

**RIGHT TO FOOD PRINCIPLES VIS À  
VIS RULES GOVERNING  
INTERNATIONAL TRADE**

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**December 2003**

# Table of Contents

<b>EXECUTIVE SUMMARY .....</b>	<b>3</b>
<b>INTRODUCTION .....</b>	<b>6</b>
<i>INSTITUTIONAL INTERACTION – WTO AND INTERNATIONAL HUMAN RIGHTS .....</i>	<i>6</i>
<i>RIGHT TO FOOD AND INTERNATIONAL TRADE – INSTITUTIONAL LINK .....</i>	<i>9</i>
<b>RIGHT TO FOOD AND INTERNATIONAL TRADING RULES .....</b>	<b>11</b>
<i>AGREEMENT ON AGRICULTURE (AOA) .....</i>	<i>12</i>
<u>Introduction</u> .....	12
<u>The AoA – Legal Obligations</u> .....	14
<u>Tariffs</u> .....	15
<u>Domestic Support</u> .....	18
<u>Export Subsidies</u> .....	22
<u>AoA and Food Security</u> .....	24
<u>Proposals for Reform Impacting Food Security</u> .....	27
<i>AGREEMENT ON TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS (TRIPS) .....</i>	<i>31</i>
<u>Proposals for Reform</u> .....	36
<u>Agreement on Sanitary and Phytosanitary Standards</u> .....	37
<u>Proposals for Reform</u> .....	40
<b>OTHER AGREEMENTS RELEVANT TO THE RIGHT TO FOOD .....</b>	<b>40</b>
<i>GENERAL AGREEMENT ON TARIFFS AND TRADE .....</i>	<i>40</i>
<i>COMPETITION AGREEMENT .....</i>	<i>41</i>
<i>FISHING SUBSIDIES .....</i>	<i>42</i>
<i>CARTAGENA PROTOCOL .....</i>	<i>43</i>
<b>CONCLUSIONS – CAN THE RIGHT TO FOOD OBLIGATIONS BE RECONCILED WITH INTERNATIONAL TRADE OBLIGATIONS .....</b>	<b>45</b>

## EXECUTIVE SUMMARY

There is no formal institutional or legal relationship between the right to food and international trade. Human rights language is not explicitly referenced in the WTO Agreements while human rights bodies, albeit more critical of the effect of international trade rules on the enjoyment of human rights, have limited engagement with the WTO system. The linkage is undermined further by several WTO members' concern that human rights enforcement through WTO rules may lead to veiled attempts to protect domestic markets. Such an approach may not appreciate that economic, social and cultural rights are to be gradually implemented in accordance with a country's resource capacity. Moreover, the use of trade sanctions to obtain compliance with human rights obligations does not lead to overall improvement of human rights protection while the economic impacts can result in the exacerbation of food insecurity.

However, there is a role for human rights in the interpretation of WTO Agreements. The WTO Agreements are not to be read in clinical isolation from the wide corpus of international law that would include human rights instruments. Moreover, there is an increasing recognition that certain rights, such as the right to health and the right to food are threatened by the implementation of international trade obligations. This interrelationship is expected to forge closer together as the international trading system develops and the understanding of human rights impacts is better understood.

The right to food concerns how food is distributed and its accessibility. International trade rules can both limit and augment the availability of food supply. The right has been interpreted to compose of obligations on states to ensure that their policies ensure access and availability both domestically as well as in other countries. What is needed is further analysis on how trade laws and policies specifically impact the right to food so that trade negotiations can be better informed.

The *Agreement on Agriculture (AoA)* governs the import and exports of food and agricultural products. Tariffs, non-tariff barriers, export subsidies and other domestic support mechanisms can impede the fulfilment of the right to food. This is evident in both market distortions and the dumping of subsidised products that can engender price variability. Domestic products can be rendered less competitive with dumped products, limiting incentives for local and small-scale production of food.

Tariffs are to be lowered under the *AoA*. Market access would enable greater potential for export revenue from developing countries although the preference margin that LDCs enjoy from GSP arrangements would be lowered. This has food availability consequences, as many food insecure countries would lack a mechanism to generate revenue to assist food distribution or protect food staple crops that are more affordable to the population. The exemption granted for primary agricultural products or food staples and the use of special safeguards could stave off rising food insecurity however but this is contingent on the maintenance of such exceptions as trade is liberalised under the *AoA*.

Reduction in domestic support can ensure fairer market conditions in foreign markets but without its availability for governments, prices can be expected to increase while farmers would have limited opportunities to receive government support. Moreover, food aid may dwindle as excess supply attributable to domestic support would be less available. Where domestic support would be permitted for such purposes as food aid, food security and crop disaster insurance, the *AoA* rules limit its availability based on historical usage revealing a majority of developed countries who are ineligible. The use of export subsidies is subject to similar restrictions based on previous use not done in developing countries.

The *AoA* provides for a compensatory mechanism to assist Least Developing Countries and Net Food Importing Developing Countries. This facilitates the provision of food aid. However, the implementation of this mechanism aimed to address the negative effects of agricultural reform has not been implemented and suffers from not having any enforcement mechanism. Moreover, there is a concern that food aid may be less available when countries cannot support domestic agricultural production to ensure excess food supply.

Discussions on the *AoA* are underway in the Doha Round. Several provisions have been proposed to compensate developing countries by offering financing during import surges or food shortages. Special safeguards would also be available for special products while certain designated staple foods would not be subject to tariff reduction obligations. A revolving fund is proposed to deal with import surges and food shortages. These can all assist in country efforts to protect their population from food insecurity and ensure the fulfilment of the right to food.

In addition to the *AoA*, the *TRIPS Agreement* raises concerns for the right to food. Granting intellectual property rights on plant genetic resources can hamper the ability to reuse seeds that may even be grown for subsistence. WTO Members can adopt an alternative *sui generis* system. However, these have not been readily introduced in developing countries. Farmers' rights to retain traditional seeds or exchange them may be restored under the *sui generis* system such as the *UPOV Agreement* but most developing countries have failed to do so. The ability under *UPOV* to protect small subsistence farmers that exchange or replant seeds, as well as to protect traditional knowledge, is undetermined.

The *SPS Agreement* allows for food imports to be restricted if not banned where nutritional and dietary needs are threatened. However, SPS measures in export markets have posed great difficulties for developing countries that have not been able to meet such standards. Without these markets, government revenue, that can be used to ensure food access and availability, is reduced. How SPS measures will be governed in the future will be important since it can be anticipated that SPS measures may be resorted to more often as agricultural tariffs are brought down.

There are other emerging regimes such as a multilateral agreement on competition, fisheries subsidies and the *Cartagena Protocol* regulating the transboundary movement of genetically modified organisms. All of these examples pose potential problems for the full exercise of the right to food.

The right to food is an emerging human rights issue to be addressed at the WTO. The likely impacts of implementing WTO Agreements on food distribution, quality, accessibility and nutritional value will become more pronounced as liberalisation on trade advances. Liberalisation will have some positive outcomes as prices will drop and market access widens however there are other offsetting concerns that arise, particularly without the ability of developing countries to use *AoA* protective or compensatory mechanisms. The incorporation of right to food language into WTO requirements can supplement some of the protective mechanisms, facilitating better integration of human rights concerns into WTO decision making. It can also establish a goal to be fulfilled for countries when negotiating and implementing international trade rules.

## INTRODUCTION

### *Institutional Interaction – WTO and International Human Rights*

Presently, there is no formal institutional link between human rights and the WTO. International and international human rights bodies do not actively participate in WTO negotiations nor does the WTO formally ensure that human rights are protected. There is no specific mandate under any of the WTO Agreements to promote or protect human rights although there may be some indirect references to human rights through the WTO stated objectives of promoting principles of non-discrimination, rule of law, economic liberalism and peaceful dispute settlement.<sup>1</sup> Attempts to incorporate human rights concerns in the Doha Development Agenda have been restricted to the right to protect public health, which is to be supported when interpreting and implementing the *WTO Agreement on Trade-Related Aspects Intellectual Property Rights (TRIPS Agreement)*.<sup>2</sup> As discussed below, the right to food may be the next human right to be formally incorporated into the WTO agenda considering that the enjoyment of such right is potentially undermined by the implementation of various WTO commitments.

Opposition to the inclusion of human rights in the WTO agenda is rooted in concerns about its selective application against countries perceived to be not in compliance with international human rights standards. Attention is drawn to the use of compliance with human rights obligations as conditions to access to markets and even trade preferences. Lack of compliance may be a basis to impose trade restrictions or prohibitions in a way to prevent practices of social dumping or illegal subsidies based on human rights violations that give exporting countries an unfair advantage.<sup>3</sup> Although induced compliance can be seen as being multilateral in origin since they are based on standards present in international instruments,<sup>4</sup> they do use a different route for enforcement than anticipated by parties who have agreed to the human rights instruments. Even the application of international human rights law affords States great leverage in how to implement commitments domestically.<sup>5</sup> Trade sanctions against States because of their human rights record can represent a bald

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<sup>1</sup> See H. Lim, "Trade and Human Rights: What's at Issue?", (2001) 35:2 *Journal of World Trade* 275.

<sup>2</sup> Para. 4, *WTO Declaration on the TRIPS Agreement and Public Health*, WTO Doc. WT/MIN(01)/DEC/2 of 14 November 2001. This right is to be particularly exercised in the context of promoting universal access to medicines and use of compulsory licensing. The WTO Members have agreed to the manner in how paragraph 6 of the *Doha Declaration*, relating to compulsory licensing, is to be implemented. See *Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health*, (Decision of 30 August 2003, IP/C/W/405).

<sup>3</sup> R. Wai, "Countering, Branding, Dealing: Using Economic and Social Rights in an Around the International Trade Regime", (2003) *EJIL* 35-83.  
at 80.

<sup>4</sup> See Bhala, "Mrs. Watu: Seven Steps to Trade Sanctions Analysis", (1999) 20 *Mich J. Int'l L.* 565 at 591.

<sup>5</sup> See R. Howse & M. Matua (2000), *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organisation*, (IHRDD: Montreal). The margin of appreciation doctrine, advanced in the European Court of Human Rights, is just one example where deference is given to the State to ensure that human rights are guaranteed to its citizenry. See T.A. O'Donnell, "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights" (1982) 4 *Hum. Rts. Q* 474.

exercise of extraterritorial application of domestic laws, violating the norms of state sovereignty and the non-interference in the affairs of other states,<sup>6</sup> and limited use of countermeasures in international law. Unilateral GSP schemes, such as the US *AGOA* (*African Growth and Opportunity Act*) and the EU *Cotonou Agreement*,<sup>7</sup> call for participating countries to meet human rights obligations.<sup>8</sup>

The use of trade sanctions to induce human rights compliance has been subject to criticism since it fails to raise human rights standards and puts sectors of the population deeper into poverty.<sup>9</sup> This can threaten the enjoyment of certain rights such as the right to food.<sup>10</sup> Moreover, the sanctions are too generalised and too removed from a tailored measure devised to address a specific rights violation.<sup>11</sup> The human rights situation may not be improved as a result while citizens who rely on such trade would suffer. As a result, it may be inappropriate to introduce human rights law that has limited binding effect to the WTO system that is strong in enforceability.<sup>12</sup> Alternative ways of inducing compliance through technical assistance and capacity building may be preferable.<sup>13</sup>

Another concern is the misplacement of human rights in the domain of the WTO, particularly WTO dispute settlement procedures. There is no consensus in the human rights community about the impacts of trade agreements on human rights.<sup>14</sup> Human rights institutions do not play a role in negotiating WTO rules, leaving WTO Members, made up of individuals from mainly trade ministries, ill-equipped to properly address human rights concerns. Professor E.U. Petersmann suggests that a paradigm shift is needed in order to properly incorporate human rights in the WTO since the latter is predominantly a state-centred system, without the engagement with the intergovernmental and non-governmental human rights communities.<sup>15</sup>

Interpreting WTO Agreements in accordance with human rights instruments may also be problematic since many human rights obligations address the vertical

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<sup>6</sup> UN Charter, Art. 2(7) bars intervention by the United Nations into the domestic affairs of states. However, the Court ruled in the *Nicaragua* case that economic sanctions against Nicaragua did not breach the customary-law principle of non-intervention. See *Military and Paramilitary Activities (Nicaragua v. US)*, [1986] ICJ Rep. (June 27) at 245.

<sup>7</sup> (2000) (June 2-3).

<sup>8</sup> Respect for human rights and fundamental principles are recognised in Arts. 8 and 9 of the *Cotonou Agreement* as essential elements to the ACP-EU partnership. Whether compliance with right to food obligations are required by either the EU or the US to ensure trade preferences is unknown although one might expect that civil and political rights would be at the top of the agenda for decisions of such nature.

<sup>9</sup> See Resolution 1999/30, 26 August 1999, *Trade Liberalisation and its Impact on Human Rights* (UN Subcommission on the Promotion and Protection of Human Rights).

<sup>10</sup> Committee on Economic, Social and Cultural Rights (1997), *The Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights*, General Comment 8, UN Doc.E/C.12/1997/8, para. 3.

<sup>11</sup> S. Cleveland (2001), "Human Rights Sanctions and the WTO", 199-261 in F. Francioni, *Environment, Human Rights & International Trade* (Oxford: Hart Publishing) at 206 at 213.

<sup>12</sup> See J. Trachtman (2001) *Unilateralism and Multilateralism in U.S. Human Rights Laws Affecting International Trade*. (paper delivered at the World Trade Forum, Bern, Switzerland).

<sup>13</sup> See J. N. Bhagwati, (1994), "Free Trade: Old and New Challenges", *Economic Journal* 104.

<sup>14</sup> See Howse and Matua (2000).

<sup>15</sup> See E. U. Petersmann (2001), "Human Rights, Cosmopolitan Democracy and the Law of the World Trade Organisation", in I. Fletcher, L. Mistelis & M. Cremona, *Foundations and Perspectives of International Trade Law*, (Sweet & Maxwell: London).

relationship between individuals and states. Since WTO laws are state-focused, it is difficult to parlay the human rights discourse based on claims of individuals.<sup>16</sup> They also allow for, in the context of economic, social and cultural rights, gradual levels of implementation depending on government resources. This is of particular relevance to economic, social and cultural rights under the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, where implementation is to be progressively undertaken according to state resources and ability.<sup>17</sup> As a result, such rights are limited in its enforceability unlike WTO obligations. Dispute settlement panels and the Appellate Body may not be able to appreciate the graduated nature of economic and social rights, as well as the differentiation of implementation relating to level of economic resources, when determining the reasonableness and necessity of a trade restrictive measure on human rights grounds. Its applicability to international trade law is conceptually undefined.

Despite not being explicitly referenced in the WTO Agreements, human rights law and principles can be relevant when interpreting the provisions of the WTO Agreements. It is unclear whether a human rights violation could serve as a basis to justify a trade restrictive measure exempt from WTO obligations under the various exceptions in those agreements.<sup>18</sup> Article XX of the *General Agreement on Tariffs and Trade* allows for exceptions to protect public morals, human, animal or plant life or health,<sup>19</sup> as well as the conservation of exhaustible natural resources and national security.<sup>20</sup> Although there is no explicit provision for using human rights as a basis for exceptions under Article XX, other safeguard clauses or “public interest” clauses may allow for governments to apply WTO rules with due regard for human rights.<sup>21</sup> The UN High Commissioner on Human Rights has reported that human rights provide an important context for interpreting WTO provisions, such as the *TRIPS Agreement*.<sup>22</sup>

International human rights instruments as well as treaties and customary law reflecting other non-trade concerns may have practical application in dispute

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<sup>16</sup> See F. Garcia, “The Global Market and Human Rights: Trading Away the Human Rights Principle”, (1999) 25 *Brooklyn J. Int’l L.* 51; Wai (2003) at 39.

<sup>17</sup> (1967) 6 ILM 368. Article 2(1) of the *ICESCR* calls on States to implement the Covenant, “to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means.” Economic, social and cultural rights may be distinguishable from civil and political rights-specifically those rights that are *jus cogens* which would prevail over conflicting international trade obligations under trade agreements. See Article 53 of the *Vienna Convention on the Law of Treaties*, (1969), 8 I.L.M. 679.

<sup>18</sup> G. Marceau, “WTO Dispute Settlement and Human Rights”, (2002) 13:4 *EJIL* 753-814 at 780.

<sup>19</sup> This basis was held to lend valid support to the French ban on asbestos and asbestos products from Canada. See *European Communities-Measures Affecting Asbestos and Asbestos-containing Products*, WT/DS135/AB/R. Report of the Appellate Body, 12 March 2001.

<sup>20</sup> Article XX(a)(b)(g) and Article XXI.

<sup>21</sup> Petersmann in Fletcher *et al.* Under the pre-WTO system, Article 7(1) of the *Havana Charter* called on states to “take fully into account the rights of workers under inter-governmental declarations, conventions and agreements”. See *Final Act and Related Documents*, United Nations Conference on Trade and Employment, Havana, Cuba, 21 November 1947-24 March 1948, UN Doc. ICITO/1/4 (1948). Article XXIX:1 of the *GATT* provides that the WTO members are to observe the general principles of the various provisions of the *Havana Charter*.

<sup>22</sup> See UN Doc. E/CN.4/Sub.2/2001/13. The High Commissioner has also passed a resolution indicating that access to medication is a human right. Commission Res. 2003/29, *Access to Medication in the Context of Pandemics Such as HIV/AIDS, Tuberculosis and Malaria*.



settlement. Under Article 3:2 of the *Dispute Settlement Understanding (DSU)*,<sup>23</sup> WTO panels and the Appellate Body must apply the customary rules of treaty interpretation, which has been held to invoke the rules under the *Vienna Convention on the Law of Treaties (VCLT)*.<sup>24</sup> Article 31(3)(c) of the *VCLT* includes the relevant rules of international law applicable between the parties to be considered, which would therefore include human rights treaties. Although some analysts restrict the role of non-WTO agreements to the rules of interpretation,<sup>25</sup> others view this provision as allowing dispute settlement panels and the Appellate Body to ensure that WTO rules conform to other areas of public international law.<sup>26</sup> The latter view has been given greater support by a WTO panel who has held that the relationship between WTO agreements to customary international law is broader than the rules of interpretation and that customary international law applies generally to economic relations between WTO members.<sup>27</sup> In fact, investigations and recommendations with respect to claims of nullification and impairment under Article XXIII:2 of the *GATT*, allows for consultation with the UN Economic and Social Council and with other appropriate intergovernmental organisations. This could arguably include the FAO in relation to the right to food and food security.

There may also be a role for a human rights perspective underlying the ongoing negotiations in the Doha Round, although this may be limited.<sup>28</sup> Mauritius has called for future negotiations under Article 20 of the *Agreement on Agriculture* to be read in conjunction with the right to food expressed in Article 11 of the *ICESCR*.<sup>29</sup> When interpreting these obligations, the problems of food importing and food exporting countries should be taken into account to “ensure an equitable distribution of world food supplies in relation to need”.<sup>30</sup> However, Mauritius’ position reflects that the right to food is an ultimate goal without any policy prescriptions being offered based on the international conventions that they base their position on.<sup>31</sup>

### *Right to Food and International Trade – Institutional Link*

In order to ascertain whether the right to food is indeed threatened by international trade law, the right must be seen in its operative context. Article 25 of the *Universal Declaration of Human Rights*<sup>32</sup> and Article 11 of *ICESCR*<sup>33</sup> guarantee the right to food. This includes the right to an adequate standard of living for individuals and their families including adequate food.<sup>34</sup> The UN Committee on Economic, Social and Cultural Rights charged states with a core obligation to take the

<sup>23</sup> Annex 2 to the *WTO Agreement* (1994) 33 I.L.M. 1226.

<sup>24</sup> *United States - Standards For Reformulated and Conventional Gasoline* (1996) WT/DS2/AB/R.

<sup>25</sup> See J. Trachtman, “The Domain of WTO Dispute Resolution”, (1999) 40 *Harv. Int. L. J.* 333.

<sup>26</sup> See J. Pauwelyn, “The Role of Public International Law in the WTO: How Far Can We Go?”, (2001) 95 *AJIL* 535.

<sup>27</sup> See *Korea – Measures Affecting Government Procurement*, WTO/DS163/R, Report of the Panel, 19 June 2000, para. 7.96.

<sup>28</sup> E.U. Petersmann, “Time for a United Nations ‘Global Compact’ for Integrating Human Rights Law Into the Law of Worldwide Organisations: Lessons from European Integration”, (2002) 13:3 *EJIL* 621-650.

<sup>29</sup> WTO Doc. G/AG/NG/W/36/Rev. 1, 9 November 2000.

<sup>30</sup> *Ibid.*

<sup>31</sup> See Marceau (2002) at 779.

<sup>32</sup> (1948) UNGA Res. 217A (III).

<sup>33</sup> (1967) 6 ILM 368.

<sup>34</sup> Art. 11(1).

necessary action to mitigate and alleviate hunger and to make every effort to meet minimum obligations to the maximum of its available resources. Article 11(2)(b) of the *ICESCR* calls on States to take the problems of both food importing and food exporting nations into account “to ensure an equitable distribution of world food supplies in relation to need”. In light of this, States are to take measures through international cooperation.<sup>35</sup>

Understanding how this right transforms into a positive government obligation can inform whether the exercise of the right is impeded by international trade obligations. What can be ascertained is that States have obligations to prevent starvation as well as to take additional steps to ensure that all individuals can fully enjoy the right to adequate food. This is manifest through physical and economic access to an adequate quantity and quality of food.<sup>36</sup> Ensuring food security would imply that people have either sufficient income to acquire food or the capacity to sustain themselves by growing their own food supply.

The right to food in the context of international trade has received some recognition in international instruments. Generally, States are to consider and give effect to such right in all international agreements. The UN Committee on Economic, Social and Cultural Rights has suggested in *General Comment 12 on the Right to Food* that states should ensure that the right is given due attention in international agreements when relevant. There was also a call for the adoption of flexibility mechanisms with international trade agreements.

Commitment 4 of the 1996 *Rome Plan of Action*<sup>37</sup> addressed the interaction of the right to food and agricultural trade as well as the impact of trade liberalisation on food security. At the same conference, the delegates agreed to “strive to ensure that food, agricultural trade and overall policies are conducive to fostering food security for all through a fair and market oriented world trade system.”<sup>38</sup> However, there has been some resistance to the direct linkage between trade liberalisation, facilitated by WTO rules, and interference with the right to food. The IMF has noted that increases in food insecurity and hunger rates are due to a multitude of factors of which WTO rules play only a part.<sup>39</sup> The UN Special Rapporteur on the Right to Food confirms that trade liberalisation is one of many factors that threaten this right.

The need to ensure the right to food through international trade reform is given more immediacy in light of the UN Millennium Development Goals (MDGs). The goal to eradicate extreme poverty and hunger includes a target to halve the proportion of people who suffer from hunger between 1990 and 2015. Combating world hunger was seen to address the problems unique to certain regions. For instance, the challenge in South Asia was seen as distribution of food while the Sub-Saharan Africa challenge also highlighted a need to increase agricultural productivity.<sup>40</sup> Goal 8,

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<sup>35</sup> Article 11(2).

<sup>36</sup> See FAO (1998), *Universal Declaration of Human Rights-50<sup>th</sup> Anniversary: What is the Right to Food?*, (FAO: Rome).

<sup>37</sup> *World Summit on Food Plan of Action* (13 Nov. 1996).

<sup>38</sup> See *Rome Declaration on World Food Security*, (1996) (FAO: Rome).

<sup>39</sup> See M. Ritchie (1999), *WTO and the Human Right to Food Security*, (paper presented to the International Cooperative Agricultural Organisation General Assembly, Quebec City).

<sup>40</sup> UNDP (2003a), *Millennium Development Goals: A Compact Among Nations to End Human Poverty*, at 6.

target 12 of the MDGs calls on states to develop an open, rule-based, predictable, non-discriminatory trading and financial system. This needs to be reconciled with Target 13 of Goal 8, which requests accommodation of the special needs of LDCs through measures such as tariff and quota free access for exports.

Policy analyses are being prepared, under the Millennium Project, to advise on strategies to achieve the MDGs. The Hunger Task force was discharged with analyzing the hunger impacts of government policies and projects. One report evaluated the impacts of OECD agriculture subsidies on maize and food security in Sub-Saharan Africa.<sup>41</sup> The Report addressed how sub-Saharan African farmers and consumers would be affected by a decline in OECD agricultural subsidies and how that decline affected food security. Overall, it was discovered that reducing such subsidies would facilitate the increase of agricultural production of African farmers. Farmers would be expected to expand production in order to increase profits although such impacts will be differentiated between large and small farmers, food-self-sufficient farmers and the landless. Food security improves as production increased but would be harmed when consumption decreases due to higher prices. Increased farmers' income would allow them to buy other crops and potentially improve food security. The report concludes that a decline in export subsidies would have a negative net welfare effect since the decline in consumption may outweigh the increase in production.

The WTO Secretariat, in a joint study with the World Health Organisation, analysed the relationship between WTO Agreements and Public Health. One part of the study looked at food security. The study focussed on net food importing countries (NFIs) rather than the countries with the highest levels of malnutrition. Some have criticised this approach as neglecting the high levels of food security in other countries including ones that cannot afford to import foodstuffs.<sup>42</sup> Kent (2002) also notes that the study sees food security as impacted primarily by the ability to earn foreign exchange in order to meet food security needs, downplaying the importance of local production for local consumption.<sup>43</sup>

Overall, the relationship between human rights and international trade cannot be defined in a hierarchical way. Both areas can exist in parallel. Human rights laws and principles can also be integrated into WTO law through negotiations or through interpretation as provided under the Dispute Settlement Mechanism.

## **RIGHT TO FOOD AND INTERNATIONAL TRADING RULES**

This survey of the WTO Agreements will highlight certain instruments that could lead to either violations of the right to food or impact the implementation of that right. The analysis covers the provisions of the respective instruments where the right to food could be affected. All potential provisions are not covered since there may be emerging linkages that can only be uncovered through the implementation of WTO

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<sup>41</sup> M. Soledad Bos, *The Impact of OECD Members' Agricultural Subsidies on Welfare and Food Security in Sub-Saharan Africa: The Case of Maize*, (Goldman School of Public Policy, University of California at Berkeley).

<sup>42</sup> G. Kent (2002), *Fish Trade, Food Security and the Human Right to Adequate Food*, (November, 2002) (paper on file with author) at 23.

<sup>43</sup> Kent (2002) at 23.

commitments at the national level. The emphasis is placed on the more obviously relevant agreements. The analysis outlines the general legal architecture of the respective instruments and reviews the relevant provisions.

### *Agreement on Agriculture (AoA)*

#### Introduction

Agriculture has always been given specific attention in international trade, separate from the rules governing trade in non-agricultural goods. This can be attributed to the special mechanisms and policy instruments that governments had regularly administered in order to ensure the supply of food production and therefore food security for the population. The unpredictability of agricultural commodity prices also motivated government decisions to compensate or otherwise support farmers who may suffer as a result of worldwide market price variances.

In agricultural trade, market access restrictions and export subsidies are considered to impose the largest obstacles to the realisation of the right to food. High tariffs, non-tariff barriers as well as measures affording protection to domestic producers can impede market access. Market access can generate higher export revenue for developing country agricultural producers although whether this can be channelled to meeting domestic food security needs is uncertain.<sup>44</sup> Dumping practices, where goods are exported at prices below the costs of production and exporters receive compensatory subsidies is also seen to be inimical to agricultural production for domestic markets in developing countries. Goods that are dumped on the international market facilitate the availability of cheap imported food but this has a consequential effect of lowering food prices in developing countries therefore lowering local farmers' income and impeding incentives to invest in agriculture.<sup>45</sup> Farmers would have less profit to reinvest in improving yields.

Dumping represents perhaps the most significant deviation from *AoA* commitments with trends showing wider practice by developed countries, since the coming into force of the WTO.<sup>46</sup> The problem is exacerbated when the dumped agricultural product impacts the country's staple crop production, where farmers and other agricultural workers are dependent on such production.

The correlative consequence of dumping under WTO rules is the limited ability of WTO members to control imports. Although there are mechanisms in the WTO Agreements to counter the effects of such practices, this is still not a "realistic

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<sup>44</sup> Madeley (2002) at 5 notes that Bangladesh experienced a number of problems in trying to meet food security needs through exports.

<sup>45</sup> See C. Gonzales (2002), "Institutionalising Inequality: The WTO Agreement on Agriculture", 27 *Columbia J. Of Envtl Law* 433-490, at 447. For instance, beef dumped by EU exporters was shown to have damaged the market for domestic livestock producers in Côte d'Ivoire and Burkina Faso. See C. Stevens, J. Kennan & J. Yates (1998), *Levelling the Field: Will CAP Reform Provide a Fair Deal for Developing Countries?*, (CIIR: London). See also FAO (2003), *Food Self-reliance of Developing Countries and Trade-Distorting Subsidies*, (FAO: Rome).

<sup>46</sup> See M. Ritchie and K. Dawkins, "Agricultural Trade Symposium) WTO Food and Agricultural Rules: Sustainable Agriculture and the Human Right to Food", (2002), in K. Gallagher & J. Werksman, *International Trade and Sustainable Development* (Earthscan: London).

solution for small, powerless, poor countries”.<sup>47</sup> Trade barriers to agricultural imports are only permissible pursuant to the general exceptions in Article XX of the *GATT*, under Article XII for balance of payments purposes,<sup>48</sup> and the development provisions under Article XVIII. There is an agricultural product specific exception available under Article XI:2, which generally prohibits the use of quantitative restrictions. WTO members can impose import restrictions on any agricultural or fish product necessary for the enforcement of governmental measures to restrict quantities of the “like” or “directly substitutable” domestic products or to remove a temporary surplus of a “like” or “directly substitutable” product where the surplus is made available to certain groups of domestic consumers free of charge or at prices below current market level.<sup>49</sup> There has also been a waiver given from Article XI obligations permitting quantitative restrictions on agricultural goods unconnected to domestic production control programmes.<sup>50</sup>

Overall, the *AoA* has not led to significant changes in the operation or trends in agricultural markets, nor in a beneficial way that facilitates the exercise of the right to food. Some analyses have shown that the liberalisation of the agricultural sector in international trade will only slightly reduce food insecurity for low income food deficit countries, since the performance of domestic food production is the most important factor influencing their food security position”.<sup>51</sup> This might be attributable to the number or clauses in the *AoA* that authorise retention of some levels of market protection thereby continuing market distortion. A FAO Report of 124 countries demonstrated that only a few of them reported improvements in agricultural exports, with little change in volume exported or in the diversification of products.<sup>52</sup> Moreover the report noted that food imports were rising rapidly but that many countries that attempted to confront the import surges were unable to raise their exports or have their domestic suppliers remain competitive with the imports.

Another FAO study of 15 countries found that the *AoA* resulted in an increase in food imports in conjunction with a correlative decline in domestic food production.<sup>53</sup> Food imports increased in value above the value of offsetting agricultural exports.<sup>54</sup> A study by Madeley of 39 developing countries impacted by

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<sup>47</sup> See UNDP (2003b) *Making Global Trade Work for People* (UNDP: New York) at 138.

<sup>48</sup> Art. XII, *GATT*.

<sup>49</sup> Article XI (2)(c)(i)(ii). Article XI 2(c)(iii) also allows for import restrictions on animal feed to support domestic efforts to reduce animal production if domestic feed production is negligible. According to Desta, Article XI(2)(c)(ii) is a limited exception narrowly interpreted by *GATT* panels, with no countries being able to successfully justify import restrictions on this basis. See M. G. Desta (2002), *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture*, (Kluwer).

<sup>50</sup> Decision of March 5, 1955, *GATT B.I.S.D.* (3d Supp.) at 32.

<sup>51</sup> See S. Shapouri & M. Trueblood (2002), *Trade Liberalization, Food Security, and Food Safety Nets for Low-Income Countries*, (Washington, D.C.; U.S. Department of Agriculture) at 11 (paper on file with author). The authors note that domestic production contributes to roughly 90 percent of consumption in food insecure countries.

<sup>52</sup> FAO (2000a), *Agriculture, Trade and Food Security: Issues and Options in the WTO Negotiations from the Perspective of Developing Countries*, (FAO: Rome).

<sup>53</sup> See FAO (2001a), *Symposium on Agriculture, Trade and Food Security*, Paper No. 3: Experience with the Implementation of the Uruguay Round Agreement on Agriculture: Developing Country Experiences, <http://www.fao.org/DOCREP/meeting/x3065E.htm>.

<sup>54</sup> See FAO (2000a), *Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries*, (FAO: Rome) at 10.

agricultural trade liberalisation noted that the combination of cheaper imports depressing domestic food prices and the impeded ability to subsidise agricultural input resulted in small farmers paying more for agricultural inputs but less for their output.<sup>55</sup> As a result, rural poverty and inequality resulted, magnified by the loss of small farmer landholdings to larger export-oriented agricultural producers.<sup>56</sup>

As trade liberalisation will continue, facilitated by the reform of agricultural trade in the *AoA*, there might be more volatility in world prices for primary agricultural products jeopardising the right to food. Drops in prices disproportionately impact countries that are highly dependent on agricultural commodity exports, decreasing export revenues, and leading to reductions in food imports and thus undermining food security. Lower commodity prices can also lead to unsustainable agricultural practices, such as intensification of production for agricultural commodities for export and the introduction of higher quantities of fertiliser and other chemicals, in order to remain competitive.<sup>57</sup> Extensification (ploughing up new lands) may also become a problem attributable to this.<sup>58</sup>

### The AoA – Legal Obligations

The *AoA* forms part of the WTO Agreements reached at the end of the Uruguay Round of trade negotiations. In essence, the *AoA* is a temporary agreement, with built in commitments of the parties to begin negotiations by 2000.<sup>59</sup>

The three ‘pillars’ in the *AoA* are market access, domestic support and export subsidies. Their interrelationship is characterised by the reduction of domestic support and export subsidies while increasing market access. Such reductions were to be made by 2000 while developing countries have until 2004. LDCs are not under any schedule and were exempt from reduction commitments although they were prohibited from introducing new forms of domestic support in the future.

There is no mention of developmental concerns or the role of agriculture in the development process, although special and differential treatment (SDT) is afforded to developing countries in the *AoA* with attention given to the particular situation and problems of LDCs. The Preamble of the *AoA* calls for consideration of the particular needs and conditions of developing countries and the possible negative effects of the implementation of the reform programme on LDCs and NFIDCs. The LDC classification may fail to represent all of the food insecure countries therefore denying the latter with mechanisms that can be used to protect certain commodities critical for

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<sup>55</sup> . See J. Madeley (2000), *Trade and Hunger: An Overview of Case Studies on the Impact of Trade Liberalization on Food Security*, at <http://www.forumsyd.se> at 8.

<sup>56</sup> *Ibid.*

<sup>57</sup> See WTO Committee on Trade and Environment, (1997) *Environmental Benefits of Removing Trade Restrictions and Distortions: Note by the Secretariat*, WT/CTE/W/67 (Nov. 7, 1997). See also K. Anderson and R. Tyers (1992), "Disarray in World Food Markets: A Quantitative Assessment," Cambridge University Press: Cambridge, UK.

<sup>58</sup> M. Ritchie, *The World Trade Organisation and the Human Right to Food Security*, (Presentation to the International Cooperative Agricultural Organization General Assembly Quebec City, Quebec) August 29, 1999 (IATP: Minneapolis).

<sup>59</sup> (Art. 1(f)).

food security.<sup>60</sup> Under the *AoA*, SDT is operational in the form of increased flexibility for developing countries to implement reduction commitments with LDCs not required to undertake any such commitments although many developing countries consider the former (transition measures) to be inadequate.<sup>61</sup> Article 20 of the *AoA* permits members to take the non-trade concerns of developing countries into account in the negotiations, while the *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries*, as discussed below, provides assurances of compensation for possible negative impacts of the *AoA* as a result of the fluctuation in prices on the world markets. SDT is also recognised in the *Doha Declaration* as present to “enable developing countries to effectively take into account their development needs, including food security and rural development.”<sup>62</sup> S&D Treatment will play an integral role in the negotiations and is to be activated in the Schedules of concessions and commitments.

However, the effect of SDT in the *AoA* is limited by a number of factors unique to the agreement itself. Firstly, the phased reduction of subsidies for countries renders the special treatment less relevant. In fact, developed countries are given preferential treatment to continue using subsidies and domestic support simply because of the fact that they had used them in the past.<sup>63</sup> As a result, SDT is better effected by imposing greater discipline of WTO rules on developed countries rather than attempting to preserve the right to use trade-distorting measures.<sup>64</sup>

### Tariffs

The *AoA* provides for the eventual reduction in tariffs for agricultural products. This can facilitate better market access for agricultural exports although such lowering may jeopardise the existing trade advantages through non-reciprocal trade preference schemes that allow many LDCs tariff free access to developed country markets.<sup>65</sup> The preference margins under such schemes have fallen from the tariff reductions coming under the Uruguay Round Agreements.<sup>66</sup>

Lowering tariffs may preclude developing countries from using an available method of protecting domestic markets, and therefore food security, since alternative safety measures such as special safeguards, have only limited application for a few

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<sup>60</sup> It has been suggested that perhaps LDCs should be allowed to permit domestic protection up to the point where the share of the world market would not be WTO consistent along the stipulations in Article 27 of the *Agreement on Subsidies and Countervailing Measures*. See FAO (2001b), *Incorporating Food Security Concerns in a Revised Agreement on Agriculture*, (FAO: Rome), Discussion Paper No. 2.

<sup>61</sup> FAO (2002a), *Impact of the Uruguay Round Agreements of Relevance to the Agricultural Sector*, (FAO: Rome) at 3.

<sup>62</sup> WTO, *Doha Ministerial Declaration*, WT/MIN(01)/DEC/1, adopted on 14 November 2001, para.13.

<sup>63</sup> Desta (2002) at 38.

<sup>64</sup> *Ibid* at 38.

<sup>65</sup> Some studies have shown that African countries would experience net trade losses as a result of tariff cuts under the *AoA*. See A. J. Yeats (1994), *What are OECD Trade Preferences Worth to Sub-Saharan Africa?*. (Washington, DC: World Bank Policy Research Working Paper No. 1254); A. Weston (1995), *The Uruguay Round – Costs and Compensation for Developing Countries*, (UNCTAD: Geneva).

<sup>66</sup> The FAO estimates that the preference margins enjoyed by all ACP countries for all agricultural products under the *Lomé Agreement* have decreased by 16 percent. See FAO (2003), *Trade Preferences in Agricultural and Adjustment Issues*, (FAO: Rome).

developing countries. The denial of tariff utilisation can also reduce revenue raised from such duties that can be used to combat food insecurity.<sup>67</sup>

Developed countries are to reduce their agricultural tariffs by 36 percent while developing countries are to do it by 24 percent over a ten-year period. This is expected to be a significant task considering that agricultural tariffs average 62 per cent.<sup>68</sup> This rate of reduction represents a global figure, therefore not prohibiting product specific tariff peaks and escalation for products of particular interest to developing countries. These would include coffee, cocoa, oilseeds, vegetables, fruits and nuts.<sup>69</sup> Most of the tariff drops to date have been in non-sensitive and infrequently traded products that were already subject to low rates.<sup>70</sup> Incidentally, developing country tariffs were already relatively low in developing countries when the *AoA* came into force, due mainly to requirements under World Bank and IMF structural adjustment programmes rather than Uruguay Round reforms.<sup>71</sup> This has ultimately limited the ability to developing countries to impose higher tariffs that are in competition with locally produced commodities that are food staples.

One of the goals of the *AoA* is to convert the use of non-tariff measures into tariffs. Under the ‘tariffication’ process, tariffs would be placed into the Schedules of Concessions under *GATT* Article II. The principle behind tariffication “is that tariffs are more transparent and therefore can be more easily negotiated downwards in the future”.<sup>72</sup> Under this process, minimum tariff cuts (15 percent for developed and 10 percent for developing countries) per product were agreed to. Tariff rate quotas have been introduced to ease this process so that countries choose a low or zero tariff for a fixed quantity of a product but charge a higher tariff for additional quantities.

The process of tariffication does not apply to primary agricultural products.<sup>73</sup> This can impact both goods that are for domestic consumption as well as ones for export purposes. The former type of agricultural goods includes predominant staples in the traditional diets of developing countries. Primary agricultural products, as well as designated products must meet with the conditions for special treatment. One such condition is that they are designated with a symbol indicating that it is subject to

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<sup>67</sup> FAO (2001b), *Incorporating Food Security Concerns in a Revised Agreement on Agriculture*, (FAO: Rome) Discussion Paper no. 2.

<sup>68</sup> See T. C. Beirle (2002), “From Uruguay Round to Doha: Agricultural Trade Negotiations at the World Trade Organisation”, (Resources for the Future, Washington, D.C.), Discussion Paper 02-13.

<sup>69</sup> M. Shirotori (2000), “Notes on the Implementation of the Agreement on Agriculture”, in UNCTAD, *Positive Agenda and Future Trade Negotiations*, (UNCTAD: Geneva).

<sup>70</sup> See K. Anderson, B. Hoekman and A. Strutt, (1999), *Agriculture and the WTO: Next Steps*, Paper prepared for the Second Annual Conference on Global Economic Analysis, 20-22 June, Helmaes, Denmark.

<sup>71</sup> See FAO (2000), *State of Food and Agriculture* (FAO: Rome) at 26. Structural Adjustment Policies have required liberalisation measures, such as the privatisation of parastatal enterprises, the elimination of subsidies and price controls, and the abolition of marketing boards that goes beyond existing *AoA* commitments. See S. Madeley (2000), *The Impact of Trade Liberalisation on Food Security and Poverty*, [http://www.tradeobservatory.org/library/uploadedfiles/Impact on Trade Liberalisation on...](http://www.tradeobservatory.org/library/uploadedfiles/Impact%20on%20Trade%20Liberalisation%20on...)

<sup>72</sup> M. Matsushita, T. J. Schoenbaum & P. C. Mavroidis (2003), *The World Trade Organization: Law, Practice and Policy*, (Oxford University Press; Oxford) at 136.

<sup>73</sup> See *AoA*, Annex 5 - *Special Treatment with Respect to Paragraph 2 of Article 4*.



special treatment reflecting factors of non-trade concerns such as food security and environmental protection.<sup>74</sup>

Article 5 of the *AoA* allows countries to apply special safeguards (additional duties) to protect against sudden import surges (imports of produce exceed a certain trigger level) or falls in world prices (when price falls below a certain trigger level).<sup>75</sup> This will be necessary in light of the bringing down of allowable tariff rates. Safeguards can be effective in thwarting the perverse effect of reducing market access as a result of the tariffification process.<sup>76</sup> The measures are reserved for countries that have undertaken tariffification. What has occurred however is that mainly developed countries use the safeguard measures since most of the developing countries have not historically engaged in imposing non-tariff measures.<sup>77</sup> Most developing countries opted to declare general ceilings for tariffs across all their imports and thus precluding them from using safeguard measures. In a WTO Secretariat report, it was noted that 39 WTO Members have reserved the right to use special safeguards on hundreds of products but only 10 Members have actually used it.<sup>78</sup>

Tariffification has resulted in industrial countries raising tariffs higher than what existed before the Uruguay Round – otherwise known as “dirty tariffification”.<sup>79</sup> Another form of dirty tariffification is the setting of tariff equivalents for non-tariff barriers at high levels, resulting in a more import restrictive barriers than the non-tariff barrier predecessors.<sup>80</sup> Most of OECD countries have engaged in dirty tariffification while most developing countries did not, since many had declared themselves bound to tariffs already subject to reduction commitments.<sup>81</sup> The highest tariffs levied under this process were for products of particular interest to developing countries exporters such as sugar, meat, milk products, cereals and tobacco as well as

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<sup>74</sup> *Ibid*, s. 1(d). Moreover, imports of the designated products must comprise less than 3 per cent of corresponding domestic consumption in the base period 1986-1988.

<sup>75</sup> Art. 5(1). Trigger levels are set according to a schedule as stipulated under Article 5(4). When using SSG measures under the *AoA*, WTO members cannot also have recourse to the general safeguard measures permitted under Art. XIX of the *GATT*. See Art. 5.8, *AoA*.

<sup>76</sup> See I. Sturgess (2000), “The Liberalisation Process in International Agricultural Trade: Market Access and Export Subsidies”, in S. Bilal & P. Pezaros (eds.), *Negotiating the Future of Agricultural Policies: Agricultural Trade and the Millennium WTO Round* (Kluwer Acad. Pubs: Dordrecht) at 135.

<sup>77</sup> FAO (2000a) at para. 34. Almost 80 per cent of tariffed items of the OECD countries are eligible for SSGs. See UNCTAD (1995), *Identification of a New Trading Opportunities Arising from the Implementation of the Uruguay Round Agreements in Selected Sectors and Markets*, (TD/B/WG.8/2). For a list of WTO developing country members who have reserved the right to use special safeguards on agricultural products, see WTO (2003) *WTO Agricultural Negotiations: The Issues, and Where We Are Now*, [http://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgrnd00\\_contents\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd00_contents_e.htm)

<sup>78</sup> See WTO, *Special Agricultural Safeguard: Background Paper by the Secretariat: Revision*, WTO Doc. G/AG/NG/S/9/Rev.1, 19 February 2002, para. 3.

<sup>79</sup> See UNDP (2003b), “Making Global Trade Work For People”, (Earthscan: London) at 115.

<sup>80</sup> I. Sturgess (2000), “The Liberalisation Process in International Agricultural Trade: Market Access and Export Subsidies” in S. Bilal & P. Pezaros (eds.) *Negotiating the Future of Agricultural Policies: Agricultural Trade and the Millennium WTO Round* 135 at 139.

<sup>81</sup> See D. Hathaway & M. Ingco (1955), “Agricultural Liberalisation and the Uruguay Round”, in W. Martin & A. Winters eds., *The Uruguay Round and the Developing Countries*, World Bank Paper No. 307 at 8. See also OCED (1999), *Preliminary Report on Market Access of Uruguay Round Implementation*, Document COM/AGR/AON/TD/WP 50 (June 1999). However, any assumption that developing countries generally do not engage in dirty tariffification may overlook the fact that developing countries chose bound ceilings that were above the tariffs applied prior to the Uruguay Round.

fruits and vegetables.<sup>82</sup> Most of the larger tariff reductions were done on items that were not produced domestically or where tariff levels were already quite low.<sup>83</sup> Tariffs also appear to be higher for more processed goods, relegating developing countries to exporting primary products in order to benefit from the lowest tariffs.<sup>84</sup> Overall, the tariffication process has had limited impact on opening market access for developing country exports, providing minimal revenue that can be used to address food security needs.

### Domestic Support

There are concerns that without any international regulation of domestic support measures, any benefits accruing from the overall reduction of tariffs on agricultural products will be offset by measures that protect domestic interests as well as create unfavourable competition for imports. Such measures can stimulate national production to the point of excess, thus leading to dumping and other price distorting effects that can impair local production and therefore the accessibility to food. The prohibition of domestic support can also restrict food insecure countries from using support mechanisms to ensure continuous domestic production to facilitate food access and protect subsistence level farming.

Reductions in domestic support may also lead to lower agricultural yield in the international market, therefore impacting the surpluses geared towards food aid. As supply drops, it is expected that prices would rise, rendering it more difficult for NFI countries to purchase on the world market and entrenching their dependence on food aid. Rising prices could reduce food aid volumes unless greater donor resources are directed towards food aid.

Domestic support is subject to the obligations set out in Article 6 of the *AoA*. There are scheduled reductions as well as a number of exceptions.<sup>85</sup> Reduction commitments are to be made through decreases in Aggregate Measurement of Support (AMS) granted by domestic agricultural policies in relation to both product-specific support and non-product specific support. The base total AMS for each WTO member is a quantification of all domestic agricultural subsidies granted during the 1986-1988 base period that are not exempted under other parts of the *AoA*.<sup>86</sup> The amount of domestic support per annum cannot exceed the commitment level specified in the WTO Member's schedule.<sup>87</sup> Article 6(2) exempts 3 types of measures from the calculation of the AMS of developing countries. The three measures are:

- a) generally available agricultural investment subsidies;

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<sup>82</sup> UNCTAD/WTO Joint Study (2002), *The Post-Uruguay Round Tariff Environment For Developing Country Exports: Tariff Peaks and Tariff escalation*, TD/B/COM.1/14/Rev. 1, 4-6.

<sup>83</sup> FAO (1999), *Symposium on Agriculture, Trade and Food Security*, Paper No. 4 at 27. See also Gonzalez (2002) at 461. Moreover, tariff reductions were found to be lower on temperate zone products rather than tropical products.

<sup>84</sup> FAO (2000a) at 28.

<sup>85</sup> See Article 6(1), which refers to criteria for exceptions, listed in Article 6 as well as Annex 2 to the *AoA*.

<sup>86</sup> Art. 6:1.

<sup>87</sup> Article 6(3). This *AoA* requires a 20 percent reduction in Base Total AMS over 6 years (1995-2000) for developed countries and 1.3 percent reduction over 10 years (1995-2004) for developing countries.

- b) agricultural input subsidies generally available to low income and resource poor producers; and,
- c) domestic support to encourage diversification from growing illicit narcotic crops.

All 3 can be added to the list of green box measures that are exempt from the calculation of the AMS. AMS calculations would also not include:

- product-specific domestic support where it does not exceed 5 per cent of that member's total value of production of a basic agricultural product during the relevant year; and
- non-product-specific domestic support where it does not exceed 5 per cent of the value of the WTO Member's total agricultural production.<sup>88</sup>

During the phase in period ending on 31 December 2000, developed states are to reduce their AMS by 20 percent. This requires a 20 percent reduction in Base Total AMS over 6 years (1995-2000) for developed countries and 13.3 percent over 10 years (1995-2004) for developing countries. LDCs are not under any obligation to reduce domestic support. For countries that do not give large subsidies to agriculture, the *AoA* provides for allowable *de minimis* levels of support: 5 per cent for industrial countries and 10 per cent for developing countries. Certain types of domestic support programmes are exempt from the *de minimis* calculation if they do not have the effect of providing price supports to producers. This would include support for food security, domestic food aid, participation in social or crop disaster insurance, structural adjustment assistance, and regional assistance programmes.<sup>89</sup> These are referred to as the green box and blue box subsidies. Red box subsidies that are effectively non-tariff measures such as variable levels are to be replaced by tariffs through "tariffication".<sup>90</sup> Red box subsidies include export subsidies as well as import substitution subsidies (i.e. subsidies contingent upon the use of domestic over imported products). Blue box subsidies are to be eventually phased out.

Under the Blue Box, Article 6:5 of the *AoA* allows countries unlimited spending for direct payments to farms as long as these are linked to production-limiting programmes based on fixed areas and yields, or per head of livestock. This would exempt such payments from the calculation of Current Total AMS on the condition that certain conditions are met such as that the payments are conditional upon other production-limiting measures taken by the recipient of the payment, including on a fixed acreage and yields, or on 85% or less of the base level production.<sup>91</sup> This provides an exception to the general rule in the *AoA* that all subsidies linked to production must be reduced or kept within a *de minimis* level. It covers payments directly linked to land size or livestock so long as the activity supported limits to production. Government support to limit production is permissible but support to increase production is not. This is problematic for developing countries

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<sup>88</sup> Article 6(4).

<sup>89</sup> Article 6.

<sup>90</sup> Article 4.

<sup>91</sup> Art. 6 (5).

since support for increasing production is what is needed to address food insecurity issues.<sup>92</sup>

Annex 2 identifies green box subsidies, including research, infrastructure, damage control, domestic food aid and extension, training, and advisory services. Blue box subsidies are listed in Art. 6, which include certain developing country subsidies designed to encourage agriculture production and certain direct payments aimed at limiting agricultural production.<sup>93</sup> Production limiting payments, such as compensation or deficiency payments, would fall under the blue box exemption from the Current Total AMS calculations. Although food insecure countries can take advantage of such exceptions to provide support for right to food purposes, developed countries are the greatest users of green and blue box subsidies. Developing countries may lack the resources and means to capitalise on the permissibility of such domestic support.

For Green Box measures, there are general requirements that the measures are to have minimal or no trade distorting effects. The *AoA* lists measures as well as general and policy specific criteria to be satisfied before being exempted from the AMS calculation. Market price support is explicitly exempted. Support must be provided through a publicly funded government programme not involving transfers from consumers and they must not have the effect of providing price support to producers. Any payments must be made in a way that is decoupled from production decisions and trade. These would include income support to farmers decoupled from production,<sup>94</sup> income safety-net programmes, input subsidies made available to low-income and resource-poor farmers in developing countries, crop insurance programmes, domestic food aid, infrastructure development and payments under environmental programmes.<sup>95</sup> Environmental protection subsidies would also fall under the green box.

Input subsidies made available to low-income and resource-poor farmers also fall under the Green Box. However, subsidies may have difficulty falling under this definition. For instance, India's input subsidies for basic foodstuffs cannot benefit from these exceptions because they are not restricted to low-income or resource-poor farmers.<sup>96</sup> Input subsidies would not be available if they were made across the board or sector-wide. Sector-wide subsidies may be needed for developing countries since programmes targeted to low-income or resource poor farmers would be difficult to apply where information on income and wealth is difficult to obtain.<sup>97</sup> Farmers who are not identified as low-income or resource-poor would still be vulnerable to becoming food insecure due to other pressures from foreign exporters benefiting from subsidies and other forms of domestic support.

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92 S. Murphy, *Food Security and the WTO*, (Minneapolis: Institute for Agriculture and Trade Policy) ([www.cafod.org.uk/policy/wtofoodsecurity.shtml](http://www.cafod.org.uk/policy/wtofoodsecurity.shtml)) at 14.

93 Art. 6(5).

94 This has been used by the US, replacing the deficiency payments that would fall under the eventually phased out blue box subsidies.

95 See Annex 2.

96 Gonzales (2002). See also FAO (2001a).

97 *Ibid.*

Since Green Box support is considered to be consistent with the *AoA*, there has been a trend in developed countries to reorient their spending in this way. This has reduced AMS levels but overall, domestic support has not been reduced.<sup>98</sup> Green Box spending has increased, alongside overall increases in OECD country agricultural support, which conflicts with the intent of the *AoA*.<sup>99</sup>

Green Box subsidies are considered to be trade-neutral although this does not represent a universal consensus among WTO Members. Some have called for either a tightening up of Green Box criteria or even the total elimination of the box, with all measures to be shifted to the Amber Box category of support to be ultimately phased out.<sup>100</sup>

Subsidies that are permissible but subject to limits are called Amber Box subsidies. Amber Box subsidies are deemed to be the most trade-distorting and form part of the Current Total AMS.<sup>101</sup> Action can be taken against them where they cause adverse trade effects. Under the Amber Box, payments and subsidies paid to producers are to be phased out. The ability of WTO members to use preferred instruments for agricultural support, while cracking down on tariffs, quotas and subsidies has been seen to undermine food security, farmer livelihoods and employment in developing countries.<sup>102</sup> Although rural development, food security or generally special and differential treatment exceptions could be excluded from Amber Box subsidies, this may still even these can be limiting for many developing countries.<sup>103</sup> Generally, the Amber Box engenders an imbalance between countries that can, financially and legally use domestic support measures.<sup>104</sup>

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<sup>98</sup> See OECD (2001), *The Uruguay Round Agreement on Agriculture: An Evaluation of its Implementation in OECD Countries*.

<sup>99</sup> UNDP (2003b) at 123.

<sup>100</sup> See proposal by India, G/AG/NG/W/102, 15 Jan. 2001.

<sup>101</sup> Art. 6.5.

<sup>102</sup> UNDP (2002b) at 117.

<sup>103</sup> Gonzales (2002) notes that India's input subsidies for basic foodstuffs cannot benefit from these exceptions because they are not restricted to low-income or resource-poor farmers. See also FAO (1999) Symposium Paper at 15. Input subsidies would not be available if they were made across the board or sector-wide. Gonzalez further notes that sector-wide subsidies may be needed for developing countries since programmes targeted to low-income or resource poor farmers would be difficult to apply where information on income and wealth is difficult to obtain. Moreover, targeted programmes can deter subsidy recipients from keeping their production low so that they can benefit from being placed in the beneficiary category.

<sup>104</sup> UNDP (2002) at 119.

## Export Subsidies

Export subsidies are considered to have more adverse effects on food security, livelihoods and employment than many domestic support measures.<sup>105</sup> Export subsidies are seen by developing countries to be the “most destructive trade policy instrument”.<sup>106</sup> These allow for the export of agriculture surpluses at prices below production costs, which bring world prices down and cause import surges and agriculture dumping in developing countries. Countries that use such subsidies can be seen to violate right to food obligations since the impacts of such measures can limit the availability and access to food in other countries where domestic production decreases.

The subsidies are contingent upon export performance and must be, as generally defined in the *Agreement on Subsidies and Countervailing Measures (SCM Agreement)*, a financial contribution made by a government or any public body conferring a benefit on the recipient.<sup>107</sup> Agricultural export subsidies would technically be in violation of Article XVI:3 of the *GATT* prohibiting export subsidies where the subsidising country gains more than an equitable share of the world export trade in the subsidised product.<sup>108</sup> The benefits that may accrue to net food importing countries by making foodstuffs available at lower prices is offset by the lesser need for food aid for these countries when international prices are lowest despite continuous limited ability of governments to pay for food imports.

The “peace clause”, otherwise known as the “due restraint” clause, expires at the end of 2003.<sup>109</sup> This clause prevents WTO members from using trade measures against other WTO members (i.e. anti dumping measures or countervailing measures under Article 3 of the *SCM Agreement*), in response to agricultural subsidies, or the initiation of WTO dispute settlement proceedings, as long as the rules of the *AoA* are being abided by.<sup>110</sup> Non-violation nullification and impairment claims are also excluded as long as the level of subsidisation does not exceed what was granted in the 1992 marketing year.<sup>111</sup> Subsidies that exceed reduction commitments do not benefit from protection under the peace clause. Subsidies may still be subject to countervailing duty actions, although Members are advised to exercise due restraint in initiating such actions.<sup>112</sup> The effect of the clause is that it would effectively preclude any countervailing duty of action or other subsidy action as well as complaints that a measure impairs tariff concessions. Developing countries, for instance, would be precluded from taking action in order to ensure the fulfillment of right to food

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<sup>105</sup> UNDP (2002b).

<sup>106</sup> Desta (2002) at 21.

<sup>107</sup> See Art 1(e), *AoA* and Article 1, *SCM Agreement*.

<sup>108</sup> However, this mounts some evidential difficulties since it is difficult to show changes in market share. See GATT Panel, *European Communities-Subsidies on Exports of Wheat Flour* (1993), 18 *US Export Weekly (BNA)* 899.

<sup>109</sup> Art. 13, 1(f).

<sup>110</sup> Art. 13 (a). In addition to export subsidies, this would apply to green box domestic support measures as well as blue box and *de minimis* domestic support, with the latter two subject only to temporary due restraint requirements imposed on WTO members in relation to countervailing duties, but not a total exemption.

<sup>111</sup> Art. 13(b)(ii)-(iii).

<sup>112</sup> Art. 13(b)(i).

commitments, against subsidised products despite the exported products being well below fair market prices. Despite the existence of the peace clause, there are still more agriculture and food related trade disputes in the WTO than under the *GATT* system that did not have an agricultural agreement.

The peace clause is to expire at the end of 2003. At the moment, an extension of the time period is not on the table of the *Harbinson Draft* (discussed below). Without a formal extension, which must be adopted by consensus, disputes may be brought that were precluded by the peace clause.<sup>113</sup>

Listed export subsidies are to be reduced in terms of budgetary outlay and export quantity (subsidised quantities).<sup>114</sup> The types of subsidies under this discipline are listed specifically in Article 9.1.<sup>115</sup> Non-listed subsidies are also disciplined so that they cannot be applied in a way resulting in a “circumventing of export subsidy commitments”.<sup>116</sup> In addition, new export subsidies cannot be levied for agricultural products that were not subsidised during the 1986-1990 base period.<sup>117</sup> This would preclude WTO members from applying subsidies when they have not used them during the base period. This has a disproportionate affect on developing countries, which have traditionally taxed the agricultural sector rather than subsidising agricultural production.<sup>118</sup>

Levels of reduction for budgetary outlays for export subsidies and the quantities benefiting from such subsidies at the end of 2000 is 36 percent and 21 percent for developing countries. For developed countries, the percentages are 24 and 14 percent. The requirement to reduce export subsidies applies on a commodity-by-commodity basis rather than an industry-wide average.<sup>119</sup> Developing countries are not required to undertake the commitments for export subsidies where the objective of the subsidies is to reduce the costs of marketing exports of agricultural products, as well as internal transport and freight charges on export shipments more favourable than those for domestic shipments.<sup>120</sup>

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<sup>113</sup> In light of this, it has been anticipated that some WTO members may alter their modes of support through “tariffs and decoupled payments systems”, which would not run *prima facie* afoul of WTO requirements governing subsidies since they would not cause displacement and price effects and are potentially non-specific. Steinberg & Josling (2003) at 415.

<sup>114</sup> See Art. 10.1.

<sup>115</sup> In the *Canada-Dairy Case*, Canada was found to be in violation of Article 9.1, due to the government’s pricing for milk used in processed dairy products for export at a much lower level than milk sold in the Canadian domestic market. The panel identified three elements of what constitutes an export subsidy: provision of products for use in export production on terms more favourable than for provision of like products in domestic production; direct or indirectly government action; and on terms more favourable than are commercially available on world markets.

See *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103 AND WE/DS113.

<sup>116</sup> Article 10.1.

<sup>117</sup> Art. 3.3.

<sup>118</sup> Gonzales (2002) at 464. Only 25 out of 135 WTO members are effectively permitted to subsidise exports. See C. Stevens *et al* (2001) *The WTO Agreement on Agriculture and Food Security*, Economic Paper 42, (Commonwealth Publications: London).

<sup>119</sup> Article 9.

<sup>120</sup> Art. 9(4).

Ironically, the EU is the largest user of global export subsidies, accounting for 90 per cent of worldwide use.<sup>121</sup> The US applies different forms of assistance for agricultural exporters such as export credits. Export credits do not technically run afoul of WTO rules although they render similar distortions to commodity prices. Export credits are usually given in the form of guaranteed bank loans at competitive interest rates. Government credits are used to assist farmers hurt by declines in commodity prices with the aid being direct but not contingent on export performance, therefore compatible with *AoA* requirements.<sup>122</sup> Other export oriented instruments such as export taxes and restrictions are also outside the parameters of what constitutes an export subsidy in the *AoA*.

### AoA and Food Security

The Preamble to the *Marrakesh Agreement Establishing the World Trade Organisation (WTO Agreement)* recognises numerous non-trade objectives in the preamble. These include raising living standards, optimal use of the world's resources in accordance with the objective of sustainable development, and ensuring full employment and a large and steadily growing volume of real income. The *AoA* recognises the importance of food security in its preamble, representing a non-trade concern that is to be regarded by WTO members. The combination of these non-trade concerns provides substantive support for members to take measures to protect citizens' right to food and ensure its fulfilment. However, the emerging disciplines on tariffs, domestic support and export subsidies under the *AoA* have limited the range of policy interventions to guarantee such right.<sup>123</sup>

How trade rules address the facilitation of food aid is problematic. By broadening the discipline of agricultural rules, it may lead to a deficit in available food surpluses for this purpose that benefit from subsidies. The use of food aid, including concessional food sales, by food exporting countries can be used by countries to circumvent their obligations regarding export subsidies.<sup>124</sup> Food aid may be seen as reflecting more the presence or absence of surplus production in the donor countries rather than responding effectively to the food aid needs of countries.<sup>125</sup> If food aid shipments, other than outright gifts, constitute subsidised exports, it could jeopardise countries that are dependent on food aid. The solution was the creation of a threshold level of concessionality set by the *Food Aid Convention* so that transactions that qualify as food aid are excluded from the rules governing export subsidies.

In anticipation of the negative consequences flowing from greater liberalisation in the agricultural sector, there is an accommodation provided for in the WTO. The *Marrakech Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries* (NFIDCs) recognises that "progressive implementation of the Uruguay Round results as a whole will generate increasing

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<sup>121</sup> UNDP (2002b) at 120.

<sup>122</sup> Sturgess (2000) at 150.

<sup>123</sup> UNDP (2002b) at 126.

<sup>124</sup> M.G. Desta (2001), "Food Security and International Trade Law: An Appraisal of the World Trade Organisation Approach", (2001) 35:3 *JWT* 449-468.

<sup>125</sup> *Ibid.*



opportunities for trade expansion and economic growth to the benefit of all participants.” However, the *Decision* accounts for the short term costs by providing for food aid, short term financing of normal levels of commercial imports, favourable terms on agricultural export credits and technical and financial assistance in order to improve agricultural productivity. During the reform process, it is noted that least developing countries (LDCs) and NFIDCs “may experience negative effects such as the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs.” Food aid is a critical concern for many developing countries that rely on it much more for overall food supplies rather than commercial imports.<sup>126</sup> As a result, food aid levels are to be made available at progressively more concessional terms. This *Decision* is to be read alongside the preamble to the *AoA*, where agricultural reform is to be made in an equitable way taking into account the possible negative effects of the implementation of the reform programme on LDCs and NFIDCs.

NFIDCs are WTO members that were net importers of basic foodstuffs in any three of the five years for which data is available. They must notify the Committee on Agriculture of its decision to be listed and present evidence to other WTO members demonstrating that they are net food importing.<sup>127</sup> Such process has been criticised since it does not use the fact that a country is already a LDC as a starting point nor does the process apply objective criteria.<sup>128</sup> Another criticism is that the NFIDC classification is a less precise indicator of food vulnerability than whether a country is a LDC.<sup>129</sup>

Financial support is to be made available together with food aid, pursuant to the *AoA*, to ensure adequate food imports are maintained and to improve agricultural productivity and infrastructure. There are three mechanisms available under the *Decision* to WTO members:

- review the level of food aid and initiate negotiations in the appropriate forum in order to establish a level of food aid comments sufficient to meet the legitimate needs of developing countries during the reform programme;<sup>130</sup>
- adopt guidelines to ensure that an increasing proportion of basic foodstuffs is provided to these countries in fully grant form or at appropriate concessional terms in line with Article IV of the *Food Aid Convention 1986*;<sup>131</sup> and,

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<sup>126</sup> S. Shapouri & M. Trueblood (2002) at 11.

<sup>127</sup> WTO doc. G/AG/3, 24 November 1995.

<sup>128</sup> See E. Bias-Bonilla, M. Thomas, and S. Robinson (2002), *Trade Liberalisation, WTO and Food Security*, (Discussion Paper 82. International Food Policy Research Institute, Trade and Macroeconomics Division, Washington, D.C.).

<sup>129</sup> See E. Diaz-Bonilla, S. Robinson, M. Thomas and Y. Yanoma (2002), *WTO, Agriculture, and Developing Countries: A Survey of Issues*, International Food Policy Research Institute, Washington, D.C.) (TMD Discussion Paper No. 81). The authors note that NFIDCs have on average 5 times the Gross National Product of LDCs and include four countries that are classified as upper middle income by the World Bank.

<sup>130</sup> Para. 3(i)).

<sup>131</sup> Para. 3(ii)).

- give full consideration to request for financial technical assistance.<sup>132</sup>

Other related provisions include:

- differential treatment in the soon to be negotiated agreement on agriculture export credits;<sup>133</sup> and,
- improved access to resources of international financial institutions in order to address short-term difficulties in financing normal levels of commercial imports.<sup>134</sup>

These mechanisms install avenues for all countries to assist in the universal fulfilment of right to food. However, operation of these mechanisms has been undermined by a number of factors including the requirement of proof of the need for assistance and that the need resulted from the reform process under the WTO Agreements.<sup>135</sup>

The level of food aid to be reviewed is established by the Food Aid Committee of the *Food Aid Convention (FAC)*.<sup>136</sup> This is expected to be the “appropriate forum” envisioned under para. 3(ii) of the *Decision*.<sup>137</sup> The Food Aid Committee under the *FAC* is represented by only a small number of donor nations.<sup>138</sup> The *FAC* provides that its main objective is to secure at least 10 million tonnes of food aid annually in the form of grain or other accepted products suitable for human consumption. There are minimum commitment levels of food aid for the various country parties, which are required to meet all international quality standards and be consistent with the dietary habits and nutritional needs of recipients”.<sup>139</sup>

The *FAC* (1999) is the only international instrument that establishes guidelines on concessionality to determine what qualifies as a food aid transaction. Two additional terms were added to the 1999 *FAC*, requiring that all food aid provided to LDCs are to be made in the form of grants and that food aid provided in the form of grants cannot represent less than 80 percent of a members contribution with the possibility that members will seek progressively to exceed this amount.<sup>140</sup> This is seen as meeting the *Decision*’s objective, under para. 3(ii) to adopt guidelines that ensure foodstuffs are provided in fully grant form or on appropriate concessional terms in line with Article VI of the *FAC*.

The *FAC* 1999 states that all food aid transactions are to be conducted “in such a way as to avoid harmful interference with the normal patterns of production and international commercial trade”.<sup>141</sup> This provision aims to assuage concerns that food

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<sup>132</sup> Para. 3(iii).

<sup>133</sup> Para. 4.

<sup>134</sup> Para. 5.

<sup>135</sup> FAO (2001b) at 4.

<sup>136</sup> The *FAC* referred to in the *Decision* is the 1986 treaty which has been subsequently replaced by the 1999 *FAC*.

<sup>137</sup> The *FAC* refers to the *Decision* to review the level of food aid established under the Food Aid Convention.

<sup>138</sup> Argentina, Australia, Canada, EC, Japan, Norway, Switzerland and the US are the only members.

<sup>139</sup> Art. III(j) of the *FAC*.

<sup>140</sup> Article IX(a).

<sup>141</sup> Article IX(d).

aid in grant form may be tied to or conditioned upon other commercial sales or that food aid may replace commercial imports that would otherwise have taken place. The *FAC* provides that food aid cannot be tied to commercial exports of agricultural products or other goods and services to recipient countries.<sup>142</sup> Such practices are inconsistent with Article 10.4 of the *AoA*, which prohibits tied aid and requires that that international food aid transactions be carried out in accordance with the *FAO Principles of Surplus Disposal and Consultative Obligations*.<sup>143</sup>

The *Decision* has never been implemented, which is partly attributed to the fact that the *Decision* does not create any mandatory obligations on developing countries to do anything nor any enforcement or monitoring mechanisms. Some have concluded that the mechanisms therein have shown to be a failure.<sup>144</sup> The international financial institutions, such as the World Bank and the IMF have stated that there is no need to establish special facilities for the purposes of adjustment to Uruguay Round developments since there are a number of facilities already available as well as the World Food Programme.<sup>145</sup> The Committee on Agriculture had set up an inter-agency panel to examine ways to improve access to multilateral financing for LDCs and NFIDCs to meet short term financing needs for commercial imports of basic foods. The final report of this panel called for an improvement of access to existing IMF facilities as well as examining the feasibility of establishing a borrowing mechanism for private food importers in LDCs and NFIDCs.<sup>146</sup>

#### Proposals for Reform Impacting Food Security

Article 20 establishes the basis for future negotiations of the *AoA*, with the long-term objective being “fundamental reform”. Negotiations are to commence one year before the end of the implementation period under a long-term objective of substantial progressive reductions in support and protection. The negotiations are to take into account:

- experience in implementing the reduction commitments;
- effects of reduction commitments on world trade in agriculture;
- non-trade concerns, special and differential treatment to developing country members and the objective to establish a fair and market-oriented agricultural trading system, in addition to other objectives and concerns mentioned in the preamble to the *AoA*; and,
- further commitments necessary to achieve the mentioned long-term objectives.

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<sup>142</sup> Article IX(e)(i).

<sup>143</sup> The *FAO Principles of Surplus Disposal* is a non-binding code of conduct first adopted in 1954 by the FAO Council (Resolution No. 2/20). The principles aim to assure that food and other agricultural commodities, which are exported on concessional terms result in additional supplies for the recipient country and do not displace normal commercial imports and that domestic production is not discouraged or otherwise adversely affected. Supplying countries are obligated to notice, consult and report their concessional transactions to the FAO Consultative Subcommittee on Surplus Disposal (CSD).

<sup>144</sup> Desta (2001) at 455.

<sup>145</sup> WTO doc. G/AG/R/4, 20-21 November 1995, para. 21.

<sup>146</sup> WTO (2002), *Inter-Agency Panel on Short-Term Difficulties in Financing Normal Levels of Commercial Imports of Basic Imports of Basic Foodstuffs*, Report of the Committee on Agriculture’s Inter-Agency Panel, Geneva.

The *Doha Declaration* supplements the agenda, stressing that the long-term objective is to establish a “fair and market-oriented trading system”, as mentioned in the preamble of the *AoA*, through a programme of “fundamental reform”.<sup>147</sup> This is to be achieved essentially through the reductions of all forms of exports subsidies, with a view to phasing them out, in addition to substantial reductions in trade-distorting domestic support.

The *Doha Declaration* also indicates that special and differential treatment for developing countries is to be integral to the negotiations. As part of this, a WTO member’s ability to meet food security needs should be enabled. Negotiations are to take food security into account, in addition to other non-trade concerns such as rural development and environmental protection. These concerns would be taken into account in the operation of a new safeguard mechanism, as proposed in Chairman Harbinson’s *Draft*<sup>148</sup> (Chair of the WTO Committee on Agriculture), which would limit if not prohibit the use of special safeguards by developed countries. For developing countries, there would be continual application of a special safeguard mechanism for developing countries on a wide range of products under defined circumstances.

In order to fulfil special and differential treatment commitments, the *Harbinson Draft* proposes the maintenance of domestic production capacity for staple crops as well as payments to small-scale or family farms for reasons of rural viability and cultural heritage.<sup>149</sup> These mechanisms, in addition to the use of the SSGs, might endow developing countries with additional mechanisms to ensure accessibility and availability of food for their populations.

Other proposals under discussion are the addition of a development box in the *AoA*.<sup>150</sup> This would, among other things, enable developing country governments to address food security concerns and protect and support small farmers and the production of food security crops through government support measures that are exempt from *AoA* requirements. This would replace the ideology that a WTO member could only benefit from WTO liberalisation of agriculture by importing products to meet food security needs.<sup>151</sup> Protection could be afforded through input and investment subsidies to all farmers in all developing countries, and to farmers producing commodities critical to food security. This could diminish the vulnerability to price fluctuations and increase agricultural productivity for food staples. It is designed so that only developing country members could benefit, focussing on low-income and resource-poor farmers and staple and food security crops. Assessment would be at the country level. Additional focus would be directed to farmers who produce for domestic consumption and not export markets.

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<sup>147</sup> Para 13.

<sup>148</sup> Report by the Chairman, Mr. Stuart Harbinson, to the Trade Negotiations Committee, *Negotiations on Agriculture*, TN/AG/10, 7 July 2003. This is to be discussed at the 5<sup>th</sup> WTO Ministerial Meeting in Cancun.

<sup>149</sup> See Harbinson Draft.

<sup>150</sup> Submitted by Cuba, Dominical Republic, Honduras, Pakistan, Haiti, Nicaragua, Kenya, Uganda, Zimbabwe, Sri Lanka and El Salvador: Special and Differential Treatment and a Development Box – G/AG/NG/W/13 dated 23 June 2000.

<sup>151</sup> Ritchie & Dawkins (2000) at 29.

Food security crops would be considered crops or animal products that are either food staples in the country concerned, or are the main sources of livelihood for low-income and resource-poor farmers. While contributing to food security, such an approach may be less effective in other ways such as enhancing agricultural biodiversity and sustainability or boosting employment and livelihoods.<sup>152</sup> However, the Development Box addresses other issues than just food security, attempting to create autonomy and flexibility to devise suitable agricultural development policies aimed to reduce poverty and promote human development.<sup>153</sup> Under the Development Box, developing countries could impose special safeguard measures, which temporarily raise tariffs when small farmers are threatened by import surges. Certain food security crops can be listed and thus exempted from  *AoA*  reduction commitments. Wider spending on support for farmers would be permitted without it being included in the AMS totals and therefore subject to requisite levels of reduction for domestic support.

According to the *Harbinson Draft*, developing countries are allowed to designate a number of "special products with respect to food security, rural development and/or livelihood security concerns," not subject to significantly reduced tariff reduction commitments nor requirements to expand tariff quota volumes. Tariffs could be introduced for products that are substitutes to the locally produced crops that are prescribed special products. Special products could also be ones designated for export since they can form a significant portion of foreign exchange. These products would only be subject to a uniform tariff cut irrespective of existing tariff levels. LDCs would not be required to undertake reduction commitments, although they could be "encouraged to consider making commitments commensurate with their development needs on a voluntary basis".

One proposal that has been advanced by the African Group has been the establishment of a revolving fund. This would operationalise the *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries* (NFIDCs) in accordance with paragraph 44 of the *Doha Declaration* regarding special and differentiated treatment. The FAO has contributed to this discussion by proposing modalities for the fund that would be activated when food import bills are rising. This would require developed countries to put into their schedules of commitments undertakings to contribute to a revolving fund for normal levels of food imports, providing food aid in fully grant form, and maintaining food aid levels consistent with recommendations and rules under the Food Aid Convention.<sup>154</sup> This fund would act as a safety-net allowing NFIDCs and LDCs to borrow from it in order to buy food in times of shortage where the food importing prices became cost prohibitive.<sup>155</sup> WTO Members would conduct their food aid transactions in accordance with the procedures under the FAO *Principles of Surplus Disposal and Consultative Obligations*.

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<sup>152</sup> UNDP (2002b) at 138.

<sup>153</sup> UNDP (2002b) at 140.

<sup>154</sup> TN/CTD/W/3/Rev.2, para. 52.

<sup>155</sup> A similar initiative is an import insurance program where food insecure countries would receive compensation whenever import costs exceed a threshold designated for a pre-selected consumption target. See Shapouri & Trueblood (2002) at 16.

The *Harbinson Draft* included proposals of new rules governing food aid. Food aid provisions are to be revised so that assistance must be provided in fully grant form, with preference to be given to financial grants for purchases by recipient countries, unless it is necessitated by humanitarian emergency situations declared by appropriate UN food aid agencies. This would be a way to ensure that aid is neither used as a method of surplus disposal nor as a means of achieving commercial advantages in world export markets.

Distinct from the development box proposals, some members of civil society have called for a food security box.<sup>156</sup> This would permit measures by developing countries that cannot invest or subsidise their agriculture but need to protect indigenous, vulnerable small-scale producers to ensure their food security. These measures would be exempted from *AoA* disciplines for countries that are not meeting basic food security needs. One commentator has proposed that all subsidies that are designed to increase domestic food production, irrespective of whom the recipients are be made available.<sup>157</sup> These countries agricultural sectors and markets would be exempted from WTO obligations requiring minimum market access, tariffication and reduction of tariffs, and increased domestic support for agriculture until they have achieved a greater level of food self-reliance.

State trading enterprises (STEs) is also a topic for discussion in the negotiations.<sup>158</sup> These can be seen as playing a role in promoting agricultural exports as well as ensuring that food security is retained by guaranteeing full access and free distribution of food. Others contend that they should be eliminated or at least under strict disciplines, since they are anti-competitive as well as a vehicle for protection of domestic markets. A key question in the negotiations is whether the agricultural modalities are to incorporate an undertaking to regulate STEs and whether their existence should be subject to an eventual phase out. Disciplines have been proposed in the *Harbinson Draft*, although notably subject to further consultations. STEs are not to operate in a way that nullifies or impairs the benefits of market access concessions and non-tariff measure commitments under Art. 4.2 of the *AoA*. They are also not to be operated in a way that circumvents export subsidy commitments or nullifies or impairs the conditions of competition in world export markets. This might raise concerns for developing countries that use STEs or other enterprises to meet domestic food needs. In light of this, the *Harbinson Draft* notes that any disciplines cannot unduly impede developing countries in pursuit of their legitimate food and livelihood security and rural development objectives.

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<sup>156</sup> See WTOWATCH (1999).

<sup>157</sup> Gonzalez (2002) AT 486. Gonzalez adds that food price subsidies, direct provision of food and income safety nets should also be included in the food security box.

<sup>158</sup> State trading import enterprises are to include any “governmental or non-governmental enterprise, including a marketing board, which has been granted or which enjoys de facto as a result of its governmental or quasi governmental status, exclusive or special rights, privileges or advantages, including any statutory or constitutional powers, in the exercise of which or by virtue of which such state trading import enterprises, influence through their purchases and sales the level, direction or prices of imports”.

### *Agreement on Trade-Related Intellectual Property Rights (TRIPS)*

The interaction between *TRIPS* and human rights has been plagued with controversy. A great deal of attention has been directed towards protection of intellectual property rights (IPRs) and its impact on access to medicines. As a result, the right to health is threatened due to high prices for essential medicines that are protected by IPRs. The right to food is also raised as potentially undermined by the *TRIPS Agreement* as it relates to the food science industry and the lack of shared benefits from the food science industry. Moreover, plant variety rights and other rights associated with farmers' ability to freely use seeds, are potentially at odds with the IPR protection under the *TRIPS Agreement*. The possible incompatibility between *TRIPS* and economic and social rights was noted by the August 2000 UN Sub-Commission for the Protection and Promotion of Human Rights.<sup>159</sup>

In relation to right to food, one predominant concern with *TRIPS* is its potential impact on the public's access to genetic resources. There are also issues relating to the presence of IPRs protection that facilitates the development of mono-agricultural practices as opposed to diversifying agro-biodiversity and the use of locally adapted plant varieties.<sup>160</sup>

The *TRIPS Agreement* requires countries to have a legally enforceable patent system so that the owner of patented product can prevent others from making, using, offering for sale or importing a patented product without the patent holder's consent. It sets out minimum standards for national intellectual property laws and requires the establishment of mechanisms for the national enforcement of intellectual property rights through civil, criminal and administrative proceedings. Enforcement is to be effective, fair and equitable. Judicial review of final administrative decisions regarding intellectual property and a full range of remedies such as injunctions and damages are to be made available. Criminal penalties are to be imposed against wilful violators of IPRs.

Developing countries had until 1 January 2000 to implement *TRIPS*<sup>161</sup> with LDCs having another 5 years.<sup>162</sup> With respect to pharmaceuticals, the 2006 deadline for LDCs was extended to 1 January 2016 at the Doha Ministerial Conference.<sup>163</sup> The objectives of the *TRIPS Agreement* are that the protection and enforcement of IPRs should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantages of producers and users of technological knowledge and in a manner conducive to social and economic welfare.<sup>164</sup>

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<sup>159</sup> United Nations Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights (2000), *The Realisation of Economic, Social and Cultural Rights, Intellectual Property Rights and Human Rights*, Fifty Second Session, Agenda Item 4, Doc. E/CN.4/Sub.2/2000/7, 17 August 2000.

<sup>160</sup> Council of Canadians (2003), *Crossroads at Cancun: CCIC Brief for the Fifth WTO Ministerial*, <http://www.ccic.ca/devpol/cancun/ccic-cancun-brief.pdf> at 28.

<sup>161</sup> Arts. 65.2, 65.3 65.4.

<sup>162</sup> Art. 66. LDCs must still meet national treatment and MFN requirements

<sup>163</sup> *Declaration on the TRIPS Agreement and Public Health*, WT/Min(01)/Dec/2, 20 November 2001, para. 71.

<sup>164</sup> Article 7.

Patent protection generally extends to all inventions, whether they are products or processes.<sup>165</sup> The length of protection afforded must be, at a minimum, 20 years from the date of filing the application.<sup>166</sup> Article 27.3(b) allows for the exemptions from patentability of plants, animals and essential biological processes. Plant varieties, as well as micro-organisms (bacteria and viruses) and non-biological and microbiological processes are not exempted. Such processes would cover genetically modified organisms, giving the owner of the patent exclusive rights over the plants obtained by using the process. Where patents are awarded, farmers would be prohibited from using seeds from such a plant without the consent of the patent holder. This raises serious consequences for small-scale farmers, since farm saved seeds account for roughly 80% of farmers total seed requirements.<sup>167</sup> There is also concern that there will be inadequate investment in plant genetic research that focuses on meeting the food needs of farming communities dependent on saved seeds for their survival, where patents for genetic resources are given.<sup>168</sup>

The *TRIPS Agreement* allows for exemptions from patents for plant genetic resources. Under Article 27(3)(b), they may be permissible when measures are adopted pursuant to the objectives listed in Article 8.1. This is relevant for food security since measures can be adopted “to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development”, as long as they are consistent with *TRIPS*. Exceptions to patentability are also evident in Article 27(2) and (3). Exceptions would include where it is necessary to protect *ordre publique* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment.<sup>169</sup> States may generally undertake measures necessary to protect public health and nutrition, although such measures must be consistent with the *TRIPS Agreement* provisions including Article 27.<sup>170</sup>

Plant breeders’ rights are entitled to protection under *TRIPS*. Under Article 27.3(b), naturally occurring plants are exempted from patentability. New plant varieties however are to be protected under a patent or under a country’s effective *sui generis* system. The *TRIPs Agreement* does not define the term *sui generis*, leaving the debate wide open as to which legal system would be permitted under the *TRIPs Agreement*.<sup>171</sup> The only requirements would be that that the system establishes a distinct IPR applicable to such varieties that comply with the core requirements and objective of the *TRIPs Agreement*.<sup>172</sup> Four core elements have been identified to qualify as an effective *sui generis* system under Article 27.3(b). They are:

- a) the law must apply to all plant varieties in all species and botanical genera;

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<sup>165</sup> Art. 27.

<sup>166</sup> Art. 33.

<sup>167</sup> K ten Kate & S. A. Laird (1999), *The Commercial Use of Biodiversity-Access to Genetic Resource and Benefit-Sharing* (London: Earthscan).

<sup>168</sup> CIDSE (2002), *Trade for Food Security? Reforming Trade to Make Food for all a Reality*, (Policy statement delivered at World Food Summit-five years later) at 6.

<sup>169</sup> Art. 27.2.

<sup>170</sup> Art. 27.1.

<sup>171</sup> L. R. Helfer (2002), *Intellectual Property Rights in Plant Varieties: An Overview with Options for National Governments*, (FAO Legal Papers, Online 31) at 33.

<sup>172</sup> *Ibid* at 33.



- b) plant breeders must be granted an IPR with either an exclusive right to control particular acts with respect the protected varieties or at a minimum, the right to remuneration when third parties engage in certain acts;
- c) the State must provide national treatment and MFN treatment to breeders to all WTO member states; and,
- d) there must contain procedures that enable breeders to enforce the rights granted.<sup>173</sup>

Most developing countries have not yet introduced *sui generis* legislation under Art. 27(3)(b).<sup>174</sup> It provides for plant breeders' rights, which are not as strong as IPRs due to a greater number of exceptions and broader extension of farmer rights. The *UPOV Convention* requires the creation of a system granting plant breeders' rights under their domestic laws.

The *UPOV* system of plant breeder's rights is controversial, seen as a model promoting the commercialised breeding in developed countries. Since this would require farmers to pay royalties on seeds, it may not be appropriate for all developing countries.<sup>175</sup> The International Plant Genetic Resources Institute (IPGRI), noted that *UPOV* is suitable for intensive, industrialised farming systems but not as much in countries where there is a lot of subsistence farming.<sup>176</sup> The conditions under the *UPOV* regime are relatively impossible for farmers especially in relation to proving novelty and therefore being recognised as a breeder.<sup>177</sup> Only varieties that are distinct, uniform and stable are entitled to be protected under the *UPOV Convention*. As a result, farmers would not be able to save and replant seeds of protected varieties engendering food insecurity.

The *UPOV Convention* recognises exceptions for both breeders and farmers. Breeders would be permitted to use the protected varieties for research purposes. The rights would cover all acts pertaining to production and reproduction of seeds and other planting material. Farmers can rely on the farmers' privilege. A farmer's privilege would allow for the retaining of traditional seeds or their exchange and even limited sales of those seeds. This can be invaluable for small-scale farmers<sup>178</sup> that cannot afford the fees owed for the use of a patented seed. Farmers would be permitted to re-use propagating material from the previous years' harvest by planting their own holdings and can freely exchange seeds of protected varieties with other

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<sup>173</sup> See D. Leskien and M. Flinter (1997), *Intellectual Property Rights and Plant Genetic Resources: Options for a sui generis system*, (IGPRI: Rome), (Issues in Genetic Resources, No. 7).

<sup>174</sup> See GRAIN (2000), *For a Full Review of TRIPS 27.3(): An Update on WHERE Developing Countries Stand with the Push to Patent Life at WTO*.

<sup>175</sup> See CIDSE (2000).

<sup>176</sup> Leskien and Flinter (1997),

<sup>177</sup> See M.V. Rao (1996) "Viewpoint of Public Sector Plant Breeding Institutions", in M. S. Swaminatha (ed.), *Agrobiodiversity and Farmers' Rights* 136 (New Delhi: Konark Publishers), found in P. Cullet, "Plant Variety Protection in Africa: Towards Compliance with the TRIPS Agreement", (2001) 45:1 *Journal of African Law*. at 14.

<sup>178</sup> The Crucible Group has developed criteria for eligibility as a small-scale farmer. This would be based on: the proportion of total yield used for personal consumption; number of acres cultivated with a protected variety; number of harvested tonnes produced with the variety; or number of harvested tonnes of all crops produced by the farmer. See Crucible Group (2001), *Seeding Solutions, Options for national Laws Governing Control over genetic Resources and Biological Innovations*, (IDRC, PPGR and Dag Hammarskjöld Foundation: Ottawa, Rome and Uppsala).

farmers. This is seen as particularly important for maintaining food security although payment would still be required for re-use of the seed itself.<sup>179</sup>

Farmer's rights are also generously recognised in the *International Treaty on Plant Genetic Resources*.<sup>180</sup> This includes the right of protection of traditional knowledge,<sup>181</sup> the right to participate in sharing the benefits arising from the use of plant varieties and the right to participate in decision-making concerning their management. No intellectual property can be claimed that would limit access to plant genetic resources for food and agriculture. In addition, no limits can be put on the rights of farmers to save, use, exchange and sell farm-saved seed and propagating material.<sup>182</sup>

Community-based and traditional knowledge embodied in farmers' varieties forms the basis of scientific plant breeding. These would not be formally recognised under *TRIPS*, since the current intellectual property rights (IPR) regime is not designed to protect traditional knowledge. Plant-breeding rights can lead to the situation where farmers or indigenous groups would not have access to their own plant breeding techniques and may have to buy the seeds back at higher prices.

Complementing the *International Treaty on Plant Genetic Resources* is the *Convention on Biological Diversity (CBD)*, where genetic resources of plants and animals are proclaimed to be the sovereign property of the State where they are located. Any exploitation of such resources entitles the developing country to benefit from its development. States govern the access to such resources, including any benefit sharing from its exploitation. Such regulations would not cause a *prima facie* violation of the *TRIPS* unless the access was offered in a way that discriminates between prospectors or favours local prospectors.

Traditional knowledge is addressed in the *CBD* calling for the protection of traditional knowledge associated with biological resources.<sup>183</sup> State parties are required to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities that embody traditional lifestyles relevant for the conservation and sustainable use of biological diversity. They are encouraged to be widely applied with the approval and involvement of the holders of such knowledge while the benefits arising from the utilisation of such knowledge are to be equitably shared. A traditional knowledge based system can be instituted to prevent any appropriation of this information transformed into an intellectual property right that limits the free access to such information vital to food production.

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<sup>179</sup> See M. Blakeney (2000/2001) "Intellectual Property Rights and Global Food Security", 3 *Bio-Science Law Rev.* 1-13.

<sup>180</sup> *International Treaty on Plant Genetic Resources for Food and Agriculture* (2001).

<sup>181</sup> The protection afforded to traditional knowledge in Article 9.3 of the *UPOV Convention* is limited to traditional knowledge relevant to plant genetic resources for food and agriculture. This is more limited in scope to the wider unqualified protection afforded in Article 8(j) of the *Convention on Biological Diversity* (1992) 31 ILM 822..

<sup>182</sup> See *Agreed Interpretation of the International Undertaking*, Res. 4/89, *Report of the Conference of the FAO 25<sup>th</sup> Sess.*, Rome 11-29 Nov. 1989, Doc. C89/REP.

<sup>183</sup> Art. 8(j), 10(c).

Many countries are not parties to the *UPOV Convention*.<sup>184</sup> This has been seen as inappropriate for countries where local food crops are not widely traded and the varieties used are local seeds saved from year to year and exchanged amongst farmers.<sup>185</sup> Previous contributors to the germplasm through the years would not be compensated when plant breeders' rights are recognised.<sup>186</sup> Farmers' varieties change over time and therefore would have difficulty meeting stability and uniformity requirements needed to obtain plant breeders rights.<sup>187</sup> Traditional users of the seeds, in addition to practices of seed exchange that guarantee food production might be undermined by the introduction of plant variety protections. There are fears that plant variety protection, along with patents, will only facilitate the commercialisation of farming undermining small-scale and subsistence farmers, who rely on the access to seeds as a fulcrum to their food security.<sup>188</sup>

Another example of *sui generis* legislation under Article 27 (3) (b) is the *Model Law for the Protection of the Rights of Local Communities, Farmers, Breeders, and for the Regulation of Access to Biological Resources*, by the Organisation of African Unity (OAU).<sup>189</sup> This aims to achieve an equilibrium between the obligations under the *Convention on Biological Diversity (CBD)* and *TRIPS* by recognising breeders rights and farmers' rights, as well as benefit sharing and access to genetic resources. No patents are available for life or the exclusive appropriation of any life form, including derivatives. In fact, the patenting or the exclusive appropriation of life forms violates the fundamental human right to life.<sup>190</sup>

Article 27 (3)(b) allows for legislative diversity in protecting plant genetic resources which is suitable considering that some States feature agricultural systems that are large scale and export oriented while others are primarily focussed on domestic production and consist of small-scale and subsistence farming.<sup>191</sup> The latter is highly dependent on the cultivation of traditional varieties and the exchange of seeds for agricultural production. However, it is arguable that too weak a system may discourage foreign breeders from importing seeds or other propagating material that can deter investment and impact the nation's food supply.<sup>192</sup>

The patenting of genetic resources raises serious concerns for the protection of human rights such as the right to food.<sup>193</sup> This is effected through limiting farmers' access to seeds, reducing efforts in public plant breeding, increasing genetic erosion,

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<sup>184</sup> There are only 23 parties to the 1991 *UPOV Convention*, as of July 15, 2003, with none of these being developing countries.

<sup>185</sup> See. A. O. Adede (2001), *Streamlining Africa's Responses to the Impact of Review and Implementation of the TRIPs Agreement*, (ICTSD: Geneva).

<sup>186</sup> C. Correa (2000), "In Situ Conservation and Intellectual Property Rights", in S. Brush (ed.), *Genes in the Field: On-Farm Conservation of Crop Diversity*, (IPGRI/IDRC/Lewis Publishers).

<sup>187</sup> See C. Correa, *Issues and Options Surrounding the Protection of Traditional Knowledge: A Discussion Paper*, (Quaker United Nations Office: Geneva).

<sup>188</sup> G. Tansey (2002) *Intellectual Property Rights, Food, and Biodiversity*, Harvard International Review.

<sup>189</sup> See *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* (2000).

<sup>190</sup> See Preamble.

<sup>191</sup> Helfer (2003).

<sup>192</sup> *Ibid* at 44.

<sup>193</sup> See UN Sub-Commission on the Protection and Promotion of Human Rights (2000).

preventing seed and plant sharing and putting farmers out of business.<sup>194</sup> The obligation to have some form of patent system for plant breeding may undermine small-scale mixed subsistence and local market-based production systems.<sup>195</sup> This can lead to a higher dependence on larger domestic producers and food imports at variable prices, impeding access to food for farmers who once could produce at a minimum subsistence level.

One exception that could be explored for the purpose of ensuring food security and the right to food, is compulsory licensing. Under the *TRIPS Agreement*, governments are able to compel patent owners to license their products and processes to governments or to private parties. The Agreement does not specify the grounds needed to support a compulsory license measure although it does establish certain conditions that must be met before the granting of a compulsory license.<sup>196</sup> An area where compulsory licenses may affect plant breeders is where farmers obtain the authorisation of the earlier patent owner.<sup>197</sup> Plant breeders may wish to seek new varieties that merely are adaptations and improvements of existing varieties. This type of practice is common among plant breeders so that production could be suited to geographical, climate, and seasonal variability. This is not recognised in the *TRIPS Agreement* unlike the breeders' exemption available in the *UPOV Convention*. Due to this "incremental innovation", governments may seek to impose compulsory licenses to such breeders who are unable to negotiate voluntary access to patented plant varieties.<sup>198</sup> More generally, states may confer such licenses so that certain agricultural objectives, such as food security and availability, may be met.<sup>199</sup>

### Proposals for Reform

Article 27.3(b) has been under review since 1999. WTO members disagree as to whether the review is geared towards its implementation or more towards a revision of the text. Some have called for an amendment to the *TRIPS Agreement*, specifically Art. 27.3(b) so that it would permit WTO members to exclude all genetic resources for food and agriculture from the TRIPS agreement.<sup>200</sup>

The *Doha Declaration* directs the TRIPS Council, upon reviewing Article 27.3(b) to examine the relationship between the *TRIPS Agreement* and the *CBD*, the protection of traditional knowledge and folklore and other relevant new developments raised by WTO Members. The TRIPS Council is to be guided by the objectives and principles set out in Articles 7 and 8 of the *TRIPS Agreement*.<sup>201</sup>

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<sup>194</sup> EU Liaison Committee on the Recommendation of the Joint Food Security Group (1999), *Putting Food Security in the WTO* at 6.

<sup>195</sup> CIDSE (2000).

<sup>196</sup> Article 31. There is disagreement over the extent that compulsory licenses can be used for the purpose of transferring technology. See Tansey (2002).

<sup>197</sup> Helfer (2002) at 32.

<sup>198</sup> *Ibid.*.

<sup>199</sup> See C. Correa (2000), *Intellectual Property Rights, The WTO and Developing Countries: The TRIPS Agreement and Policy Options* (London: Zed Books/TWN) at 194.

<sup>200</sup> NGDO-EU Liaison Committee on the recommendation of the Joint Food Security Group (1999) at 6.

<sup>201</sup> Para. 19, *Doha Declaration*. Article 7 requires that IPR protection and enforcement are to contribute to the promotion of technological innovation and to the transfer and dissemination of technology in a manner conducive to social and economic welfare and to a balance of rights and obligations. Article 8 allows members to adopt measures necessary to protect public health and

In addition, the *Doha Declaration* has put traditional knowledge specifically on the agenda of the WTO TRIPS Council, specifically to “contribute to the promotion of technological innovation and to the transfer of and dissemination of technology to the mutual advantage of producers and users of technological knowledge”. The WTO members are to review the *TRIPS-CBD* relationship through the TRIPS Council, taking the development dimension fully into account.

### Agreement on Sanitary and Phytosanitary Standards

A strong component of the right to food is the guarantee of access to safe and nutritious food to meet dietary needs and food preferences. The *SPS Agreement* offers a sanctioned method to ensure this through import control although it can also impede market access by rendering it more difficult to meet importing country standards. The use of SPS Measures as a mode of disguised protectionism is worrisome for developing country exporters who see stricter measures introduced when there are agricultural surpluses in developed country markets.<sup>202</sup> They also represent a high cost for developing countries in introducing the proper SPS measures consistent with importing country requirements, despite the ability to receive technical and financial assistance under the *SPS Agreement*.<sup>203</sup> Some developing countries have expressed concern about potential abuse of the *SPS Agreement* to compensate for other tariff barriers to their exports that have fallen.<sup>204</sup> One strong motivation for the introduction of the *SPS Agreement* is to develop a degree of harmonised standards to combat agricultural protectionism.<sup>205</sup>

The *SPS Agreement* establishes the rules governing the domestic application of human, animal and plant health standards for imports. It permits WTO members to apply measures “to protect human, animal or plant life or health.”<sup>206</sup> Food safety measures, which can immediately impact the right to food based on quality and nutritional value could fall under the *SPS Agreement* disciplines. SPS measures must be based on scientific principles and be consistent with international standards.<sup>207</sup> Measures can be taken to protect against risks associated with diseases, pests, additives, contaminants, toxins, and disease-causing organisms in foods, beverages, and feedstuffs. They must be non-discriminatory and not represent a disguised restriction on international trade although the appropriate level of protection is still the prerogative of the WTO member. The SPS measure, indicating how to attain the

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nutrition and to promote the public interest in sectors of vital importance to their socio-economic and technological development.

<sup>202</sup> See Díaz-Bonilla (2002) at 37.

<sup>203</sup> Arts. 29 and 30. Díaz-Bonilla (2002) notes that for developing countries, costs of compliance consist of a larger percentage of GDP than for industrialised countries.

<sup>204</sup> Murphy (2001) at 24.

<sup>205</sup> See G. Marceau & J. Trachtman (2002), “A Map of the WTO Law of Domestic Regulation of Goods”, (2002) 36:5 *JWT* 811-881; D. Roberts (1998), “Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations”, (1998) 1 *JIEL* 377.

<sup>206</sup> Art. 2.1. A corollary provision in the *Technical Barriers to Trade Agreement (TBT Agreement)* allows states to apply technical regulations with the “protection of human health or safety, animal or plant life or health be a legitimate objective of such regulation. See Art. 2.2. Ultimately, the *TBT Agreement* would not be applicable to a member’s sanitary and phytosanitary measures defined under the *SPS Agreement* although states may prefer to rely on the *TBT Agreement* since there is a lower scientific threshold to uphold a measure.

<sup>207</sup> Arts. 2.2, 5.5.

chosen level of protection, is subject to the scrutiny of the *SPS Agreement*. The means to be chosen to reach the sought objective are assessed under Article 5.6, which looks at whether: another SPS measure is reasonably available taking into account technical and economic feasibility; the chosen measure achieves the Member's desired level of sanitary or phytosanitary protection; and whether another measure is significantly less restrictive to trade than the chosen measure.<sup>208</sup>

WTO members can choose measures that conform to international standards and are therefore deemed consistent with WTO obligations.<sup>209</sup> The standards are set by international bodies such as the by a Codex Alimentarius Commission, which is an intergovernmental body administered jointly by the FAO and the WHO, as well as the International Office of Epizootics, which is responsible for animal health (food contamination issues) and the FAO Secretariat of the *International Plant Protection Convention*<sup>210</sup> which deals with plants. The Codex Commission consists of 165 members operating under objectives of protecting the health of consumers and ensuring fair practices in the food trade.

WTO members can introduce measures “based” on international standards, guidelines, or recommendations, known as harmonised standards,<sup>211</sup> where there are only minor variations from the international standards. Members must submit notification of such measure in advance of its implementation to the SPS Committee so that other Members can have an opportunity to comment.<sup>212</sup> Members also retain discretion to introduce measures that maintain a distinctively high level of protection above the international or harmonised norms.<sup>213</sup> This can have an impact on agricultural exports, vital for some developing countries who can use export revenue to meet domestic food availability concerns, since developing countries are ill-equipped to meet the more stringent standards.<sup>214</sup> This can have a significant economic impact on developing countries dependent on such exports for revenue. As SPS measures become more complicated, greater scientific and institutional ability by the exporting country will be needed in order to achieve compliance with the particular standard. Technology transfer and other means of assistance are required so that importing requirements can be met.

Where this is done, the standards must be based on a risk assessment, which must be based on “scientific principles” and “sufficient” scientific evidence”.<sup>215</sup> The risk must be ascertainable, and not based on theoretical uncertainty.<sup>216</sup> A risk

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<sup>208</sup> Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, para. 194. See also, Appellate Body Report, *Japan – Agricultural Products (Apples)*, (15 July 2003, WT/DS245/R), para. 95.

<sup>209</sup> Art. 3.2.

<sup>210</sup> (1979) Food and Agriculture Organisation.

<sup>211</sup> Art. 3.1.

<sup>212</sup> An exception to this arises in cases of emergency, where Members can act without delay but must immediately notify other WTO members and still consider comments submitted by them.

<sup>213</sup> Art. 3.3.

<sup>214</sup> A World Bank study had estimated that African exports of cereals, dried fruits and nuts decreased by 64 percent resulting in a loss of US \$670 million. The EU had applied a standard allowing only for 4 ppb of total aflatoxins in contrast to the 15 ppb established by *Codex Alimentarius*. Found in FAO (2003c), *Non-Tariff Measures in Agricultural Trade*.

<sup>215</sup> See Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R, WT/DS48/AB, paras. 179, 280.

<sup>216</sup> See Appellate Body Report, *Australia-Salmon*, para. 125.

assessment under the *SPS Agreement* must identify the diseases whose entry, establishment or spread is to be prevented, as well as the potential biological and economic consequences associated with the entry, establishment or spread of these diseases. It must also evaluate the likelihood of entry, establishment or spread of the diseases and such likelihood according to the SPS measures that might be applied.<sup>217</sup> No scientific consensus is required under the risk assessment, so that members could base a measure on a minority scientific opinion.<sup>218</sup> There is a list of considerations to be taken into account in a risk assessment under article 5.2 of the *SPS Agreement*.

There is some concern raised about the standard setting process and the limited impact that developing countries have in contributing to this process. Under the *Doha Declaration*, the WTO Director General is to “facilitate the increased participation of members at different levels of development in the work of the relevant international standard setting organisations as well as his efforts to coordinate with these organisations and financial institutions in identifying SPS-related technical assistance needs and how best to address them.” The FAO and WHO have also established a Trust Refund to improve participation of developing countries in the *Codex Alimentarius*.

SPS Measures can also be taken pursuant to the precautionary principle<sup>219</sup> although these can only be on a provisional basis under Article 5.7, with an underlying obligation to conduct a proper risk assessment. In the *Beef-Hormones* dispute, the EU had unsuccessfully argued that the application of the principle relieved it from undergoing any risk assessment or adducing any specific scientific evidence to base their measure on.<sup>220</sup> Provisional measures taken under Article 5.7 will subsequently create an obligation to obtain additional information in order to conduct a “more objective assessment of risk”.<sup>221</sup> Moreover, this is to be done within a “reasonable period of time”, depending on the specific circumstances of the case and the difficulty of obtaining the additional information.<sup>222</sup>

The *Japan-Varietals* case<sup>223</sup> addressed the requirements under Article 5.7. The case involved a complaint by the United States relating to Japanese testing and quarantine treatment for each variety of certain agricultural products. Japan attempted to argue that Article 5.7 supported their measure. The Appellate Body ruled that there are four requirements that must be met in adopting and maintaining a provisional SPS measure. The WTO Member can do so if the measure is imposed in respect of a situation where relevant scientific information is insufficient, and is adopted on the

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<sup>217</sup> See Appellate Body Report, *Australia-Salmon*, para. 121.

<sup>218</sup> See Appellate Body Report, *EC – Hormones*, para. 194. See also Matsushita *et al.* (2002) at 498.

<sup>219</sup> The precautionary principle appears in a number of international law instruments such as the *Rio Declaration*, stating the “when there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. See United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, (1992) 31 ILM 874.

<sup>220</sup> Paras. 118-122.

<sup>221</sup> The Appellate Body in *Japan – Agricultural Products (Apples)*, had noted that examples of such desirable information include: the evaluation of the likelihood of entry, establishment or spread of, *in casu*, a pest. See para. 92.

<sup>222</sup> *Ibid.* at para. 93. The Appellate Body in that case ruled that four years was deemed to be a “reasonable time”.

<sup>223</sup> *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, 22 February 1999.

basis of available pertinent information. The member taking the measure must seek to obtain additional information necessary to undertake a more objective assessment of risk and review the measure within a reasonable period of time. A proper risk assessment is to consider relevant economic factors, which includes potential loss of production or sales from the disease, the costs of control or eradication or the disease and the relevant cost-effectiveness of alternative measures that limit the risk.<sup>224</sup>

### Proposals for Reform

In order to address the difficulties exporting developing countries have in gaining access to other markets due to SPS measures, the African Group of WTO Members has proposed the establishment of a facility within the Global Trust Fund to ensure that developing and LDCs have the financial and technical capacity, cost free, to meet the SPE requirements. At the Committee on Agriculture, discussion is ongoing regarding whether the modalities on upcoming agricultural negotiations are to include an authoritative interpretation of the conditions of which Members can impose SPS measures under Art. 5.7 of the *SPS Agreement* regarding conditions of which such measures can be invoked.<sup>225</sup> However, there is also resistance to introducing SPS issues into the discussions on agricultural modalities, since the SPS Committee may be the more appropriate forum.

## **OTHER AGREEMENTS RELEVANT TO THE RIGHT TO FOOD**

### *General Agreement on Tariffs and Trade*

The *General Agreement on Tariffs and Trade* is the agreement forming the basis of international trade relations since 1947. It provides for requirements embodying the principles of most favoured nation treatment, national treatment and non-discrimination. It governs both tariff (through scheduled commitments) and non-tariff measures imposed either at the border or internally.

There is no provision that would proscriptively interfere with the right to food. A situation would only arise based on the particulars of the facts involved and the goods or service that is at issue. Where a WTO Member adopts a trade restrictive measure for the purpose of ensuring the right to food, it may be justified under Article XX of the *GATT*, which enumerates several exceptions from the *GATT* rules. Article XX (b) allows members to take measures “necessary to protect human, animal or plant life or health.” All of these could support a measure taken for the purpose of ensuring the food availability, accessibility or security. The member who has taken the measure is required to demonstrate, at a minimum, *prima facie* evidence of the good’s threat to any of these concerns.<sup>226</sup>

Even if a measure that violates the *GATT* is found to be necessary to protect human, animal or plant life or health, it still must be not applied in a way that constitutes a means of arbitrary or unjustifiable discrimination where the same conditions prevail in those countries, or a disguised restriction on international trade. These conditions are informally known as the *chapeau* obligations under Article XX.

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<sup>224</sup> Art. 5.3.

<sup>225</sup> *Harbinson Report*, para. 16(b).

<sup>226</sup> See Appellate Body Report, *EC – Asbestos*, para. 157.



For agricultural goods, this may be a burdensome task since the WTO member introducing the measure must demonstrate that it was necessary for the purpose of ensuring the population's right to food and that it was not geared to protect local products and markets. Restricting imports of food at lower prices must be seen as justifiable by the need to stimulate local production so that food is available and the food security situation would worsen without the measure. A dispute settlement panel or the Appellate Body would then have to determine that this was the least restrictive measure to achieve that goal as opposed to simply introducing domestic reform to guarantee the right to food for the population.

A stronger basis to restrict food imports would be for the purpose of protecting human health by ensuring the availability of nutritional food. In the *EC-Asbestos* ruling, the Appellate Body ruled that the health risks associated with a particular product could form the basis for differentiating products. To show a violation of the *GATT*, "like" or "directly substitutable" products must be accorded differential treatment. What constitutes a "like" product will be dependent on a number of factors including consumer tastes and preferences. In the *EC-Asbestos* dispute, the French government banned the importation of asbestos products. Canada had challenged the ban, holding that the ban was a violation of the national treatment obligation under Article III:4 since the products were "like" certain competing non-asbestos containing products.<sup>227</sup> Health risks can be considered when assessing "like" products because they are an important factor in the competitive relationship between products and they influence consumers' tastes and habits

### *Competition Agreement*

At the moment, WTO negotiators are considering whether to adopt modalities for a possible multilateral competition agreement. The extent of monopolisation and anti-competitive practices in the multinational agricultural sector has raised some concerns with food-importing countries. Although agricultural prices have dropped for some commodities due to the greater volume of imports, consumers have not benefited from such price decreases due to corporate control of the global food business.<sup>228</sup> Food security and the availability of food may be undermined by the concentration of food production.<sup>229</sup> Some trends have seen the consolidation of operations between commodity companies merging with agricultural input companies (seed and chemical), resulting in larger companies that buy, store, ship and process the products.<sup>230</sup> The top five vegetable seed companies have been reported to control 75 per cent of the global vegetable seed market.<sup>231</sup> The market concentration has led

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<sup>227</sup> See Appellate Body Report, *European Communities – Asbestos*, paras. 115, 122.

<sup>228</sup> CIDSE (2002).

<sup>229</sup> See S. Zarrilli (2000), *International Trade in Genetically Modified Organisms and Multilateral Negotiations*, (UNCTAD: Geneva) UNCTAD/DITC/TNCD1, 20 October 2000.

<sup>230</sup> NGDO-EU Liaison Committee on the recommendation of the Joint Food Security Group (1999) at 6.

<sup>231</sup> Blakeney (2000) at 9. Coincidentally, there has been an antitrust suit filed against Monsanto relating to its practices that are detrimental to the world's consumers and farmers. See *Bruce Pickett et al. v. Monsanto Co.*, Case No. 1; 99CV03337 (Antitrust), U.S. District Court for the District of Columbia.

to “higher prices being charged to farmers for inputs and lower prices paid to them for their production”.<sup>232</sup>

In addition, trade in commodities is increasingly dominated by a small number of actors. For instance, the coffee trade appears to be dominated by a few multinational corporations that purchase coffee beans from small producers in almost 50 countries.<sup>233</sup> The concentration of the economic actors in the coffee market has paralleled with the overall drop in coffee prices, which has resulted in the loss of export revenues for coffee exporters, and an increase in household food shortages.<sup>234</sup> The relevant question will be whether the emerging international regime on competition at the WTO can be used to address anti-competitive practices in the international agriculture trade.

### *Fishing Subsidies*

Another area where food security is at risk in relation to international trade concerns the fish trade. Developing countries are the largest exporters of fish and fish products. Fish is also a main protein staple for many developing countries. Fish exports can generate considerable revenue to pay for other needed food commodities, as well as generating income and employment, although it may also divert fish food away from domestic supply, thus jeopardising food security. The populations that are fishers and fishworkers are usually the sectors of the population who suffer from malnutrition and limited availability of food.<sup>235</sup>

The burgeoning fish trade has imposed significant strains on the resource. The phenomenon of overfishing is partly attributable to the government subsidies. Developed countries benefit from such subsidies that are directed towards support of foreign fishing fleets. Since the subsidies go towards fish procurement and production, it does not lead to lower prices but facilitates greater use of the resource. This can lead to dwindling stocks and therefore higher prices, which disproportionately impact lower income families who depend on fish for nutrition and food security.<sup>236</sup>

The *Kyoto Declaration and Plan of Action*, agreed to at the International Conference on the Sustainable Contribution of Fisheries to Food Supply in 1995, noted that fish supply will continue to decrease and therefore impact food security. There was little emphasis on how international trade impacted this. However, the linkage between subsidies and dwindling fish stocks emerged in the WTO as an issue to be addressed.

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<sup>232</sup> W. Heffernan (1999), *Consolidation in the Food and Agriculture System, Report to the National Farmers Union*, found in Ritchie and Dawkins (2000) at 20. Madeley (2000) notes that trade liberalisation generally has led to increases in the prices of farm inputs, while farmers receive less for their crops, pointing to a study of edible oils in India.

<sup>233</sup> See Gonzalez, (2002).

<sup>234</sup> See C. Charveriat, *Bitter Coffee: How the Poor are Paying for the Slump in Coffee*, <http://www.Oxfam.org.uk/policy/papers/coffee.htm>

<sup>235</sup> Kent (2002) at 6.

<sup>236</sup> Kent (2002) at 7 reports that this is already occurring in several developing countries including the Philippines and India.

The *Doha Declaration* calls for the clarification and improvement of WTO disciplines on fisheries subsidies. Fish and fishery products are not covered under the *AoA*, with disciplines on fishing subsidies falling under the negotiations on Market Access for Non-Agricultural Products (NAMA). Tariffs on fish products are considered to be relatively low in developed countries although this does not account for the tariff peaks and tariff escalation for processed or value-added fish products.<sup>237</sup> Discussions have led to a similar classification of fishing subsidies as seen with agriculture. The proposed Red Box of fisheries subsidies would be banned, which include all subsidies that promote overcapacity and overfishing, such as subsidies to: transfer of a country's ships to the high seas or the local waters of another country; purchase of new or used ships; fleet modernisation; as well as positive discrimination in tax treatment or access to credit. Amber Box subsidies would be permissible and include all other subsidies not causing injury to other WTO Members. These would include, social subsidies designed to assist small-scale fisheries and coastal communities, and subsidies to improve fisheries management to ensure the sustainability of the fisheries. The operation of this scheme could lead to greater market access for fish while eliminating government support that potentially leads to dwindling fish resources.

#### *Cartagena Protocol*

International trade agreements relating to particular products or practices impacting the right to food may exist outside the WTO Agreements. The *Cartagena Protocol*<sup>238</sup> regulates the transboundary movement of LMOs (living modified organisms or GMOs), thereby directly affecting trade. Under the *Protocol's* advanced informed agreement (AIA) procedure, a party can decide to prohibit or restrict imports so long as the decision is based on a scientifically sound risk assessment. Where scientific certainty is lacking due to insufficient relevant information and knowledge regarding the extent of the potential adverse effects, countries can regulate or prohibit the imports of GMOs as a precautionary measure. The ability of countries to restrict or prohibit GMO imports could be motivated by concerns about nutrition and food security, as well potential environmental damage when genetically modified seeds are introduced into the environment. Some have expressed concerns that genetically modified seed use will impact traditional family farming practices in developing countries and raise the costs of production for farmers.<sup>239</sup> Food security and the availability of new food sources may be threatened.

International trade rules are unclear whether members can distinguish genetically modified products from their non-GMO counterparts and therefore apply differential measures since they are neither "like products" or are "substantially equivalent". This would enable countries to treat these products differently based on whether they are natural in origin or modified. GMO products and seeds are also subject to the *Protocol's* labelling requirement for products containing GMOs, which might be challenged under either the *SPS* or *TBT Agreement*. GMOs for food, feeding and processing must have labels and identification, noting that they "may contain"

<sup>237</sup> FAO (2003d), *Fisheries Trade Issues in the WTO* (FAO: Rome).

<sup>238</sup> *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, (2000) 39 ILM 1027.

<sup>239</sup> See S. Boensch Meyer, "Genetically Modified Organisms", (1998) *Y.B. Colo. J. Int'l Env't. L. & Pol'y* 102 at 111.

GMOS, that they are not intended for international introduction into the environment, and that they specify a contact for further information. GMOs intended for introduction into the environment are subject to a different labelling regime that identifies them as GMOs, specifies their identify and relevant traits, requirements for safe handling, storage, transport and use, as well as a contact point for further information and the name of the exporter.

The *SPS Agreement* permits only provisional measures based on precaution, even though food safety can serve as a basis, with ensuing obligations to perform a proper risk assessment and greater scientific study.<sup>240</sup> The *SPS* and *TBT Agreements* also contain a more limited scope for risk assessment and contain no provisions regarding risk management unlike the *Protocol*.<sup>241</sup> There are now *Codex Alimentarius* standards concerning standards and guidelines for risk analysis and safety assessments, and other food safety aspects of GMOs.<sup>242</sup> Under the standards, the baseline standard is that a GMO should be "as safe as the conventional counterpart (otherwise known as "substantial equivalence"<sup>243</sup> while "product tracing" is considered to be an acceptable tool of risk management as long as it is consistent with both the *SPS* and *TBT Agreements*.<sup>244</sup> Ultimately, an assessment should conclude whether the new food is as safe as the conventional counterpart

Developing countries may not have the institutional and technical capacity to assess the scientific risks presented by such imports. This will render it difficult for them to provide the requisite scope of scientific assessment to support any measure restricting imports. Where GMOs present a real threat to food security or compromises the nutritional health of the population, food insecure countries are powerless to take any measures without having undertaken a sound risk assessment.

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<sup>240</sup> The precautionary principle is not explicitly mentioned in the *SPS Agreement* although the Appellate Body noted that the principle 'finds reflection in Article 5(7)'.  
<sup>241</sup> See A. H. Qureshi, "The Cartagena Protocol on Biosafety and the WTO-Co-existence or Incoherence? (2000) 49 *ICLQ* 835-866.

<sup>242</sup> See *Principles for the Risk Assessment for Foods Derived from Modern Biotechnology, Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants*. In addition, the International Plant Protection Convention Secretariat has set up an expert working group with experts from the CBD Secretariat to develop standards for Phytosanitary measures identifying and assessing plant pest risks associated with LMOs.

<sup>243</sup> The application of the "substantial equivalence" test has been criticised for not fully addressing the risks and uncertainties associated with GM food. See B. van Dyke & M. Stilwell (1998) *Codex, Substantial Equivalence and WTO Threats to National GMO Labeling Schemes*, (Centre for International Environmental Law, Geneva)

<sup>244</sup> Principle 21.  
<http://www.ciel.org/Publications/CODEXSubstantialEquivalenceandWTO.pdf>

## CONCLUSIONS – CAN THE RIGHT TO FOOD OBLIGATIONS BE RECONCILED WITH INTERNATIONAL TRADE OBLIGATIONS

Overall, it is difficult to know how the AoA has impacted the right to food perhaps because it is difficult in knowing the counterfactual - what would happen in the absence of the AOA.<sup>245</sup> Many developing countries have already reformed their agricultural policies partly imposed by domestic aid and international financial institution motivated programmes. This has limited their ability to use several of the market protection mechanisms that are still available under the *AoA*, in order to ensure protection of the right to food and fulfilment of that right through its equitable distribution and availability. Not having the availability of policy tools that developed countries have benefited from, such as subsidies, pricing policies, safeguards, border measures and other support measures, may impede sustainable agricultural growth.<sup>246</sup> This may change in the reform of the *AoA*, with the creation of special product exceptions for food staples in addition to a new special safeguard mechanism for developing countries.

It is likely that there will be both winners and losers in relation to food security as a result of trade liberalisation. The availability of cheaper agriculture products, due to lower tariffs, may enhance the access of food and even drive down prices in the local market. Market access would be enhanced providing revenue for export products although LDCs could suffer since their products, that benefit from preferential tariff regimes would lose their competitive margin. However, agricultural producers who cannot remain competitive will likely suffer. This will have a disproportionate impact on small-scale producers who rely on domestic markets for their livelihoods.

In addition there would be both positive and negative consequences as a result of the elimination of export subsidies and the reduction of domestic support. Domestic goods in food insecure countries would be in a better position to compete with exported goods, which could stimulate local production and small-scale farming. Decreases in domestic support can also create a fairer playing field for developing country exports. However, limiting export subsidies and domestic support may render higher prices for commodities and higher levels of food inaccessibility. Moreover, lack of domestic support can decrease food surpluses that were dedicated to food aid as well as government interventions to ensure equitable food distribution or protect small-scale farmers from commodity price fluctuations or crop disasters.

The violations to the right to food can be seen in agriculture trade policies. The use of export subsidies and domestic support can have extraterritorial effect, lessening food supply due to lower prices that inhibit domestic production due to market forces. States are to give due attention to the right to food in international

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<sup>245</sup> FAO (2003e), *Impact of the Uruguay Round Agreements of Relevance of the Agricultural Sector, Winners and Losers*, (FAO: Rome) at 4.

<sup>246</sup> See FAO (2001c), *Some Issues Relating to Food Security in the Context of the WTO Negotiations on Agriculture*, Discussion Paper No. 1 (FAO: Rome) at 3.

agreements. As a result, a failure to implement *AoA* commitments by retaining market protections and export subsidies can give rise to right to food violations.

Right to food concerns also emerges in other WTO Agreements. The *TRIPS Agreement* allows for the introduction of intellectual property right protection for plant genetic resources or another *sui generis* system. This could limit the availability of seeds for food production and undermine traditional practices by small farmers of seed exchange and developing plant varieties. The *SPS Agreement* authorises WTO members to take measures for the purpose of meeting nutritional or dietary needs or the protection of health. This can assist in ensuring food quality for the population but also can be used as a means to protect markets against exported goods from developing countries.

This paper surveys the right to food implications from various WTO Agreements. There are a number of provisions where food accessibility, quality and distribution could be undermined. The rules themselves can also be used, through various exemptions and proscribed interventions, to ensure food availability to the entire population. This renders it difficult to isolate the causal relationship between the particular WTO Agreement provision and the potential violation of the right to food. How WTO members implement their WTO obligations will more likely trigger the violation. However, the urgency of food security and hunger should necessitate a more direct reference to the right to food in the WTO so that the obligation to ensure that WTO members have an obligation to respect the right to food when negotiating trade rules and subsequently implementing them.