

Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture

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I. Introduction

Food is life and livelihood; a commodity and a right. As a right it is one of the least realized as the persistently high figures on hunger and malnutrition show.

852 million people were undernourished worldwide in 2000-2002: 815 million in developing countries, 28 million in countries in transition and 9 million in industrialized countries.² This sad picture becomes even worse if one adds the two billion that suffer from micronutrient deficiencies, the so-called “hidden hunger”, with its devastating effects on mental and physical capacity, health and life expectancy.³

Of the world’s poor and food insecure, two-thirds live in rural areas of developing countries⁴ and depend on agriculture for their immediate livelihoods and future prospects.⁵ Appropriate agricultural policies, including agricultural trade policies, are an essential component of a much wider bundle of measures necessary to realize their right to food. Since

² FAO, *The State of the Food Insecurity in the World 2004*, 6.

³ UN Millennium Project, *Halving Hunger: It Can Be Done*, Summary version of the report of the Task Force on Hunger, 2005, 3.

⁴ IFAD, *Rural Poverty Report 2001 – The Challenge of Ending Rural Poverty*, 2001, 1; FAO, *The State of Food and Agriculture 2005 – Agricultural Trade and Poverty: Can Trade Work for the Poor?*, 2005, 61. Agriculture’s importance is greatest where undernourishment is most prevalent. While throughout the developing world agriculture accounts for around 9 percent of GDP and more than half of total employment, these figures rise to 30 percent and nearly 70 percent, respectively, in countries where more than 34 percent of the population are undernourished. FAO, *The State of the Food Insecurity in the World 2003*, 16.

⁵ In Least Developed Countries (LDCs) the poverty rate for rural households reaches almost 82 percent; World Bank, *Global Economic Prospects*, 2004, 106.

1995, the Agreement on Agriculture (AoA)⁶ establishes important parameters for such policies and economic growth by initiating a process of liberalization which consists of increasing market access, and reducing domestic support and export subsidies.

More than ten years after the entry into force of the AoA and towards the end of the Doha Round negotiations, the positive and negative implications of the AoA for the right to food can be assessed and some criteria may be established, which a revised AoA should meet in order to be conducive to the realization of this important right. Such a call for coherence is justified by the fact that all WTO Members are bound by both trade and human rights law. In particular, almost all WTO Members have ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), which contains the most important codification of the right to food (article 11). Therefore, the normative content and theoretical framework of obligations developed in the context of article 11 ICESCR will be the standard used to gauge the repercussions of agricultural liberalization on the right to food. The right to food thereby works as a threshold against which to test the AoA in two ways: first, it provides an ethical and legal justification for claims to modify the current regulation of international trade in agriculture. Second, it serves to determine the boundaries of permissible policy options.

The paper will proceed as follows: the first section will set out the linkages between trade in agriculture, poverty reduction and the right to food (II.). Next, the normative content of the right to food and states' obligations will be presented (III.). The following part (IV.) will deal with the legal architecture of the AoA and of the Marrakesh Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (Marrakesh Decision).⁷ It will analyse the right to food implications of these two instruments and assess the experiences made resulting from their implementation from a right to food perspective. Both the effects upon developing countries and the question whether countries have retained sufficient space to adopt right to food policies will be addressed. In addition, some first recommendations will be interspersed on how the right to food could be given

⁶ Agreement on Agriculture (AoA) in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 April 1994, UNTS Vol. 1867 No. 31874, page 410.

⁷ UNTS Vol. 1867 No. 31874, page 60.

greater weight. The last part (V.) will – against the backdrop of the current debate about trade and human rights – explore four ways of making agricultural trade rules more supportive of the right to food: by inserting the right explicitly in the new agreement, by interpreting existing or future rules to take account of the right, by invoking the right as an exception to a trade obligation, and, most promisingly, by shaping a new AoA to conform to the right to food. Some conclusions and recommendations will follow.

Limitations of space demand omission of a number of issues: the SPS⁸ and TBT Agreements⁹ will not be dealt with, although they are relevant to the right to food due to their effects on food safety and market access. The same applies to the intellectual property protection requirements of the TRIPS Agreement and their consequences for farmers' access to key agricultural inputs such as seeds.¹⁰ As a matter of fact, almost all WTO Agreements have some indirect effects via their implications for economic growth, employment and income generation. The special case of cotton, which could serve as a case in point for some of the arguments made here, will not be addressed either. The most important drawback, however, is the fact that not sufficient attention can be paid to the differences that exist between developing countries. Indeed, in a number of respects it is no longer possible to speak of developing countries as such in the context of trade negotiations as they are a heterogeneous group in terms of their current trade policies, their level of agricultural development, and the importance of the agricultural sector in the economy. The interests of competitive export nations like Brazil, for instance, differ both from those of the 79 African, Caribbean and Pacific (ACP) states, which have enjoyed preferential access to the EC market and fear that increasing market access in general will erode these preferences, and from those of net food-importing developing countries with underdeveloped agricultural sectors.

⁸ Agreement on the Application of Sanitary and Phytosanitary Measures, UNTS Vol. 1867 No. 31874, page 493.

⁹ Agreement on Technical Barriers to Trade, UNTS Vol. 1868 No. 31874, page 120.

¹⁰ On the implications of the TRIPS Agreement for the right to food, see K. Mechlem/ T. Raney, "Agricultural Biotechnology and the Right to Food", in: J.M. Dupuy/ F. Francioni/ E.U. Petersmann (eds), *The Impact of Biotechnology on Human Rights*, forthcoming.

II. The Linkages between Trade in Agriculture, Poverty Reduction and Food Security

Agriculture produces food, fibres, flowers, renewable energy and raw materials for industrial production. It underpins food security, including in times of contingencies,¹¹ foreign exchange earnings, rural development, employment generation, the viability of rural communities, the preservation of agrobiodiversity and of certain landscapes (e.g., terraced paddy fields), and the upholding of cultural heritage, traditional lifestyles, customs and values (multifunctionality of agriculture).¹² It typically represents the basic economic activity on which other economic activities are subsequently built; growth in agriculture can have disproportionately positive impacts.¹³ Given the concentration of the poor in the agricultural sector, growth in agriculture and increases in productivity are critical to reducing poverty and to realizing the right to food in developing countries.¹⁴

¹¹ Contingencies can be caused by political reasons (wars, trade embargoes), technical reasons (radioactive fallouts), natural events (floods, droughts, plant and animal diseases, earth quakes), long term declines in the productive capacity of agriculture due to increasing water scarcity, desertification, soil erosion or climate change, or problems of affordability (e.g., caused by currency devaluations).

¹² OECD (ed.), *Multifunctionality – Towards an Analytical Framework*, 2001. The other side of the coin are negative effects such as soil erosion, chemical residual, nutrient leaching, greenhouse gas emissions and problems with animal welfare.

¹³ D. Byerlee/ X. Diao/ C. Jackson, *Agriculture, Rural Development, and Pro-poor Growth – Country Experiences in the Post-Reform Era*, World Bank Agriculture and Rural Development Discussion Paper 21, 2005, viii. The contribution of agriculture to growth declines with the transformation of an agricultural economy to an urban-based non-agricultural economy, although even in middle-income countries agriculture continues to “pull beyond its weight”; *ibid.*

¹⁴ Overall growth does, of course, not translate automatically into better realization of socio-economic rights (see, e.g., UNDP (ed.), *Human Development Report 1999*, 1999), nor do declining growth rates as such constitute human rights violations. Economic growth plays, however, an essential role in reducing poverty and realizing socio-economic rights.

In 2002, food accounted for approximately seven percent of merchandise trade.¹⁵ Generally, involvement in trade leads to higher rates of economic growth,¹⁶ and engagement in trade in agriculture is associated with less hunger, not more.¹⁷ The proportions of undernourished people and underweight children tend to be lower in countries where agricultural trade is large in proportion to agricultural production.¹⁸ However, there are no automatic correlations. Developing countries with similar levels of agricultural trade show very different amounts of hunger and poverty, which suggests that the impact of agricultural trade on food security is mediated by factors such as markets, natural resource endowments, human capacity, institutions and policies, and the degree of equity with which benefits are distributed.¹⁹ If trade policy is to contribute to food security, it needs to be embedded in a coherent and well-sequenced national development strategy and complemented by appropriate pro-poor companion policies. In particular, sequencing is important: as such policies take time to yield results, they are only effective if they are set in motion before trade or agricultural reforms, which may harm low-income, food-insecure households.²⁰ Such policies may include improving the productivity and competitiveness of the sector by removing penalizing tariffs on agricultural inputs, such as machinery, fertilizers and pesticides; providing agricultural extension services; improving public investment in roads and infrastructure, education and health, research and development; removing obstacles to private investment including increasing access to credit; creating non-agricultural employment and long-term institutional development; and, in some

¹⁵ C. Breining-Kaufmann, "The Right to Food and Trade in Agriculture", in: T. Cottier/ J. Pauwelyn/ E. Bürgi Bonanomi (eds), *Human Rights and International Trade*, 2005, 341 et seq.

¹⁶ FAO, *The State of the Food Insecurity in the World 2003*, see note 4, 16; on trade and development a number of important reports have been published during the last years, amongst them are: FAO, *The State of Food and Agriculture*, see note 4; UNDP, *Making Global Trade Work for the Poor*, 2003; UNCTAD, *Least Developed Countries Report 2004*; WTO, *World Trade Report 2004*.

¹⁷ Countries, where more than 15 percent of the population goes hungry import less than 10 percent of their food, compared to more than 25 percent in more food secure countries; FAO, *The State of the Food Insecurity in the World 2003*, see note 4, 18.

¹⁸ Ibid.

¹⁹ Cf., Ibid.

²⁰ FAO, *The State of Food and Agriculture*, see note 4, (84 et seq.), (96).

cases, facilitating socially acceptable transitions out of agriculture in the medium to long term.²¹

Economic modelling exercises have shown that further liberalization of trade in agriculture can yield welfare gains at the global level for most, but not all, individual countries. While there is agreement on the overall direction, specific forecasts need to be taken with caution as there are limitations to the degree to which real change caused by complex agricultural trade policy reforms can be predicted.²² Recently, benefit estimates have become smaller and less significant, in large part due to better modelling and data.²³ From a right to food point of view it is problematic that estimates typically refer to aggregates and say little about the distributional effects amongst and within individual countries. Experience suggests that the within-country distributional impact finds those affected negatively at the bottom of the economic pyramid.²⁴ If these losses, which are typically suffered by a large number of

²¹ Byerlee et al., see note 13, 40; Vietnam is an example of a country where agricultural trade stimulated economic growth and food security. In the 1980s, Vietnam introduced a national economic reform program that gave farmers control over land, allowed them to increase sales to the market and reduced agricultural taxation. Exports benefited from enhanced market access while the domestic sector continued to benefit from subsidies and border protection against imports. A poverty eradication campaign targeted investments in rural infrastructure. As a result, Vietnam's agricultural output grew by 6 percent per year and agricultural exports grew even faster so that in the 1990s the country generated a large agricultural trade surplus. At the same time, the percentage of undernourished people fell by 8 percent. Mozambique, in contrast, shows how liberalization that is not accompanied by appropriate policies can have detrimental effects on food security. Mozambique removed a ban on raw cashew exports. While about a million cashew farmers received higher prices for their products, at least half the higher prices went to traders and did not stimulate an increase in production. At the same time, Mozambican processing plants lost their assured access to raw cashews and closed down putting 7000 people out of work. FAO, *The State of the Food Insecurity in the World 2003*, see note 4, 18 et seq.

²² FAO, *Trade Policy Briefs on Issues Related to the WTO Negotiations on Agriculture, No. 13 Global Impacts of Agricultural Trade Reforms – Why Users Need to be More Vigilant When Interpreting Quantitative Estimates*, available at: <<ftp://ftp.fao.org/docrep/fao/008/j6878e/j6878e01.pdf>>.

²³ Ibid.

²⁴ FAO, *Trade Policy Technical Notes on Issues Related to the WTO Negotiations on Agriculture, No. 14, Considerations in the Reform of Agricultural*

poor people, are offset by overall gains at the national level, liberalization might still look desirable at first glance. Unless, safety nets and other mechanisms which help those negatively affected to find alternative ways of gaining a living are in place, such in-country redistribution can lead to human rights violations.

Amongst countries, the highest benefits of further liberalization are expected to accrue to OECD countries where markets are most distorted. For developing countries, the potential gains would be smaller in absolute terms, but larger relative to gross domestic product because agriculture constitutes a comparatively large share of their economies. Their food security would mainly improve when higher prices for agricultural commodities translate into higher wages and more jobs in non-agricultural sectors, and provide incentives for investment.²⁵ They would benefit from market liberalization in OECD countries, but also from their own reform policies in agriculture. The realization of potential benefits is, however, neither automatic nor universal. As developing countries are a very heterogeneous group, a one-size fits all approach to trade liberalization will neither affect all of them in a similar, nor indeed in a positive way.

A particular concern is market access: if countries reduce tariffs local products might be displaced by imports. If the displacement concerns products that are mainly grown by small-scale and subsistence farmers, the incomes of the rural poor might plummet with devastating consequences for their food security. In countries with large numbers of subsistence farmers, such as India or Kenya, it is unlikely that sufficient opportunities would be available in the short or medium term in other sectors to absorb these displaced farmers.²⁶ Such transitions need appropriate companion policies (see above) which, as historical experience shows, take decades or longer to bear fruit.²⁷ Countries therefore need to avoid opening their agriculture sectors to international competition too extensively and too quickly, as this is likely to hinder rather than enhance their growth prospects, and in turn their ability to reduce poverty and food insecurity. It is increasingly argued that countries with

Trade Policy in Low Income Developing Countries, available at: <ftp://ftp.fao.org/docrep/fao/009/j7724e/j7724e00.pdf>, 8.

²⁵ FAO, *The State of Food and Agriculture*, see note 4, 79.

²⁶ S. Polaski, "Agricultural Negotiations at the WTO: First, Do No Harm, Carnegie Endowment for International Peace", *Policy Outlook*, June 2005, 3 et seq.

²⁷ Ibid.

underdeveloped agriculture sectors would benefit from some border protection for a defined period during which productivity enhancing investments are made in order to make their agriculture sectors more competitive and to prevent them being undermined by cheaper imports, in particular where this would lead to unemployment and impoverishment of small-scale and subsistence farmers.²⁸ State intervention might have a role to play in such circumstances, as much as it did in the now more advanced economies when they too were at earlier stages of development.²⁹ Such flexibility can be of particular relevance for import-competing food staple sectors, where the majority of the rural poor operate and which are critical to the development of agricultural and wider rural growth.³⁰ The Special Products and the Special Safeguard Mechanism that will form part of a revised AoA have the potential to accommodate such concerns (see under V. 3. d. bb.).

III. The Right to Food

The right to food has been recognized as a human right in numerous binding and non-binding legal instruments³¹ since the Universal Declaration of Human Rights (UDHR) in 1948. The ICESCR contains in article 11 (1), which is based on article 25 (1) of the UDHR,³² the most important codification of the right to food:³³

²⁸ Such policies should not be confused with protectionist policies in pursuit of food self-sufficiency objectives. FAO, *Trade Policy Technical Notes on Issues Related to the WTO Negotiations on Agriculture, No. 14*, see note 24. See below the discussion of Special Products.

²⁹ Ibid.

³⁰ Ibid.

³¹ See, FAO, *Extracts from International and Regional Instruments and Declarations, and Other Authoritative Texts Addressing the Right to Food*, Legislative Study No. 68, 1999.

³² Adopted by A/RES/217 A (III) of 10 December 1948.

³³ Other codifications of the right to food, or aspects of it, can be found in article 12 (2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979, A/RES/34/180 of 18 December 1979; article 24 (2) (c) and (e), as well as article 27 (3) of the Convention on the Rights of the Child (CRC) of 1989, A/RES/44/25 of 22 November 1989; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003, adopted at the 2nd. Ordinary Sess. of the Assembly of the Union, Maputo, Doc.

“States Parties ... recognize the right of everyone to an adequate standard of living ... including adequate food.”³⁴

In its General Comment No. 12 the Committee on Economic, Social and Cultural Rights (CESCR), the supervisory mechanism of the ICESCR, defined the right to food as realized when every individual “alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.”³⁵ It implies the “*availability* of food in a quantity and quality sufficient to satisfy the *dietary needs* of individuals, *free from adverse substances*, and *acceptable* within a given culture [and] the *accessibility* of such food in ways that are *sustainable* and that do not interfere with the enjoyment of other human rights” (emphasis added).³⁶

Under the ICESCR, states have to use all appropriate means to progressively realize the right to food (article 2 (1)). A commonly used analytical framework of states’ human rights obligations, originally developed by Eide³⁷ and now adopted by the CESCR and other human rights actors, distinguishes between three types of obligations, *viz.* the

CAB/LEG/66.6. Among non-binding instruments, see the 1992 World Declaration on Nutrition; the 1996 Rome Declaration on World Food Security, and Plan of Action; the 2002 Declaration of the World Food Summit Five Years Later; the 2002 Plan of Implementation of the World Summit on Sustainable Development; and, in particular, the 2004 Voluntary Guidelines for the Progressive Realization of the Right to Adequate Food.

³⁴ UNTS Vol. 993 No. 14531.

³⁵ Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12 on The Right to Adequate Food, Doc. E/C.12/1999/5 of 12 May 1999, para. 6.

³⁶ *Ibid.*, para. 8. For the 153 States Parties to the ICESCR this definition is of high authoritative value. Cf. *Updated Study on the Right to Food, Submitted by Mr. Asbjørn Eide in Accordance with Sub-Commission Decision 1998/106*, Doc. E/CN.4/Sub.2/1999/12 of 28 June 1999, para. 45. On the legal relevance of General Comments of the CESCR, and other treaty bodies in general, see, for example, P. Alston, “The Historical Origins of the Concept of ‘General Comments’ in Human Rights Law”, in: L. Boisson de Chazournes/ V. Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality, Liber Amicorum Georges Abi-Saab*, 2001, 763 et seq.; M. Craven, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development*, 1995, 90 et seq.; M. Scheinin, “International Mechanisms and Procedures for Implementation”, in: R. Hanski/ M. Suksi (eds), *An Introduction to the International Protection of Human Rights*, 1999, 429 et seq. (444).

³⁷ A. Eide, *Right to Adequate Food as a Human Right*, 1989.

obligations to respect, protect, and fulfil.³⁸ The obligation to *respect* requires states to refrain from interfering directly or indirectly with the enjoyment of the right to food.³⁹ They must refrain from denying or limiting access to food or interfering arbitrarily with existing arrangements, e.g., by destroying functioning market systems. The obligation to *protect* requires states to take measures to ensure that third parties such as individuals, groups, corporations or other private entities do not interfere in any way with the enjoyment of the right.⁴⁰ States must enact and enforce effective legislation and take other measures – such as food safety measures – to control and restrain third party activities. The obligation to *fulfil* means that states have to take positive measures to *facilitate* and *provide* for individuals' enjoyment of their rights.⁴¹ They must develop comprehensive national right to food strategies and policies, repeal legislation that impairs the progressive realization of the right, and enact necessary laws. In short, to facilitate the realization of the right to food means to create an enabling framework in which as many individuals as possible can provide for their own food. Finally, states have the obligation to *provide directly* for the fulfilment of the right of those individuals who are unable, for reasons beyond their control, to realize their rights themselves like orphans or disabled people.⁴² Food safety nets and food interventions targeted towards vulnerable groups fall within the “provide” dimension. Additional state obligations stem from cross-cutting human rights principles, which comprise participation, non-discrimination, and the right to a remedy for rights violations. The ICESCR does not prescribe any specific economic system and was drafted deliberately so as to accommodate a variety of approaches.⁴³ An internationally liberalized market economy shaped in a human rights conforming manner can hence offer an appropriate framework to realize the right to food.

³⁸ This framework of obligations is increasingly used by UN and regional human rights actors, academia and national courts, in particular for economic, social and cultural rights.

³⁹ CESCR, General Comment No. 12, see note 35, para. 15.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ CESCR, *General Comment No. 3 Concerning the Nature of States Parties' Obligations (Art. 2, para. 1 of the Covenant)*, para. 8, reprinted in Doc. HRI/GEN/1/Rev. 7 of 12 May 2003, 127; Craven, see note 36, 123 et seq.

Human rights law foresees, centrally, the responsibility of each state to realize the rights of individuals under its jurisdiction. Besides this domestic side, a much vaguer international dimension exists. According to article 28 of the UDHR:

“[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in th[e] Declaration can be fully realized.”

With respect to the right to food, article 11 (2) ICESCR lays down that:

“States Parties ... recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: (a) To improve methods of production, conservation and distribution of food ... (b) [t]aking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.”

In the spirit of Article 56 of the UN Charter, and using the analytical framework set out above, the CESCR interpreted the ICESCR (arts. 11 (2), 2 (1) and 23) as containing obligations to cooperate internationally, so as to take steps to respect, protect and facilitate the right to food in other countries, and to provide the necessary aid, including food aid, when required.⁴⁴ In addition, states should ensure that the right to food is given due attention in international agreements.⁴⁵ The failure of a state to take into account its international legal obligations regarding the right to food when entering into agreements with other states or with international organizations amounts to a violation.⁴⁶ The extent of such obligations, which are variably called extraterritorial, transnational or international ones, remains ill-defined but is currently widely debated.⁴⁷

⁴⁴ It should be noted that in General Comment No. 12, see note 35, the CESCR uses the term “international obligations” and the softer language of “international commitments” interchangeably.

⁴⁵ Ibid., para. 36.

⁴⁶ Ibid., para. 19.

⁴⁷ See, for example, S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation*, 2006; S. Skogly/ M. Gibney, “Transnational Human Rights Obligations”, *HRQ* 24 (2002), 781 et seq.; M. Windfuhr, (ed.), *Beyond the Nation State – Human Rights in Times of Globalization*, 2005. The debate about extraterritorial obligations is an interesting one: according to classical human rights theory, each state

The most recent elaboration of steps conducive to the realization of the right to food can be found in the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Voluntary Guidelines) which were adopted by the FAO Council in 2004.⁴⁸ They set out a kaleidoscope of recommendations for food specific (e.g. food availability, safety and nutrition) and non-food specific measures (e.g. good governance, education, safety nets, access to resources, and legal and institutional frameworks) necessary to realize the right to food. National and international trade are amongst the issues addressed (see under V. II.). However, as the Voluntary Guidelines leave open where suggestions for sound policies end and obligations begin, they will not be used as a basis for the subsequent analysis.

has obligations *vis-à-vis* individuals under its jurisdiction. Clear, geographically determined spheres of responsibility exist that should leave nobody unprotected. Non-realization and violations can be attributed to one actor only. However, this neat theoretical model has been challenged by the increasingly strong effects one or more states with political power can have on the realization of human rights abroad: economic sanctions or the destruction of local income opportunities by dumping of subsidised goods are but two examples. How to attribute and balance spheres of responsibilities and obligations remains, however, to be conceptually clarified.

⁴⁸ <<http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm>>. For the history of the Voluntary Guidelines, see, K. Mechlem, "The Development of Voluntary Guidelines for the Right to Adequate Food", in: A. Mahiou/F. Snyder (eds), *La Sécurité Alimentaire – Food Security and Food Safety*, The Hague Academy of International Law, 2006, 351 et seq. and K. Mechlem, "Food Security and the Right to Food in the Discourse of the United Nations", *ELJ* 10 (2004), 631 et seq.; also reprinted in: F. Snyder (ed.), *International Food Security and Global Legal Pluralism*, 2004, 47 et seq.

IV. The Agreement on Agriculture and the Marrakesh Decision: Implementation Experiences Viewed from a Right to Food Perspective

1. The Background to and the Objective of the Agreement on Agriculture

The GATT contained many exceptions for trade in agriculture which led to severe trade distortions.⁴⁹ A number of the major exporting states came close to ignoring GATT requirements altogether, up to the point of refusing even to implement GATT panel decisions.⁵⁰ World market prices were depressed and unstable, access to markets limited, and export competition unfair.

In 1986, the Punta del Este Ministerial Declaration, which launched the Uruguay Round, put agriculture at the heart of the negotiations and declared that “there is an urgent need to bring more discipline and predictability to world agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets.”⁵¹ The entry into force of the AoA in 1995 was the

⁴⁹ For the regulation of agriculture under the GATT, see J. McMahon, “The Agreement on Agriculture”, in: P. Macrory/ A. Appleton/ M. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis*, Vol. 1, 2005, 189 et seq.

⁵⁰ M. J. Trebilcock/ R. Howse, *The Regulation of International Trade*, 1999, 247. See also M.G. Desta, *The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture*, 2002; and Breining-Kaufmann, see note 15, 344. O’Connor points out that there was also relatively little case law and suggests that this was due to the fact that many countries with comparative advantage in agricultural production were not GATT contracting parties; that many countries had their own programmes in place and did not want to promote jurisprudence that could come back to haunt them; and that Governments did not take international action because they agreed on the need to manage domestic production and supply; B. O’Connor, “Book Review: The Law of International Trade in Agricultural Products: From GATT 1947 to the WTO Agreement on Agriculture”, *JIEL* 6 (2003), 535 et seq. (537 et seq.).

⁵¹ GATT, Ministerial Declaration on the Uruguay Round of Multilateral Trade Negotiations, adopted in Punta del Este, Uruguay, on 20 September 1986, *ILM* 25 (1986), 1623 et seq.

first step towards subjecting agricultural trade to a rules-based system and to initiating a process of trade liberalization.⁵²

The long-term objective of the AoA, as set out in its preamble, is “to establish a fair and market-oriented agricultural trading system”⁵³ through “substantial progressive reductions in agricultural support and protection.”⁵⁴ The AoA’s goal is to be achieved via commitments in three areas, the three pillars of the AoA: increasing market access, reducing trade-distorting domestic support, and reducing export subsidies. In order to avoid creating a level playing field of unequal players, obligations in these disciplines incorporate special and differential treatment for developing countries (article 15 AoA). The implementation period was six years starting in 1995.⁵⁵ As the AoA is only the beginning of the liberalization process, it foresees new negotiations beginning one year before the end of the implementation period (article 20 AoA). These difficult and sticky negotiations form part of the current Doha Round agriculture (see under V. (3) (d)).

2. Market Access

The first pillar of the AoA is to increase market access. Access of foreign products to domestic markets can be impeded by tariffs or non-tariff barriers such as quotas, minimum import prices, or discretionary import licensing.⁵⁶ Such barriers serve to protect domestic producers

⁵² The AoA is an integral part of the WTO Agreements. It is annexed to the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, UNTS Vol. 1867 No. 31874, page 410. Article 2 together with Annex 1 of the AoA specify that the AoA applies to all products listed in Chapters 1 through 24 of the Harmonised System less fish and fish products, plus certain other specified items. Dealing with agriculture in a separate agreement was explained with the need to treat agriculture differently and separately because of its unique role in securing food, rural livelihoods and lifestyles, biodiversity, environmental services, and cultural practices.

⁵³ AoA, Preamble, para. 2.

⁵⁴ *Ibid.*, para. 3.

⁵⁵ Article 1 (f) AoA. For the “Peace Clause”, article 13, which limits the possibility of disputes, a period of nine-years was agreed.

⁵⁶ See article 4 (2), footnote 1, AoA, for a list of non-tariff barriers. Despite the fact that already the GATT prohibited, with few exceptions, non-tariff barriers, an abundance of such measures was widely used, often in violation

against imports of subsidized, or for other reasons cheaper, commodities, generate governmental revenue, or enforce internal health, technical, and other regulations. They raise the cost of food for consumers, but even in developing countries urban consumers, who may be affected negatively by such higher food prices in the short term, are ultimately most interested in the income earning opportunities which a healthier agricultural economy may provide as a result of more remunerative prices.⁵⁷

WTO Members committed to improve market access in two ways: through “tariffication”, i.e. the conversion of all non-tariff trade barriers, except those for health and safety reasons, into tariffs,⁵⁸ and through binding these tariffs against future increases and subjecting them to tariff reductions.⁵⁹

Tariffication introduced a systemic change.⁶⁰ It was intended to make agricultural protection more transparent, and reductions easier to negotiate.⁶¹ However, the actual conversion of non-tariff barriers into their tariff equivalents was left to countries themselves which led to a

of GATT rules and causing major distortions of agricultural trade. M.G. Desta, *Legal Issues in International Agricultural Trade: The Evolution of the WTO Agreement on Agriculture from Its Uruguay Origins to its Post-Hong Kong Directions*, FAO Legal Paper Online No. 55, 2006, available at: <<http://www.fao.org/Legal/prs-ol/lpo55%20.pdf>>, 11.

⁵⁷ The picture is more complicated in the rural areas where the net food production/consumption status varies widely across households and it is much less clear whether “net consuming” households would be negatively affected by higher food prices.

⁵⁸ Article 4 (2) AoA. According to footnote 1 to article 4 (2) non-tariff measures to be converted into tariffs include “quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties.” As for the scope of this provision, see Report of the GATT Panel, Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products, Doc. WT/DS207/R, paras 7.17-7.102 (2002). Details of the tariffication process are not contained in the AoA itself but in the so-called Modalities Agreement, Modalities for the Establishment of Specific Binding Commitments under the Reform Programme, Doc. MTN.GNG/MA/W/24 of 20 December 1993.

⁵⁹ Article 4 (1) AoA.

⁶⁰ Breining-Kaufmann, see note 15, 344.

⁶¹ McMahon, see note 49, 203.

phenomenon called “dirty tariffication”:⁶² tariff equivalents were often established at much higher levels than their corresponding non-tariff barriers leading to artificially high levels of tariffs from which to start reductions. It reduced the impact of the reform process so that, for example, the U.S. and the EC have *de facto* not significantly increased access to their markets. To dispel fears that, as a result of tariffication, market access could decrease, “current access commitments” and “minimum access opportunities” were agreed upon to guarantee that historic levels of imports would not be adversely affected.⁶³ Both measures are given effect by tariff rate quotas at low or minimal duty rates.⁶⁴ Annex 5 to the AoA permits, under stringent conditions and subject to minimum access opportunities, to exempt products that are the predominant staple in the traditional diet of a developing country from the tariffication obligation of article 4 (2) AoA.

The tariff reduction obligation required developed countries to reduce their tariffs on average by 36 percent over the six-year implementation period; for developing members the average was 24 percent over a ten-year period, in line with the principle of special and differential treatment.⁶⁵ A minimum reduction of fifteen per cent per tariff line for developed countries and ten percent for developing countries was established. Least developed members have no reduction commitments, but had to bind their tariffs. The agreed reductions were averages so some countries made large reductions in tariffs that were already low (e.g. a 50 percent reduction by dropping a tariff from 2 percent to 1 percent) or in areas of low sensitivity. In sensitive product areas, or with

⁶² According to Annex 3, para. 2 of the Modalities Agreement, tariff equivalents are to be fixed using the actual difference between internal and external prices.

⁶³ Desta, see note 56, 12.

⁶⁴ *Ibid.* Tariff rate quotas or tariff quotas refers to lower tariff rates for specified quantities and higher (sometimes much higher) rates for quantities that exceed the quota. Their purpose is to ensure that quantities imported before tariffication could continue to be imported, and to guarantee that some quantities were charged duty rates that were not prohibitive; WTO, Understanding the WTO: The Agreements, available at: <http://www.wto.org/English/thewto_e/whatis_e/tif_e/agrm3_e.htm>.

⁶⁵ Tariff reduction commitments were recorded for each member in its national schedule of concessions annexed to the Uruguay Round Protocol that forms an integral part of the Final Act; McMahon, see note 49, 205.

respect to products of particular interest to developing countries, tariffs were often reduced only minimally.⁶⁶

High tariffs on developing country export products such as cotton, sugar, cereals and horticulture, co-exist with tariff peaks and higher and more complex tariffs for developing country products than temperate zone products. These imbalances are compounded by the fact that average agricultural tariffs remain much higher than tariffs for non-agricultural products. This fact works to the detriment of developing countries, which rely more on agricultural exports than on exports of manufactured goods.⁶⁷ Another “strikingly antidevelopment”⁶⁸ phenomenon is tariff escalation. “Tariff escalation” refers to tariffs that rise with the degree of processing, i.e., higher tariffs are imposed on semi-processed and fully processed raw materials than on primary or less processed forms of the same products. Tariff escalation protects the processing industry of the importing country.⁶⁹ It works systematically against the efforts of producers in developing countries to diversify into the rapidly growing markets for value-added processed products⁷⁰ and penalizes investors in developing countries who seek to add value to production for export.⁷¹

In sum, despite the implementation of the AoA commitments, developing countries’ access to OECD agricultural markets remains severely curtailed. At the same time, developing countries are under obligations to open their own markets. Limited developing country access coupled with OECD domestic support and export subsidies prevents developing countries from realizing their comparative advantages in agriculture and, as alternatives are often lacking, locks them into poverty, with serious repercussions for the degree with which notably economic and social rights can be realized. Such a result is not only contrary to

⁶⁶ World Bank, see note 5, 117.

⁶⁷ Ibid., 118. The protection facing developing country exporters in agriculture is four to seven times higher than in manufactures in the North and two to three times higher in developing countries. Ibid., xvi.

⁶⁸ Ibid., 123 et seq.

⁶⁹ FAO, *The State of the Food Insecurity in the World 2003*, see note 4, 20. FAO, *Fact sheet for the Sixth WTO Ministerial Conference, Hong Kong, Major Constraints to Trade in Processed Agricultural Products Confronting Developing Countries*, 2005, available at: <<ftp://ftp.fao.org/docrep/fao/meeting/010/j6834e.pdf>>.

⁷⁰ World Bank, see note 5, xvi et seq.

⁷¹ Ibid., 123 et seq.

the spirit of the WTO undertaking, but also to the promise of article 28 UDHR according to which everybody is entitled to an international order in which his or her rights can be fully realized.

Only some developing countries benefit from the current high tariffs, namely those enjoying preferential access arrangements to OECD markets (e.g. under the EC's Cotonou Partnership Agreement or the Caribbean Basin Initiative of the United States). Increasing access for all countries through the lowering of the most-favoured nation tariff will erode these benefits. For these countries, special compensatory measures need to be taken in order to avoid causing hardship affecting the realization of human rights.

All countries are, in principle, prohibited from introducing new measures to protect their markets. During the AoA negotiations concerns were raised that increasing market access could lead to import surges of particularly low-priced products harming domestic production. To allay such concerns, WTO Members developed a special safeguard provision (article 5 AoA). Special agricultural safeguard measures (SSG) take the form of an additional tariff which may be applied when the volume of imports exceeds a specified trigger level or the price of imports falls below a specified trigger price.⁷² Access to the SSG was, however, made conditional on the tariffication of non-tariff barriers which most developing countries historically did not use.⁷³ Only 39 WTO Members, amongst them 22 developing countries, have reserved the right to use the special safeguard option on hundreds of products. Between 1995 and 2001 as few as 10 members, including six developing countries, have triggered it.⁷⁴ Between 1995 and 2004, developing coun-

⁷² In order to have recourse to the special safeguard provision, a member must have designated the product in question in its Schedule using the symbol SSG (article 5 (1) AoA). For details of the designations, see Committee on Agriculture, Special Agricultural Safeguard, Background Paper by the Secretariat, Doc. G/AG/NG/S/9 of 6 June 2000.

⁷³ These duties are subject to less stringent conditions than those set by GATT article XIX and the Agreement on Safeguards (UNTS Vol. 1869 No. 31874, page 154). Notably, there is no need to prove injury, *Destia*, see note 50, 87. FAO, *Trade Policy Briefs on Issues Related to the WTO Negotiations on Agriculture, No. 9 A Special Safeguard Mechanism for Developing Countries*, available at: <<ftp://ftp.fao.org/docrep/fao/008/j5425e/j5425e01.pdf>>, 1.

⁷⁴ The EC is counted as one. WTO, Special Agricultural Safeguard, Background Paper by the Secretariat: Revision, Doc. G/AG/NG/S/9/Rev.1 of 19 February 2002, para. 3 and Table 1.

tries triggered the SSG in only 1 percent of the cases in which they could have applied it, which reflects the fact that the SSG is overly complicated and inflexible.⁷⁵ Countries that have no access to the SSG have instead resorted to raising applied tariffs up to the limit set by WTO bound rates.⁷⁶ Those that have bound rates at zero levels enjoy, however, no flexibility at all and may be forced to open their markets to their detriment.⁷⁷

Indeed, since the mid-1990s import surges linked to trade liberalization, particularly of basic foodstuffs, have increasingly occurred.⁷⁸ They undermined the viability of domestic markets, displaced local production and have caused human rights concerns particularly in countries where small-scale farmers predominate but safety nets are lacking to buffer negative effects.⁷⁹ As these consequences were foreseeable, the lack of a safeguard mechanism to which all members can resort to is an example of a violation of the obligation to take human rights into account when concluding new international treaties. A new and better accessible safeguard mechanism for developing countries is currently under discussion.

⁷⁵ FAO, see note 73, 1.

⁷⁶ Many developing countries generally apply low tariffs and therefore still have substantial room to raise tariffs up to their bound levels. For an overview of the differences between bound and applied tariffs in 23 countries, see, FAO, *WTO Agreement on Agriculture: The Implementation Experience – Developing Country Case Studies*, 2003, 11 et seq.

⁷⁷ Capacity to resort to general trade remedy measures such as anti-dumping, countervailing and emergency safeguards is often lacking, *ibid.*; IGWG, *Right to Food Principles and International Trade Agreements*, Information Paper, FAO Doc. IGWG RTFG/INF 5, para. 35 et seq.

⁷⁸ FAO, *Trade Policy Technical Notes on Issues Related to the WTO Negotiations on Agriculture, No. 9 A Special Safeguard Mechanism for Developing Countries*, available at: <<ftp://ftp.fao.org/docrep/fao/008/j5425e/j5425e00.pdf>>.

⁷⁹ IGWG, see note 77, para. 35; FAO, *WTO Agreement on Agriculture Implementation Experience: Developing Country Studies*, 2003, available at: <www.fao.org/trade>. Several national and international civil society organizations have also documented cases of import surges based on field work. See also *Some Trade Policy Issues Relating to Trends in Agricultural Imports in the Context of Food Security*, Doc. CCP/03/10, 64th Sess. of the Committee on Commodity Problems, 18-21 March 2003, FAO, Rome.

3. Domestic Support

The second pillar of the AoA is the commitment to reduce trade-distorting domestic support measures (article 6 AoA).⁸⁰ Amongst the three pillars of the AoA, the provisions of this pillar have the most far-reaching effects on countries' flexibility to design agricultural and food security policies. Domestic support ranges from direct budgetary transfers to other forms of market price support such as minimum artificial market prices.⁸¹ While direct support measures aim at guaranteeing certain levels of income, other forms of domestic support were originally implemented to stimulate domestic growth. Domestic support often leads to excess production at artificially high prices which, because of its elevated prices, can only be exported with the help of export subsidies, or as food aid.⁸² The EC, for example, had become the world's second largest sugar exporter despite the fact that its production costs were more than double those in many developing countries.⁸³ At the same time, world market prices of sugar were below the costs of even the most efficient producers.⁸⁴

The AoA establishes various categories of domestic support measures and foresees different commitments for each. Its basic approach is that all market price support, non-exempt direct payments and other non-exempt measures are to be reduced. They fall in the residual category of "Amber Box" measures. 35 countries (counting the EC as one) provided such support during the 1986–1988 base period. They had to calculate their Base Total Aggregate Measurement of Support (Base Total AMS)⁸⁵ and to reduce it by 20 percent during the six-year imple-

⁸⁰ The term "domestic support" in the AoA refers to subsidies provided to agricultural producers regardless of whether their products are exported, i.e., to domestic subsidies; Desta, see note 56, 25. For details on domestic support, see McMahon, note 49, 207 et seq. While in the WTO in general domestic subsidies are disciplined by the Agreement on Subsidies and Countervailing Measures (UNTS Vol. 1869 No. 31874, page 14), the regulation of agricultural domestic support is left mainly to the AoA.

⁸¹ Desta, see note 50, 309 et seq.

⁸² At the same time, the artificially high prices make imports, and even re-imports of subsidised exports, attractive so that import restrictions are often needed to accompany domestic support measures, *ibid.*, 26.

⁸³ FAO, *The State of the Food Insecurity in the World 2003*, see note 4, 21.

⁸⁴ World Bank, *Global Economic Prospects*, see note 5, 127.

⁸⁵ The Aggregate Measurement of Support (AMS) is defined as "the annual level of support, expressed in monetary terms, provided for an agricultural

mentation period in the case of developed countries; and 13.3 percent over ten years in the case of developing ones. Least developed countries (LDCs)⁸⁶ had to bind their support levels, but have no reduction obligations. The reduction commitment applies sector-wide and is not product-specific. Countries can therefore legally increase product-specific Amber Box support to any level provided the aggregate limit is respected.⁸⁷ The AoA prohibits the introduction of new Amber Box measures. This restriction *de facto* favours those countries that have already used them and which can continue to do so within the limits of their reduction commitments.

Article 6 AoA exempts a number of domestic support measures from the reduction commitments: these are *de minimis* exemptions, developing country exemptions, the Blue and the Green Box.

De minimis exception: all members may provide product specific support (e.g., price support for rice or cotton) up to a *de minimis* threshold, which is for developed countries 5 percent and for developing countries 10 percent of the total value of production of the agricultural product per year. An additional 5, respectively 10, percent of the value of total agricultural production may be granted for non-product specific support (e.g., for fertilizers, seeds, etc.).⁸⁸ This exemption has proved to be of little use to developing countries as most of them have

product in favour of the producers of the basic agricultural product or non-product specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2” (article 1 (a) AoA). The Total Aggregate Measurement of Support means the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-specific aggregate measurements of support and all equivalent measurements of support (article 1 (h) AoA). Annex 3 sets out how the AMS is to be calculated. The countries are Argentina, Australia, Brazil, Bulgaria, Canada, Chinese Taipei, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, EC, Hungary, Iceland, Israel, Japan, Jordan, Korea, Lithuania, Macedonia, Mexico, Moldova, Morocco, New Zealand, Norway, Papua New Guinea, Poland, Slovak Republic, Slovenia, South Africa, Switzerland-Liechtenstein, Thailand, Tunisia, United States, Venezuela; Committee on Agriculture, Special Session, Total Aggregate Measurement of Support, Note by the Secretariat, Doc. TN/AG/S/13 of 27 January 2005.

⁸⁶ LDCs are those LDCs recognized by the Economic and Social Council of the United Nations.

⁸⁷ Desta, see note 56, 28.

⁸⁸ Article 6 (4) AoA.

been able to use only a small part of the 10 percent limit due to lack of financial resources.⁸⁹

Developing country exceptions: recognizing that encouraging agricultural and rural development is an integral part of the development programmes of developing countries, article 6 (2) AoA exempts for these countries certain measures from the calculation of the total AMS. The two most important exceptions are investment subsidies which are generally available to agriculture in developing countries as well as agricultural input subsidies generally available to low-income or resource-poor producers.⁹⁰ This flexibility provided under article. 6 (2) AoA has, however, been little used.⁹¹

Blue Box: the next category of support measures are the so-called Blue Box measures which were included at the instigation of the EC. Those are direct payments provided under production-limiting programmes such as compensation payments or U.S. deficiency payments, both of which pay farmers the difference between a government target price for agricultural commodities and the corresponding market price.⁹² They constitute a half-way house between highly trade and production distorting Amber Box measures and those categorized as Green Box measures which are the least trade and production distorting. Blue Box measures are excluded from the reduction commitments (article 6 (5) AoA).⁹³ Nine OECD countries have used Blue Box measures between 1995 and 2003.⁹⁴ Although the Blue Box allows clearly market distorting support, its acceptance was necessary to secure an overall agreement on the AoA⁹⁵ – as the lesser evil compared to no

⁸⁹ IGWG, see note 77, para. 30. India is the only developing country that comes anywhere close to its limits on domestic support.

⁹⁰ Another exception applies to domestic support to producers in developing countries to encourage diversification from growing illicit narcotic crops, article 6 (1) AoA.

⁹¹ IGWG, see note 77, para. 31.

⁹² C. Gonzales, "Institutionalizing Inequality: the WTO Agreement on Agriculture, Food Security, and Developing Countries", *Columbia Journal of Environmental Law* 27 (2002), 438 et seq. (457).

⁹³ To be exempted, payments under such production-limiting programmes must be based on fixed area and yields, or made on 85 percent or less of the base level of production, or, in the case of livestock payments, be made on a fixed number of head, article 6 (5) AoA.

⁹⁴ Czech Republic, Estonia, EC (15), Iceland, Japan Norway, Slovenia, Slovakia and the U.S.; Desta, see note 56, 29.

⁹⁵ McMahon, see note 49, 209.

regulation of trade in agriculture. As the overwhelming majority of WTO Members cannot use Blue Box measures, there is strong pressure to reduce or abolish them.

Green Box: finally, the Green Box exempts a number of policies from the reduction commitment.⁹⁶ These measures must meet the fundamental requirement of not having any trade distorting or production effects, or at least keep them to the “most minimal” standard used by the AoA.⁹⁷ They must also be provided through publicly-funded government programmes, not involve transfers from consumers and not have the effect of providing price support to producers.⁹⁸ Twelve specific types of policies are listed under which support can be provided without limits. Amongst them are measures which are highly relevant to the development of the rural sector in developing countries, namely, investments in research, pest and disease control, training, extension, advisory, inspection, marketing and promotion, and infrastructural services such as electricity, roads, market and port facilities etc.⁹⁹

In addition, some typical elements of food security policies are covered, such as domestic food aid, income safety-net programmes, public stockholding for food security purposes, and direct payments for relief from natural disasters.¹⁰⁰ These exceptions allow countries to meet their obligation to take measures to support domestically vulnerable groups, including those harmed by trade liberalization measures, and those that cannot provide for their own needs. They need to be available in parallel to long-term investments in the agricultural sector.¹⁰¹

Food safety nets, in the terminology of the AoA called “domestic food aid,” are an indispensable component of any program to realize

⁹⁶ Annex 2 AoA. For comprehensive information about Green Box measures reported by WTO Members, see Committee on Agriculture, Special Session, Green Box Measures: Note by the Secretariat, Doc. TN/AG/S/10 of 8 November 2004.

⁹⁷ Annex 2 (1) AoA.

⁹⁸ Ibid.

⁹⁹ Cf. Voluntary Guidelines 8.4 and 8.14.

¹⁰⁰ Cf. Voluntary Guidelines 16.7 and 14.

¹⁰¹ Cf. FAO’s “twin-track approach”; FAO, *Anti-Hunger Programme*, Rome: FAO, 2003, available at: <<ftp://ftp.fao.org/docrep/fao/006/j0563e/j0563e00.pdf>>.

the right to food. They are permitted under the AoA (Annex 2 (4))¹⁰² if eligibility to receive support is subject to clearly-defined criteria related to nutritional objectives.¹⁰³ Aid may be provided in-kind (food), or cash (cash support or coupons) to allow eligible recipients to buy food either at market or at subsidized prices. Food purchases by the government shall be made at current market prices and the financing and administration of the aid shall be transparent. The provision of food-stuffs at subsidized prices with the objective of meeting food requirements of urban and rural poor in developing countries on a regular basis at reasonable prices is explicitly considered to be in conformity with the AoA (Annex 2 (4) note 6 AoA).¹⁰⁴ Whether in-kind or cash support is more appropriate depends on a number of policy parameters.¹⁰⁵ Targeted employment programmes qualify, as well as “the provision of means to allow eligible recipients to buy food either at market or at subsidized prices” (Annex 2 (4) AoA).¹⁰⁶

Green Box measures are also necessary in order to support small-scale farmers, in particular in marginalized areas. The underlying principle of international trade to move production to where it is most efficient and to use economies of scale tends to lead to a consolidation of farms as competitive pressures begin to build up following trade liberalization.¹⁰⁷ While productivity and competitiveness increase, farm labourers tend to become displaced and marginalized, creating hardship that involves typically small farmers and food-insecure population groups.¹⁰⁸ States need to respond to such developments with support mechanisms that may require trade offs between growth and poverty

¹⁰² Annex 2, para. 4 AoA defines domestic food aid outlays as “expenditures (or revenue foregone) in relation to the provision of domestic food aid to sections of the population in need.”

¹⁰³ This requirement is in line with right to food principles as it ensures allocation according to need and based on clear criteria, and allows recipients who were unjustly denied access to such programs to challenge decisions.

¹⁰⁴ See note 6 to Annex 2, para. 4 AoA.

¹⁰⁵ IGWG, *Information Paper, Safety Nets and the Right to Food*, FAO Doc. IGWG RTFG/INF 3.

¹⁰⁶ FAO, *Agriculture, Trade and Food Security – Issues and Options in the WTO Negotiations from the Perspective of Developing Countries, Vol. II – Country Case Studies*, Chapter Six – India, 2000, 165.

¹⁰⁷ *Ibid.*, 25. In addition, farmers in more favoured areas with better access to markets tend to gain the most from liberalized trade. Byerlee et al., see note 13, 24.

¹⁰⁸ FAO, see note 106, 25.

reduction.¹⁰⁹ Suitable response mechanisms comprise employment programmes, targeted food subsidies, food price stabilization programmes,¹¹⁰ support of less favourable areas where poverty is often greatest, and measures to provide employment generation in other sectors.

Amongst the precautions to take against emergencies is food stockholding, which is another measure permitted under the AoA (Annex 2 (3)). Food stockholding for stabilizing domestic prices is no longer common.¹¹¹ In contrast, maintaining food stocks for emergencies is a standard measure. It helps countries to fulfil the obligation to provide food in cases of emergencies.¹¹² The AoA places no limits on such stockholding, as all expenditures (including government aid to private storage) in relation to the accumulation and holding of stocks which form part of a food security programme, fall in the Green Box category as long as they correspond to predetermined targets related solely to food security (Annex 2 (3) AoA). Developing countries can acquire and release stocks of foodstuffs for food security purposes at administered prices, provided that the difference between the acquisition price and the external reference price is counted as a trade-distorting subsidy in the AMS. As most developing countries only use a fraction of their 10 percent *de minimis* flexibility, this requirement does not pose a constraint.¹¹³

Finally, if developing countries want to introduce export prohibitions or restrictions on foodstuffs in order to prevent or relieve critical shortages of foodstuffs, article 12 AoA exempts them from the obligations to consider the effects of such measures on importing members' food security, to notify the Committee on Agriculture, and to consult with any other member having a substantial interest as an importer upon request.¹¹⁴

Eleven years of experience with the AoA have shown that the obligation to reduce domestic support has been of limited effect only. Over 90 percent of all domestic support is concentrated in developed coun-

¹⁰⁹ Byerlee et al., see note 13, 40.

¹¹⁰ Ibid.

¹¹¹ IGWG, see note 77, para. 37.

¹¹² Ibid.

¹¹³ IGWG, see note 77, para. 38.

¹¹⁴ The measures need to be in accordance with article XI (2) (a) of GATT 1994. These exceptions do not apply to a developing country which is a net-food exporter of the specific foodstuff concerned, article 12 (2) AoA.

tries and over 60 percent of it is excluded from reduction commitments under the AoA.¹¹⁵ The basic commitment to reduce trade distorting domestic support is hollowed out by numerous exceptions.¹¹⁶ Since the mid-1990s support has shifted from non-exempt measures to exempt ones (box shifting).¹¹⁷ Europe, the U.S., and other wealthier countries continue to support agricultural producers with more than US\$ 250 billion every year resulting in huge surpluses, which are often sold on world markets at less than half their cost of production,¹¹⁸ putting developing country farmers out of business.

The general approach to allow domestic support of “early users”, subject to reduction commitments, stands in uneasy contrast to the prohibition to introduce any new support to develop domestic agriculture which affects most developing countries. In addition, macroeconomic reforms under World Bank and International Monetary Fund structural adjustment programmes have restricted investments in agriculture and required liberalization of agricultural sectors even beyond AoA requirements.¹¹⁹ The combined effects of these approaches may pose obstacles to economic development and impede the better realization of the right to food. Therefore, greater coherence should be sought between the WTO obligations and the policies of international financial institutions.¹²⁰

Apart from these structural imbalances, studies on the AoA and food security demonstrated that the AoA leaves policy space to implement certain food security policies, to comply with the obligations to provide for the right to food and to pay special attention to vulnerable groups. There is also room to develop domestic agriculture. The main constraints these countries face are lack of funding¹²¹ and institutional

¹¹⁵ OECD, *The Uruguay Round Agreement on Agriculture: An Evaluation of its Implementation in OECD Countries*, 2001, 8.

¹¹⁶ Desta, see note 56, 27.

¹¹⁷ FAO, *Trade Policy Briefs on Issues Related to the WTO Negotiations on Agriculture, No. 5 Reducing the Trade-Distorting Impact on Agricultural Support*, available at: <ftp://ftp.fao.org/docrep/fao/007/j5012e/j5012e01.pdf>.

¹¹⁸ FAO, *The State of Food Insecurity in the World 2005*, 2005, 27.

¹¹⁹ UNCTAD Doc. TD/B/COM.1/EM.11/2, paras 12, 14 and 36. FAO, *WTO Agreement on Agriculture: The Implementation Experience – Developing Country Case Studies*, see note 76, 2003, 21.

¹²⁰ IGWG, see note 77, para. 34.

¹²¹ Foreign direct investors largely bypass agriculture; FAO, see note 118, 26.

capability, and to some extent, inadequate interest in their agricultural sectors.¹²²

4. Export Subsidies

The third pillar of the AoA is the commitment to reduce export subsidies, i.e., subsidies contingent upon export performance.¹²³ Export subsidies, are often regarded as the most contentious, and, particularly from the perspective of developing countries, the most harmful trade policy instrument.¹²⁴ Potentially more competitive developing country exporters cannot compete with subsidized low-priced OECD commodities, leading in the long-term to the neglect of much needed investment in agriculture.¹²⁵ Export subsidies depress world market prices and, coupled with the opening of markets, can cause import surges which displace domestic production. In Kenya for instance, in the 1990s, a sudden soar in imports of milk powder displaced 70 percent of the domestic processed milk production.¹²⁶

Developed countries account for the vast majority of export subsidies with the EC alone providing 90 percent.¹²⁷ Subsidies for products such as meat, dairy products and cereals remain high, causing depression and destabilization of world market prices.¹²⁸ Developing countries which lack financial resources, cannot offer similar support to their producers.

¹²² IGWG, see note 77.

¹²³ Article 1 (e) AoA. The term “subsidy” is not defined in the AoA. The Agreement on Subsidies and Countervailing Measures (UNTS Vol. 1869 No. 31874, page 14) defines “subsidy” as a financial contribution made by a government or any public body conferring a benefit on the recipient (article 1).

¹²⁴ Desta, see note 56, 23.

¹²⁵ World Bank, *Global Economic Prospects*, see note 5, xvii.

¹²⁶ Imports of milk powder soared from 48 tonnes in 1990 to 2500 tons in 1998, FAO, *The State of the Food Insecurity in the World 2003*, see note 4, 21.

¹²⁷ FAO, *Trade Policy Briefs on Issues Related to the WTO Negotiations on Agriculture, No. 4 Export Competition – Appropriate Disciplines for Eliminating Subsidies*, 1, available at: <<ftp://ftp.fao.org/docrep/fao/007/j5013e/j5013e01.pdf>>.

¹²⁸ FAO, *The State of the Food Insecurity in the World 2003*, see 4, 21.

Under the AoA, each member undertakes not to provide export subsidies otherwise than in conformity with the AoA and with the commitment specified in its Schedule (article 8 AoA). Six types of export subsidies are subject to reduction commitments which relate both to expenditure on subsidies and quantity exported. For developed countries obligations are higher and implementation periods shorter than for developing countries, while least developed members are not required to undertake any reductions.¹²⁹ Twenty-five WTO Members have scheduled export subsidy reduction commitments with respect to different products.¹³⁰ Countries that had not provided export subsidies, namely the vast majority of developing countries, are prohibited from introducing export subsidies,¹³¹ which creates structural imbalances similar to those highlighted under domestic support. Article 10 (1) AoA prohibits the utilization of non-listed export subsidies in a manner that results or may result in the circumvention of the export subsidy commitments undertaken in article 9 (1). In addition, members commit to undertake to work towards the development of internationally agreed disciplines for export credits, export credit guarantees, or insurance programmes. All three are measures for which the AoA foresees no reduction commitments but which are widely used, partly to compensate for declines of those subsidies regulated by the AoA.¹³² The U.S. is the main provider of export credits, and mainly due to its opposition, progress in the negotiations about their reduction has been slow.¹³³

Although export subsidy use has declined significantly over the past decade from about 7.5 billion US\$ in 1995 to about 3 billion US\$ in

¹²⁹ Under the Modalities Agreement, developed countries are required to reduce their expenditure on export subsidies to a level 36 percent below the levels existing in the 1986-1990 base period and to reduce the quantities benefiting from export subsidies by 21 percent, both over a six year implementation period; Modalities Agreement, Annex 8. For developing countries the equivalent figures are 24 percent and 14 percent and the period is ten years; McMahon, see note 49, 211.

¹³⁰ Australia, Brazil, Bulgaria, Canada, Columbia, Cyprus, Czech Republic, European Communities, Hungary, Iceland, Indonesia, Israel, Mexico, New Zealand, Norway, Panama, Poland, Romania, Slovak Republic, South Africa, Switzerland-Lichtenstein, Turkey, United States, Uruguay and Venezuela. See WTO (ed.), *Background Paper by the Secretariat*, Doc. TN/AG/S/8 of 9 April 2002, para. 4 (cited in Desta, see note 56, 22).

¹³¹ Article 3 (3) AoA, Desta, see note 56, 22; Gonzales, see note 92, 456.

¹³² Gonzales, *ibid.*, 465.

¹³³ Desta, see note 56, 24.

2000,¹³⁴ the limitations of export subsidies under the AoA have not yet been sufficient to meet the legitimate concern of developing countries not to be harmed by cheap, subsidized goods.

On the positive side, the AoA allows developing countries to grant marketing cost subsidies and internal transport subsidies, provided that they are not applied in a way that circumvents other export subsidy commitments (article 9 (4) AoA). It also allows unlimited amounts of food aid as long as they are not tied directly or indirectly to commercial exports of agricultural products to recipient countries, accord with the FAO Principles of Surplus Disposal and Consultative Obligations, and are provided to the extent possible in fully grant form or on terms no less concessional than those provided for in the 1986 Food Aid Convention¹³⁵ (article 10 (4) AoA).¹³⁶ Transactions that are claimed to fall under food aid but do not meet these requirements are considered export subsidies and limited by the AoA. Historically, food aid is firmly rooted in surplus disposal¹³⁷ and the distinction between legitimate food aid and disguised commercial export subsidies that circumvent export subsidy restrictions remains difficult.¹³⁸ Food aid has been a contentious issue, with countries regularly raising concerns over other countries' food aid transactions¹³⁹ and, in particular, the EC regarding

¹³⁴ FAO, *Trade Policy Briefs*, see note 127, 1.

¹³⁵ Article IV of the 1986 Food Aid Convention.

¹³⁶ In 1995-2000, food aid accounted for 2-4 percent of traded cereal volumes. World Bank, *Global Economic Prospects*, see note 5, 137. In 2003, thirty-seven countries required food assistance, most of them in Sub-Saharan Africa, but also in Asia, the Middle East, Europe, Central Asia, Central America and the Caribbean. FAO, *Food Outlook No. 3*, 2003, available at: <<http://www.fao.org/docrep/005/y9643e/y9643e04.htm>>. See on the linkages between the food aid, its regulation by the AoA and food security R. Zhang, "Food Security: Food Trade Regime and Food Aid Regime", *JIEL* 7 (2004), 565 et seq.

¹³⁷ FAO, Committee on Commodity Problems, *A Historical Background on Food Aid and Key Milestones*, Sixty-Fifth Session, Rome, Italy, 11-13 April 2005, FAO Doc. CCP 05/CRS.6, para. 2.

¹³⁸ World Bank, *Global Economic Prospects*, see note 5, 137.

¹³⁹ See, for instance, the examples provided in FAO, Committee on Commodity Problems, *Consultative Sub-Committee on Surplus Disposal – Fortieth Report to the CCP*, 56th Sess., Rome, Italy, 11-13 April 2005, FAO Doc. CCP 05/15, para. 13 et seq. See also M.G. Desta, "Food Security and International Trade Law: An Appraisal of the World Trade Organization Approach", *JWT* 35 (2001), 449 et seq.

U.S. food aid practices as means of circumventing export subsidy restrictions.¹⁴⁰

5. The Marrakesh Decision

For some countries, the high amount of OECD domestic support and export subsidies has worked to their advantage. LDCs and net food-importing developing countries (NFIDCs) have traditionally benefited from cheap, subsidized, foodstuffs from the major industrialized nations. For this short-term benefit, however, they often paid the long-term price of preventing their own agricultural growth and rendering their agriculture non-competitive. During the negotiations of the AoA, it became clear that these countries could suffer, at least during a transition period, from the expected rise in world food prices coupled with a decline in food aid motivated by support reductions in OECD countries. It was accepted that they would need temporary assistance to make the necessary adjustments to deal with higher priced imports, and eventually to export.¹⁴¹ In response, the Marrakesh Decision was adopted, which constitutes a specific application of the principle of special and differential treatment.¹⁴² According to article 16 AoA, devel-

¹⁴⁰ See, Desta, see note 139, 468.

¹⁴¹ Some net food importers have, however, high tariff walls and can offset all or most of the increases in global prices by lowering tariffs. World Bank, *Global Economic Prospects*, see note 5, 138. Net food importing and least developed countries that import temperate zone commodities for which prices are expected to rise will be worse off as they typically do not export temperate zone commodities but developing country products for which prices are likely to rise far less. Such countries are expected to profit more from liberalized trade with each other than from access to OECD markets. It should be noted in this context, that some project that the negative effects of price changes on low-income net importers will be only small and manageable, *ibid.*, 105.

¹⁴² See note 7. Besides the 50 least-developed countries as recognized by ECOSOC, the list of NFIDC includes Barbados, Botswana, Côte d'Ivoire, Cuba, Dominica, Dominican Republic, Egypt, Gabon, Honduras, Jamaica, Jordan, Kenya, Mauritius, Mongolia, Morocco, Namibia, Pakistan, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Sri Lanka, Trinidad and Tobago, Tunisia and Venezuela, Doc. G/AG/5/Rev. 8 of 22 March 2005. For the criteria, see Decision by the Committee on Agriculture, Doc. G/AG/3 of 24 November 1995.

oped country members shall take such action as is provided for within the Marrakesh Decision.

WTO Members agreed upon four mechanisms. The first concerns food aid. Members decided to review the level of food aid established by the Committee on Food Aid under the Food Aid Convention and to initiate negotiations to establish a level of food aid commitments necessary to meet the legitimate interests of developing countries. In addition, they committed to adopting guidelines on increasing the proportion of food aid that is provided in fully grant form and/or on appropriate concessional terms. Second, ministers undertook to give full consideration in their aid programmes to requests for technical and financial assistance to improve agricultural productivity and infrastructure. Third, they ensured that any future agreement relating to agricultural export credit markets (as mandated under article 10 AoA) will make provision for differential treatment; and, finally, they agreed to enable countries experiencing short-term difficulties in financing their normal level of commercial imports to draw on the resources of international financial institutions under existing or new facilities.¹⁴³

Between 1995 and 1999, LDCs and NFIDC indeed experienced increases in food bills and reductions in food aid, which they had difficulties dealing with, in part due to the poor implementation of the Marrakesh Decision.¹⁴⁴ With respect to the first commitment, a new Food Aid Convention was concluded. It neither increased the level of com-

¹⁴³ Marrakesh Decision, see note 7, paras 3 and 4. The Marrakesh Decision was to be reviewed regularly by the Ministerial Conference and the Committee on Agriculture; Marrakesh Decision, para. 5. See also WTO Committee on Agriculture, Actions Taken Within the Framework of the Decision as Notified by Members, Doc. G/AG/NG/S/4 of 27 April 2000.

¹⁴⁴ There are three reasons for the unsatisfactory implementation of the Marrakesh Decision: first, the Decision has no operational mechanism for carrying out the support measures specified in it; second, there has been no attempt within the WTO framework to estimate systematically the impact of the implementation of the AoA on LDCs and net-food-importing developing countries; and third, there have been few country-specific impact studies of the AoA during the WTO's monitoring of the Decision. UNCTAD, *Impact of the Reform Process in Agriculture on LDCs and Net Food-Importing Developing Countries and Ways to Address Their Concerns in Multilateral Trade Negotiations*, Doc. TD/B/COM.1/EM.11/2 and Corr.1 of 23 June 2000, paras. 25 et seq.

mitments,¹⁴⁵ nor was aid distributed according to want. The WFP pointed out that only half of global food aid during the 1990s was actually targeted at those who needed it.¹⁴⁶ Due to the fact that food aid is measured in monetary terms rather than in tonnage, food aid availability is inversely proportional to need: when prices are high and aid most required, availability is low. Conversely, when prices are low, more food aid is obtainable.¹⁴⁷ The Marrakesh Decision avoids addressing the double edged sword of food aid. Food aid can harm as much as help and adequate disciplines are needed in order to avoid negative effects (see under V. 3. d. dd.).

In relation to the second commitment, it is unclear whether requests for technical and financial assistance to improve agricultural productivity and infrastructure have been received.¹⁴⁸ In any case, the volume and share of aid directed to agriculture has fallen to less than half the levels of the 1980s resulting in a large and growing investment gap between countries where the prevalence of hunger is high and those that have managed to reduce hunger.¹⁴⁹ Assistance to agriculture is also not related to need.¹⁵⁰ With respect to export credits, the third commitment, little overall progress has been made until present, so that the question of special and differential treatment has not yet been fully addressed.

¹⁴⁵ Food Aid Convention, 1999, available at: <<http://untreaty.un.org/English/notpubl/19-41c-eng.htm>>. Under the new Convention, which entered into force in July 1999 with an initial three-year duration (which was prolonged subsequently), the list of products which can be supplied was broadened beyond cereals and pulses to include edible oil, skimmed milk powder, sugar, seeds and other products important in relief. The total wheat equivalent value of commitments remains approximately unchanged at 5.35 million tons; FAO, *Food Outlook No. 4*, 1999, 22.

¹⁴⁶ *Globalization and its Impact on the Full Realization of Human Rights, Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights Resolution 2001/32*, Doc. E/CN.4/2002/54 of 15 January 2002, para. 29.

¹⁴⁷ *Ibid.*, IGWD, *Food Aid and the Right to Food*, Information Paper, FAO Doc. IGWG RTFG/INF 6.

¹⁴⁸ *Globalization and its Impact on the Full Realization of Human Rights*, see note 146, para. 30.

¹⁴⁹ FAO, *The State of Food Insecurity in the World 2005*, see note 118, 26 et seq.

¹⁵⁰ Countries where fewer than 5 percent of the population go hungry, receive three times the amount of assistance per agricultural worker than countries where more than 35 percent of the population suffer from hunger, *ibid.*, 27.

Regarding the fourth commitment concerning finance facilities, in 2002, the Inter-Agency Panel on Short-Term Difficulties in Financing Normal Levels of Commercial Imports of Basic Foodstuffs recommended, *inter alia*, exploring the feasibility of an inter-agency *ex-ante* financing mechanism.¹⁵¹ Little progress has been made since then.¹⁵² When world food prices are high concessionary financing could ensure that LDCs and NFIDCs could purchase food at reasonable prices in the international market. An *ex-ante* mechanism, as recommended by the Panel, would be preferable to an *ex-post* revolving fund as *ex-post* financing cannot support food imports in times of need.¹⁵³ Given the lack of progress on the Marrakesh Decision, the Doha WTO Ministerial Conference included it amongst the implementation issues in 2001.¹⁵⁴

Despite its weak implementation, the Marrakesh Decision is important because of the fact that it calls for “a level of food aid commitments sufficient to meet the *legitimate* needs of developing countries during the reform program” (emphasis added).¹⁵⁵ The fact that the needs of developing countries that are adversely affected by the liberalization process are recognized as legitimate is noteworthy. The Marrakesh Decision thereby acknowledges that the joint undertaking of increasing welfare through trade liberalization is coupled with the rise of legitimate needs for assistance of those countries that are harmed by the process. The Marrakesh Decision hence validates, in the specific context of the liberalization process in agriculture, claims of a redistributive nature.¹⁵⁶

¹⁵¹ Inter-Agency Panel on Short-Term Difficulties in Financing Normal Levels of Commercial Imports of Basic Foodstuffs, *Report of the Inter-Agency Panel*, Doc. WT/GC/62 G/AG/13 of 28 June 2002, 44.

¹⁵² Doc. IGWG, see note 77, para. 42.

¹⁵³ Inter-Agency Panel, see note 151, 44.

¹⁵⁴ *Decision on Implementation-Related Issues and Concerns*, Doc. WT/MIN(01)/17 of 20 November 2001, para. 2.2. In September 2001, the Committee on Agriculture examined means to improve the effectiveness of the Decision and adopted a number of recommendations. Several proposals had been submitted to the Committee on Agriculture by NFIDC: *Proposal to Implement the Marrakesh Ministerial Declaration in favour of LDCs and NFIDCs*, Doc. G/AG/W/49 of 19 March 2001, Doc. G/AG/W/49/Add.1 of 23 May 2001 and Doc. G/AG/W/49/Add.1/Corr.1 of 27 June 2001; Annex 2 of the Minutes of the Committee on Agriculture, Doc. G/AG/11 of 28 September 2001.

¹⁵⁵ Para. 3 (a).

¹⁵⁶ While some human rights actors seem to promote obligations that entail development assistance (see the CESCR’s obligation to *fulfil* the right to

They are established as a corollary to countries' acceptance, as part and parcel of a wider process, of rules that hurt them at least in the short-term. It is, of course, open to debate what "legitimate needs" are. Given the common commitment of all WTO Member States to human rights, it is submitted that at least the level of food aid necessary to avert marked decreases in the realization of the right to food would be legitimate.¹⁵⁷ The Marrakesh Decision thereby gives concrete meaning to the general obligation to cooperate, detailing that this would involve preventing deteriorations of the level of rights' realization. It is an example of the kind of meaning that can be given to the obligation to cooperate "taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need" (article 11 (2) (b) ICESCR). However, the imbalance between the obligations of the AoA that are binding upon countries even if to their detriment, and the weak commitments of the Marrakech Decision to address negative impacts, are yet another piece of evidence that cooperation obligations under international law remain vague, ill defined and without much effect.

6. Assessment

Despite the disciplines imposed by the AoA, agriculture remains one of the most distorted areas of international trade.¹⁵⁸ As one commentator puts it, "agriculture still stands alone as the sector where export subsidies are expressly and generously – albeit selectively – permitted under WTO law; where three digit tariffs are rather common; where significant additional duties can be introduced in the name of 'safeguard measures' regardless of injury considerations and in the most unpredictable of ways; where a proven trade-distortive and injurious domes-

food in other states (see above under III.) no general obligation to provide aid is accepted in international law. Bonds of solidarity that give rise to redistribution exist at the level of the nation-state but no comparable mechanisms have been developed as yet on the international plane.

¹⁵⁷ This interpretation is based on an application of article 31 (3) (c) VCLT.

¹⁵⁸ OECD, *The Uruguay Round Agreement on Agriculture: An Evaluation of Its Implementation in OECD Countries*, 2001, 5. The lack of true liberalization is partly due to the fact that support levels were historically high during the base periods from which reductions were to be made. World Bank, *Global Economic Prospects*, see note 5, 118. See also, Breining-Kaufmann, note 15, 366 et seq.

tic support programme may escape any challenge, etc.”¹⁵⁹ Some suggest that market protection may have even increased due to dirty tariffification.¹⁶⁰

The AoA reflects economic and political power distribution, is strikingly asymmetrical and works systematically against developing countries and the world’s poor.¹⁶¹ It has not yielded the benefits promised by economic simulation models. It remains open to debate whether this fact is due to less than expected cuts in support and protection, or to limitations of the models in estimating net benefits. By making much needed economic growth in agriculture in developing countries more difficult, the *de facto* imbalances in rights and obligations between developing and developed countries have negative implications for the right to food and deprive trade of the positive role it could play in the realization of human rights. The fact that the AoA leaves some policy space to adopt food security policies can only partly counterbalance these more indirect but powerful effects. In this context it should be noted that historically in OECD countries protectionist policies have led to significant increases in agricultural productivity, which in turn raises the question whether similar policies could have a role to play in

¹⁵⁹ Desta, see note 56, 8.

¹⁶⁰ World Bank, *Global Economic Prospects*, see note 5, 117.

¹⁶¹ World Bank, *Global Economic Prospects*, see note 5, 118. Diverse views are expressed on the merits and shortcomings of the AoA. Gonzales criticizes it as “systematically [favouring] agricultural producers in industrialized countries at the expense of farmers in developing countries” and thereby institutionalizing inequality and increasing “food insecurity by exacerbating rural poverty” in developing countries and hampering their ability to adopt appropriate measures to address the problem. Gonzales, see note 92, 438 and 476. According to Murphy the focus of the AoA on reducing trade barriers is too limited and ignores the lack of power for millions of people to purchase their food on the market, their dietary preferences, the importance of agriculture in providing livelihoods, and important ecological considerations, including agrobiodiversity. S. Murphy, “Structural Distortions in World Agricultural Markets: Do WTO Rules Support Sustainable Agriculture?”, *Columbia Journal of Environmental Law* 27 (2002), 605 et seq. (609 et seq.). Desta views the regulation of trade in agriculture as “an embodiment of sheer hypocrisy in global economic relations,” Desta, see note 56, 33. See also Dommen who argues that the Uruguay Agreements in general are weighted in favour of the rich and do not necessarily reflect the interests of the poorest countries and their inhabitants, C. Dommen, “Trade and Human Rights: Towards Coherence”, *Sur – International Journal on Human Rights* 2 (2005), 7 et seq. (10).

some developing countries where increased agricultural productivity is seen as being important.

Some areas of tension have also emerged. Human rights problems occur when food secure countries become food insecure, or when vulnerable groups within a country pay a disproportionate price for liberalization while benefits accrue to others. The AoA has not been able to avoid such consequences as cases of import surges testify. Nor has the Marrakesh Decision, on the inter-state plane, been sufficiently implemented to buffer negative effects. In light of the fact that without the AoA market distortions would be even greater, the AoA must, however, be credited for constituting an important first step towards the establishment of a rules-based system for trade in agriculture.¹⁶² Cases like EC Sugar and US Cotton show that developing countries can now successfully challenge other members' support measures in contravention of the AoA.¹⁶³ The reforms initiated by the AoA have the potential to make positive contributions to agricultural development and the realization of the right to food and therefore should be continued subject to the inclusion of certain human rights safeguards.¹⁶⁴

V. Raising the Right to Food Profile in the Regulation of Trade in Agriculture

1. The Starting-Point: Two Concurrent Regimes

On the basis of the preceding overview of the current regulation of international trade in agriculture, the next section will discuss how right

¹⁶² Trebilcock/ Howse, see note 50, 268.

¹⁶³ Doc. WT/DS/265, 266, 284/AB/R, *European Communities – Export Subsidies on Sugar*; Doc. WT/DS267/AB/R, *United States – Subsidies on Upland Cotton*.

¹⁶⁴ Cf. IGWG, see note 77, para. 18. Desta, see note 56. For literature on the linkage between the AoA reform process and food security, see, for example FAO, *Some Issues Relating to Food Security in the Context of the WTO Negotiations on Agriculture*, 2001; and FAO, *Incorporating Food Security Concerns in a Revised Agreement on Agriculture*, 2001; OECD, *The Medium-term Impacts of the Trade Liberalization in OECD Countries on the Food Security of Non-member Economies*, Doc. COM/AGR/TD/WP(2001)74/FINAL of 18 June 2002; FAO, *The State of the Food Insecurity in the World 2003*, see note 4.

to food concerns could be strengthened in the revised AoA and what options WTO Members have to let human rights trump trade obligations. The results of the on-going agricultural negotiations of the Doha Round will be taken into account until the Hong Kong Ministerial Conference of December 2005.

States Parties to the WTO have obligations under two concurrent regimes: the human rights regime and the international trade system.¹⁶⁵ All WTO State Parties are bound by customary human rights law, have accepted the UDHR, and have at least ratified one human rights treaty. The majority is party to the ICESCR. Therefore, they need to ensure that human rights are given adequate weight in their trade dealings.

The objectives of both regimes are, in principle, compatible. The AoA endeavours to establish a “fair” agricultural trading system. Only a trading system that is in harmony with other universally shared values such as the promotion and protection of human rights which are regarded as inherent and inalienable to the human being can be regarded as fair. This thesis is supported by the Agreement Establishing the World Trade Organization which foresees that members’ relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living.¹⁶⁶ This objective is, in language and spirit, close to the “adequate standard of living” envisaged in article 11 (1) ICESCR.¹⁶⁷

A crucial difference between the two regimes is, however, that the WTO system seeks to raise aggregate standards of living, while human rights are concerned with the individual. They emphasize the need to particularly promote and protect the rights of the poorest and most vulnerable, i.e., of those whose rights are least realized. They require ensuring that interests of society as a whole are pursued in a manner that guarantees certain minimum standards for each individual. If aggregated standards of living are raised, this often makes everybody better off. There are, however, no automatic correlations as welfare gains can accrue to some while others become poorer depending on the dis-

¹⁶⁵ All State Parties to WTO Agreements have ratified at least one human rights treaty; *Report of the High Commissioner*, see note 146, para. 10 (as of 2002).

¹⁶⁶ Marrakesh Agreement Establishing the World Trade Organization, Preamble, para. 1, UNTS Vol. 1867 No. 31874, page 154.

¹⁶⁷ On the extent to which the multilateral trading system and human rights law pursue similar objectives, see, H. Lim, “Trade and Human Rights – What’s at Issue?”, *JWT* 35 (2001) 275 et seq. (276 et seq.).

tribution of benefits. Therefore, at the level of abstract objectives, the liberalization of trade in agriculture and the right to food are complementary and international trade can even support the realization of the right. Yet, conflicts and tensions may arise at implementation level. To avoid the latter, human rights safeguards need to be in place.

There are several options how the right to food could be given stronger effect within the AoA. The first would be by inserting a specific reference to human rights or the right to food into the AoA. The second is to interpret trade rules, including exception clauses, taking the right to food into account. The third is to invoke the right to food directly as a justification for non-compliance with AoA rules in case of a conflict of obligations. The fourth, which is the most promising and indispensable, is to shape trade rules in a manner conducive to the realization of the right to food – an approach partly touched upon in the foregoing sections. These four avenues are not mutually exclusive but complementary. After an overview of the debate about trade and human rights, they will be discussed in turn.

2. The Status Quo of the Debate

A number of human rights bodies have addressed the relationship and tensions between trade and human rights in general, or trade in agriculture and the right to food in particular.¹⁶⁸ They unanimously share the basic tenet that trade is a means not an end and that the promotion and protection of human rights should be the objective and primary purpose of trade.¹⁶⁹

¹⁶⁸ The High Commissioner for Human Rights published a detailed analysis of the human rights concerns raised by the AoA and formulated recommendations, *Report of the High Commissioner*, see note 146.

¹⁶⁹ CESCR, *Statement of the UN Committee on Economic, Social and Cultural Rights to the Third Ministerial Conference of the World Trade Organization*, Doc. E/C.12/1999/9 of 26 November 1999, para. 6; J. Oloka-Onyango/ D. Udagama, *Human Rights as the Primary Objective of International Trade, Investment and Finance Policy and Practice*, Doc. E/CN.4/Sub.2/1999/11 of 17 June 1999; Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, *Human Rights as the Primary Objective of Trade, Investment and Financial Policy*, Resolution 1998/12 of 20 August 1998; Sub-Commission on the Promotion and Protection of Human Rights, *Liberalization of Trade in Services and Human Rights*, Doc. E/CN.4/Sub.2/2002/9 of 25 June 2002, para. 7. In a simi-

Therefore, the international trade system should be organized so that the projected welfare gains can be reached while appropriate safeguards against human rights violations are in place. According to the High Commissioner for Human Rights, a human rights approach to WTO rules would mean balancing the economic aspects of trade liberalization with a social dimension.¹⁷⁰ Human rights should frame world trade so that it becomes a motor for realizing rights.¹⁷¹ This approach is consistent with the commitment in the Vienna Declaration of the World Conference on Human Rights that human rights are “the first responsibility of Governments.”¹⁷² Concerns have also been raised: the Sub-Commission on the Promotion and Protection of Human Rights described the WTO as a “veritable nightmare” for developing countries¹⁷³ and the impact of liberalization of trade in agricultural products as detrimental for the right to food for members of vulnerable groups. The Working Group on the Right to Development of the former Commission on Human Rights suggested introducing and strengthening human rights standards and principles in undertaking impact assessments of trade.¹⁷⁴ The Special Rapporteur on the Right to Food opposes market

lar vain, see the São Paulo Consensus which states that “Trade is not an end in itself, but a means to growth and development.” United Nations Conference on Trade and Development, Doc. TD/410, 25 June 2004, para. 63; See also C. Dommen, “Raising Human Rights Concerns in the WTO”, *HRQ* 24 (2002), 1 et seq.; R. Howse/ M. Mutua, *Protecting Human Rights in the Global Economy: Challenges for the WTO, Rights and Democracy*, 2000, available at: <www.ichrdd.ca>; and the numerous contributions by E.U. Petersmann, including: *Time for Integrating Human Rights into the Law of Worldwide Organizations*, Working Paper 7/01 Jean Monnet Program, Harvard Law School, 2001.

¹⁷⁰ *Report of the High Commissioner*, see note 146, paras 8 and 10.

¹⁷¹ Dommen, see note 161, 17; S. Leader, “Trade and Human Rights II”, in: P. Macrory/ A. Appleton/ M. Plummer (eds), *The World Trade Organization: Legal, Economic and Political Analysis*, Vol. II, 2005, 695.

¹⁷² World Conference on Human Rights, Vienna Declaration and Programme of Action, Vienna, 14-25 June 1993, A/CONF.157/23 of 12 July 1993, para. 1.

¹⁷³ *Globalization and its impact on the full enjoyment of human rights – Preliminary report submitted by J. Oloka-Onyango and Deepika Udagama, in accordance with Sub-Commission resolution 1999/8*, Doc. E/CN.4/Sub.2/2000/13 of 15 June 2000, para. 15.

¹⁷⁴ Dommen, see note 161, 21 fn. 24; *Report of the Working Group on the Right to Development on its Sixth Session*, 2005, Doc. E/CN.4/2005/25 of 3 March 2005, para. 52 et seq.

liberalization and international trade and advocates considering “food sovereignty” as an alternative model for agriculture and agricultural trade.¹⁷⁵

It is noteworthy that, in contrast to the prolific debate about “WTO and Human Rights” which has been going on in academic,¹⁷⁶ UN and NGO circles, states have only in exceptional instances referred to human rights within WTO negotiations and procedures and no WTO dispute settlement decision has explicitly taken human rights into account. Possibly, the current institutional set-up is not conducive to this aim as WTO negotiations are not formally informed by human rights considerations.¹⁷⁷ With respect to the right to food, only Mauritius and Norway argued before the Committee on Agriculture that the right to food should be taken into account in the continuation of the reform process.¹⁷⁸ Burundi has also referred to this notion,¹⁷⁹ and Burkina Faso

¹⁷⁵ Report submitted by the Special Rapporteur on the Right to Food to the Commission, Doc. E/CN.4/2004/10 of 9 February 2004. The concept of food sovereignty is advocated by a number of NGOs. There is no uniformly accepted definition of food sovereignty. The Special Rapporteur uses the term as defined by the NGO Via Campesina: “Food sovereignty is the right of peoples to define their own food and agriculture; to protect and regulate domestic agricultural production and trade in order to achieve sustainable development objectives; to determine the extent to which they want to be self-reliant; [and] to restrict the dumping of products in their markets.”

¹⁷⁶ In addition to the authors already mentioned see the exchange of views in various contributions between E.U. Petersmann and P. Alston in *EJIL* 2002, and A. Eide, “The Importance of Economic and Social Rights in the Age of Globalization”, in: W. Barth Eide/ U. Kracht (eds), *Food and Human Rights in Development, Vol. I – Legal and Institutional Aspects and Selected Topics*, 2005, 34.

¹⁷⁷ K. Gray, *Right to Food Principles vis à vis Rules Governing International Trade*, Research Paper, Center for International Development at Harvard University, 2003, available at: <<http://www.cid.harvard.edu/cidtrade/site/new.html>>, 6.

¹⁷⁸ Committee on Agriculture, Special Session, *Note on Non-Trade Concerns*, Doc. G/AG/NG/W/36/Rev.1 of 9 November 2000, 44 and 57 et seq. Mauritius and Norway made their suggestions as part of a joint submission of a number of WTO Members on non-trade concerns. The submission comprised different papers prepared for a conference on non-trade concerns in agriculture held in Ullensvang, Norway, in July 2000. Norway repeated its call to take the right to food into account in Doc. G/AG/NG/W/101 of 16 January 2001, 6 et seq.

stated that agriculture served to ensure its capacity to feed its people and to defend their right to food.¹⁸⁰ However, none of them drew any clear policy conclusions from their referring to the right to food.

Trade, both domestic and international, was an important topic during the negotiations of the Voluntary Guidelines on the Right to Food.¹⁸¹ They address a number of aspects that are also dealt with in WTO Agreements, such as access to markets, food aid, domestic (food) safety nets, food safety etc. They mention some WTO agreements, notably the SPS Agreement, the TBT Agreement and the AoA, and they are based on an explicit recognition of the importance of functioning national, regional and global markets.¹⁸² According to the Voluntary Guidelines, international trade can play a major role in promoting economic development, alleviating poverty and improving food security (Section III, para. 6) and consequently they recommend promoting it (Section III, para. 7). Section III, para. 8 recalls the long-term objective of the AoA, namely to establish a fair and market-oriented trading system in order to correct and prevent restrictions and distortions in world agricultural markets. Section III, para. 9 emphasizes and reinforces

¹⁷⁹ Burundi, however, referred to the right to food in the context of a criticism of an economic blockage against it, Doc. WT/MIN(98)/ST/78 of 18 May 1998.

¹⁸⁰ Doc. TN/AG/R/10 of 9 September 2003, para. 35.

¹⁸¹ States and observers voiced widely divergent views on the extent to which international trade should be addressed in the Voluntary Guidelines. IGWG, *Synthesis Report of Submissions Received from Governments and Stakeholders*, FAO Doc. IGWG RTFG 1/2 Rev. 1, para. 42. Most recognized the potential of trade to reduce poverty and the need to pursue further liberalization of international agricultural trade. However participants also mentioned the negative impacts of unequal competition, subsidized exports, depressed world food prices and developing country market barriers. Some submissions called for recognition in the Voluntary Guidelines of the right of countries to define their own policies, levy import duties and provide targeted subsidies in order to realize the right to adequate food. Other submissions called for insertion of the right to adequate food as a priority principle in various WTO agreements or suggested that agriculture should not be subject to WTO rules. There was also a call for reform of international trade rules to favour small-scale producers. Others, notably the United States and the European Union opposed any reference to international factors, including international trade.

¹⁸² See e.g., Guideline 4 on Market Systems; Guideline 9 on Food Safety and Consumer Protection; Guideline 13 on Support for Vulnerable Groups; Guideline 14 on Safety Nets; Guideline 15 on Food Aid and Section III.

prior commitments, including paras 75 and 77 of the São Paulo Consensus¹⁸³ which are reproduced and which refer to the Doha mandate. Section III, para. 10 states that the measures mentioned therein can contribute to strengthening an enabling environment for the progressive realization of the right to food.

While the domestic side of promoting agriculture for the realization of the right to food is well addressed, the Voluntary Guidelines' recommendations with respect to international trade are disappointing. They never move beyond generalities. They neither address the implications of trade for the right to food, nor do they suggest how to deal with the most relevant issues of existing or possible tension. They also do not establish criteria for protecting the right to food in AoA negotiations and beyond. The Voluntary Guidelines are limited to reinforcing prior commitments and repeating previously negotiated language. The instrument that deals with the negative effects of the AoA on LDCs and NFIDCs, the Marrakesh Decision, is not even mentioned.

¹⁸³ “75. Agriculture is a central element in the current negotiations. Efforts should be intensified to achieve the internationally agreed aims embodied in the three pillars of the Doha mandate, namely substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support. The negotiations on agriculture taking place in the WTO should deliver an outcome that is consistent with the ambition set out in the Doha mandate. Special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall take fully into account development needs in a manner consistent with the Doha mandate, including food security and rural development. Non-trade concerns of countries will be taken into account, as provided for in the Agreement on Agriculture, in accordance with paragraph 13 of the Doha Ministerial Declaration. ...

77. Efforts at extending market access liberalization for non-agricultural products under the Doha Work Programme should be intensified with the aim of reducing or, as appropriate, eliminating tariffs, including tariff peaks, high tariffs and tariff escalation, as well as non-tariff barriers, in particular on products of export interest to developing countries. Negotiations should take fully into account the special needs and interests of developing countries and LDCs, including through less than full reciprocity in reduction commitments.”

3. Options for the Reform Process and Beyond

a. Inserting the Right to Food into the Agreement on Agriculture

The AoA recognises food security as an important non-trade concern and policy objective but without mentioning states' underlying human rights obligations.¹⁸⁴ This absence of references to human rights has several reasons, amongst them, particularly with respect to economic, social and cultural rights, are fears that they could be abused to interfere in a far-reaching and unpredictable manner with the WTO Agreements.¹⁸⁵

The High Commissioner for Human Rights, Venezuela and commentators have called for an explicit reference in the AoA to the promotion and protection of human rights.¹⁸⁶ Such a reference should be to human rights both as an objective of trade and as a legitimate exception to trade commitments. While an explicit reference to human rights would neither add to nor subtract from existing obligations, it would frame the AoA in an appropriate manner, recognize the pivotal role human rights play, and facilitate human-rights-conducive interpretations.¹⁸⁷ It can, however, be safely assumed that an explicit reference to the right to food in the AoA would meet the adamant resistance of at least one, but most likely more, of the WTO Members.¹⁸⁸

¹⁸⁴ For a discussion of the differences between the concepts of food security and the right to food, see, Mechlem, *Food Security and the Right to Food in the Discourse of the United Nations*, see note 48.

¹⁸⁵ Breining-Kaufmann points out that although food security as a non-trade concern is broadly accepted, there are as yet no clear conceptions on how such concerns should be incorporated into the WTO framework; see note 15, 350.

¹⁸⁶ *Report of the High Commissioner*, see note 146, para. 45. Statement of Venezuela in: Trade Negotiations Committee, *Minutes of Meeting Held in the Centre William Rappard* on 30 November 2005, Doc. TN/C/M/22 of 10 March 2006, 21; Gray, see note 177, 5.

¹⁸⁷ It has been pointed out that many developing countries fear that explicit human rights clauses could be used as a new form of disguised protectionism; Lim, see note 167, 287. This concern seems to apply more to references to human rights, in particular labour rights, in other agreements than to a right to food reference in the AoA.

¹⁸⁸ On the position of the U.S. with respect to economic, social and cultural rights, see P. Alston, "U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy", *AJIL* 84

b. Interpreting the Right to Food into the Agreement on Agriculture and Article XX GATT

WTO law is “not to be read in clinical isolation from public international law.”¹⁸⁹ According to article 3 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes “customary rules of interpretation of public international law” need to be used when interpreting WTO law.¹⁹⁰ These rules have been codified in the Vienna Convention on the Law of Treaties (VCLT).¹⁹¹ Amongst them is the rule to take into account “any relevant rules of international law applicable in the relations between the parties” (article 31 (3) (c) VCLT).¹⁹² Amongst the relevant law applicable between WTO Members is human rights law,¹⁹³ including the right to food.¹⁹⁴ Both sets of obligations

(1990), 365 et seq.; C. Powell, “Geographies of Hunger”, in: M. Likosky (ed.), *Transnational Legal Processes*, 2002, 466 et seq.

¹⁸⁹ *United States – Standards for Reformulated and Conventional (US – Gasoline)*, Report of the Appellate Body (adopted by the Dispute Settlement Body on 20 May 1996), Doc. WT/DS2/AB/R of 29 April 1996, 17.

¹⁹⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2 to the Marrakesh Agreement Establishing the World Trade Organization, UNTS Vol. 1869 No. 31874, page 401.

¹⁹¹ UNTS Vol. 1155 No. 18232.

¹⁹² *US – Gasoline*, see note 189, 17. L. Bartels, “Article XX of GATT and the Problem of Extraterritorial Jurisdiction – The Case of Trade Measures for the Protection of Human Rights”, *JWT* 36 (2002), 353 et seq. (354); J. Pauwelyn, “The Role of Public International Law in the WTO: How Far Can We Go?”, *AJIL* 95 (2001), 535 et seq. (562, note 178). See also, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US – Shrimp)*, Report of the Appellate Body, Doc. WT/DS58/AB/R of 12 October 1998, adopted on 6 November 1998, para. 130 (on the evolutionary interpretation of “natural resources” in article XX (g)); G. Marceau, “WTO Dispute Settlement and Human Rights”, *EJIL* 13 (2002), 753 et seq. (784) and Bartels, see above, 354, note 8.

¹⁹³ Marceau, *ibid.* contra J. Trachtman, “The Domain of WTO Dispute Resolution”, *Harv. Int’l L. J.* 40 (1999), 333 et seq. (343) (only rules of interpretation). In *Korea – Measures Affecting Government Procurement*, Doc. WT/DS163/R of 1 May 2000, Report of the Panel, 19 June 2000, para. 7.96, a WTO Panel held that customary international law applies generally to economic relations between WTO Members.

¹⁹⁴ While certainly a customary right to food is comprised, the situation is less clear with respect to the ICESCR which is an inter-se agreement between a large, but still limited subset of WTO Members. Due to the fact that the WTO, in contrast to human rights treaties, accepts non-sovereign mem-

need to be interpreted in a reconciliatory manner. Some argue that such good faith interpretation can avoid or solve conflicts between the trade and the human rights regimes in most cases.¹⁹⁵

One opening clause to bring in human rights is article XX GATT,¹⁹⁶ which continues to be relevant for trade in agriculture.¹⁹⁷ Article XX GATT contains a number of exceptions permitting WTO Members not to comply with their normal trade obligations in order to protect “important state interests”¹⁹⁸ provided that the measures taken do not constitute a means of arbitrary or unjustifiable discrimination between countries.¹⁹⁹ Article XX (b) GATT allows WTO Members to refuse to trade if the refusal is necessary and proportional to protect human life or health.²⁰⁰ Article XX (a) GATT foresees a similar exception in order to protect public morals.²⁰¹ According to the UN Secretary-General “[t]he exceptions referred to [in article XX] call to mind the protection

bers, complete identity of membership to the WTO and another treaty is not possible. Relevant rules of treaties with broad membership, such as human rights treaties, can therefore be considered, cf. Bartels, see note 192, 360 et seq.; Marceau, see note 192, 782 et seq.; Pauwelyn, see note 192, 575 et seq. The Appellate Body considered on a number of occasions international treaties with a broad but different membership from WTO when interpreting a WTO Agreement; OHCHR, *Human Rights and World Trade Agreements – Using General Exception Clauses to Protect Human Rights*, Doc. HR/PUB/O5/5 (2005). See, for example, *US-Shrimp*, see note 192, paras. 127 et seq. which examined CITES and a number of other multilateral environmental agreements, many of which did not have the same membership as the WTO.

¹⁹⁵ Cf. Marceau, see note 192, 804 et seq.

¹⁹⁶ Cf. Lim, see note 167, 283 et seq.; S. Charnovitz, “The Moral Exception in Trade Policy”, *Va. J. Int’l L.* 38 (1998), 689 et seq. (742); Bartels, see note 192; Marceau, see note 192, 786; Howse/ Mutua, see note 169.

¹⁹⁷ McMahon, see note 49, 206; Gray, see note 177, 13. The GATT remains applicable except to the extent that the AoA contains specific provisions dealing specifically with the same matter, which is not the case with respect to article XX GATT.

¹⁹⁸ *US-Gasoline*, see note 189, 30.

¹⁹⁹ Lim, see note 167, 283.

²⁰⁰ Similar clauses can be found in article 8 TRIPS and article IV (b) GATS.

²⁰¹ It is noteworthy that public morals can be protected using a straightforward exception clause (see, for example the *U.S. Gambling and Betting* case, Doc. WT/DS285/AB/R), while for the protection of human rights more complicated and in dispute settlement proceedings riskier arguments must be provided.

of the right to life, the right to a clean environment, the right to food and to health ... to mention just a few.”²⁰² Since without the realization of the right to food, human health suffers and life can be endangered, a strong case can be made for reading the right to food into article XX (b) GATT.²⁰³ Equally, the right to food has been so widely accepted that it can be regarded as being part of the public morals of most states.²⁰⁴ The potential human rights scope of these article XX GATT exceptions has not yet been clarified, as no WTO Member in any of the dispute settlement cases has actually used or invoked human rights in any of its panel submissions.²⁰⁵

Entering human rights via the backdoor of exception clauses has the advantage of not requiring any formal, consensual amendments to the AoA. A danger is that they might be relegated to exceptions that are interpreted in a least trade restrictive way.²⁰⁶ Such an approach would make it unlikely that human rights are accepted as a ground for trade restrictions and thus diminish their potency.²⁰⁷ In contrast, if one joins the human rights actors in asserting that human rights should be the objective of trade, then human rights should not be interpreted in a

²⁰² *Globalization and its Impact on the Full Enjoyment of all Human Rights: Preliminary Report of the Secretary-General*, Doc. A/55/342 of 31 August 2000, 4.

²⁰³ The human rights concern can arise in the country taking the measure or in the country of the trading partner. For instance, state A may refuse to import goods from state B (or lower a tariff *vis-à-vis* B) in reaction to right to food violations in state B. Or, state A may refuse to import goods originating in state B (or lower a tariff *vis-à-vis* B) because of fears that those might have negative effects on the realization of the right to food in its own country. The former constellation, which has a theoretically interesting extraterritorial dimension (see, in detail, Bartels, note 192, on this issue), shall not be discussed here as the latter situation is more relevant in the context of this paper.

²⁰⁴ If a state invokes the “public morals” exception (article XX (a) GATT) on human rights grounds, the participation of a state in human rights treaties, and other confirmations of a state’s endeavour to protect human rights may be used in order to determine the legality of the measure. Marceau, see note 192, 790 et seq.

²⁰⁵ Lim, see note 167, 284. For a discussion of case law related to this issue, see, OHCHR, *Human Rights and World Trade Agreements*, see note 194.

²⁰⁶ Trebilcock/ Howse, see note 50, 140.

²⁰⁷ B. Brandtner/ A. Rosas, “Trade Preferences and Human Rights”, in: P. Alston (ed.), *The EU and Human Rights*, 1999, 698, 705. Leader, see note 171, 683 et seq.

manner that is necessarily the least trade restrictive. Instead, trade rules should be interpreted to encroach upon human rights to the least extent possible, i.e., the direction of adaptation should be different.²⁰⁸

c. Invoking the Right to Food as an Exception to a Trade Obligation

In the case of a conflict between an AoA obligation and the right to food that cannot be solved in another way than by applying one rule at the expense of the other, the right to food should take precedence. This precedence can easily be justified if one accepts that all human rights have a *ius cogens* character.²⁰⁹ Otherwise, the problem exists that, on the one hand, a non-*ius cogens* right to food would be, from a formal point of view, hierarchically equal to the AoA. On the other hand, human rights are the only rights that legal philosophy and international treaties, in reminiscence of natural law theories, recognize as inherent and inalienable to the human being,²¹⁰ i.e., pre-existing any law and as not able to be relinquished. If this concept of human rights is taken seriously, human rights can structurally not give way to trade rules and must overrule them in cases of conflict.²¹¹

²⁰⁸ Leader, *ibid.*, 690.

²⁰⁹ Cf. Petersmann, who uses the concept of “constitutional primacy” of human rights and accepts a *ius cogens* character of the core of all human rights; E.U. Petersmann, “Human Rights and the World Trade Organization”, *JWT* 37 (2003), 241 et seq. (251 et seq.) For another solution, see Sohn, who argues that human rights as elaborated in the International Bill of Human Rights partake in the force of Article 103 UN Charter and thereby prevail over conflicting obligations under other treaties. His interpretation of Article 103 UN Charter is, however, not widely shared. L. Sohn, “John A. Sibley Lecture – The Shaping of International Law”, *Ga. J. Int’l & Comp. L.* 8 (1978), 1 et seq. (19); L. Sohn, “The Human Rights Law of the Charter”, *Tex. Int’l L. J.* 12 (1977), 133 et seq.

²¹⁰ Such natural law remnants can, for example, be found in the preambles of the UDHR, the ICCPR and the ICESCR.

²¹¹ If human beings are indeed born with certain rights that cannot be relinquished, all these rights (and not only those that are recognized as *ius cogens*) should be accorded higher normative hierarchical value than other treaty rules such as trade rights that are created and changed as needed. Yet, an irreconcilable contrast between the idea, concept und claim of human rights and their formal legal protection as rights equal in status to other rights remains.

A related disputed question is whether human rights could overrule WTO law if a state invoked them before a WTO dispute settlement body within the framework of a claim under one of the covered agreements.²¹² WTO dispute settlement bodies have limited jurisdiction to assess the compatibility of a measure with WTO law, and do not rule on its compliance with international law in general.²¹³ According to Pauwelyn, a defendant in a WTO dispute settlement procedure would, however, be allowed to invoke non-WTO rules as justification for a breach of a WTO rule, even if the WTO treaty itself does not offer such justification. The justification should be recognized if both disputing parties are bound by the non-WTO rule and if the rule prevails over the WTO rule pursuant to conflict rules of international law.²¹⁴

In this theoretical discussion, a practical concern should not be overlooked: while binding dispute settlement procedures are in place for disputes concerning WTO rules, no such effective redress mechanism exists to vindicate violations of economic, social and cultural rights.²¹⁵ As a rule, violating them involves at worst public shaming.²¹⁶ This shortcoming leads to weaker implementation of these rights, and

²¹² Pauwelyn, see note 192, 577. The covered agreements are all WTO multilateral trade agreements and the plurilateral agreements unless otherwise notified to the DSU; DSU Appendix 1. Contra Marceau, see note 192, 777 et seq.

²¹³ Arts 1 and 7 DSU; Marceau, see note 192, 762 et seq.; Lim, see note 167, 288.

²¹⁴ Pauwelyn, see note 192, 577. Against this reading of the competence of the WTO adjudicating bodies, cf. Marceau, see note 192, 777 and 797, who argues that WTO adjudicating bodies cannot reach a conclusion that a human rights provision has superseded a WTO provision, as in doing so they would need to interpret and apply international obligations other than those of the WTO and would thereby be adding to or diminishing the rights and obligations of the covered agreements contrary to article 3 (2) DSU. Marceau underlines that although WTO adjudicating bodies can only enforce WTO applicable law, states remain, of course, bound by all their international obligations.

²¹⁵ The reporting mechanism foreseen under the ICESCR does not offer the possibility to study any country's situation in depth nor can the CESCR hear individual cases. The latter might change if the current process of discussing an optional protocol to the ICESCR bears fruit.

²¹⁶ See, on this issue, K. Roth, "Defending Economic, Social and Cultural Rights – Practical Issues Faced by an International Human Rights Organization", *HRQ* 26 (2004), 23 et seq.

might induce countries, fearing the forceful WTO dispute settlement mechanism, to subdue them to trade rules if in doubt.²¹⁷

d. Shaping the Future Rules for Trade in Agriculture

The last option of ways to better protect and realize the right to food within and through the AoA concerns the adequate design of the revised AoA. The discussion will take up some of the points developed in Part IV and take them further by analysing the agreements reached up until the 2005 Hong Kong Ministerial Conference.

The starting point is the obligation that states should not conclude agreements that harm the right to food.²¹⁸ Rather, they have an individual and collective responsibility to protect and promote human rights also through international treaties not specific to human rights. The right to food should hence inform the design and implementation of rules for trade in agriculture. This seemingly simple rule is difficult to adhere to when it comes to international treaties such as the AoA that are concluded as part of a package deal with complex, context- and country-dependent, and only partly predictable effects.²¹⁹ International trade is an area in which the one-time transfer of sovereignty sets in motion long-term processes in which the decisions of other states and powerful private actors have far-reaching implications for the realization of human rights. Decisions need to be made on the basis of economic projections that are prone to errors. Notwithstanding these limitations, there are some areas for which recommendations emerge on how the ongoing liberalization of trade in agriculture should be shaped in order to be conducive, or at least not detrimental to, the realization of the right to food and what the boundaries of policy options are.

²¹⁷ Dommen, see note 161, 16.

²¹⁸ CESCR, *General Comment No. 12*, see note 35, para. 19.

²¹⁹ Reducing trade-distorting domestic support and export subsidies will facilitate the realization of the right to food for those farmers that become more competitive but might harm the realization of others, e.g., individuals depending on cheap subsidized food imports.

aa. The Status of the Negotiations

The negotiations foreseen in article 20 AoA began in early 2000.²²⁰ At the 2001 Doha Ministerial Conference, they became part of the single undertaking of all negotiations of the Doha Round, which is now unofficially expected to end in 2006 or 2007, well after the originally planned end date of 1 January 2005.²²¹ The sensitive and contentious topic of agriculture, together with the Singapore issues, caused much of the delay.²²² The Doha Round has the ambition of becoming a Development Round, partly in reaction to manifold criticisms that developing countries lost out in the Uruguay Round,²²³ including through the AoA.²²⁴

²²⁰ Negotiations for continuing the agricultural trade reform process were to be initiated one year before the end of the implementation period of the AoA, i.e., by the end of 1999. A sector-specific negotiation process was launched on 7 February 2000 (see WTO, Services and Agriculture Negotiations: Meetings set for February and March, WTO Press Release (Press/167 of 7 February 2000). An earlier attempt to launch the mandated negotiations in agriculture as part of the third Ministerial Conference in Seattle had failed as the Millennium round of comprehensive trade negotiations as such was not launched.

²²¹ Other – passed – deadlines as in the Doha Declaration are: 31 March 2003 for formulas and other modalities for countries' commitments, and the Fifth Ministerial Conference 2003 (Mexico) for countries' comprehensive draft commitments and stock taking, see, <http://www.wto.org/english/tratop_e/agric_e/negoti_e.htm>.

²²² The so-called Singapore issues comprise investment, competition, transparency in government procurement, and trade facilitation. For a detailed account of the developments in the agriculture negotiations, see Desta, see note 56, 8 et seq. Many doubt whether the Doha Round can realistically be expected to end in 2006. For an analysis of U.S. and EU domestic political interests and factors influencing the outcome, see S.J. Evenett, *The WTO Ministerial Conference in Hong Kong: What Next?*, 18 January 2006, available at: <[http://www.evenett.com/articles/dohaprosects.pdf](http://www.evenett.com/articles/dohapropects.pdf)>.

²²³ M. Ritchie/ K. Dawkins, "WTO Food and Agricultural Rules: Sustainable Agriculture and the Human Right to Food", *Minn. J. Global Trade* 9 (2000), 9 et seq.; S. Subedi, "The Road from Doha: The Issues for the Development Round of the WTO and the Future of International Trade", *ICLQ* 52 (2003), 425 et seq. (428). Dommen, see note 161, 10. See also the following declarations by developing countries: ACP Declaration on the Fourth Ministerial Conference adopted in Brussels, 5-6 November 2001, Doc. WT/L/430 of 9 November 2001; Declaration of the Group of 77 and China on the Fourth Ministerial Conference at Doha, Qatar, Doc.

Non-trade concerns are to be taken into account in the negotiations (article 20 (c) AoA). In the Doha Ministerial Declaration, WTO Members committed themselves “to comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support.” They agreed “that special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the Schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally *effective* and to enable developing countries to effectively *take account of their development needs*, including *food security* and rural development” (emphasis added).²²⁵ After the failure of the Cancún Ministerial Conference, negotiations were brought back on track with the adoption of the so-called July 2004 Package in which members agreed on a Framework for Establishing Modalities in Agriculture (July Framework).²²⁶ After slow progress,²²⁷ the Hong Kong Ministerial Conference in December 2005 made the broad agreements of the July Framework more concrete by deciding to adopt four bands for structuring tariff cuts, to have three

WT/L/424 of 24 October 2001; Zanzibar Declaration of LDCs, Doc. WT/L/409 of 6 August 2001; Abuja Ministerial Declaration on the Fourth Ministerial Conference of the WTO, Doc. WT/L/423 of 18 October 2001; see also, Brussels Declaration of the Third UN Conference on the Least-developed Countries, 14-20 May 2001, Doc. A/CONF.191/L.20 of 20 May 2001. Some agreements, that have been concluded as part of the Uruguay Round package, pose particular problems. For instance, benefits under the TRIPS Agreement, which is neutral at face value, accrue *de facto* almost exclusively to developed countries, see Mechlem/ Raney, see note 10.

²²⁴ Subedi, see note 223, 438. Subedi mentions similar concerns with the agreements on textiles, subsidies, intellectual property protection, anti-dumping, and sanitary and phytosanitary measures.

²²⁵ Doha Ministerial Declaration, adopted on 14 November 2001, Doc. WT/MIN(01)/DEC/1 of 20 November 2001, para. 13.

²²⁶ Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, Annex A – Framework for Establishing Modalities in Agriculture, Doc. WT/L/579 of 2 August 2004 (hereinafter July Framework). For an analyses of the July Framework, see: F. Ismail, “A Development Perspective on the WTO 2004 General Council Decision”, *JIEL* 8 (2005), 377 et seq.

²²⁷ See, *Agricultural Negotiations: Status Report II Looking Forward to the Hong Kong Ministerial – Assessment by the Chairman*, Doc. TN/AG/19 of 1 August 2005, para. 4.

bands for reductions in trade-distorting domestic support, and to complete the elimination of all forms of export subsidies by 2013, but fell short of developing concrete modalities. It is expected that modalities will be agreed upon by the end of 2006.²²⁸

bb. Market Access

Improving market access is the most complex and protracted issue of the current negotiations and crucial for a reformed trade system supportive of development.²²⁹ The current negotiations deal with the depth of tariff reductions and the method by which to reach the envisaged reduction targets.²³⁰ WTO Members agreed to adopt four bands for structuring tariff cuts, to cut the deeper the higher the tariff levels (progressivity),²³¹ and to cut tariffs from bound rates rather than applied tariff rates.²³² The latter favours developing countries as they have often significant differences between the two tariff rates.²³³ Most – but importantly not all, for example not Brazil and India – will be allowed to retain their existing applied rates while reducing their bound rates to levels which should, in many instances, still remain higher than what most of them will want to apply.²³⁴ Hence, the reduction commitment will be felt mainly in developed countries.

Both developing and developed countries will be able to designate “sensitive products” for which tariff cuts will be more lenient than

²²⁸ In Hong Kong, members decided to complete the agricultural modalities by 31 April 2006 and to submit comprehensive schedules by 31 July 2006. The April deadline was missed and the July deadline is unlikely. Sixth WTO Ministerial Conference, Hong Kong, 13-18 December 2005, Doha Work Programme Ministerial Declaration adopted on 18 December 2005, Doc. WT/MIN(05)/DEC of 22 December 2005 (hereinafter Hong Kong Declaration).

²²⁹ World Bank, *Global Economic Prospects*, see note 5, xxvii.

²³⁰ Desta, see note 56, 13. See also Desta for a detailed account of the negotiations and proposals on this issue.

²³¹ Such cuts would also address the problem of tariff escalation.

²³² July Framework, para. 29; Hong Kong Declaration, para. 7.

²³³ Desta, see note 56, 21.

²³⁴ *Ibid.*, 52. It is worth noting that not all, including some of the more important developing country players, e.g., Brazil and India, will be able to retain their applied tariffs despite cuts in the bound ones. Additionally, some applied tariffs may already be too low and a reduction in the space between the bound and the applied can become important in such cases.

those required by the formula.²³⁵ The number of products and other issues, such as tariff rate quota expansion,²³⁶ for such products, have not yet been determined and are hotly disputed. To be distinguished from sensitive products are “Special Products” which concern only developing countries. They will be allowed to self-designate “an appropriate number of products as Special Products, based on criteria of food security, livelihood security and rural development needs.”²³⁷ Special Products will be subject to more flexible treatment, including lower or no tariff cuts. However, they have been controversial and details still need to be worked out.²³⁸

In addition, the fate of the SSG is under negotiation. For developing countries that typically have no access to the SSG but are particularly vulnerable to external commodity shocks, a new mechanism called Special Safeguard Mechanism (SSM) will be introduced to protect them against price slumps and import surges.²³⁹ Such a mechanism is crucial

²³⁵ July Framework, para. 31, Hong Kong Declaration, Annex A – Agriculture, A-5.

²³⁶ See note 64.

²³⁷ July Framework, para. 41. Possible indicators to identify Special Products could comprise the product’s share in total calorie consumption (food security), the product imported as a share of domestic consumption (food security), the product share in harvested area, the product share in total agricultural production and the product production growth rate (the last three relating to the livelihood security and rural development criteria); FAO, *Fact-sheet for the Sixth WTO Ministerial Conference, Hong Kong, Identification of Special Products: Possible Selection Criteria and Treatment*, FAO 2005, available at: <<ftp://ftp.fao.org/docrep/fao/meeting/010/j6901e.pdf>>. Lately, it seems that self-designation might be limited to a specific number or proportion of tariff lines, possibly combined with criteria for indicators. See, Committee on Agriculture, *Chair’s Reference Paper – Special Products of 4 May 2006*, available at: <http://www.wto.org/english/tratop_e/agric_e/ref_paper_sp_e.pdf>.

²³⁸ There is still a lot of controversy in this regard: some members proposed that Special Products should be fully exempt from any new market access commitments and have automatic access to the SSM. Others favour some degree of market opening for these products, albeit reflecting more flexible treatment than for other products. The Hong Kong Declaration mentions a new proposal for a tripartite categorization of Special Products involving limited tariff cuts for at least a proportion of such products which remains to be fully discussed. Hong Kong Declaration, Annex A Agriculture, A-6.

²³⁹ The Hong Kong Declaration provides that “[d]eveloping country Members will ... have the right to have recourse to a Special Safeguard Mechanism

to enable them to manage reform processes carefully in order to avoid hardships such as the sudden flooding of national markets with subsidized imported goods. The new SSM should be simple to use, flexible and effective.²⁴⁰

Both Special Products and the new SSM will be crucial mechanisms that offer countries the flexibility to use measures at the border to protect the livelihoods of small-scale and subsistence farmers (see above under II.). They help to prevent the displacement of local products by foreign imports, which, in the absence of other employment opportunities, would lead to food insecurity and impoverishment of the rural poor.

With respect to LDCs, developed and willing developing countries agreed to implement duty-free and quota-free market access for at least 97 percent of products originating from LDCs defined at the tariff line level.²⁴¹ The gains might, however, be smaller than the figures seem to suggest as the remaining 3 percent will be sufficient to exclude a high number of products including, for example, sugar, rice and bananas.

cc. Domestic Support

WTO Members agreed to three bands for reductions in Final Bound Total AMS, and overall cuts in trade-distorting domestic support in general.²⁴² The EC, the member with the highest level of support, will be in the top band, the U.S. and Japan will be in the middle band and all other members, including all developing country members, will be in

(SSM) based on import quantity and price triggers, with precise arrangements to be further defined” (para. 7). Desta warns that the introduction of the SSM will come at too high a price. As developing countries’ applied tariffs are often lower than their bound tariffs they have already the flexibility to raise tariffs up to the bound rate so that the SSM might be of little additional value. Developed countries might, however, link the introduction of the SSM to the continued existence of the SSG from which mainly they benefit. Desta also makes the point that both mechanisms are contrary to the long-term objective of achieving a fair and market-oriented agricultural trading system; Desta, see note 56, 21.

²⁴⁰ For more details, see FAO, *Trade Policy Briefs*, see note 73.

²⁴¹ Hong Kong Declaration, para. 47 together with Annex F on Special and Differential Treatment.

²⁴² I.e., Amber Box, *de minimis* and Blue Box combined.

the bottom band.²⁴³ A 20 percent down payment at the beginning of the implementation period is foreseen.²⁴⁴ *De minimis* levels will be reduced but developing countries that allocate almost all *de minimis* support for subsistence and resource-poor farmers will be exempt.²⁴⁵ Furthermore, the *de minimis* rights of developing countries with no AMS commitments remain unaffected. The Blue Box will be reduced to no more than 5 percent of the value of a country's agricultural production over a period to be determined.²⁴⁶ The Green Box criteria will be reviewed to guarantee that they actually do have no, or at most minimal, trade distorting effects in response to concerns that some permitted policies have stronger impacts. They will also be reviewed to ensure that programmes of developing countries are effectively covered,²⁴⁷ i.e., to make Green Box criteria more development oriented and better tailored to the realities of developing country agriculture.²⁴⁸ Developing countries argue that some provisions of the current Green Box are difficult to apply in their context, and that for some most minimally trade distorting programmes which they would like to implement, no explicit provision exists. Developed countries are, however, concerned that accommodating such requests would open a Pandora's Box of large-scale developing country subsidisation.²⁴⁹

²⁴³ Cf. Hong Kong Declaration, para. 5. The gap in the amount of Final Bound total AMS within the 35 members that undertook commitments in the area is so big that the Hong Kong Declaration was able to be more specific about the allocation of countries to each of the three tiers, Desta, see note 56, 32. For the data, see Committee on Agriculture, Special Session, *Total Aggregate Measurement of Support, Note by the Secretariat*, Doc. TN/AG/S/13 of 27 January 2005. The rate that will apply to each of the three bands which will be determined in the modalities agreement.

²⁴⁴ July Framework, para. 7 et seq.; Hong Kong Declaration, para. 4.

²⁴⁵ July Framework, para. 11.

²⁴⁶ July Framework, para. 15.

²⁴⁷ Hong Kong Declaration, para. 5.

²⁴⁸ July Framework, para. 16.

²⁴⁹ See, Committee on Agriculture, *Agricultural Negotiations: Status Report II Looking Forward to the Hong Kong Ministerial – Assessment by the Chairman*, Doc. TN/AG/19 or 1 August 2005, Attachment, Agriculture Negotiations – Status Report, Key Issues to be addressed by 31 July 2005 – Assessment by the Chairman.

dd. Export Subsidies

The main achievement of the Doha Declaration was the commitment to negotiate to reduce all forms of export subsidies with a view to phasing them out.²⁵⁰ In the July 2004 Framework, members agreed to eliminate export subsidies as listed in their schedules as well as to develop disciplines for other forms of export support, such as export credits,²⁵¹ exporting state trading enterprises and food aid practices that may have the same effect as listed export subsidies.²⁵² As provided for in the Marrakesh Decision (para. 4), the disciplines will make provision for special and differential treatment for LDCs and NFIDCs.²⁵³ In Hong Kong members reached a break-through by agreeing on the end of 2013 as the phase out date for all forms of export subsidies,²⁵⁴ but not much progress was made on export credits.²⁵⁵

With respect to food aid, members decided to close loop-holes for disguised export subsidization and commercial displacements. They will agree on effective disciplines on in-kind food aid, monetization and re-exports.²⁵⁶ At the same time, they committed to maintain an ade-

²⁵⁰ Doha Ministerial Declaration, para. 13. Success and failure of the Doha Ministerial Conference depended until the very end on the inclusion of the commitment to phase out export subsidies; Desta, see note 56, 23. The vast majority of WTO Members, with the EC as the main opponent, had called for an end to export subsidies.

²⁵¹ The term “export credits” is used here and hereinafter as shorthand for export credits, export credit guarantees or insurance programmes in the language of the July Framework.

²⁵² July Framework, para. 45; Desta, see note 56, 10 et seq. This commitment addresses the criticism that the AoA prohibited some forms of export subsidies while unjustifiably allowing others, particularly measures favoured by the United States.

²⁵³ July Framework, para. 24.

²⁵⁴ Hong Kong Declaration, para. 6. This date is subject to confirmation upon the completion of the modalities agreement scheduled for 30 April 2006. Developing country members will continue to benefit from article 9 (4) AoA for five years after the end-date for the elimination of all forms of export subsidies, para. 6.

²⁵⁵ Cf. Hong Kong Declaration, para. 6.

²⁵⁶ The disciplines on export credits, exporting state trading enterprises and food aid are to be completed by 30 April 2006 as part of the modalities, including appropriate provisions in favour of least-developed and net food-importing developing countries as provided for in paragraph 4 of the Marrakech Decision, Hong Kong, para. 6.

quate level of food aid and to take into account the interests of food aid recipient countries. To this end, a “safe box” for bona fide food aid will be provided to ensure that there is no unintended impediment when dealing with emergency situations.

Food aid disciplines under the AoA should be harmonized with the right to food. In the AoA negotiations, the types of food aid such as programme and project food aid, which affect trade, should be subject to stricter disciplines than non-trade impacting types such as emergency food aid.²⁵⁷ States are under an obligation to request aid in cases of emergencies to fulfil their “provide” obligations. Food aid must serve this “fulfil/provide” function without compromising the “respect” obligation. This requires that food aid is made available for humanitarian and not commercial purposes, that it is delivered on the basis of a sound and independent needs assessment, in a timely manner, and as far as possible in grant form. In-kind contributions should be limited to cases where they are more appropriate than cash, e.g., because marketing channels are not functioning, and where appropriate United Nations or other international bodies have appealed for such help.²⁵⁸ Food aid should be targeted towards the most vulnerable and needy countries and groups within countries, and should not harm local producers and sellers.²⁵⁹ The latter is achieved if food aid is consumed in addition to other food and not instead of other supplies (criterion of additionality) and thereby does not displace commercial transactions and production.²⁶⁰ Preferably, food aid should be channelled through international

²⁵⁷ In addition, the evidence on the degree to which different types of food aid displace commercial transactions is still inconclusive. It is clear, however, that commercial displacement occurs least in the case of emergency food aid, i.e., aid which is targeted and freely distributed to victims of natural and human-made disasters, and most in the case of programme food aid, which is untargeted aid provided directly to a recipient government for sales on local markets for balance of payments or budgetary support activities and which displaces either imports or domestic supply in final consumption. Project food aid, i.e., aid which is targeted to vulnerable groups to improve their nutritional status and to support specific developmental activities such as food for work or school-feeding, takes a middle position. For a critique of the Food Aid Convention, see Desta, see note 139.

²⁵⁸ World Bank, *Global Economic Prospects*, see note 5, 137.

²⁵⁹ CESCR, General Comment No. 12, see note 35, para. 37 et seq. Voluntary Guideline 15 and para. 13 of Section III.

²⁶⁰ FAO, *Trade Policy Technical Note, No. 8 Food Aid in the Context of International and Domestic Markets and the Doha Round*, 2, available at: <ftp://

agencies rather than be provided bilaterally. Some of these criteria are outside the purview of the AoA and are – imperfectly – addressed by instruments such as the Food Aid Convention and the FAO Principles on Surplus Disposal to which the AoA points.²⁶¹

Food aid provided according to the criteria set out above can also “facilitate” the right to food by strengthening the ability of the poor to maintain sustainable livelihoods. Finally, it can “protect” their right to food by insulating them from fluctuations in food prices.²⁶²

ee. Assessment

The Doha round negotiations until Hong Kong have yielded only moderate overall progress, but some decisions have been taken that will be conducive to the realization of the right to food.

As far as market access is concerned, the better market access opportunities foreseen under the new regime can have positive and negative effects on the right to food. A positive development is the decision to base tariff reduction commitments on bound rather than applied tariffs as it works in favour of developing countries. Most, but importantly not all of them, apply tariffs at much lower rates than their bound tariffs, which leaves them flexibility to adjust their height. The further reduction of tariffs in OECD countries will improve developing countries’ access to those markets and give them an opportunity to reap the benefits that such stronger integration into international trade will yield, particularly if such access spurs pro-poor economic growth and poverty reduction. Conversely, increased access of products to underdeveloped developing country agriculture markets can harm local producers, who cannot compete with cheaper imports, at a time when no

<ftp.fao.org/docrep/fao/007/j5072e/j5072e00.pdf>>; World Bank, *Global Economic Prospects*, see note 5, 137.

²⁶¹ Both instruments lack effective control mechanisms. In addition, the Food Aid Convention has not reached its objective of guaranteeing timely and predictable minimum flows of food aid to the most needy. A more inclusive instrument, in which recipient countries’ interest play a greater role and food aid is coordinated, could in the medium-term replace the Food Aid Convention. See, the Berlin Statement for Sustainable Food Security, tabled in closing of the International Workshop on Food Aid – Contributions and Risks to Sustainable Food Aid, 2-4 September 2003, available at: <<http://www.ifpri.org/pubs/speeches/vonbraun/foodaidday.pdf>>.

²⁶² FAO, *Food Aid and the Right to Food – Information Paper*, FAO Doc. IGWG RTFG/INF 6, para. 10.

other possibilities to gain a living exist. The new rules foresee better protection against such negative effects of increased market access. Developing countries need policy space to protect their small-scale and subsistence farmers against being displaced as a consequence of reduced tariffs on those crops that these farmers grow as long as no other income earning opportunities have been created. Otherwise, impoverishment of a potentially large number of individuals and violations of their right to food would be a consequence. If details are worked out adequately, the envisaged introduction of special products and the SSM will give countries the flexibility to protect against such deteriorations of the realization of the right to food.

Both the domestic support reduction commitments and the decision to phase out all sorts of export subsidies by 2013 work towards a more level playing field.²⁶³ Their long-term effects on developing countries may well have positive repercussions for the realization of socio-economic rights. Also, the review of Green Box criteria to ensure that programmes of developing countries are covered, that do not cause more than minimal trade-distortions, is helpful. It opens a window of opportunity to exempt measures in favour of vulnerable groups from support prohibitions and to bring agricultural trade rules further in line with human rights requirements. Much depends, of course, on the specific modalities that will be agreed upon. With respect to food aid, members committed not to compromise humanitarian needs.

In principle, the mentioned rules give some concrete meaning to the principle of special and differential treatment and the label “Development Round”. However, they only set out broad lines of agreement. In addition, it remains to be seen how the rules operate in practice, which is difficult to predict. Advances at the level of detail also do not offset persisting fundamental problems. Special and differential treatment in favour of developing countries is still only of limited scope compared to the *de facto* existing “special and preferential treatment” for developed countries that allows the latter to continue to limit market access, to use trade-distorting domestic support and to provide export subsidies.²⁶⁴

²⁶³ See also the commitment to eliminate developed countries’ export subsidies on cotton by 2006; Hong Kong Declaration, para. 11.

²⁶⁴ LDCs are, however, largely exempt from any disciplines on market access and reduction commitments.

Unlike approaches in other fields,²⁶⁵ developing countries are not given leeway to catch up and use those measures from which the now developed countries once profited before they are bound by almost the same obligations as developed countries. These imbalances together with pervasive market failures in developing countries continue to hamper these countries' possibilities to move out of poverty and to realize the human rights of individuals under their jurisdiction. Ideally, special and differential treatment rules would also take better account of the differences that exist between developing countries and move beyond the two groups of "developing countries" and "LDCs". Such increased differentiation could both dispel the fears of developed countries to give too many privileges to developing countries and achieve meaningful rules.²⁶⁶ Creative rules need to be designed that do not primarily rely on the availability of often scarce financial resources and that work in favour of the poor in a country, not its elites.

VI. Conclusions and Recommendations

The WTO system and socio-economic rights pursue the same global objective: to advance human welfare. While the WTO scheme, including the AoA, is, however, concerned with aggregated improvements in global welfare, human rights focus on the individual. They set objectives to be reached for the benefit of each person and postulate standards that cannot be violated in the pursuit of overall societal goals. Despite the complementarity of goals at the abstract level, tensions therefore arise between trade and human rights in general, and the AoA and the right to food in particular, since impacts at country, community or household level can be negative.

In sum, the AoA is both a significant achievement and a failure for the right to food. On the one hand, it accomplished the setting in motion of a process of redressing imbalances in a highly distorted market which generally have worked against the interests of developing coun-

²⁶⁵ Cf. for example the Kyoto Protocol; on the discussions around the distinction between developed and developing country obligations under the Kyoto Protocol, see P. Sands, *Lawless World*, 2005, 69 et seq.

²⁶⁶ Examples of exceptions that could be useful in different contexts, see, FAO, *Trade Policy Briefs on Issues Related to the WTO Negotiations on Agriculture, No. 10 Special and Differential Treatment in Agriculture*, available at: <<ftp://ftp.fao.org/docrep/fao/008/j5529e/j5529e01.pdf>>.

tries. It fell short of reaching significant progress in this regard, but might have prevented worse excesses. On the other hand, the obligations of the AoA, and in particular its rules on increasing market access, have harmed some countries or groups within countries and have caused right to food concerns.

In order to make the revised trade in agriculture regime more conducive to the realization of the right to food, four sets of measures could be taken. First, an explicit reference to human rights or the right to food could be inserted in the AoA to complement or substitute food security as a non-trade concern and to formally bring human rights into the WTO system, including its dispute settlement mechanisms. While this suggestion might appear formalistic and legalistic, it would send an important signal and provide a basis for interpreting the AoA. Second, the possibility to interpret exception and other clauses so as to cover the right to food should be explored. Third, in cases of irreconcilable conflicts, the right to food should be invoked in order to justify non-compliance with a trade obligation if this is the only way to avoid a human rights violation.

Fourth, and most importantly, human rights should be accorded greater weight in the formulation of new trade in agriculture rules. The process of liberalization needs to be continued in order to wipe out the asymmetries embedded in the current system.²⁶⁷ The interlinked protection²⁶⁸ still allowed under the AoA has detrimental effects on the realization of the right to food in developing countries by keeping their agricultural sectors uncompetitive.²⁶⁹ The AoA's inherent inequalities

²⁶⁷ To reduce unfair barriers to market access, especially for goods in which developing countries have a strong comparative advantage and to phase out existing export subsidies and trade-distorting domestic measures, is also amongst the recommendations of the World Commission on the Social Dimension of Globalization, World Commission on the Social Dimension of Globalization, *A Fair Globalization – Creating Opportunities for All*, ILO, 2004, 143, available at <<http://www.ilo.org/public/english/wcsdg/docs/report.pdf>>.

²⁶⁸ The various forms of protection are linked. For instance, goods produced in countries with high tariffs and with the use of domestic support often depend on export subsidies to be sold at world markets, World Bank, *Global Economic Prospects*, see note 5, 118.

²⁶⁹ See in this context also the CESCR's Statement on Poverty, in which the Committee expressed its view that the absence of an equitable multilateral trade, investment and financial system – amongst other factors – is a global structural obstacle to poverty reduction. CESCR, *Poverty and the Interna-*

are heavily biased against these countries and the world's poor.²⁷⁰ The challenge is to craft disciplines that effectively open markets and level the playing field while retaining the policy space needed to protect human rights. Human rights law forbids countries to trade away those flexibilities that are necessary to effectively realize human rights, including to manage transitions so that increased liberalization does not lead to unemployment and impoverishment of small-scale and subsistence farmers. Relevant and modestly promising progress has been made in all three pillars. It now needs to be given adequate final form in the remainder of the negotiations.

In this context, special and differential treatment would be a means to operationalize international cooperation commitments under the ICESCR and other legal instruments.²⁷¹ In accordance with the principle that special attention needs to be paid to vulnerable groups, special and differential treatment should be designed in a way that benefits mainly the poor and vulnerable in a country. Such a right to food conforming AoA would also be conducive to achieving its long-term objective, namely to establish a "fair ... agricultural trading system". Only a system that takes full account of members' obligations with respect to the most fundamental type of legally protected rights – human rights – deserves to be called fair. In addition to new AoA rules, the existing commitments undertaken in the Marrakesh Decision should be lived up to.

Finally, it goes without saying, that trade policies and law have to be accompanied with appropriate complementary policies and measures in a range of subject areas outside the purview of the AoA and the field of agriculture. For example, the establishment of an appropriate legal framework for the right to food including its justiciability, the creation of safety nets, the regulation of non-discriminatory access to natural and other resources, the participatory design of appropriate nutrition

tional Covenant on Economic, Social and Cultural Rights, para. 21, Doc. E/C.12/2001/10 of 10 May 2001.

²⁷⁰ Ibid.

²⁷¹ Cf. *Report of the High Commissioner for Human Rights submitted in accordance with Commission on Human Rights Resolution 2001/32*, see note 146, para. 25. However, the exclusive call upon the home state fails when developing countries become overall poorer as a consequence of acceding to WTO agreements. If this is the case, national redistribution measures are unfeasible due to overall impoverishment. For such situations, inter-state cooperation mechanisms are needed to bring WTO obligations in line with human rights cooperation obligations.

and consumer protection policies, and measures to ensure food safety, all play an important role. Trade in agriculture, including international trade in agriculture, is just one piece in a bigger puzzle.