

2011

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Recommended Citation

Endean Nierenberg, Lily, "Reconciling the Right to Food and Trade Liberalization: Developing Country Opportunities" (2011).
Minnesota Journal of International Law. 298.
<https://scholarship.law.umn.edu/mjil/298>

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Reconciling the Right to Food and Trade Liberalization: Developing Country Opportunities

Lily Endean Nierenberg*

I. INTRODUCTION

In late summer 2010, two nations, Brazil and Kenya, inserted the human right to food into their national law. Brazil's Constitution¹ and its Policy of Food Security and Nutrition² and Kenya's new Constitution³ impose a legal duty on each state that had previously existed only as a moral duty in the international human rights regime.⁴ In both cases, the domestic law creates an accountability mechanism by which citizens can challenge their governments for failing to fulfill this new legal obligation.

Although these two countries adopted right to food laws, it

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1. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] ch. II, art. 6 (Braz.). See also *The Right to Food Is Now in the Constitution of Brazil*, RIGHT TO FOOD (Feb. 15, 2010), http://www.fao.org/righttofood/news39_en.htm.

2. Decreto No. 7.272, de 25 de Agosto de 2010, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.8.2010 (Braz.). See also *Brazil Adopts a New Policy on Food Security and Nutrition*, RIGHT TO FOOD (Sept. 2, 2010), http://www.fao.org/righttofood/news43_en.htm.

3. CONSTITUTION, art. 43 (2010) (Kenya). See also *The Republic of Kenya Recognizes the Right to Food in the New Constitution*, RIGHT TO FOOD (Aug. 31, 2010), http://www.fao.org/righttofood/news42_en.htm.

4. Both are state parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which implies that states have a duty to ensure adequate food and to keep their people free from hunger. See International Covenant on Economic, Social and Cultural Rights art. 11, *opened for signature* Dec. 19, 1966, 999 U.N.T.S.3 (entered into force Jan. 3, 1976). See also *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Jan. 28, 2011) (listing the signatories).

is uncertain whether they can fulfill their obligations by enacting the necessary domestic policies, given the existing dictates of the international trade regime.⁵ The goal of this Note is to critically examine this tension between the domestic right to food and international trade law and, in doing so, to add analytical rigor to the scholarship on trade liberalization as it corresponds to human rights.⁶ This Note concludes that the human right to food may be reconciled with international trade law through developing country actions, including protectionist measures and international collaboration defended on the basis of the domestic right to food.

First, it will briefly summarize the history of agricultural liberalization and the development of the international human right to food. Next, the inquiry will turn to the prevalence and the features of the domestic right to food. The final section of Part I will critically examine the argument that developed countries are obligated to protect citizens of other states.

Part II will begin by providing a general summary of countries' existing obligations—and opportunities—under international trade agreements in agriculture. Next, it will discuss the potential for international dispute resolution forums to incorporate domestic right to food justifications in determining whether or not a trade violation has occurred. It will do so by examining two instances in which there is the potential for such occurrence: disputes within the World Trade Organization (WTO) and international arbitrations. Finally, as an alternative to unilateral action, this Note will identify potential loci for international cooperation between developing countries that have adopted the right to food in two areas:

5. For a thoughtful assessment of this problem, see generally Chris Downes, *Must the Losers of Free Trade Go Hungry? Reconciling WTO Obligations and the Right to Food*, 47 VA. J. INT'L L. 619 (2007); Christine Kaufmann & Simone Heri, *Liberalizing Trade in Agriculture and Food Security—Mission Impossible?*, 40 VAND. J. TRANSNAT'L L. 1039 (2007).

6. See Philip Alston, *Remarks on Professor B.S. Chimni's A Just World Under Law: A View from the South*, 22 AM. U. INT'L L. REV. 221, 229–30 (2007) (“Unfortunately, too many of the analyses of global economic issues undertaken by human rights proponents lack analytical rigor, are economically illiterate, and are ultimately unpersuasive except to the human rights faithful. It is essential that we acknowledge the complexity of the challenge of working out ways in which human rights might be relevant to—let alone transcend or trump—the principles underpinning international regimes such as those dealing with trade, finance, or investment. The real world policy consequences of an appropriate insistence upon giving priority to human rights considerations require careful, informed, systematic, and balanced analysis.”).

special treatment for seeds under the WTO's Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement and coordinated competition laws.

A. AGRICULTURAL LIBERALIZATION AND THE INTERNATIONAL HUMAN RIGHT TO FOOD

Global statistics on food insecurity elucidate what is at stake in the academic discussion on the right to food and international trade. According to the Food and Agriculture Organization (FAO) of the United Nations, roughly 925 million persons worldwide suffered from food insecurity in 2010.⁷ Another statistic puts that number above one billion.⁸ The majority of those are, ironically, food producers.⁹ The remaining groups of food insecure persons live in urban areas¹⁰ or are victims of disaster.¹¹ These statistics reveal a history of agricultural restructuring that has negatively impacted farmers.¹²

7. *FAQs on Hunger*, FOOD & AGRIC. ORG. UNITED NATIONS, <http://www.fao.org/hunger/faqs-on-hunger/en> (last visited Nov. 17, 2010). Food insecurity is interchangeably referred to as hunger in the literature. However, it is this author's view that the term "hunger" connotes an emergency situation that must be solved in the short term, whereas "food insecurity" connotes a structural problem that should be addressed sustainably. Therefore, the term "food insecurity" is more apt for the present discussion.

8. Smita Narula, *Reclaiming the Right to Food as a Normative Response to the Global Food Crisis*, 13 YALE H.R. & DEV. L.J. 403, 403 (2010) (citing a projection of the FAO for 2009).

9. This includes farmers who own their land, farm laborers, fisherfolk, and both subsistence and cash crop farmers. *FAQs on Hunger*, *supra* note 7.

10. *Id.* Urban migration often occurs as a result of rural economic pressures. However, a solution to food insecurity might not be the same for urban dwellers, for the obvious reason that they do not have access to the means of production without moving to rural areas. While this Note examines the right to food from the standpoint of rural farmers, an interesting next question to examine is what the consequences of domestic policies will be for the urban poor.

11. *Id.* It has been suggested that international humanitarian law arises from the same universal framework as trade and human rights, and, as such, should be integrated with these areas to form a comprehensive international approach to food. For a discussion of this position, see generally Donald E. Buckingham, *A Recipe for Change: Towards an Integrated Approach to Food Under International Law*, 6 PACE INT'L L. REV. 285 (1994).

12. See, e.g., Wenonah Hauter, *The Limits of International Human Rights Law and the Role of Food Sovereignty in Protecting People from Further Trade Liberalization under the Doha Round Negotiations*, 40 VAND. J. TRANSNAT'L L. 1071, 1080 (2007) (summarizing the results of two long-term surveys and noting the widespread negative effects on farmers from liberalization of agriculture); Alexandra Spieldoch, *NAFTA: Fueling Market Concentration in*

Following the debt crisis of the 1980's, countries with developing economies rapidly transitioned to industrial and export-based agriculture.¹³ During that time, the World Bank and International Monetary Fund (IMF)¹⁴ encouraged governments to pursue trade liberalization in agriculture by conditioning loans on the reduction of trade barriers and government support for agriculture.¹⁵ The General Agreement on Tariffs and Trade (GATT) (now the WTO) further encouraged developing countries to lower the barriers to their markets.¹⁶ These institutions considered that liberalization would result in net efficiency gains—a positive development viewed in the aggregate and from the point of view of consumers—because the net result is to lower the cost of food. To some extent, industrial nations have seen gains in terms of overall economic growth, a greater variety of foods at lower cost, and individuals' freedom to seek employment in other industries.¹⁷

Agriculture, INST. FOR AGRIC. & TRADE POLICY (Mar. 2010), <http://www.iatp.org/iatp/publications.cfm?accountID=451&refID=107275> (discussing NAFTA's impact on small farmers and rural communities). See generally Mark Ritchie & Kristin Dawkins, *WTO Food and Agricultural Rules: Sustainable Agriculture and the Human Right to Food*, 9 MINN. J. GLOBAL TRADE 9 (2000) (exploring the impact of export dumping by agricultural corporations on agriculture and food security).

13. For a history of liberalization in India leading to food insecurity, see Sukanya Pillay, *India Sinking: Threats to the Right to Food, Food Security & Development in an Era of Economic Growth*, 27 WINDSOR Y.B. ACCESS JUST. 127 (2009) (discussing, *inter alia*, the reasons for India's food insecurity rates, pointing to the neoliberal development model encouraged by the IMF and World Bank and the liberalized agricultural reforms of the Green Revolution). For a discussion of food security in the context of Mexico's history of agricultural liberalization, see Carmen G. Gonzalez, *Markets, Monocultures, and Malnutrition: Agricultural Trade Policy through an Environmental Justice Lens*, 14 MICH. ST. J. INT'L L. 345 (2006).

14. This Note doesn't address the IMF or World Bank because these institutions are peripheral to the international trade regime, strictly speaking. The obligations of countries to the IMF or World Bank do not exist as treaties or as international customary law.

15. See Narula, *supra* note 8, at 408; Michael Windfuhr, *The Agreement on Agriculture of the WTO and the Right to Food*, FOODFIRST INFO. & ACTION NETWORK (Sept. 2003), <http://www.fian.org/resources/documents/others/agreement-on-agriculture-of-the-wto-and-the-right-to-food/pdf>; These loan conditionalities are referred to as structural adjustment policies. Narula, *supra* note 8, at 408. For a more in depth history of the effects of these institutions on developing economies, see generally JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2003).

16. Narula, *supra* note 8 at 409–10.

17. Sophia Murphy, *Concentrated Market Power and Agricultural Trade*, ECOFAIR TRADE DIALOGUE DISCUSSION PAPERS NO. 1 (Heinrich Böll Found.,

The corollary is that trade liberalization of agriculture pushes peasants off the land and into cities,¹⁸ or for those who stay it results in an economically difficult—if not impossible¹⁹—situation.²⁰ Behind this reality is an economic relationship between farmers and transnational corporations (TNCs). TNCs have a heavy impact on the food system in developing countries, including what food is selected for production, how it is produced, and the cost at which food is produced.²¹ Because of their market power, TNCs are able to charge high prices for agricultural inputs while commodity buyers push the selling prices of crops downward.²² This lack of purchasing power caused by the disparity between the selling price of farmers' raw goods (called the "farmgate price") and the price of local or imported food²³ is the immediate cause of food insecurity. The state is called upon to meet the needs of these food insecure individuals through the provision of food aid.²⁴

Thus, hunger and malnutrition are ultimately caused by a lack of access to food and not an inadequate global food supply.²⁵ Peasants have responded by creating a transnational

Berlin), Aug. 21, 2006, at 21, *available at* <http://www.tradeobservatory.org/library.cfm?RefID=89014>.

18. See Gonzalez, *supra* note 13, at 346–47.

19. For instance, over 17,000 Indian farmers committed suicide in 2003 as a result of the psychological and economic pressures of agricultural restructuring. Steve Suppan, *Challenges for Food Sovereignty*, 32 FLETCHER F. WORLD AFF. 111, 116 (2008). See also George Lerner, *Activist: Farmer Suicides in India linked to Debt, Globalization*, CNN (Jan. 6, 2010), <http://edition.cnn.com/2010/WORLD/asiapcf/01/05/india.farmer.suicides/>.

20. See *UN Rapporteur and WTO Head Debate the Impact of Trade on Hunger*, WTO, http://www.wto.org/english/forums_e/debates_e/debate14_summary_e.htm (last visited Nov. 15, 2010) (“Prices are too high for consumers at the end of the chain, but are still too low and not sufficiently profitable for small farmers, who cannot really earn a living from their crops,’ Dr De Schuter [sic] said. ‘This is where the food crisis is. It is small farmers driven towards the cities, unable to live off their fields, relegated to subsistence farming because prices are not sufficiently profitable.’”).

21. Narula, *supra* note 8, at 410.

22. *Id.* at 411.

23. Murphy, *supra* note 17, at 25. While, ideally, trade liberalization would lead to lower commodity prices and, thus, cheaper food for consumers, this has not been the case in many developing countries that rely increasingly on imported food. *Id.* Simultaneously, farmers are charged higher prices for inputs such as seeds and fertilizers. *Id.* at 24.

24. Food assistance can thus be viewed as a necessity arising out of the logic of free trade. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 201–02 (2d ed. 2003).

25. U.N. Econ. & Soc. Council, Comm. on Econ., Soc., & Cultural Rights, General Comment 12: Right to Adequate Food (Art. 11), ¶ 5, U.N. Doc.

peasant movement for agricultural policy change.²⁶ At the World Social Forum in 1996, Via Campesina, a collective of peasant organizations, raised a slogan of food sovereignty that stands in marked contrast to agricultural liberalization.²⁷ In fact, one of the main slogans of the food sovereignty movement is “WTO Out of Agriculture!”²⁸ Also, at the World Social Forum, member countries called for a clearer definition of the nascent international human right to food.²⁹

The human right to food is enshrined in a host of international agreements. Article 25 of the Universal Declaration of Human Rights is considered the first articulation of the right to food in an international legal instrument.³⁰ It was adopted as part of the International Covenant on Economic, Social and Cultural Rights (ICESCR),³¹ a group of rights that have been criticized as deeply socialistic and have yet to be adopted by the United States.³² Article 11 of the ICESCR and General Comment 12 by the Committee on Economic, Social and Cultural Rights together contain the most detailed and widely accepted articulation of the right to food.³³

E/C.12/1999/5 (1999) [hereinafter General Comment 12].

26. See Suppan, *supra* note 19, at 111.

27. *Id.* The goals of food sovereignty announced at that time were the right to food; genuine agrarian reform; protecting natural resources; reorganizing trade in food; controlling globalization; social peace, and democratic control of the food system. Sadie Beauregard, Food Policy for People: Incorporating Food Sovereignty Principles into State Governance, 10–11 (Apr. 2009) (unpublished senior comprehensive), <http://departments.oxu.edu/uepi/uep/studentwork/09comps/Food%20Policy%20for%20People.pdf>.

28. Suppan, *supra* note 19, at 113.

29. General Comment 12, *supra* note 25, ¶ 2. See also Olivier De Schutter, *Countries Tackling Hunger with a Right to Food Approach*, BRIEFING NOTE 1, May 2010, at 2.

30. See, e.g., De Schutter, *supra* note 29, at 4; Narula, *supra* note 8, at 404. Cf. George Kent, *The Human Right to Food and Dignity*, 37 HUM. RTS. 1, at 3 (2010) (noting that the human right to adequate food was stated as early as 1963 at the Special Assembly on Man’s Right to Freedom from Hunger); Anthony Paul Kearns, III, Note, *The Right to Food Exists Via Customary International Law*, 22 SUFFOLK TRANSNAT’L L. REV. 223, 225–26 (1998) (noting the presence of a right to food in historical treaties and constitutions).

31. ICESCR, art. 11, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

32. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights*, 84 AM. J. INT’L L. 365, 366 (1990).

33. The right to food also appears in regional human rights instruments. See American Declaration of the Rights and Duties of Man, Article XI, O.A.S. Res. XXX (May 2, 1948) (“Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing,

General Comment 12, a response to the request for clarity at the World Social Forum,³⁴ declares the core content of the right to food to be: “The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”³⁵

In effect, the CESCR imposes an obligation on parties to respect, protect, and fulfill—which in turn means to facilitate and provide—the right to food of their citizens under the above definition.³⁶ Like other economic, social and cultural rights, the right to food is meant to be realized progressively.³⁷ In sum, the right to food is an economic, social, and cultural right³⁸ that is a duty borne by states to individual citizens.³⁹ Countries have adopted a domestic right to food modeled after the international human right.

B. THE DEVELOPING DOMESTIC RIGHT TO FOOD

A domestic right to food is fundamental to the success of the international human right because it allows citizens to

housing and medical care, to the extent permitted by public and community resources.”).

34. General Comment 12, *supra* note 25, ¶ 2.

35. *Id.* ¶ 8.

36. *Id.* ¶ 15. *See also* Kent, *supra* note 30, at 4 (“*Respect* means to do no harm to others. *Protect* means to prevent harm to others by third parties. *Facilitate* means to help others to meet their own needs. *Provide* means to meet others’ needs when they cannot do that themselves.”).

37. General Comment 12, *supra* note 25, ¶ 14.

38. For a general introduction to economic, social, and cultural rights, see DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS 97–105 (4th ed. 2009).

39. For a discussion of individual versus group rights in the human rights context, see DONNELLY, *supra* note 24, at 204–24. There is a developing view that indigenous groups have collective rights, including the right to food. *See, e.g., id.* at 215 (granting that indigenous groups may not be subject to the general critique of group rights because the best legal mechanism to protect them from external pressures may be group rights to self-government and restrictions on non-members). For a discussion specific to the group right to food and indigenous groups, see Lidija Knuth, *The Right to Adequate Food and Indigenous Peoples*, RIGHT TO FOOD STUDIES (Food & Agric. Org. United Nations, Rome), 2009, available at www.fao.org/righttofood. Cf. Jan Kratochvil, *Realizing a Promise: A Case for Ratification of the Optional Protocol to the Covenant on Economic, Social, and Cultural Rights*, 16 HUM. RTS. BRIEF 30, 31 (2009) (noting the fact that the Optional Protocol to the Convention on Economic, Social, and Cultural Rights allows individual, but not collective, complaints).

challenge human rights violations of their governments.⁴⁰ In order to understand why this is, it is important to emphasize the unique nature of international human rights. One of the major distinctions between international and domestic rights is the likelihood of enforcement, with domestic rights having the higher likelihood.⁴¹ Another is the uniquely moral character of human rights, which theoretically push states to a higher standard of behavior, but do not necessarily translate into action.⁴² As mentioned above, some governments, including most recently Brazil and Kenya, recognize a legally enforceable right to food in their domestic law, which addresses these shortcomings.

In Brazil, the right to food was established with a constitutional amendment in February 2010,⁴³ following the adoption, in 2006, of the National Food and Nutritional Security Framework Law.⁴⁴ In August, 2010, the constitutional amendment was followed by the adoption of a Policy on Food Security and Nutrition, firmly anchoring the right to food

40. National implementation is generally the goal of international moral obligations which are, by their nature, less often legally enforceable than domestic legal obligations. See DONNELLY, *supra* note 24, at 179–80; see also Alston, *supra* note 6, at 233–34 (noting that the most important actions for human rights remain at the national level). The Food and Agriculture Organization of the United Nations (FAO) has created a set of Voluntary Guidelines to help states enact and implement the right to food into their domestic law. Food and Agriculture Organization of the United Nations, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (2005), available at <http://www.fao.org/docrep/meeting/009/y9825e/y9825e00.htm>.

41. See DONNELLY, *supra* note 24, at 173–75 (noting that the “nonjudicial and noncoercive aspects of IHR [international human rights] are those that produce the greatest impact”—e.g. country reporting and complaint procedures—but that human rights obligations are generally implemented through voluntary national action, the dimensions of which are understudied).

42. See *id.* at 14–15 (stating that the source of human rights is human morality); see also *id.* at 136–37 (asserting that human rights regimes reflect moral interdependence at the international level, but states and individuals are resistant to converting that into action at the international level); Kent, *supra* note 30, at 2–3 (describing the moral source of rights and the fact that human rights have a universal dignity component and a local component, ideally). Cf. Andras Sajó, *Socioeconomic Rights and the International Economic Order*, 35 N.Y.U.J. INT'L L. & POL. 221, 226–27 (2002) (noting that human rights do not derive from a sense of morality, but rather an obligation of realization, which derives from a sense of international cooperation).

43. CONSTITUIÇÃO FEDERAL [C.F.] [Constitution] ch. II, art. 6 (Braz.).

44. Lei No. 11.346, de 15 de Setembro de 2006, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 18.9.2006 (Braz.). See also *The Right to Food Is Now in the Constitution of Brazil*, *supra* note 1.

under Brazilian law.⁴⁵ This law charges administrators in the Federal Executive responsible for implementing programs of the Policy of Food Security and Nutrition with “establishing . . . mechanisms and instruments of accountability. . . .”⁴⁶

Likewise, the President of Kenya signed a new Constitution into effect in 2010,⁴⁷ which includes the right to food as a reflection of its international obligations under the CESC.R.⁴⁸ In Kenya, the new Constitution allows for various types of claim mechanisms in the case that the state or state organs violate the right to food.⁴⁹ Thus, with these claim mechanisms in place in both Brazil and Kenya, a citizen can hold his government responsible for failing to respect, protect, promote or provide his right to food.⁵⁰

By the end of 2010, twenty-five countries had the right to food in their Constitutions.⁵¹ In addition, national policies (or “framework laws”) provide for the accountability of government officials, prioritize the right to food in development strategies and establish a nation’s bargaining position in trade and investment.⁵² Ideally, these laws are translations of the

45. Decreto No. 7.272, de 25 de Agosto de 2010, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.8.2010 (Braz.). See also *Brazil Adopts a New Policy on Food Security and Nutrition*, *supra* note 2.

46. See Decreto No. 7.272, de 25 de Agosto de 2010, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 26.8.2010 (Braz.).

47. CONSTITUTION, art. 43 (2010) (Kenya). See also *The Republic of Kenya Recognizes the Right to Food in the New Constitution*, *supra* note 3 (noting and citing Kenya’s adoption of a Constitutional provision guaranteeing the right to food).

48. See *The Republic of Kenya Recognizes the Right to Food in the New Constitution*, *supra* note 3.

49. *Id.*

50. Of course, a domestic court may not necessarily use the same test to interpret liability under domestic laws as international laws, though doing so is encouraged by the Committee on Economic, Social, and Cultural Rights. See General Comment 12, *supra* note 25, ¶ 29.

51. De Schutter, *supra* note 29, at 5 (noting twenty-four countries have included the right to food in their Constitution). The twenty-fifth government was Kenya. See CONSTITUTION, art. 43 (2010) (Kenya); see also *The Republic of Kenya Recognizes the Right to Food in the New Constitution*, *supra* note 3. In the context of water, one Note argues that positive rights specifying the content of the right in law, as opposed to an umbrella right such as the right to life, are more effective and democratic. Note, *What Price for the Priceless?: Implementing the Justiciability of the Right to Water*, 120 HARV. L. REV. 1067 (2007) [hereinafter *What Price for the Priceless?*].

52. De Schutter, *supra* note 29, at 5–6.

ICESCR into domestic laws.⁵³ Additionally, national strategies such as Brazil's Fome Zero (Zero Hunger) Strategy and India's National Rural Employment Guarantee Act are another important step toward implementing the right to food.⁵⁴

Effective remedies are essential to the national implementation of the right to food.⁵⁵ National courts are encouraged to follow the Committee on Economic, Social and Cultural Rights' interpretation of the right to food, as laid out in General Comment 12.⁵⁶ Some countries, such as Argentina, allow direct claims under the ICESCR to be brought in domestic courts.⁵⁷ There have been successful challenges of a government's violation of the right to food in the domestic courts of a number of countries, including India and Nepal.⁵⁸ In India, the Supreme Court interpreted the right to food as a justiciable Constitutional right in *People's Union for Civil Liberties v. Union of India & Others*.⁵⁹ The Indian Supreme Court's opinion was cited in a subsequent right to food challenge brought before the Nepalese Supreme Court,⁶⁰ which was also considered a victory by human rights advocates.⁶¹

One interesting question is what to do if there is no accountability mechanism in place to make the government accountable if it fails to honor its commitment to the right to food. If there is no accountability mechanism domestically,⁶²

53. *Id.* at 6; *see also* General Comment 12, *supra* note 25, ¶ 29.

54. De Schutter, *supra* note 29, at 7–9. *See also* General Comment 12, *supra* note 25, ¶ 21.

55. *See* General Comment 12, *supra* note 25, ¶ 32.

56. *Id.* ¶ 33.

57. Hauter, *supra* note 12, at 1089.

58. De Schutter, *supra* note 29, at 10–12. *See also id.* at 10, 15 n. 18 (citing cases from Argentina, Colombia, Switzerland, and Paraguay, where the claimant alleged a violation of their right to food).

59. *People's Union for Civil Liberties v. Union of India & Others* (PUCI), (2001) (India), available at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401033. *See also* Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691 (2010) (detailing recent developments in the domestic law and policy on the right to food in India, which are primarily focused on food assistance entitlements).

60. De Schutter, *supra* note 29, at 11, 15 n.21.

61. *See* Birchfield & Corsi, *supra* note 59, at 764 (noting that the *PUCI* case in India sparked litigation in neighboring countries, such as Nepal, and discussing that such success could translate into judicial actions elsewhere in the world); *see also* De Schutter, *supra* note 29, at 11. For more information on domestic right to food litigation, *see id.* at 10–12.

62. India is an example of a country where the enforceability mechanism

then any judicial challenges must be made at the regional⁶³ or international level. There is an academic trend to make Economic, Social, and Cultural Rights justiciable at an international, or supranational, level.⁶⁴ However, for now the reality appears to be that international and regional tribunals are hesitant to adjudicate economic, social, and cultural rights outside of states' duty to protect.⁶⁵ Yet a hopeful sign for justiciability promoters occurred in December, 2008, when the UN General Assembly adopted the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights.⁶⁶ However, the effect of the Optional Protocol is not likely to be higher enforcement rates;⁶⁷ thus domestic adjudication remains vitally important.

In a contrary fashion, recent scholarship that has examined the tension between the right to food and international trade has generally focused on the obligation of developed countries, such as the United States, to protect the rights of citizens of other states.⁶⁸

for the right to food was read broadly by the courts as falling under the Indian Constitution. Birchfield & Corsi, *supra* note 59, at 699–700.

63. Three regional human rights systems recognize the right to food. See Hauter, *supra* note 12, at 1090. For example, the right to food is made explicit in the Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (“Protocol of San Salvador”), adopted in 1998. However, due to the lack of enforceability and procedural difficulty of adjudicating cases in these regional systems, only a few violations of the right to food have been redressed using these bodies. *Id.* at 1090.

64. See, e.g., David Marcus, *The Normative Development of Socioeconomic Rights Through Supranational Adjudication*, 42 STAN. J. INT’L L. 53 (2006) (proposing supranational justice for social, economic, and cultural rights violations in order to demonstrate their equality with civil and political rights, and the use of the international criminal court for gross violations on the order of crimes against humanity); *What Price for the Priceless?*, *supra* note 51 (noting that adjudicating positive responsibilities of states over their social, economic, and cultural rights obligation would assure the highest degree of protection).

65. See generally Marcus, *supra* note 64.

66. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008).

67. Kratochvil, *supra* note 39, at 34 (noting that “[t]he rationale of the Protocol is not enforcement, but rather more subtle kinds of implementation like highlighting, mainstreaming and assisting the governments to identify with more precision their obligations under the Covenant.”)

68. See, e.g., Narula, *supra* note 8; see also Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT’L L. 691 (2006).

C. THE MISPLACED FOCUS ON DEVELOPED COUNTRIES'
OBLIGATIONS AND ACTIONS

Scholars have explored what actions the United States should take, were it obligated to act under the international right to food.⁶⁹ For instance, Narula suggests a number of solutions that stem from powerful states' obligations to respect and protect, as embodied in human rights instruments such as the CESC. ⁷⁰ She ultimately concludes that powerful states, as members of international financial institutions (IFIs) such as the World Bank and IMF, should encourage institutional policies that are closely tailored to an individual country's needs, rather than using a one-size-fits-all model.⁷¹ In the context of the WTO, she suggests that powerful states could support policies that "truly level the playing field."⁷² Finally, with regard to TNCs, she advocates for powerful states to enact legislation with an extraterritorial reach and to extend their antitrust legislation to address the buying power of TNCs.⁷³

Narula, however, doesn't address the fact that the United States is not a party to the CESC, and therefore is not bound—even under her analysis—to respect or protect the rights of global citizens.⁷⁴ In any event, as a limitation on extraterritorial action by third parties, the CESC requires the nations' free consent to international cooperation.⁷⁵ This offers developing states protection against potentially neo-colonial intervention by powerful states, but it also thereby limits the effectiveness of calling for powerful states to act in relation to their obligations under the CESC.⁷⁶

Theoretically, the United States may be obligated through

69. Narula, *supra* note 8, at 414. ("The existing human rights legal framework is ill-equipped to deal with these actors and the effects of their policies abroad: it limits states' obligations to respecting, protecting, and fulfilling the rights of individuals in their territory or under their jurisdiction, and it does not directly address the obligations of IFIs and TNCs."). While this note does not address IFIs, TNCs play a central role, as well as the policies of the WTO.

70. Narula, *supra* note 8, at 408.

71. *Id.* at 417.

72. *Id.* at 417–18.

73. *Id.* at 418–19.

74. Peter Straub, *Farmers in the IP Wrench—How Patents on Genetically Modified Crops Violate the Right to Food in Developing Countries*, 29 HASTINGS INT'L & COMP. L. REV. 187, 211 (2006).

75. Sajo, *supra* note 42, at 226–27.

76. *Id.*

customary international law on the right to food,⁷⁷ which one scholar believes has achieved the status of *jus cogens*.⁷⁸ However, the United States has been careful to deny any legal obligations arising from international law or its involvement in the realm of food aid,⁷⁹ and may therefore be a persistent objector.⁸⁰ There is, however, a consensus among development economists and policy makers in the United States that trade and the right to food are consistent, if not mutually reinforcing, and therefore that the agricultural export model and food aid are sufficient to satisfy any moral obligation that Americans may have toward other citizens of the world.

The behavior of TNCs presents a different type of obstacle to the human right to food because states—not corporations—bear the primary obligation to citizens under international law.⁸¹ And while there have been international efforts to draft and impose non-voluntary norms of responsibility on transnational corporate actors,⁸² such efforts have proven ultimately unsuccessful.⁸³ Corporate behavior is affected only

77. Compare Laura Niada, *Hunger and International Law: The Far-Reaching Scope of the Human Right to Food*, 22 CONN. J. INT'L L. 131 (2006) (recognizing a customary international norm, possibly *jus cogens*), and Henry J. Richardson, III, *The Right to Food: The International Perspective*, 30 HOW. L.J. 223, 233 (1987) (claiming that an interpretation of Article 11(b) of the CESCR and the established expectations of international food support programs give rise to a duty).

78. Kearns, III, *supra* note 29. One scholar has argued that the United States' pledge of food aid has resulted in a duty to rescue under a common law understanding of that obligation. Dinah Shelton, *The Duty to Assist Famine Victims*, 70 IOWA L. REV. 1309 (1985).

79. See *Explanation of Position by Craig Kuehl, United States Advisor, on Resolution L.30, Rev. 1—The Right to Food, in the Third Committee of the Sixty-fourth Session of the United Nations General Assembly*, States News Service (Nov. 19, 2009), available at <http://usun.state.gov/briefing/statements/2009/132187.htm>.

80. J.M. Greene, *Localization: Implementing the Right to Food*, 14 DRAKE J. AGRIC. L. 377, 382 (2009) (noting that, even under customary international law, the United States may be exempt as a persistent objector from the right to food).

81. See, e.g., Narula, *supra* note 68, at 724; see also Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses*, 6 NW. U.J. INT'L HUM. RTS. 222 (2008) (reviewing changes in the recognition of TNC's within the international legal system, human rights in particular).

82. See David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

83. See Duruigbo, *supra* note 81, at 243–47 (discussing the conclusions of the Secretary-General's Special Representative on the issue of Human Rights

indirectly through human rights treaties.⁸⁴ There may be a changing view of human rights bodies toward state accountability for non-state actors that violate human rights law, specifically that the state's duty to protect citizens extends to regulating TNCs in its jurisdictions.⁸⁵ However, because the examples from the human rights courts and commissions primarily concern developing countries' accountability to their citizens,⁸⁶ it is uncertain how strong an effect this will have in terms of action that TNCs' home states—such as the United States—must take.

The following pages will look at a host state's actions and obligations. It is important to look at this issue from the perspective of states that have enacted domestic right to food laws, because it can illuminate whether developing countries' implementation of the right to food at the national level is ultimately an effective human rights goal. This should not be read as a critique of home state actions, but rather an opportunity to analyze the agency of the countries that have already assumed human rights obligations.

II. ANALYSIS: DEVELOPING COUNTRY OPPORTUNITIES

The argument of this Note is not against the principles of trade or trade agreements—which are defensible from the perspective of economic study. Rather, the critical inquiry is upon the idea that trade and the human right to food cannot coexist. While there is a coalesced point of view within the human rights community that the reality of free trade and the

and Transnational Corporations and Other Business Enterprises, John Ruggie, on the norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, ultimately finding little change in the position of TNCs in international law). *Cf.* David Graham & Ngaire Woods, *Making Corporate Self-Regulation Effective in Developing Countries*, 34 *World Development* 868 (2006) (noting that limited economic control or unwillingness to regulate are traditional problems with regulation of corporations by the developing, i.e. host, countries, and suggesting less direct regulations that could effectively result in voluntary corporate adoption of higher standards due to pressures from civil society).

84. Corporations are not generally considered subject to international human rights law. *See* Duruigho, *supra* note 81; *see also* Analia Marsella Sende, *The Responsibilities of States for Actions of Transnational Corporations Affecting Social and Economic Rights: A Comparative Analysis of the Duty to Protect*, 15 *COLUM. J. EUR. L. ONLINE* 33 (2009) (indicating the importance of extraterritorial control by the home state).

85. Sende, *supra* note 84.

86. *Id.*

right to food are fundamentally in conflict,⁸⁷ scholarship suggests that there is no inherent inconsistency between trade and human rights, but rather there is an implementation gap. For instance, contrary to what the parties have agreed to, seldom do they perform or eliminate trade liberalization agreements.⁸⁸ To make matters worse, trade agreements continue to be enforced while human rights obligations often go unenforced.⁸⁹ This Note thus proceeds under the assumption that, while trade obligations may be theoretically consistent with human rights, they are not optimal from a human rights perspective. This section will look at whether developing states are able to craft law and policy to ensure the right to food for their citizens given their existing trade obligations.

A. DEVELOPING COUNTRIES COULD ENACT TRADE PROTECTIONS UNDER EXISTING LAW

Proponents of the right to food often support protectionist measures that are assumed to be illegal under the WTO, thus raising the question of whether the WTO and human rights are reconcilable.⁹⁰ The UN Special Rapporteur on the right to food, Olivier de Schutter, has called for trade bodies to review their policies to ensure that countries have adequate “policy space”—that is, the freedom to enact political change—to fulfill their obligations.⁹¹ In other words, countries should be legally

87. See *Human Rights Council Holds Panel Discussion on Realization of Right to Food*, STATES NEWS SERVICE (Mar. 9, 2009). They argue that the underlying causes of food insecurity are the trade liberalization policies of the WTO, the World Bank and the International Monetary Fund (IMF)—that support an industrial and export model of agriculture—and the further marginalization of farmers by TNCs. *Id.*

88. See generally Ritchie & Dawkins, *supra* note 12 (making strong recommendations about reforms in the WTO that would reconcile trade with sustainable agriculture and the right to food, including global anti-trust measures).

89. Lamy: *Trade and Human Rights Go Hand in Hand*, STATES NEWS SERVICE (Sept. 30, 2010). See also Straub, *supra* note 74 (discussing the conflicting human rights and trade obligations on states with respect to Intellectual Property in seeds, and concluding that without enforcement of a “hard” human rights norm, states are more likely to resolve conflict on the side of trade obligations).

90. See, e.g., Kaufmann & Heri, *supra* note 5 (surmising that states’ obligations under WTO rules and their human rights commitments are reconcilable, but concluding that legal reconciliation is insufficient to overcome food insecurity).

91. See WTO: *Trade Negotiations Need to Reflect New Global Consensus on Hunger*, Warns UN Expert on Right to Food, STATES NEWS SERVICE (Dec. 2, 2009); *Report of the Special Rapporteur on the right to food, Olivier De*

allowed to choose policies that best achieve the right to food of their citizens.⁹² Scholars have argued that certain policies best achieve the human right to food.⁹³ For instance, human rights objectives may be optimized by allowing greater protectionism by developing states and restricting trade-distorting behavior by developed states.⁹⁴ An appropriate starting place is to look at the options that are currently available under the WTO framework.

States, by acceding to trade agreements, are obligated to act according to the dictates of the international trade regime.⁹⁵ With respect to food, this includes, inter alia, agreements between member states of the WTO, such as the Agreement on Agriculture (AoA).⁹⁶ Obligations under the WTO generally require states to lower tariff and non-tariff barriers to trade, eliminate state support and subsidies for certain industries, and not discriminate against foreign ownership.⁹⁷ The AoA

Schutter (presented to the Human Rights Council, Mar. 9, 2009) 1, http://carnegieendowment.org/files/Summary_of%20report%20of%20the%20Special%20Rapporteur%20on%20the%20right%20to%20food.pdf.

92. Karen Kong, *The Right to Food for All: A Right-Based Approach to Hunger and Social Inequality*, 32 SUFFOLK TRANSNAT'L L. REV. 525 (2009) (promoting an expansive concept of equality, which relies on Amartya Sen's concept of development as freedom, as a method for interpreting the legal obligations of states with regard to the right to food).

93. Kent, *supra* note 30 (asserting the primacy of locally-based and dignified solutions within the human right paradigm: people can and should be allowed to feed themselves). *Cf.* Hauter, *supra* note 12 (suggesting Food Sovereignty as an ideal, policy-based solution to food insecurity in light of the slow progress and jurisdictionally-limited nature of the right to food enforcement). *See also* Greene, *supra* note 80 (suggesting changes in United States domestic and foreign food policy that would better achieve food security by strengthening local food systems at home and abroad).

94. Gonzalez, *supra* note 13, at 373 (recommending an asymmetrical trade policy that allows developing countries to implement protectionist measures and requires developed countries to remove all trade-distorting policies).

95. States, of course, are only obligated insofar as they have either become party to a treaty by completing the procedures required by the treaty and the state's national law, or where there is a customary international legal obligation. Under the Vienna Convention on the Law of Treaties, states obligations under multiple treaties must be interpreted in a way that gives effect to both wherever possible. *See* Vienna Convention on the Law of Treaties, art. 2, para. 1(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

96. For a brief, but comprehensive overview of international trade law pertaining to agriculture, see Kaufmann and Heri, *supra* note 5, at 1042–49.

97. State behavior is similarly constrained as a result of Structural Adjustment Policies (SAPs), which are conditions placed on loans provided by IFIs, such as the World Bank and International Monetary Fund (IMF). *See*

targets government policies that are trade distorting, but it allows governments to offer support where it would not directly stimulate production.⁹⁸ In addition to converting all barriers to trade into tariffs (called “tariffication”), countries commit to reducing their tariffs over time. However, developing countries generally do not have to lower their tariffs as much as developed countries,⁹⁹ and least-developed countries are not required to lower their tariffs at all.¹⁰⁰

Subject to strict conditions, governments are allowed to take advantage of “special safeguards” to protect their farmers from price volatility and “special treatment” provisions to protect particularly sensitive products.¹⁰¹ WTO Director-General Pascal Lamy has suggested that countries might take advantage of these safeguards to improve food security.¹⁰² However, in reality, these protections are rarely used, either for lack of administrative resources in the developing countries,¹⁰³ or as a result of prior or existing loan conditionalities from IFIs.¹⁰⁴ In some cases, it is unclear whether a measure would be consistent with existing rules. For example, food stocks—specifically grain reserves—are being discussed by a number of governments as an important component of food security.¹⁰⁵ One study finds that the AoA rules do not necessarily restrict countries’ use of grain reserves, but they are not necessarily supportive either; in the end, countries will need to test

Narula, *supra* note 8, at 408.

98. Agreement on Agriculture pmb., Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 (1994) [hereinafter AoA]. The AoA groups types of domestic support: the “amber box” includes measures that do affect production and must be reduced; the “blue box” includes measures of support that are aimed at reducing production, such as income support to farmers; the “green box” includes measures that do not directly affect production and can continue, such as government research. *Id.* See also Windfuhr, *supra* note 15.

99. *Understanding the WTO: The Agreements*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm (last visited Nov. 15, 2010).

100. *Id.*

101. *Id.*

102. *Lamy: Trade and Human Rights Go Hand in Hand*, STATE NEWS SERVICE (Sept. 30, 2010).

103. Hauter, *supra* note 12, at 1079.

104. Downes, *supra* note 5, at 639.

105. Sophia Murphy, *Trade and Food Reserves: What Role Does the WTO Play?*, ECOFAIR TRADE DIALOGUE (Inst. for Agric. & Trade Pol’y, Minneapolis, Minn.), Sept. 2010, at 3–4. This policy had been in vogue twenty-plus years ago after the food security crisis of the mid-1970’s. See Shelton, *supra* note 78, at 1310–11.

them.¹⁰⁶

Therefore, these or other domestic agricultural policies may come under attack as being trade distorting or protectionist. In the case of an alleged violation, countries resort to the dispute settlement mechanism within the WTO. A number of scholars have examined how the right to food may be used in these arbitrations.

B. JUDICIAL FORUMS FOR TRADE LAW VIOLATIONS MAY LOOK TO RELEVANT HUMAN RIGHTS LAW

The main focus of this section is the legal exception in Article XX of the General Agreement on Tariffs and Trade (Article XX) for violations of trade agreements, which may prove useful for violations based on the human right to food.¹⁰⁷ The second topic that will be discussed is the potential role of bilateral investment treaties (BITs) to aid governments in fulfilling their human rights obligations.

1. The domestic right to food under Article XX jurisprudence

Recent scholarly attention has been paid to using Article XX of the GATT in relation to human rights protections, especially the right to food.¹⁰⁸ Article XX provides exceptions under which a country may disobey its trade mandates for important state interests such as “public morals” or human “life or health.”¹⁰⁹ In general, the WTO Appellate Body’s (AB) rulings on Article XX exceptions indicate that any trade-distortion must be “necessary,” under the language of Article XX, to achieve the purposes of one of the enumerated exceptions.¹¹⁰ The AB has indicated that it will use a balancing test to determine what is “necessary.”¹¹¹ The AB has applied

106. Murphy, *supra* note 105.

107. Scholars have posited a range of assessments of the Article XX exceptions, which will be discussed below. *See, e.g.*, Downes, *supra* note 5.

108. *See* Agatha Panday, *The Role of International Human Rights Law in WTO Dispute Settlement*, 16 U.C. DAVIS J. INT'L L. & POL'Y 245 (2009) (discussing the potential role of Article XX of the GATT to the allowance of governments' human rights goals in WTO adjudications of trade agreement violations following the WTO Appellate Body's decision in *U.S.-Shrimp*); *see also* Niada, *supra* note 77, at 191 (briefly discussing Article XX in relation to the question of whether WTO obligations and human rights obligations are compatible); *see also* Kaufmann & Heri, *supra* note 5.

109. General Agreement on Tariffs and Trade, art. XX(a)–(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.S.T. 194.

110. *See* Panday, *supra* note 108, at 265.

111. Christopher Tran, *Using GATT, Art XX to Justify Climate Change*

the balancing test in cases asserting the value of environmental protection, but not yet in human rights cases.¹¹²

What is the likelihood, then, that protections based on the right to food would qualify under Article XX? It has been argued that, due to their protectionist connotation, labor-related trade measures may not pass the public morals exception under XX(a).¹¹³ On the one hand, the human right to food is a compelling moral basis for enacting a trade measure; however, it may not be more compelling than labor standards, which are also widely accepted international norms. There is also jurisprudential preference for inwardly-directed measures (to protect one's own morals) as compared to outwardly-directed measures (which are intended to address another country's moral behavior).¹¹⁴ As the right to food is an inwardly-directed concern, this factor would work in the developing country's favor.

It may be possible to predict the outcome of the balancing test between trade-distorting state practices and the relative importance of protecting the right to food. One scholar has argued that the right to food is not likely to pass muster on this basis at present.¹¹⁵ This is based on an assessment of the relative likelihood that food security measures would outweigh trade obligations in four areas—state trading enterprises, food aid, domestic support, and market protection. On the other hand, when such food security measures have minimal trade distorting effects, they would be more likely to pass the equilibrium test.¹¹⁶ This conclusion was reached considering only two types of the right to food, both at the international level: the right in the ICESCR and international customary

Measures in Claims Under the WTO Agreements, 27 ENVTL. & PLAN. L.J. 346, 352 (2010) (internal quotations and numbering omitted) (emphasis added).

112. Panday, *supra* note 108.

113. Kevin Kolben, *The WTO Distraction*, 21 STAN. L. & POL'Y REV. 461, 479 (2010).

114. *Id.* at 479.

115. Downes, *supra* note 5, at 654. As a general principle, an equilibrium analysis would imply that where a measure reflects a 'strong' food obligation and has a minimal distorting effect on the market, that obligation will 'outweigh' a trade commitment. Where this occurs, the measure, although prima facie inconsistent with GATT rules, can be presumed to be legal. Equally, where a justification for a GATT-inconsistent measure on the basis of the right to food is more tenuous and the impact on international trade is considerable, the trade commitment would logically 'outweigh' any food obligation. *Id.* at 687.

116. *Id.* at 688–90.

law.¹¹⁷ Focusing the inquiry on domestic law might change the outcome, considering the relative concreteness and enforceability of domestic laws compared to international norms. This would allow the weight of the human right to be more forceful when balanced against the trade commitment.¹¹⁸

There are lingering issues related to analyzing the Article XX exception. At least in the context of environmental protection, it is unclear whether the Article XX approach is applicable outside the GATT to other WTO agreements.¹¹⁹ It is not safe to assume, then, that new cases relating to AoA would be dealt with in a similar manner as prior cases. Additionally, there is the problem of precedent, to which the AB is not bound.

While the exact result remains uncertain, Article XX holds promise.¹²⁰ If good faith policies, upon a legal challenge, were shown to fail under Article XX, it would give support to those who have called for the removal of food from the authority of the WTO.¹²¹ A potentially negative consequence of doing so, however, is that developing countries risk losing an avenue to challenge dumping (i.e. the flooding of a foreign market with goods that are priced significantly lower than the domestic equivalent)—though critics say that dumping continues with the aid of the WTO.¹²² (Dumping, were it to be addressed in the WTO, is also difficult to prove).¹²³ On the other hand, it could be argued that the WTO is the best place to address dumping because it is uniquely situated to address the problem.¹²⁴

117. *Id.* at 661–78.

118. Downes got around this problem by finding the customary right more easily weighed against the trade laws. *Id.* However, even assuming his characterization of the customary right to food, a complimentary theory may nevertheless be preferable. *Cf.* Greene, *supra* note 80.

119. *See* Downes, *supra* note 5, at 661–78.

120. *See* Panday, *supra* note 108. *Cf.* Kolben, *supra* note 113, at 479 (arguing that linking trade and labor standards through the WTO is a distraction from more productive avenues, such as bilateral and regional agreements). This Note may be distinguished on the basis that Kolben was arguing from the side of the United States, which has strong labor standards and a powerful bargaining position.

121. *See* Downes, *supra* note 5, at 622.

122. Ritchie & Dawkins, *supra* note 12, at 13–14; Downes, *supra* note 5, at 635–36.

123. Suppan, *supra* note 19, at 114.

124. Contrarily, the food sovereignty movement calls for an arm of the United Nations to regulate food. *See* Beauregard, *supra* note 27. However, this author is skeptical that human rights experts have the requisite knowledge about the economics of international trade.

2. The right to food under international BIT arbitration

The negotiated economic relationship between host states and TNCs is a factor limiting host states' actions.¹²⁵ Regulation of foreign investment occurs through thousands of bilateral investment treaties (BITs).¹²⁶ While BITs protect investors, they do not directly impose any duties on investors.¹²⁷ Specifically, the "stability" clause limits host states' ability to regulate TNCs in a way that could diminish their profits.¹²⁸ Yet, while BITs may be viewed as constraints on a government's action,¹²⁹ they are also mechanisms by which governments can assert their citizens' right to food.

BITs are interpreted through a decentralized process of international arbitration¹³⁰ in tribunals with limited jurisdiction over a particular BIT.¹³¹ Theoretically, however, international law generally may be relevant to the resolution of disputes under Article 31.3(c) of the Vienna Convention, and many courts have agreed with such an assessment.¹³² Arbitrators have, to date, referenced human rights law only where human rights—such as due process and property—can be used to protect businesses involved in foreign investment.¹³³

Increasingly, however, host states—the country on whose soil the company is operating—are raising their obligations to their citizens, as non-parties to the BITs, to counter investors' claims against the host state for violating legal protections owed to them.¹³⁴ Though the right to food specifically has not been raised in arbitration, counterclaims for an abuse of the

125. Narula, *supra* note 8, at 416.

126. LUKE ERIC PETERSON, HUMAN RIGHTS & BILATERAL INVESTMENT TREATIES 11 (Rights & Democracy 2009), available at http://www.dd-rd.ca/site/_PDF/publications/globalization/HIRA-volume3-ENG.pdf.

127. *Id.* at 12. Forms of protection include repatriation of profits; treatment of foreign business on the same plane as national treatment or most-favored nation treatment; "fair and equitable treatment" or "full protection and security"; and promise of full compensation in case of nationalization. *See id.* at 13, tbl.1.

128. *Id.* at 410 (citing Olivier de Schutter, *Transnational Corporations as Instruments of Human Development*, in HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT 414–16 (Philip Alston & Mary Robinson eds., 2005)).

129. Narula, *supra* note 8, at 408.

130. Peterson, *supra* note 126.

131. *Id.* at 22.

132. *Id.*

133. *Id.* at 9, 23, 25.

134. *Id.* at 910.

human right to water as established in the CESCRC have been brought by states against investors in disputes over investments in the water and sanitation sector.¹³⁵ Argentina has been the strongest proponent of using this approach.¹³⁶

As with Article XX above, there are a number of lingering concerns. First, there is no precedential requirement upon arbitrators, and arbitration proceedings need not be public.¹³⁷ Also, nations may feel too vulnerable pursuing these actions alone, and therefore a multilateral agreement on investment may be needed.¹³⁸

An alternative would be for a country to establish a rule in its BIT that the country would exert jurisdiction over the foreign corporation if an individual were to challenge the TNC directly for a human rights violation.¹³⁹ A BIT can contain a provision “for the enforcement of judgments in the host country against TNC’s in the home country.”¹⁴⁰ It may also include a provision that tort claims may be brought against a company in its home country, i.e. an “expanded aliens tort provision.”¹⁴¹ Finally, courts could incorporate a version of the balancing test to give deference to policies made for the protection of human rights.¹⁴²

C. INTERNATIONAL COOPERATION TO PROTECT HUMAN RIGHTS

Another tool is international cooperation, which could be used to extend competition law to TNCs or to demand beneficial treatment for the purchase of seeds. The next section will discuss a proposal for special treatment of seeds under the WTO’s Trade Related Aspects of Intellectual Property Rights

135. *Id.* at 26–27.

136. *Id.* at 27. Argentina has used the human right to water to argue for a favorable interpretation of the expropriation and equitable treatment clause and the definition of “necessity” for violations. *See id.* at 27–29.

137. Yira Segrera Alaya, *Restoring the Balance in Bilateral Investment Treaties: Incorporating Human Rights Clauses*, *Revista de Derecho*, Núm. 32 (Universidad del Norte Colombia), 144–45, Dec. 2009, available at <http://redalyc.uaemex.mx/redalyc/pdf/851/85112936007.pdf>.

138. *Id.* at 159.

139. Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 *AM. U. INT’L L. REV.* 451, 537 (2007) (discussing the role of Bilateral Investment Treaties and debunking myths of market fundamentalism).

140. *Id.*

141. *Id.* at 538.

142. *See id.* at 546.

(TRIPS) Agreement.

1. Cooperation to reach special agreement on seeds

The privatization of seeds—a component of agricultural liberalization—negatively affects food security by causing economic and physical dependence on the genetically modified (GM) seed stock and encouraging production of food for export rather than local consumption.¹⁴³ Worse, seed companies have been accused of expropriating traditional knowledge, and then selling it back to farmers at high prices (e.g., Bt cotton).¹⁴⁴ These companies are heavily concentrated, as will be discussed below.

One potential solution might be to encourage reform of the WTO system to include an exception for low-cost agricultural inputs that are essential to the right to food, including seeds and fertilizers. There may already be a mechanism in place in TRIPS that can be used to patent seeds specially for developed countries: a unique system of patenting to protect seed producers and farmers.¹⁴⁵ However, it deserves a note of caution that some regional trade agreements may be more restrictive than the WTO and TRIPS.¹⁴⁶

One scholar has suggested such a plan for distribution of GM seeds to combat hunger, called the “GM Seeds for Africa” plan, as a bottom-up approach to food security.¹⁴⁷ GM seeds could help combat food insecurity because they have higher yields and nutritional benefits than non-GM seeds.¹⁴⁸ While seeds of the Green Revolution required higher levels of expensive inputs such as fertilizers and pesticides, GM seeds now require fewer costly inputs.¹⁴⁹ The “GM Seeds for Africa” plan would involve an agreement between developing states and agribusiness to purchase GM seeds at a reduced cost,¹⁵⁰

143. *Id.* at 196–200.

144. Suppan, *supra* note 19, at 116.

145. See Peter Straub, *supra* note 74, at 206–07 (suggesting an exploration of the sui generis system that was provided for under TRIPS).

146. Emily M. Cowley, *The Right to Health: Guatemala’s Conflicting Obligations Under the Central American Free Trade Agreement and the International Covenant on Economic, Social, and Cultural Rights*, 11 MICH. ST. J. MED. & L. 240 (2007).

147. Franke Tenente, *Feeding the World One Seed at a Time: A Practical Alternative for Solving World Hunger*, 5 NW. U. J. INT’L HUM. RTS. 298 (2007).

148. *Id.* at 311.

149. *Id.* at 317.

150. *Id.* at 318.

which might be modeled on the deal brokered by the UN for the reformed TRIPS agreement.¹⁵¹

That deal followed the signing of TRIPS, and was a response to the outcry over the high cost of life-saving HIV/AIDS medicines and called for pharmaceutical companies to provide low cost medicines and allow companies to produce generic AIDS drugs for African countries.¹⁵² There is a parallel issue of compatibility between a country's obligation to protect the health of its citizens and its obligation to protect IP rights for pharmaceutical companies under TRIPS or other free trade agreements.¹⁵³ The most direct such link is the connection between IP rights and patents placed on GM or genetically engineered (GE) seeds.¹⁵⁴

While this Note doesn't necessarily align with this suggestion,¹⁵⁵ it is mentioned here to indicate that the availability of GM seeds at a low cost might be a step toward achieving the right to food, and it could be seen as an argument against encouraging strict intellectual property rights (IPRs) for seed developers. On the other hand, if food security isn't a result of the total global supply of food, but instead of people's

151. *Id.* at 320.

152. Tenente, *supra* note 147, at 320.

153. For a country-specific discussion, see Cowley, *supra* note 146, at 227 (concluding that Guatemala, in order to fulfill its human rights obligations, should seek revision of Article 15 of the Central American Free Trade Agreement (CAFTA) to make it more compatible with the human right to health or, if unsuccessful in that attempt, should unilaterally withdraw from CAFTA).

154. Straub, *supra* note 74, at 212 (“[D]eveloping states find themselves under external and internal pressure to enact stricter norms of IP protection.”).

155. For a detailed survey of the debate over GM seeds, see Hossein Azadi & Peter Ho, *Genetically Modified and Organic Crops in Developing Countries: A Review of Options for Food Security*, 28 BIOTECHNOLOGY ADVANCES 160 (2010), http://www.globalchange.umich.edu/globalchange2/current/labs/gmfood_video/GM%20review%202010.pdf (concluding that GM adoption, where it occurs, should be done in a manner that minimizes its potential risks). Potential risks of GM adoption include a lower quality of food; antibiotic resistance; toxicity; allergenicity; gene transfer to wild plants; new viruses and toxins; limited access because of patents; religious, cultural and ethical concerns; labeling concerns; animal rights concerns; negative effects on organic and traditional farmers; unknown impacts and wider ecosystem and environmental concerns. *Id.* at 162, Table 1. A higher yield, lower cost, and lower requirement of inputs such as water are the supposed benefits of GM seeds as compared to organic agriculture which has advantages for human health, food quality and nutrition, plant biodiversity and disease-rates, cultural biodiversity and jobs, natural resources, costs, and animal health and welfare. *Id.* at 163, tbl.2.

access to food,¹⁵⁶ increasing the total global yield is likely to be a misdirected goal.

2. Cooperation in the application of national competition law

The United Nations (UN) Special Rapporteur for Food, Oliver De Schutter, has suggested a number of national actions that support the right to food,¹⁵⁷ including the application of local competition laws to TNCs.¹⁵⁸ It is generally accepted that competition leads to net gains in efficiency.¹⁵⁹ This policy might prevent companies from increasing the prices on inputs and exerting downward pressure on the prices of goods produced.¹⁶⁰

There is strong evidence that the concentration in agricultural markets of a small group of corporate actors¹⁶¹ negatively affects the bargaining position of farmers.¹⁶² This so-called market power in agriculture occurs both in the sale of productive resources, such as seeds,¹⁶³ and in the purchase of

156. See *FAQs on Hunger*, *supra* note 7 (“The majority of the people who don’t have enough to eat live in poor, rural communities in developing countries.”).

157. See De Schutter, *supra* note 29.

158. Special Rapporteur on the right to food, *Report of the Special Rapporteur on the Right to Food, Agribusiness and the Right to Food*, ¶¶ 34–6, U.N. Doc. A/HRC/13/33 (Dec. 22, 2009) (by Olivier De Schutter), available at http://www.srfood.org/images/stories/pdf/officialreports/20100305_a-hrc-13-33-agribusiness_en.pdf.

159. See, e.g., Murphy, *supra* note 17, at 31 (“In a perfect market, open competition among firms ensures that consumers are given as much of and as good a product as it is possible to make at the price they are willing to pay.”).

160. See Murphy, *supra* note 17, at 24. The result of market power is the “cost-price squeeze,” which means the result of increasing costs of inputs such as seeds and fertilizers and the decreasing margin of return. *Id.*

161. See Spielfeld, *supra* note 12 (“U.S. agribusiness also controls a large percentage of global trade and investment in food and agriculture; hence, our domestic regulations matter a great deal internationally. The U.S. is the largest global producer of both chicken and cattle meat and the second-largest pork producer. Cargill, Archer Daniels Midland (ADM) and Bunge control most of the corn, soy and wheat being moved around the world. Monsanto accounts for nearly 90 percent of the global market in genetically engineered seeds. ADM employs 28,000 people in more than 60 countries and is invested in oilseeds, corn, food and feed ingredients, sweeteners, biofuels and agricultural services. Cargill is even larger, employing 159,000 people in 68 countries and is invested in meat, grains and poultry, fuels, fertilizer, sweeteners and starches, grain trading markets and agricultural services.”) (internal citations omitted).

162. For a general overview on concentration of market power in agriculture, see Murphy, *supra* note 17.

163. The United States Department of Justice (DOJ) is looking at the concentrated market power of Monsanto and seed companies. In its report, the

farm commodities.¹⁶⁴ Market power allows firms to set standards on products for export that can be prohibitive for many farmers.¹⁶⁵ Competition laws would ideally improve farmers' bargaining position with respect to prices, wages, and the types of standards that the producers must comply with (and often cannot).¹⁶⁶

There are conceptual and practical difficulties faced by any host country that seeks to regulate the market power of TNCs in order to protect its citizens' right to food.¹⁶⁷ One major challenge is that some governments are unwilling to regulate.¹⁶⁸ Because the investments are often critical to the developing economy's economy, countries compete to attract investors by most lowering their regulations, called a "race to the bottom."¹⁶⁹ There is also the problem of resources and expertise, both of which are lacking in developing countries.¹⁷⁰

CGIAR, which has a mission to achieve sustainable food security and reduce poverty in developing countries, urged the DOJ and the USDA to take into account the affect that United States seed companies have on developing country markets: "Certain practices in the U.S. seed industry, resulting in the concentration of ownership of IP or vertical integration of seed production, can translate into undesirable effects outside the U.S. such as restricted choice of lines of high quality seeds, lack of access to germplasm for breeding, and lack of control over price." CGIAR Central Advisory Service on Intellectual Property, *Comments Regarding Agriculture and Antitrust Enforcement Issues in Our 21st Century Economy*, <http://www.slideshare.net/CAS.IP/comments-regarding-agriculture-and-antitrust-enforcement-issues-in-our-21st> (last visited Nov. 3, 2010).

164. See Murphy, *supra* note 17, at 5–6.

165. See Murphy, *supra* note 17, at 14 (citing the example of on-farm refrigeration for dairy farmers in Brazil).

166. The focus of this Note is only on competition regulation, not environment, workers rights, or other regulatory fields. For a brief discussion framing the issue of agribusiness and competition law, see Timothy A. Wise, *Ask an Economist: Regulating Multinational Agribusiness*, TRIPLECRISIS, <http://triplecrisis.com/ask-an-economist-regulating-multinational-agribusiness/> (last visited Nov. 3, 2010).

167. This can be seen to violate the non-discrimination principle of free trade. However, as Joseph Stiglitz has indicated, a distinction can be drawn between direct discrimination against a foreign corporation or investor, i.e. discrimination was the primary purpose of the regulation, and discrimination in effect, i.e. there is a legitimate public purpose. See Stiglitz, *supra* note 139, at 549.

168. See Graham & Woods, *supra* note 83, at 869 ("Some governments are unwilling to regulate, perceiving instead benefits to be gained from a lack of regulation as they compete for foreign direct investment.").

169. *Id.*

170. Pradeep Mehta, *Living with Cross-Border Competition Challenges in the Absence of Global Competition Rules*, CENTRE ON REGULATION AND COMPETITION, 7 (2003), <http://www.competition-regulation.org.uk/conferences/>

Market power may be more difficult to identify than monopoly power.¹⁷¹ This may not always be a problem, especially for larger developing economies. China recently adopted an anti-trust law,¹⁷² which might serve as a model for a similarly situated country such as Brazil.¹⁷³

There are obvious jurisdictional problems with the application of such laws, given that the foreign agribusinesses with market power are largely organized under the laws of non-obligated countries.¹⁷⁴ For example, the United States has not been unilaterally opposed to extraterritorial enforcement of its laws when it benefits American companies. In fact, it has enforced its antitrust laws extraterritorially against monopolistic actions by other states.¹⁷⁵ However, these states have not attempted to enforce their own competition laws extraterritorially against United States firms.¹⁷⁶ While the United States has settled on the “effects” test to determine the reach of its anti-trust enforcement, this test for jurisdiction has not been easily accepted by other countries.¹⁷⁷ In some cases, bilateral agreements and cooperation¹⁷⁸ can settle the matter of

Philippines03/Mehta.pdf.

171. See *id.* at 9 (“[E]ach competition authority has to conduct its own investigation to detect and prove the violation of the relevant laws and calculate the extent of damage. Resource constrained small economies will not be able to do this alone.”).

172. See, e.g., Xiaoye Wang, *Highlights of China’s New Anti-Monopoly Law*, 75 ANTITRUST L.J. 133 (2008).

173. For an in-depth comparison of the agricultural sector in Brazil and China, see Mario Queiroz de Monteiro Jales et al., *Agriculture and Brazil and China: Challenges and Opportunities*, INTAL-ITD (October 2006), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35317353>.

174. For example, the United States is not a party to any legally binding international agreement concerning the right to food. How customary international law might affect the obligations of the United States will be discussed below. There has been helpful scholarship written on the extraterritorial enforcement of the right to food that makes doctrinal recommendations. See, e.g., Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, *supra* note 68.

175. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 188 (2000).

176. *Id.*

177. See, e.g., Paul Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT’L L.J. 173, 203 (2005); Mehta, *supra* note 170, at 7 (“The wide-ranging nature of this concept aroused considerable opposition outside the US, as did American attempts to take evidence abroad under very broad pre-trial discovery provisions in US law.”).

178. Mehta, *supra* note 170, at 8.

jurisdiction.¹⁷⁹

One potential solution to these problems is competition law cooperation between countries.¹⁸⁰ Implicit in the idea of an international competition law is a sense of universal norms and values.¹⁸¹ However, while accepted as a topic for debate in the Doha round of WTO negotiations, developing states have been hesitant to enter into multilateral competition agreements.¹⁸² Discussion of competition issues at the Doha round of negotiations was blocked by civil society organizations because of the perception that the United States and the EU were interested in advancing the position of their firms, not in eliminating threats to competition.¹⁸³ Like competition law, multilateral agreements on investment have also failed in the face of suspicious civil society.¹⁸⁴ It has been suggested instead that the regional approach of CARICOM (Caribbean Community) may be a model for other countries.¹⁸⁵

Also, a less centralized form of international cooperation may be possible. The International Competition Network (ICN) is a transnational regulatory network of over one hundred competition agencies that is committed to promoting antitrust enforcement through enhanced cooperation and convergence of principles.¹⁸⁶ Together with merger review and cartel work, the ICN also targets anti-competitive unilateral conduct of dominant firms and firms with market power by creating

179. See Stephan, *supra* note 177, at 204–05 (“In the case of antitrust, however, some intergovernmental agreements also seek to distribute regulatory jurisdiction.”).

180. *Id.* It deserves mention that competition law is not a uniform enterprise among nations; varying approaches result from logistical differences as much as political-economic interests such as protectionism. See *id.* at 178–95.

181. *Id.* at 196.

182. See Mehta, *supra* note 170, at 8. Similarly, in 1995, a block of developing countries declared its opposition to inserting a social clause or any labor-related provision into trade agreements, calling it “coercive.” Kolben, *supra* note 113, at 469. These countries deemed such efforts veiled protectionism. *Id.* at 470.

183. See Murphy, *supra* note 17, at 33.

184. See Peterson, *supra* note 126, at 11.

185. Mehta, *supra* note 170, at 7. Examples of regional approaches also include those in Mercosur, COMESA (Common Market for Eastern and Southern Africa), SADC (Southern African Development Community), EAC (East African Community), CEMAC (Economic and Monetary Community of Central Africa). *Id.* at 9.

186. See ICN Factsheet and Key Messages (April 2009), <http://www.internationalcompetitionnetwork.org/uploads/library/doc608.pdf>.

recommended regulatory practices and reports and holding workshops.¹⁸⁷ Other global competition initiatives such as UNCTAD and the OECD's Global Forum similarly set standards, provide technical assistance, and share information.¹⁸⁸ This may solve the problem of scarce administrative resources.

III. CONCLUSION

The question that this Note set out to address is whether or not developing states that are obligated protect the right to food of their citizens can legally act in that regard, given their existing trade commitments. Its conclusion, based on a thorough examination of the literature in this field, is that countries that are committed to the human right to food can act more assertively with regard to protectionist trade policies and in the regulation of TNCs, and they can do so both alone and cooperatively.

Instead of focusing on developed countries such as the United States, this Note focused on developing countries that have implemented the right to food and provided actors within those countries with a legally-sound framework in which to pursue their goals. This should not be taken as an assertion that the United States should not act to promote respect for human rights at the national or international level, but rather as a complimentary view that developing countries should continue to implement the right to food domestically.

187. *See id.*

188. *See Mehta, supra* note 170, at 9–11.