructure for more remote areas that are capable, if such investment took place, of providing local and regional markets.¹⁴⁸

The cash crop focus has resulted from an undue focus on export markets. Food products are probably more in demand amongst regional and local markets in

¹⁴¹ Stiglitz and Charlton, above n 34, 85; Murphy, above n 93, 33; Khor, above n 41, 37–8. ¹⁴² Report of the Special Rapporteur on the Right to Food, above n 14, para 38. ¹⁴³ See also IAAKSTD, above n 20, 7. ¹⁴⁴ Murphy, above n 93, 36; Arda, above n 114, 195–6. ¹⁴⁵ United Nations Human Settlements Programme, above n 91, 41. ¹⁴⁶ Dommen, above n 29, 34. ¹⁴⁷ See Dan Ben-David, Håkan Nordström and Alan Winters, ‘Trade, Income Disparity, and Poverty’ (WTO Special Studies 5) (WTO, Geneva, 1999) 57, on the example of Zambia, where the switch to cash crops ‘apparently eliminated the knowledge and seed supplies required for subsistence varieties, preventing farmers from reverting to traditional methods when the cash crop market disappeared’. ¹⁴⁸ IAAKSTD, above n 20, 459.
C. Food and Trade: An Uneasy Combination

developing States; they are important yet neglected outlets for agricultural traders in many regions.¹⁴⁹

Of particular concern to the enjoyment of the right to food in recent years has been the shifting of agricultural resources to the production of ‘biofuels’, fuels derived from plant materials.¹⁵⁰ The trend towards biofuels is driven by a need to find alternatives to fossil fuels and a desire for energy security. However, biofuel production has diverted many crops which traditionally feed the poor, such as maize, sugarcane, cassava, palm oil, and sorghum,¹⁵¹ into products which are used by the rich to drive their cars.¹⁵² Most biofuel is currently produced in developed States. However, that situation is expected to change, given the availability of agricultural land and appropriate climatic conditions in many developing States, which are increasing production of primary commodities (for example, palm oil) for biofuel conversion.¹⁵³ Significant production already takes place, largely for export, in Brazil, Indonesia, and Malaysia.¹⁵⁴

The result has been to drive up land prices¹⁵⁵ and food prices, due to the lesser availability of such products as edible commodities. The IMF has calculated that biofuel production raised the price of maize by 70 per cent and soybeans by 40 per cent.¹⁵⁶ Yet the positive environmental impacts of biofuels are questionable, due to the unsustainable practices used to produce them, such as extensive forest clearance and energy usage to convert plants into fuel. It seems very unlikely that biofuels will make a significant dent, at least in the short term, in demand for fossil fuels, when one compares the massive volume of grain and land used to produce biofuel with the tiny portion of the fuel market occupied by biofuels.¹⁵⁷

The present Special Rapporteur on the Right to Food, Olivier De Schutter, has gone so far as to say that the promotion of biofuel production and trade is so detrimental that it represents ‘a deliberately retrogressive measure’ in respect of the right to food. In such a situation, relevant States (whether producing or importing) have to demonstrate that biofuel production and trade is justified according to the

¹⁴⁹ Ibid, 453.
¹⁵¹ Report of the Special Rapporteur on the right to food, above n 14, para 28.
¹⁵² Report of the Special Rapporteur on the right to food to the General Assembly, Jean Ziegler, above n 150, para 23; Annex 2, para 10.
¹⁵⁵ The increased competition for land has also led to forced evictions for vulnerable peoples who lacked secure tenure, particularly indigenous peoples. Report of the Special Rapporteur on the right to food to the General Assembly, Jean Ziegler, above n 150, paras 38–9.
¹⁵⁷ Report of the Special Rapporteur on the Right to Food, above n 14, Annex 2, quoting US National Academics of Sciences. IAAKSTD, above n 20, 464 cites a study which indicates that only 15% of US transportation needs would be satisfied if all of its corn was converted into biofuel.
totality of the rights in the ICESCR.¹⁵⁸ He doubts that that burden can be met, especially when the environmental benefits of biofuels are highly suspect.¹⁵⁹

De Schutter’s statements may indicate that the import of biofuels constitutes an extraterritorial breach by a State of the right to food. If so, this could be a rare example of international human rights law compelling the adoption by a State of trade bans (that is, ‘outward measures’) on a product.¹⁶⁰ However, De Schutter may not be going so far. He seems to be saying that States should not encourage biofuel production (whether at home or overseas) through, for example, offerings of subsidies and tax breaks. Removal of subsidies and other incentives would probably bring biofuel production to a halt, as biofuel use is not currently economically viable without them.¹⁶¹

In any case, the clear link between some biofuel production and detrimental impacts on the right to food indicate that measures which deter such production are welcome from a human rights point of view. Yet a managed phase-out of the trade of biofuels, or a phased-in policy of only importing biofuels produced in a manner which preserves rights to food, could possibly be illegal under WTO rules.¹⁶²

In this respect, I note that the European Union has adopted ambitious targets to promote the use within the EU of non-fossil fuels, which will ‘trigger a large increase in the consumption of biofuel in the EU’.¹⁶³ Its Renewable Energy Directive¹⁶⁴ sets out support schemes to facilitate the production and import of biofuels which meet certain ‘sustainability criteria’. These criteria are arguably designed to ensure that eligible biofuels have a minimal carbon footprint. The criteria are not however aimed at mitigating effects on the right to food, and their suitability for minimizing detrimental environmental impacts is debatable.¹⁶⁵ The sustainability criteria may also breach WTO law. Unfortunately, more robust criteria, which could be designed to protect the right to food and to redress criticisms of the environmental impact of the current criteria, could be even more vulnerable to being found in violation of international trade rules.¹⁶⁶

Specialization

The theory of comparative advantage encourages specialization rather than diversity in agricultural outputs. This emphasis on specialization, along with the

¹⁵⁸ See Chapter 1, text at notes 71–2.
¹⁶⁰ See Chapter 4, text at notes 17–30.
¹⁶² Report of the Special Rapporteur on the Right to Food, above n 14, para 32. The impact of WTO rules on the trade in ‘bad’ products is discussed in Chapter 4.
¹⁶⁵ See generally, Actionaid, above n 161, and Lendle and Schaus, above n 163.
¹⁶⁶ See Lendle and Schaus, above n 163, esp at 15.
commercial benefits of relevant intellectual property protection.¹⁶⁷ encourages ‘vast monocultures being planted with genetically identical seed’.¹⁶⁸ However, specialization can magnify losses if a crop should fail or plummet in price,¹⁶⁹ and leads to a loss of biological diversity and ecological resilience.¹⁷⁰

Environmental damage

Global production of food in many developing States in the developing world, such as Mexico and India, was fired from the 1950s by the Green Revolution, a process involving intensive use of fertilizers, pesticides, irrigation, and better plant varieties.¹⁷¹ The Green Revolution is a classic example of the economic focus of agricultural policy with an emphasis on boosting yields. The benefits of the Green Revolution cannot be denied, with those extra yields feeding previously hungry people. Furthermore, the Green Revolution permitted increases in production without the need to significantly expand areas of cultivation, which led to the preservation of forests, wetlands and greater biodiversity.

However, the extensive use of chemical fertilizers and pesticides has also caused water pollution, soil degradation, and health problems. Cancer rates have reportedly soared in the Punjab, one of the major sites of the Green Revolution in India.¹⁷² Intensive agricultural operations also place ‘enormous stress’ on ecological resources, including water¹⁷³ and soil,¹⁷⁴ and have even given rise to new diseases, such as BSE (mad cow disease)¹⁷⁵ and, possibly, avian flu and swine flu.¹⁷⁶ Furthermore, globalization has caused environmental damage by facilitating the ‘introduction of alien species’ to fragile ecosystems.¹⁷⁷ Finally, current agricultural activity is calculated to be the second biggest generator of global greenhouse gas emission.¹⁷⁸ A second era of like green revolution policies is not sustainable.

¹⁶⁷ Problems regarding intellectual property protection and loss of biodiversity are further discussed below.
¹⁶⁸ Dommen, above n 29, 40.
¹⁷⁰ IAAKSTD, above n 20, 10. ¹⁷¹ Ibid, 20.
¹⁷³ IAAKSTD, above n 20, 20–1.
¹⁷⁴ Murphy, above n 105, 4. Oxfam uses the Bangladeshi prawn industry as an example of a commodities market that has impacted detrimentally on the environment, through massively increased soil salinity, which has not benefitted the poor due to ‘the high capital costs involved’ (above n 37, 92–3).
¹⁷⁵ Wolf, above n 27, 191.
¹⁷⁶ IAAKSTD, above n 20, 72 (the report does not mention swine flu; it predated that pandemic).
¹⁷⁷ Ibid, 40.
¹⁷⁸ Smaller and Murphy, above n 21, 2. See also IAAKSTD, above n 20, 30, reporting that 30% of emissions which generate climate change are attributable to agricultural activities: 3 and 11.
Conclusion

There is a need to break from the purely economic focus in agriculture to promote more sustainable modes of agriculture.¹⁷⁹ A shift in global agricultural policy from current modes, which are focused largely on improving productivity, to a multi-faceted approach aimed at empowering smallholders and designed to boost development and sustainability, including food security, was recently advocated in the Synthesis Report of the International Assessment of Agricultural Knowledge, Science and Technology for Development (IAAKSTD). The IAAKSTD is an intergovernmental entity created by the World Bank and the FAO. The report was compiled over three years by 400 experts, including a wide range of scientists and development specialists. Fifty-eight governments unreservedly accepted the report in April 2008, which endorsed the report’s findings, while three governments expressed reservations.¹⁸⁰ The report’s main conclusion was that ‘[b]usiness as usual is no longer an option.’¹⁸¹

D. Empowering Smallholder Farmers

As noted above, half of the world’s underfed are smallholder farmers. Furthermore, nearly 90 per cent of farms are smallholder operations.¹⁸² Around 40 per cent of the world’s population are employed in agriculture, with the large majority of those in small-scale farms.¹⁸³ Three quarters of the world’s poor are located in rural areas,¹⁸⁴ and more than half of extremely poor people make their livelihoods from agriculture.¹⁸⁵ Given those figures, it is hardly surprising that smallholders constitute ‘the largest employment and small business group among the world’s poor’.¹⁸⁶ Yet a vastly disproportionate share of farm income, including subsidies, goes to the 0.5 per cent of farms which are over 100 hectares in size,¹⁸⁷ leading to great bifurcation in world agricultural markets. Global agricultural policy is largely driven by the interests of those bigger farms, rather than the vast number of smaller farmers.

In alignment with the IAAKSTD conclusions, an appropriate strategy from the perspective of the right to food, and poverty reduction generally, is to empower small farmers so that they can sell their stock at prices which enable them to become food secure and to maintain their livelihoods.¹⁸⁸

¹⁷⁹ IAAKSTD, above n 20, 44; World Development Report 2008, above n 97, 1.
¹⁸⁰ Australia, Canada, and the US submitted some reservations. The 58 approving governments included a range of developing nations, along with Finland, France, Ireland, Sweden, Switzerland, and the UK. See IAAKSTD, above n 20, vii.
¹⁸¹ IAAKSTD, above n 20, Executive Summary, 4. ¹⁸² Von Braun, above n 70, 25.
¹⁸⁴ IAAKSTD, above n 20, 14. ¹⁸⁵ Von Braun, above n 70, 21.
¹⁸⁸ IAAKSTD above n 20, 7–8, 15, 45, 454; World Development Report 2008, above n 97, 2, 8, 10; FAO, above n 28, 100; Howe, above n 123, 137–8.
Women are the main producers of stable crops, ‘providing up to 90 per cent of the rural poor’s food intake’. The empowerment of smallholders will necessarily involve the empowerment of women in countries where they continue to suffer from entrenched discrimination, for example in terms of security of title to land.

Perhaps it could be argued that smallholders would be better off selling their farms and moving into more appropriate efficient sectors. For example, they could be employed by the export firms or large entrepreneurial holdings which will probably buy them out if they sell. Certainly, some diversification of livelihoods away from agriculture is probably desirable. However, where are the smallholders to go? Agricultural workers, whether landed or not, dominate the populations of poorer countries, so labour is hardly scarce. Indeed, agricultural labour is one of the worst sectors in terms of labour rights abuses: child labour, informal, forced and bonded labour are prevalent, as are occupational work hazards. Furthermore, many rural households are headed by women: it is extremely difficult in practice in many countries for women to leave their rural communities and seek new opportunities elsewhere. In any case, agribusiness and the larger farms are unlikely to be able to gainfully employ all smallholders who lose livelihoods, especially given greater mechanization and the truly vast number of people to absorb. The Dutch NGO, Milieudefensie (Friends of the Earth), reported the following employment statistics in agriculture in Sambas in West Kalimantan in Indonesia from 2006: 80,000 hectares provided subsistence and employment for 207,350 small farmers, while 199,200 hectares run by 15 plantation companies employed only 1,944 people. For those who cannot be employed in the agricultural industry, prospects are grim due to a lack of alternative skills. The choice may then be between staying on small plots or joining the ‘rapidly expanding slums’ in overburdened cities.

Moreover, extensive reduction in smallholders will only exacerbate the problems, discussed above, regarding the lack of competition in food and agricultural

---

189 Spieldoch, above n 133, quoting an FAO fact sheet from 2006 at 16.
190 Ibid, 19.
191 See Howe, above n 123, 140–1.
192 IAAKSTD, above n 20, 7.
193 Ibid, 27.
194 See generally, ILO and FAO, ‘Food, Agriculture and Decent Work: Decent Employment for the Rural Poor’ (undated) <http://www.fao-ilofilo-dec-employ/en/?no_cache=1> accessed 22 September 2010; see also IAAKSTD, above n 20, 35; World Development Report 2008, above n 97, 6 and 17; Murphy, above n 93, 24–5. Some of these abuses arise on smallholder farms but many arise on large farms where the labourers have no ultimate stake in the output beyond their low wages: Paul and Wahlberg, above n 94, 8.
195 Agricultural work accounts for 170,000 occupational deaths per year, half of all workplace accidents: IAAKSTD, above n 20, Executive Summary, 17.
196 IAAKSTD, above n 20, 44 and 457 (containing graphs indicating that further liberalization along the lines of Doha proposals will boost land-intensive agriculture and processed agriculture, but lead to a reduction in export markets for labour-intensive agriculture). Murphy, above n 93, 7 and 21; FAO, above n 28, 63.
197 Milieudefensie (Friends of the Earth Netherlands), Lembaga Gemawan, and KONTAK Rakyat Borneo, Policy, Practice, Pride and Prejudice: Review of Legal, Environmental and Social Practices of Oil Palm Plantation Companies of the Wilmar Group in Sambas District, West Kalimantan (Indonesia), July 2007, 20–1, as reported in Colbran, above n 169, 22.
198 Report of the Special Rapporteur on the Right to Food, above n 14, para 5; IAAKSTD, above n 20, 43.
markets, over-attention to cash crops, specialization and environmental degradation. Von Braun adds that inequality is worse in those developing States, mainly in Latin America and the Caribbean, where the average farm size is larger.\(^\text{199}\) Furthermore, while ‘[i]n some contexts small farm size may be a barrier to investment’, small farms are nevertheless ‘often among the most productive in terms of output per unit of land and energy’.\(^\text{200}\) While smallholder farms cannot compete easily with large plantations, they can nevertheless be just as if not more efficient. After all, efficient food production is not the same thing as globally competitive mass food production. In any case, the idea of shifting small farmers into larger operations is not realistic according to current trends, which suggest that ‘small-scale farms will continue to dominate the agricultural landscape in the developing world, especially Asia and Africa, at least for the coming two or three decades’.\(^\text{201}\)

Of course, the assertion that smallholders should give up their land and independence to work for larger competitors is to treat those smallholders as economic units rather than as human beings, that is means rather than ends. Indeed, other human rights issues beyond the right to food are at stake in the notion of letting smallholders and their communities wither and be replaced by larger plantations focused on monocultures and exports. Local farming practices and associated communities may be essential to the maintenance of certain cultural practices, which are simply not within the concerns of modern agribusiness.\(^\text{202}\) In particular, indigenous peoples continue to engage, where unmolested, in traditional hunting and gathering, fishing, and/or other agricultural practices. As noted by Sophia Murphy, ‘food...is tied into some of people’s oldest and most important rituals, religious beliefs and cultural practices’.\(^\text{203}\) Relevant human rights include many recognized in the Declaration on the Rights of Indigenous Peoples, and Article 27 of the ICCPR, which protects the rights of minority groups.\(^\text{204}\)

As noted by the current Special Rapporteur on the Right to Food, the ‘search for sustainable solutions’ to world hunger may not be particularly attractive to private interests.\(^\text{205}\) In particular, regarding the need to protect smallholders:

Governments should have the policy flexibility both to protect their agricultural producers whose livelihoods may be threatened by import surges or repressed prices and to allow for a sufficient degree of diversity in various types of production. Second, smallhold farmers from developing countries...must not be marginalized as a result of the development of global supply chains, and they must be either better integrated in those chains (provided the means to reap the gains from the lowering of trade barriers) or allowed to prosper by

\(^{199}\) Von Braun, above n 70, 26.

\(^{200}\) IAAKSTD, above n 20, 9; see also Von Braun, above n 70, 24. See also Camilla Toulmin and Bara Guèye, ‘Is there a future for family farming in West Africa?’ in Tiina Huvio, Jukka Kola, and Tor Lundström (eds), above n 70, 53–73.\(^\text{201}\) IAAKSTD, above n 20, 9.

\(^{202}\) Dommen, above n 29, 46.

\(^{203}\) Murphy, above n 93, 20.


\(^{205}\) Report of the Special Rapporteur on the Right to Food, above n 14, para 10.
relying on local and regional markets, which must be insulated from the damaging effects of global trade liberalization.²⁰⁶

Significant investment, whether from national governments or international donors, in better education,²⁰⁷ research, facilities for credit (including microcredit) and risk management, infrastructure, security of land tenure, safety nets for losers from trade reform, and support for producer collectives is needed to empower small-scale farming. If such reform does not precede greater liberalization, smallholders in the poorest countries are likely to lose from the liberalization process.²⁰⁸ Rather, trade liberalization is likely to favour large agribusiness firms and exacerbate the gap and dichotomization between smallholders and agribusiness.²⁰⁹ One size does not fit all: instead, ‘flexibility and differentiation in trade policy frameworks’ is needed to ensure that the poorest can also benefit from agricultural liberalization.²¹⁰

Doha round negotiations in the WTO in July 2008 broke down, ostensibly over the issue of safeguards for farmers in the developing world. The issue is however of crucial importance if the Doha round is to conclude in a manner that promotes or at least does not harm enjoyment of the right to food.

E. Food and Intellectual Property

Article 27(3)(b) of TRIPS requires States to provide for either patent or *sui generis* intellectual property (IP) rights in ‘plant varieties’, including ‘seeds, plant cells or DNA sequences’.²¹¹ As noted above, commercial farming is reliant on genetically modified seeds, which are only likely to become more prevalent on present policy trajectories. There are benefits in developing new seed varieties which might, for example, be more resistant to diseases, pests or drought, or have higher nutritional value.²¹² However, the trend towards commercialization and privatization of food products is not good news for the poor. Article 27(3)(b) mandates the private commercialization of certain food sources which will inevitably lead to rising prices which again threatens enjoyment of the right to food for the poor.²¹³ This is especially so, given the concentration of market power in companies that own the relevant rights.

It is therefore important that the traditional and informal seed systems of farmers be preserved within global agricultural policy. Sometimes farmers have little practical choice but to purchase commercial seeds. Usage of commercial seed

²⁰⁷ The World Development Report 2008, above n 97, describes education as ‘often the most valuable asset for rural people to pursue opportunities’, yet ‘education levels in rural areas are dismally low worldwide’, 9.
²⁰⁸ IAAKSTD, above n 20, 452–3; see also FAO, above n 28, 6–7, 106.
²⁰⁹ IAAKSTD, above n 20, 44.²¹⁰ Ibid, 452.
packages may be a condition of receipt of certain subsidies or credit schemes,²¹⁴ or a condition for smallholders to sell their produce to a nucleus estate.

TRIPS standards of intellectual property, which are discussed in greater detail in Chapter 7, are inherently biased towards Northern notions of invention and innovation compared to ancient and local indigenous knowledge systems. Indeed, the latter have long been neglected in agricultural policy debates.²¹⁵ Yet such knowledge is invaluable in dealing with environmental crises given that traditional farming communities have been masters at adapting to environment change for generations.²¹⁶ However, ‘indigenous’ or ‘traditional’ knowledge is generally not patentable. For example, indigenous knowledge lacks an identifiable author as it has often been passed down communally from generation to generation. Its long term evolutionary nature may also lack the requisite ‘originality’.²¹⁷ In any case, Northern notions of commodification and property rights over knowledge and innovation are not culturally consistent with indigenous notions of community rights and individual responsibilities over indigenous knowledge.²¹⁸

On the other hand, minor industrial modifications of indigenous discoveries are patentable. In such situations of ‘bio-piracy’, the patent-holder (often a Northern company) reaps the commercial benefits without any requirement under TRIPS to compensate the relevant indigenous communities who are largely responsible for the relevant idea and concept. Instead, the ‘people who originally developed [the plant or seed varieties] must buy them back at exorbitant rates’.²¹⁹ Megan Davis has commented that the past two decades has seen ‘aggressive commercial exploitation of Indigenous knowledge’ which is worth billions to corporations and States, with little economic benefit for indigenous peoples.²²⁰

Hence, TRIPS prescribes a discriminatory IP regime. Northern commercial interests and notions of invention are protected, while biopiracy is permitted to undermine the enjoyment of cultural rights by communities, particularly indigenous communities.²²¹ Examples of attempted biopiracy include the granting of a patent (later overturned) in the US with regard to medical uses for tumeric,²²² the attempt by US company Rice-Tec to patent strains of basmati rice²²³ and US company Therma Trilogy’s attempt to patent a medicinal product derived from the

²¹⁵ IAAKSTD, above n 20, 17–18, 51.
²¹⁷ See Breining-Kaufman, above n 82, 356.
²²⁰ Davis, above n 218, 19: the same point may be made about the commercialization of indigenous works of art, including paintings and performances.
²²¹ Dommen, above n 29, 9.
²²² Stiglitz, above n 219, 126.
Indian neem tree.²²⁴ Demonstrating the extent of this problem, the Traditional Knowledge Digital Library was compiled over a period of eight years in India as a tool for the prevention of misappropriations of traditional knowledge by so-called bio-prospectors, following the finding of at least 2,000 patents worldwide for ‘medical plants and traditional systems’ that related to natural remedies and traditional treatments that had long been part of Indian systems of medicine.²²⁵

IP rewards homogeneity and standardization rather than agrobiodiversity.²²⁶ Commercial efforts have been concentrated, so that only around 150 species are cultivated now, and most of the world lives off only 12 species of plants.²²⁷ The Special Rapporteur on the Right to Food reported in 2009 that 75 per cent ‘of plant diversity has been essentially lost from the agricultural cycle because farmers have foregone local varieties in favour of genetically uniform varieties’.²²⁸ Furthermore, overly protective IP systems can hinder research by closing off the opportunities for rival researchers to perform public interest research using patented products.²²⁹

Another potential problem concerns the quest for originality, which encourages genetic modification of plant breeds. Modified foods can pose dangers to unmodified crops through cross-fertilization. Furthermore, the potential risks posed by genetically modified food sources to human health are hotly debated.²³⁰

Certainly, TRIPS permits the adoption of *sui generis* IP systems rather than strict patent protection for plant varieties. Therefore, IP systems may perhaps be developed which account for the right to food and any other relevant human rights.²³¹ It is presently uncertain whether TRIPS allows such flexibility, as *sui generis* regimes must, under Article 27(3)(b), be ‘effective’.²³² Article 27(3) does not seem to recognize relevant stakeholders beyond breeders, such as farmers, so an effective *sui generis* regime under TRIPS may require greater protection for breeders than is desirable under international human rights law.²³³ On the other hand,
Article 8 of TRIPS permits Members to take measures to protect ‘nutrition’ so long as they are consistent with TRIPS: this article may imply that TRIPS permits *sui generis* regimes that are compatible with the protection of the right to food.

Most States that have eschewed patents for plant varieties have opted or been pressured to adopt the IP system developed in Europe by the International Union for the Protection of New Varieties of Plants (UPOV).²³⁴ The European Union is trying to inject UPOV compliance into its European Partnership Agreements, currently being negotiated with numerous developing States.²³⁵ UPOV grants monopoly rights to breeders.²³⁶ Farmers are permitted to reuse seeds but they cannot sell produce from those harvested seeds.²³⁷ It is to be hoped that in the future WTO Members will make use of the more balanced regimes recommended in the UN Convention on Biological Diversity 1992 (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture 2001, which both provide greater recognition for the rights of farmers (and indigenous peoples), and that such regimes are recognized as TRIPS compliant.²³⁸ For example, the CBD acknowledges the need for recognition and compensation for the commercialization of indigenous knowledge in Articles 8(j) and 10(c). At the time of writing, consultations were continuing within the WTO on ‘the relationship between the TRIPS Agreement and the [CBD]’.²³⁹

Finally, the flexibilities available in TRIPS might be undermined by bilateral or other free trade deals, as discussed in Chapter 7, or by contractual clauses between farmers and the owners of seed technology.²⁴⁰

**F. Conclusion**

What recommendations, in light of the above, can be made in respect of ongoing Doha negotiations on agriculture? Pascal Lamy has stated that:

The reduction of trade barriers in agriculture, enhanced market access for agricultural products and the gradual decrease in subsidies provided by rich countries to their farmers…all contribute to the same objective: the implementation of the right to food for all.²⁴¹

²³⁴ Report of the Special Rapporteur on the Right to Food, above n 127, para 16; Edwardson, above n 226, 388.
²³⁵ See also Chapter 9, text at notes 72–90.
²³⁷ UPOV Convention, above n 236, Article 5.
²³⁸ Edwardson, above n 226, 388–90; Breining-Kaufman, above n 82, 357.
²⁴¹ Pascal Lamy, ‘Towards shared responsibility and greater coherence: human rights, trade and macroeconomic policy’(Speech at the Colloquium on Human Rights in the Global Economy,
With respect to Lamy, this statement manifests the absolute faith shown by many free trade advocates in the beneficial outcomes of free trade. Yet such faith may be blind.

Developed States must reduce their protectionist barriers to facilitate the development of the agricultural industry in poorer countries, and to cease the harm done to developing States by those measures. But what about the rights of Northern farmers, whose rights might be harmed by the removal of Northern protectionism? Farmers are only a small part of the population in Northern countries. The trend in Northern farming is towards small hobby farms and large agribusiness farms. In fact, ‘the main beneficiaries of current [Northern] farm support are the largest farmers and agribusiness companies’. In 2005, the UNDP reported that three quarters of EU agricultural subsidies under its Common Agricultural Policy (CAP) went to 10 per cent of subsidy recipients. Wolf’s figures are less extreme but still worrying: he reports that 50 per cent of CAP subsidies went to 17 per cent of farmers. Stiglitz reports that 1 per cent of US farms receive 25 per cent of agricultural support, while 87 per cent goes to the top 20 per cent of farms. He thus argues that US subsidies have in fact ‘driven out the small farmers’, who have been tempted to sell out to agribusiness due to increased land prices. Thus, a severe reduction in subsidies would not hurt the individual farmer so much as agribusiness profits. Subsidies for poorer farmers could be phased out more slowly to allow for adjustment periods for those farmers. Furthermore, the large differences in productivity between Northern farmers and Southern farmers indicate that Northern farms can expect to maintain a competitive edge if subsidies were significantly reduced or even abolished. Northern States would certainly remain food secure and essentially self-sufficient, despite increased competition from the South.

Some liberalization by and between Southern countries should probably take place. Those States that will benefit from the lowering of barriers by developed States, such as China and Brazil, could also be required to open markets to poorer States. Indeed, inter-South trade already constitutes about one third of agricultural trade, and this trade can be expected to grow. Such States will probably be able
to provide institutional support mechanisms for local smallholders, given their likely gains if Northern subsidies are reduced. Therefore, some lowering of barriers by those States to developed States might be justified. However, care must still be taken to ensure that safeguards are available to protect the livelihoods and rights in such States of their large populations of poor farmers, so a well-designed safeguard mechanism must be put in place.

The removal of subsidies will affect the availability of cheap food and food aid, which could harm the right to food in net food importing developing States. In that case, Northern subsidies would have to be phased out gradually to allow for adjustment. Alternatively, adjustment costs could be assisted by the provision of aid through this adjustment period, probably ‘at a fraction’ of the costs of current subsidies. Food aid should be reformed to ensure that it conforms to the needs of the recipients rather than those of donors and exporters, and does not disrupt smallholder livelihoods in recipient states. Food aid should preferably be procured from local or regional markets, rather than from the donor’s market. The outcomes of WTO negotiations should facilitate such reforms of food aid. At present, this issue is being largely ignored within the WTO.

For the majority of developing States, including poor net food importing states, further liberalization of their own markets must be preceded by institutional reforms, such as significant investment in local agricultural capacities designed to ensure food security for the most vulnerable. As noted in Chapter 5, policy space must be preserved to avoid premature liberalization with potentially or even likely disastrous consequences.

A difficult issue arises with regard to the perverse incentives that might arise for some developing States with the opening up of foreign agricultural markets. Such measures might encourage certain developing States to continue to concentrate their agricultural output on cash crops, including biofuel production, when a focus on local food production is a better way of ensuring local food security. If policy space was preserved for the less agriculturally competitive developing States, such a choice (between a focus on cash crops, food production for local markets, or a mix thereof) would at least be their own rather than a policy dictated by external actors.

In order to reduce present problems in cash crop markets, liberalizing measures (for developed and the more agriculturally competitive developing States) within the WTO should be accompanied by measures (either within or outside the WTO) designed to control global volatility in agricultural markets, to unravel existing market concentrations, and to upgrade the agricultural sectors in vulnerable developing States, especially those States where the sector has declined spectacularly during the last four decades.


253 Stiglitz, above n 219, 87.
255 De Schutter, above n 13, 48–9.
Nevertheless, a persistent focus by a State on cash crop exports, if such a focus was to continue to harm food security in that State, would violate that State’s obligations with respect to the right to food.²⁵⁶ However, it is difficult to predict whether a focus on cash crops within a fairer agricultural trade system, with diminished agricultural protection amongst Northern States and other States with powerful agricultural sectors, and preserved policy space for those States with vulnerable agricultural sectors, would be a threat to food security or an avenue out of poverty for hungry people.

The bottom line, from a human rights point of view, is that the enjoyment of the right to food and the eradication of hunger are more important than the efficient functioning of global agricultural markets if those two goals should clash. While the assertion that human rights always prevail over free trade obligations is supported by this author, I recognize that that proposition remains legally controversial.²⁵⁷ The proposition is surely less controversial when the right at issue (here, the right to food and especially the right to be free from hunger) concerns life and death, or ‘human security’²⁵⁸ Market efficiency does not ensure that the hungry have access to food. It may well dictate the diversion of finite food resources to wealthier markets, leaving behind those who are too poor to attract markets and too under-resourced to compete even in a ‘fair’ market in order to climb out of poverty. Therefore, the effects of proposals for WTO agricultural rules on human rights and the right to food in particular should be explicitly considered during negotiations, monitored after the rules come into effect,²⁵⁹ and be adjusted if the effects should be negative.²⁶⁰ Indeed, the Office of the High Commissioner for Human Rights recommended human rights impact studies with regard to the right to food and trade liberalization as early as 2002, yet neither the WTO nor its members have seen fit to do so, despite the manifest human rights obligations of the latter.²⁶¹ Given the reality of hunger today, and the misery caused by the World Food Crisis, such an approach smacks of sticking one’s head in the sand, or a slavish belief in the benefits of free trade, or both.

²⁵⁶ Ibid, 43: ‘each State should decide whether or not it is resilient enough to take the risk of increased vulnerability to external shocks, by maintaining or increasing its reliance on international markets to increase food security at home—but it must to do in full awareness of the implication.’
²⁵⁷ See Chapter 2, Part B.
²⁵⁸ See, generally, Howse and Teitel, above n 61.
²⁶⁰ See, generally, De Schutter, above n 254, 14 at 22–5. See also Smaller and Murphy, above n 21.
²⁶¹ Paasch, above n 47, 42.