

Comment

The Global Food Crisis: Law, Policy, and the Elusive Quest for Justice

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The right to food is recognized as a fundamental human right in the Universal Declaration of Human Rights, the International Covenant on Economic Social and Cultural Rights, and the United Nations Convention on the Rights of the Child.¹ Notwithstanding the obligation of states to respect, protect, and fulfill this right, the Food and Agriculture Organization of the United Nations (FAO) reports that 1.02 billion people are chronically undernourished worldwide—a figure that represents one-sixth of humanity.² While fifteen million of the world's food insecure people are located in the Global North, the remaining billion reside in Asia, Africa, Latin America, the Pacific, and the Caribbean.³

The food crisis of 2008 propelled the issue of food security from the margins to the center of public debate, and focused the world's attention on the need for sustainable and equitable food production and distribution systems. From 2006 through 2008, skyrocketing food prices plunged an additional 115 million people into the ranks of the malnourished and provoked food riots across the globe.⁴ The immediate causes of the food

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1. See Universal Declaration of Human Rights, art. 25, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/NR0/752/35/img/NR075235.pdf?OpenElement>; United Nations Convention on the Rights of the Child, arts. 24 & 27, G.A. Res. 44/25, at 167, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989), International Covenant on Economic, Social and Cultural Rights, art. 11, G.A. Res. 2200A, at 49, U.N. GAOR, 21st Sess., 1496th plen. Mtg., U.N. Doc. A/6316 (Dec. 16, 1966), reprinted in 6 I.L.M. 360 (1967).

2. See FOOD & AGRIC. ORG. OF THE U.N. (FAO), THE STATE OF FOOD INSECURITY IN THE WORLD 2009, 11 (2009).

3. See *id.* at 11. Food insecurity has also been growing in the United States. According to the U.S. Department of Agriculture, 14.6 percent of American households experienced periods of food insecurity in 2008—a significant increase from 11.1 percent in 2007. See MARK NORD ET AL., U.S. DEPT. OF AGRIC., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES, 2008, ECONOMIC RESEARCH REPORT NO. 83, at iii (2009), available at <http://www.ers.usda.gov>.

4. See FAO, THE STATE OF AGRICULTURAL COMMODITY MARKETS 2009, 6, 9, available at <http://www.fao.org/docrep/012/i0854e/i0854e00.htm> [hereinafter, FAO, STATE OF

crisis included adverse weather, high oil prices, rising worldwide meat consumption, growing demand for grain-based biofuels, and financial speculation in global commodity markets.⁵ Curiously, high food prices coincided with bumper cereal harvests in major food-producing nations and with hefty profits by the transnational corporations that dominate global food and agro-chemical markets.⁶ The FAO's 2009 report on global commodity markets pointed out that the food crisis was provoked primarily by escalating demand (notably demand for grain-based biofuels) rather than shrinking supply.⁷ Indeed, the world's food supply has kept pace with population growth for several decades.⁸ There is currently sufficient food to meet global nutritional needs, but many households are simply too poor to purchase the food that is available.⁹

Despite the global trend toward urbanization, poverty and undernourishment remain concentrated in the rural areas of the Global South. Approximately seventy-five percent of the developing world's poor reside in rural communities.¹⁰ The majority are small farmers who produce at least 70 percent of the world's food and whose livelihoods depend on marketing their agricultural products.¹¹ These farmers suffered when domestic crop prices plummeted as a consequence of food aid and of the influx of highly subsidized food imports from industrialized countries.¹² but they did not benefit from the recent food price increases because prices

AGRICULTURAL COMMODITY MARKETS 2009].

5. See *id.* at 15; U.N. Conference On Trade and Development [UNCTAD], *The 2008 Food Price Crisis: Rethinking Food Security Policies*, G-24 Discussion Paper No. 29, at 3-8, U.N. Doc. UNCTAD/GDS/MDP/G24/2009/3 (June 2009) (prepared by Anuradha Mittal).

6. See Eric Holt-Giménez, *The World Food Crisis: What's Behind It and What We Can Do About It*, Food First Policy Brief No. 16, at 6 (Oct. 2008), available at <http://www.foodfirst.org/files/pdf/PB#16#World#Food#Crisis.pdf>; Geoffrey Lean, *Rising Prices Threaten Millions with Starvation, Despite Bumper Crops*, THE INDEP., March 2, 2008.

7. See FAO, STATE OF AGRICULTURAL COMMODITY MARKETS 2009, *supra* note 4, at 16.

8. Holt-Giménez, *supra* note 6, at 2-3; FRANCES MOORE LAPPÉ ET AL., *WORLD HUNGER: TWELVE MYTHS* 9 (1998).

9. See Holt-Giménez, *supra* note 6, at 2-3; Lean, *supra* note 6.

10. See Thomas Hirsch et al., *Deepening the Food Crisis? Climate Change, Food Security and the Right to Food*, in THE GLOBAL FOOD CHALLENGE: TOWARDS A HUMAN RIGHTS APPROACH TO TRADE AND INVESTMENT POLICIES 78, 84 (2009), available at <http://www.fian.org/resources/documents/others/the-global-food-challenge/pdf>; FAO, THE STATE OF FOOD INSECURITY IN THE WORLD 2003, 16 (2003), available at <http://www.fao.org/docrep/006/j0083e/j0083e00.htm> [hereinafter FAO, STATE OF FOOD INSECURITY 2003].

11. See Action Group on Erosion, Technology, and Concentration, WHO WILL FEED US? 1 (Nov. 2009), available at http://www.etcgroup.org/upload/publication/pdf_file/ETC_Who_Will_Feed_Us.pdf; Kevin Watkins & Joachim von Braun, *Time to Stop Dumping on the World's Poor*, in INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE 2002-2003 ANNUAL REPORT, 2, available at <http://www.ifpri.org/publication/time-stop-dumping-worlds-poor>.

12. See, e.g., JAMES WESSEL, *TRADING THE FUTURE: FARM EXPORTS AND THE CONCENTRATION OF ECONOMIC POWER IN OUR FOOD SYSTEM* 168 (1983) (pointing out that provision of cheap food to developing countries, whether in the form of food aid or commercial food imports, contributed to rural poverty in the Global South by driving down prices farmers received for crops); *Harvesting Poverty: The Unkept Promise*, N.Y. TIMES, Dec. 30, 2003, at A20 (explaining how protectionist trade policies in the industrialized world, specifically, high levels of agricultural subsidies, encourage overproduction, depress commodity prices, and impoverish farmers in the developing world).

for inputs (such as seeds and fertilizer) skyrocketed as well and because most small farmers do not have direct access to markets and are thus dependent on intermediaries.¹³ In light of the importance of rural communities to global food security, the Advisory Committee to the U.N. Human Rights Council has prepared a report that emphasizes the need to protect the rights of small farmers in the context of the right to food.¹⁴

Even though food insecurity is a function of poverty rather than food scarcity, the Group of 8 (G-8) industrialized nations, the World Bank, and the International Monetary Fund (IMF) responded to the food crisis with supply-oriented solutions (such as food aid and proposals to boost food production) and with the familiar calls for market-oriented reforms rather than proactive state intervention.¹⁵ Sadly, these responses fail to address the deeper structural causes of food insecurity in the Global South, including inequities in the rules governing international trade, ill-advised economic reforms imposed by international financial institutions, and the dominance of transnational corporations in global food markets. Indeed, even before the 2008 food crisis, undernourishment had been on the rise for at least a decade, undermining progress toward the Millennium Development Goal of reducing world hunger in half by 2015 relative to 1990-1992 levels.¹⁶

While food prices have stabilized, they remain high by historic standards and are not predicted to decline in the near future.¹⁷ Unless the underlying structural causes of chronic food insecurity are acknowledged and addressed, it appears increasingly unlikely that the Millennium Development Goal of halving world hunger by 2015 will be achieved.

This essay examines the historic and current practices that have contributed to food insecurity in developing countries, and recommends several steps that the international community might take to promote the fundamental human right to food. Part I places the current food crisis in historical perspective by discussing the trade and aid policies that laid the foundation for food insecurity in the Global South from colonialism until the early 1980s. Part II explains how food insecurity was exacerbated by the free market reforms implemented in the Global South in the last three decades pursuant to the structural adjustment programs mandated by international financial institutions and pursuant to multilateral and bilateral trade agreements. Part III discusses the impact of the financial crisis and the climate crisis on food security. Parts IV and V conclude by suggesting steps that the international community might take to promote food security through international law and regulation.

13. See FAO, STATE OF AGRICULTURAL COMMODITY MARKETS 2009, *supra* note 4, at 34-35.

14. See U.N. Human Rights Council Advisory Comm., *Peasant Farmers and the Right to Food: a History of Discrimination and Exploitation*, A/HRC/AC/3/CRP.5 (Aug. 4, 2009) (prepared by Jean Ziegler), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/advisorycommittee/A.HRC.AC.3.CRP.5.pdf>.

15. See U.N. Conference on Food and Development, *supra* note 5, at 16-18.

16. See FAO, STATE OF FOOD INSECURITY 2009, *supra* note 2, at 8.

17. See FAO, STATE OF AGRICULTURAL COMMODITY MARKETS 2009, *supra* note 4, at 6.

I. THE HISTORIC ROOTS OF FOOD INSECURITY IN THE GLOBAL SOUTH

The root cause of food insecurity in the Global South is the imposition through trade, aid, and financial institutions of an agricultural development model that undermines rural livelihoods, increases ecological vulnerability, and places developing countries in a structurally disadvantageous position in world trade.

As a consequence of the plantation-based production and trade patterns imposed under colonialism, most developing countries entered the world economy as producers of natural resources and consumers of imported manufactured goods.¹⁸ Specialization in agricultural exports is economically disadvantageous due to the volatility of world market agricultural prices and to the declining terms of trade for primary commodities vis-à-vis manufactured goods.¹⁹ In other words, countries that export agricultural products cannot count on steady revenue streams for investment, and must sell increasing amounts of their output in world markets in order to purchase the same amount of manufactured products.²⁰ Agro-export specialization also diverts prime agricultural land from food production to cash crop production, concentrates land ownership in the hands of the rural elite, and consigns many small farmers to poverty by relegating them to fragile, ecologically marginal lands.²¹

The structural disadvantage of agro-export specialization is relevant to food security because the most food-insecure countries are those that do not produce sufficient food to satisfy domestic needs and depend on the export of a small number of agricultural commodities for a substantial portion of their foreign exchange earnings.²² Adverse weather, pest infestations, and market price fluctuations can depress export earnings and deprive these countries of the resources necessary to finance food imports and productive investment.²³ For example, many agro-exporting developing countries were harmed by the 2008 food price increases because they are net food importers and the price of imported food staples, such as cereals and oilseeds, rose far more dramatically than the price of the products that these countries export (e.g. as coffee, cocoa, cotton, and rubber).²⁴ Consequently, economic diversification and industrialization

18. See CARY FOWLER & PAT MOONEY, SHATTERING: FOOD, POLITICS, AND THE LOSS OF GENETIC DIVERSITY 40-41 (1996); E.M. YOUNG, WORLD HUNGER 41-42 (1997).

19. See JAMES M. CYPHER & JAMES L. DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT 86 (1997); PETER ROBBINS, STOLEN FRUIT: THE TROPICAL COMMODITIES DISASTER 2-3, 7-15 (2003).

20. See CYPHER & DIETZ, *supra* note 19, at 172.

21. See FOWLER & MOONEY, *supra* note 18, at 95-96; WESSEL, *supra* note 12, at 166-67; YOUNG, *supra* note 18, at 66.

22. See CHRISTOPHER STEVENS ET AL., THE WTO AGREEMENT ON AGRICULTURE AND FOOD SECURITY 14 (2000); FAO, THE STATE OF AGRICULTURAL COMMODITY MARKETS 2004, 19 (2004), available at <http://www.fao.org/docrep/007/y5419e/y5419e00.htm> [hereinafter FAO, STATE OF AGRICULTURAL COMMODITY MARKETS 2004].

23. See CYPHER & DIETZ, *supra* note 19, at 86; FAO, STATE OF AGRICULTURAL COMMODITY MARKETS 2004, *supra* note 22, at 12-13; ROBBINS, STOLEN FRUIT: THE TROPICAL COMMODITIES DISASTER, *supra* note 19, at 2-3, 7-15; YOUNG, *supra* note 18, at 41-42.

24. See FAO, STATE OF AGRICULTURAL COMMODITY MARKETS 2009, *supra* note 4, at 10, 27-29.

promote food security at the national level by guaranteeing a reliable revenue stream with which to purchase food.²⁵

Regrettably, the trade and aid policies of wealthy countries in the aftermath of World War II exacerbated rural poverty in the Global South and deprived many developing countries of the resources needed for economic diversification. In the post-war period, the United States and Western Europe provided generous subsidies to their agricultural producers and utilized both tariff and non-tariff import barriers to protect them from foreign competition.²⁶ By contrast, most developing countries imposed taxes on agricultural producers to finance industrialization and lacked the resources to provide farmers with significant subsidies.²⁷

The 1947 General Agreement on Tariffs and Trade (1947 GATT) did little to curb Northern agricultural protectionism. Negotiated at a time when most developing countries were under colonial rule, the 1947 GATT favored the interests of the Global North at the expense of the Global South.²⁸ While industrialized countries benefited from the 1947 GATT's reduction of tariffs on manufactured goods, various GATT exemptions enabled industrialized countries to heavily subsidize the agricultural sector and to limit or exclude textiles, clothing, and agricultural products from their less developed counterparts.²⁹ In response to sustained pressure from developing countries, the 1947 GATT was amended several times in order to foster greater access by the Global South to Northern markets and to enable developing countries to promote industrialization through the protection of infant industries.³⁰ However, the amendments were often couched in non-binding language, proved unwieldy and unworkable, and frequently excluded the very products of greatest interest to developing countries.³¹ In short, the 1947 GATT succeeded in reducing tariffs on manufactured goods, but permitted agricultural protectionism to flourish in the United States and Western Europe.

One of the consequences of agricultural protectionism was a glut of food on U.S. markets, which prompted the United States to dispose of its surplus production in developing countries as food aid pursuant to U.S.

25. See JEAN DRÈZE & AMARTYA SEN, HUNGER AND PUBLIC ACTION 76-77, 168-70 (1989); Eric S. Reinert, *Increasing Poverty in a Globalized World: Marshall Plans and Morgenthau Plans as Mechanisms of Polarization of World Incomes*, in RETHINKING DEVELOPMENT ECONOMICS 453, 470 (Ha-Joon Chang ed., 2003).

26. See THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) 141, 155-56 (Terence P. Stewart ed., 1993) [hereinafter GATT URUGUAY ROUND]; M. Ataman Aksoy, *Global Agricultural Trade Policies*, in GLOBAL AGRICULTURAL TRADE AND DEVELOPING COUNTRIES 37 (M. Ataman Aksoy & John C. Beghin eds., 2004).

27. See GATT URUGUAY ROUND, *supra* note 26, at 154-157; Aksoy, *supra* note 26, at 37.

28. See PHILIPPE CULLET, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW 60 (2003); Faizel Ismail, *Rediscovering the Role of Developing Countries in GATT Before the Doha Round*, 1 L. & DEV. REV. 49, 50, 55 (2008).

29. See YONG-SHIK LEE, RECLAIMING DEVELOPMENT IN THE WORLD TRADING SYSTEM 107-10 (2006); Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 440-46 (2002); Ismail, *supra* note 28, at 58-59.

30. See Ismail, *supra* note 28, at 65-67.

31. See LEE, *supra* note 29, at 37-38.

Public Law 480 (the so-called "Food for Peace Program").³² This practice exacerbated food insecurity in the Global South by depressing agricultural commodity prices and undermining the livelihoods of poor farmers; at the same time, the import barriers maintained by the United States and other wealthy nations deprived developing countries of the foreign exchange earnings necessary to finance imports and to promote industrialization.³³

The next major milestone in the transformation of Southern agriculture was the Green Revolution. Funded by the Ford and Rockefeller Foundations, the Green Revolution sought to reduce world hunger by increasing global crop yields.³⁴ International crop breeding institutions developed new varieties of rice, wheat, and corn that produced higher yields than traditional varieties in response to the application of synthetic fertilizers and controlled irrigation.³⁵

While the Green Revolution was a tremendous success from the standpoint of food production, it ultimately exacerbated food insecurity by increasing poverty and inequality in the Global South.³⁶ First, the Green Revolution disproportionately benefited wealthy farmers because many poor farmers could not afford the synthetic fertilizers, chemical pesticides, and irrigation equipment necessary to achieve high yields.³⁷ Second, by increasing world food production, the Green Revolution depressed agricultural commodity prices and rendered many small farmers destitute.³⁸

The Green Revolution also produced serious environmental degradation in the Global South as farmers abandoned ecologically sustainable low-input agricultural practices in favor of uniform seeds, chemical fertilizers, and synthetic pesticides manufactured by transnational corporations based in the industrialized world.³⁹ The environmental consequences of this dramatic shift to industrial agriculture included loss of soil fertility, depletion of aquifers, agrochemical contamination of surface waters and groundwater, loss of ecosystem

32. See Agricultural Trade Development and Assistance Act of 1954, 7 U.S.C. §§ 1691-1736e (1982); Food for Peace Act of 1966, Pub. L. No. 89-808, § 3(c), 80 Stat. 1526 (codified at 7 U.S.C. §§ 1442, 1427, 1431, 1431b, 1691-1736e (1982)); WESSEL, *supra* note 12, at 29-31, 52-55, 168-76.

33. See Carmen G. Gonzalez, *Markets, Monocultures, and Malnutrition: Agricultural Trade Policy Through an Environmental Justice Lens*, 14 MICH. ST. J. INT'L L. 345, 361 (2006).

34. See GORDON CONWAY, *THE DOUBLY GREEN REVOLUTION: FOOD FOR ALL IN THE 21ST CENTURY* 44-51 (1997); KEITH GRIFFIN, *ALTERNATIVE STRATEGIES FOR ECONOMIC DEVELOPMENT* 144 (2d ed. 1990).

35. See CONWAY, *supra* note 34, at 47-52, 60-61.

36. See FOWLER & MOONEY, *supra* note 18, at 58-59; KEITH GRIFFIN, *THE POLITICAL ECONOMY OF AGRARIAN CHANGE: AN ESSAY ON THE GREEN REVOLUTION* 51-52 (1974); YOUNG, *supra* note 18, at 72. Over eighty percent of the published reports on the Green Revolution conclude that it had a negative impact on poverty and inequality. See Donald K. Freebairn, *Did the Green Revolution Concentrate Incomes? A Quantitative Study of Research Reports*, 23 WORLD DEV. 265, 277 (1995).

37. See Carmen G. Gonzalez, *Trade Liberalization, Food Security, and the Environment: The Neoliberal Threat to Sustainable Rural Development*, 14 TRANSNAT'L L. & CONTEMP. PROB. 419, 442-43 (2004).

38. See GRIFFIN, *supra* note 34, at 158; Gonzalez, *supra* note 37, at 443-44.

39. See FOWLER & MOONEY, *supra* note 18, at 75-76, 130-31; LORI ANN THRUPP, *LINKING BIODIVERSITY AND AGRICULTURE: CHALLENGES FOR SUSTAINABLE FOOD SECURITY* 35 (1997).

biodiversity, loss of traditional food crops, increased pesticide-related illness, narrowing of the genetic base of the world's food supply, and heightened vulnerability of the global food supply to catastrophic blight.⁴⁰

Ecosystem biodiversity and food crop diversity are essential to food security for at least two reasons. First, highly diverse ecosystems are more resilient to environmental perturbations (e.g. droughts, heavy rains, and outbreaks of new pests that may be associated with climate change), and provide a wide range of "free" ecosystem services (e.g. pest control, pollination, and enhanced soil fertility).⁴¹ Second, modern plant breeders depend on wild crops to furnish the fresh germplasm that can be used to produce crops capable of withstanding a variety of environmental stresses and of serving as new food sources.⁴² Alarming, the expansion of industrial agriculture is exacerbating the vulnerability of the world's food supply to catastrophic climate change by narrowing the number of food crops cultivated, reducing the genetic diversity within these cultivated crops, degrading ecosystem services, and encouraging reliance on non-renewable petroleum-based agrochemicals whose production and use release greenhouse gases.⁴³

In short, Northern trade and aid policies laid the groundwork for food insecurity in the Global South by reinforcing economically disadvantageous agro-export specialization, exacerbating rural poverty, and promoting agricultural production systems that deplete biodiversity and rely on environmentally harmful agrochemicals.

II. DOUBLE STANDARDS IN WORLD AGRICULTURAL TRADE

The debt crisis of the 1980s inaugurated a series of economic reforms that increased the structural vulnerability of developing countries to food insecurity. As a consequence of significant petroleum price increases by the Organization of Petroleum Exporting Countries (OPEC) in the early 1970s, many developing countries borrowed money from commercial banks to finance the importation of fuel and petroleum-based agricultural inputs.⁴⁴ When additional oil price shocks in 1979-80 coincided with rising interest rates and plummeting agricultural commodity prices, developing countries incurred crippling amounts of debt that they were increasingly unable to

40. See CONWAY, *supra* note 34, at 86-104; FOWLER & MOONEY, *supra* note 18, at 63-81; THRUPP, *supra* note 39, at 32-33.

41. See THOMAS PRUGH, NATURAL CAPITAL AND HUMAN ECONOMIC SURVIVAL 58-62, 66-69 (1995); UNITED NATIONS ENVIRONMENT PROGRAMME [UNEP], THE ENVIRONMENTAL FOOD CRISIS: THE ENVIRONMENT'S ROLE IN AVERTING FUTURE FOOD CRISES 66 (Christian Nellemann et al. eds., 2009); David Tilman, *Biodiversity and Ecosystem Functioning*, in NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 93, 104-06 (Gretchen C. Daily ed., 1997).

42. See PRUGH, *supra* note 41, at 64-65; UNEP, THE ENVIRONMENTAL FOOD CRISIS, *supra* note 41, at 74; Norman Myers, *Biodiversity's Genetic Library*, in NATURE'S SERVICES, *supra* note 41, at 255, 256-63.

43. See PRUGH, *supra* note 41, at 81-84.

44. See SUSAN GEORGE, A FATE WORSE THAN DEBT: THE WORLD FINANCIAL CRISIS AND THE POOR 28-29 (1990); RICHARD PEET ET AL., UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO 71 (2003).

repay.⁴⁵ By the mid-1980s, two-thirds of African countries and nearly three-quarters of Latin American countries had agreed to implement structural adjustment programs mandated by the World Bank and the IMF as conditions for receiving new loans or restructuring existing debt.⁴⁶

Structural adjustment exacerbated poverty and inequality, reinforced the crippling dependence of developing countries on agro-export specialization, and inflicted serious environmental damage. In order to maximize the revenues available to service the foreign debt, developing countries were instructed to expand agricultural commodity exports.⁴⁷ The aggressive shift to export production diverted land and other resources from food crops to cash crops, increased dependence on food imports, and harmed the environment by accelerating the expansion of chemical-intensive industrial agriculture.⁴⁸ Furthermore, this economic strategy ultimately depressed the export earnings of developing countries by glutting world markets with competing export commodities from multiple debtor nations.⁴⁹

Structural adjustment also introduced a double standard that continues to plague world agricultural trade: protectionism for the wealthy and free markets for the poor. As a condition of debt restructuring, developing countries were required to adopt a standard recipe of free market economic reforms, including the reduction of tariffs, the elimination of non-tariff import barriers, and the curtailment of government services and subsidies.⁵⁰ However, developed countries continued to subsidize and protect their agricultural producers while reaping the benefits of relative market openness in developing countries.⁵¹ The elimination of tariff and non-tariff import barriers in developing countries exposed Southern farmers to direct competition from highly subsidized Northern agricultural producers.⁵² The vulnerability of developing country farmers was compounded by the elimination of agricultural input and food subsidies, the curtailment of subsidized credit, the reduction of extension services,

45. See GEORGE, *supra* note 44, at 27-28, 45 (attributing debt burden of non-oil producing developing countries to oil price shocks of 1973-74 and particularly 1979-80); PEET ET AL., *supra* note 44, at 74 (stating that sharp drop in global commodity prices in early 1980s required many export-dependent non-oil producing developing countries to increase foreign borrowing); YOUNG, *supra* note 18, at 42-43 (explaining that 1973 and 1979 oil price shocks accelerated developing country borrowing at increasingly high interest rates during a period of declining prices for developing country exports).

46. PEET ET AL., *supra* note 44, at 75.

47. See GEORGE, *supra* note 44, at 59-60; JOHN MADELEY, FOOD FOR ALL: THE NEED FOR A NEW AGRICULTURE 24 (2002).

48. U.N. Conference on Food and Development, *supra* note 5, at 13-15; STRUCTURAL ADJUSTMENT PARTICIPATORY REV. INT'L NETWORK (SAPRIN), THE POLICY ROOTS OF ECONOMIC CRISIS AND POVERTY: A MULTI-COUNTRY PARTICIPATORY ASSESSMENT OF STRUCTURAL ADJUSTMENT 124-26 (2002), available at http://www.saprin.org/SAPRI_Findings.pdf [hereinafter SAPRIN].

49. See BELINDA COOTE, THE TRADE TRAP 34-35 (1992); GEORGE, *supra* note 44, at 60-61; MADELEY, *supra* note 47, at 154-55; ROBBINS, *supra* note 19, at 29-30.

50. See MICHEL CHOSSUDOVSKY, THE GLOBALISATION OF POVERTY 62-63 (1997); GEORGE, *supra* note 44, at 52.

51. See Gonzalez, *supra* note 33, at 365.

52. See MICHAEL E. CONROY ET AL., A CAUTIONARY TALE: FAILED U.S. DEVELOPMENT POLICY IN CENTRAL AMERICA 14 (1996); MADELEY, *supra* note 47, at 120.

and the withdrawal of the public sector from agricultural marketing.⁵³

The World Trade Organization (WTO) Agreement on Agriculture purported to mitigate these inequities in international agricultural trade and to “establish a fair and market-oriented agricultural trading system” by gradually dismantling agricultural subsidies and tariffs.⁵⁴ Regrettably, the agreement reinforced the international double standard. While ambiguities in the agreement’s key provisions enabled developed countries to maintain high levels of agricultural protectionism, the agreement did succeed in prohibiting developing countries from raising tariffs to regulate the flow of agricultural imports into their markets so as to protect small farmers from economically ruinous surges of cheap imported food products.⁵⁵

As a consequence of this double standard in the rules governing international agricultural trade, agricultural producers in the United States and the European Union destroyed the livelihoods of millions of small farmers in the developing world by dumping agricultural commodities on world markets at prices below the cost of production.⁵⁶ The devastating surges of cheap imported food further impoverished the world’s most food insecure population, and exacerbated food insecurity at the national level by discouraging food production in developing nations.⁵⁷ As domestic food production declined, developing countries became increasingly dependent on food imports. In the course of a few decades, net food-exporting developing countries were transformed into net food importers as a consequence of liberalization commitments undertaken pursuant to structural adjustment programs, the WTO Agreement on Agriculture, and bilateral and regional free trade agreements.⁵⁸ These former food-exporting countries are now being buffeted by the soaring cost of imported food.

Finally, it is important to recognize that world market prices for agricultural inputs and agricultural commodities are distorted by the market power of transnational corporations.⁵⁹ For example, three

53. See U.N. Conference on Food and Development, *supra* note 5, at 8-11; SAPRIN, *supra* note 48, at 116-18.

54. Agreement on Agriculture pmb. ¶ 2, Apr. 15, 1994, 1867 U.N.T.S. 410, available at http://www.wto.org/english/docs_e/legal_e/14-ag.pdf [hereinafter Agreement on Agriculture]; see also Gonzalez, *supra* note 29, at 452-58 (analyzing the main provisions of the Agreement on Agriculture).

55. See Gonzalez, *supra* note 29, at 459-68, 478-80.

56. See SOPHIA MURPHY ET AL., INSTITUTE FOR AGRICULTURAL TRADE & POLICY, WTO AGREEMENT ON AGRICULTURE: A DECADE OF DUMPING 1 (2005), available at <http://www.tradeobservatory.org/library.cfm?RefID=48532>.

57. See ACTIONAID, THE IMPACT OF AGRO-EXPORT SURGES IN DEVELOPING COUNTRIES 8 (2008), available at <http://www.actionaid.org/docs/cheap%20imports%20and%20protection%20of%20ag.pdf>.

58. See *id.* at 8-10.

59. See RAJ PATEL & SANAZ MEMARSADEGHI, AGRICULTURAL RESTRUCTURING AND CONCENTRATION IN THE UNITED STATES: WHO WINS? WHO LOSES?, FOOD FIRST POLICY BRIEF NO. 6, 34-36 (2003), available at <http://www.foodfirst.org/pubs/policy/pb6.pdf>; PETER M. ROSSET, FOOD IS DIFFERENT: WHY WE MUST GET THE WTO OUT OF AGRICULTURE 45-49 (2006) (describing the concentration of U.S. agriculture); Timothy A. Wise, *The Paradox of Agricultural Subsidies: Measurement Issues, Agricultural Dumping, and Policy Reform* 8-9, 24 (Global Dev. & Env’t Inst. Working Paper No. 04-02, 2004), available at <http://www.ase.tufts.edu/gdae/Pubs/wp/04-02AgSubsidies.pdf>.

companies control eighty two percent of all U.S. corn exports.⁶⁰ The top three agrochemical corporations control approximately half of the global agrochemical market, and the top ten control nearly ninety percent of that market.⁶¹ Although thousands of seed companies and breeding institutions were in existence decades ago, ten firms currently dominate over two thirds of the world's proprietary seed sales.⁶² This market concentration enables a small number of agribusiness conglomerates to manipulate market prices to their advantage at the expense of small farmers and consumers in the Global North as well as the Global South.⁶³ In addition, these agribusiness conglomerates dominate the agricultural research agenda, and have used their considerable political influence to persuade U.S. government officials to support biofuels as the solution to climate change, to promote genetic engineering as the solution to the food crisis, and to demand greater access to developing country markets in bilateral and multilateral trade negotiations while maintaining lavish agricultural subsidies in the domestic market.⁶⁴

In sum, the global food crisis is not a problem of food supply but the consequence of ill-advised policies imposed on the Global South by international aid, trade, and financial institutions. These policies have benefited the transnational food industry at the expense of the world's most vulnerable populations, who are also the stewards of the biodiverse food systems necessary to respond to the looming climate crisis. As a consequence of these misguided policies, billions of small farmers in the Global South have been driven off their land and into urban slums at a rate that vastly exceeds the availability of urban employment.⁶⁵

III. COMMODITY SPECULATION, BIOFUELS, AND LAND GRABS

The climate crisis and the financial crisis have only exacerbated the threats to food security outlined above. The bursting of the U.S. housing bubble shifted speculative investment into agricultural commodities and contributed significantly to the 2008 spike in food prices.⁶⁶ This dramatic

60. See ROSSET, *supra* note 59, at 46.

61. See ETC GROUP, WHO OWNS NATURE? 4, 15 (2008), available at http://www.etcgroup.org/upload/publication/707/01/etc_won_report_final_color.pdf.

62. *Id.* at 3-5, 12.

63. See generally, SOPHIA MURPHY, MANAGING THE INVISIBLE HAND: MARKETS, FARMERS AND INTERNATIONAL TRADE 21-29, 32 (2002), available at <http://www.tradeobservatory.org/library.cfm?RefID=25497>; PATEL & MEMARSADEGHI, *supra* note 59, at 34-36; ROSSET, *supra* note 59, at 46-48; BILL VORLEY, FOOD, INC.: CORPORATE CONCENTRATION FROM FARM TO CONSUMER (2003), available at <http://www.ukfg.org.uk/docs/UKFG-Foodinc-Nov03.pdf>; Wise, *supra* note 59, at 8. In the United States, for example, farmers have been plagued by skyrocketing seed prices as a consequence of the advent of genetically modified crops and market concentration in the seed industry. These unprecedented price increases have prompted a Justice Department antitrust investigation of the seed industry and greater government scrutiny of competition (or lack thereof) in agricultural markets. See William Neuman, *Rapid Rise in Seed Prices Draws U.S. Scrutiny*, N.Y. TIMES, Mar. 11, 2010, at B1).

64. See ROSSET, *supra* note 59, at 41-51.

65. See e.g., ROBIN HAHNEL, THE ABCS OF POLITICAL ECONOMY 189-90 (2002).

66. See Peter Wahl, *The Role of Speculation in the 2008 Food Price Bubble*, in THE GLOBAL

increase in food prices threatened the well-being of hundreds of millions of poor people and sparked worldwide social unrest.⁶⁷ While food prices declined once the bubble burst, the failure of states to regulate speculation in agricultural commodity markets poses ongoing risks to food security by increasing market volatility and by permitting the periodic formation of speculative bubbles.⁶⁸

Food security is also threatened by biofuel production. The decision by the United States and the European Union to subsidize biofuel production in order to achieve energy security and to mitigate climate change has driven up food prices and reduced production of other food crops.⁶⁹ Ironically, the production of certain biofuels may result in greater greenhouse gas emissions than conventional fossil fuels. For example, the emissions resulting from corn ethanol production in the United States (including the emissions that result from cultivating corn and processing it into corn starch) may actually exceed fossil fuel emissions by more than ten percent.⁷⁰ When corn cultivation shifts to developing countries, the emissions are even greater as rainforests and peatlands are converted into agricultural lands.⁷¹ Corn production also has serious impacts on the local environment, including chemical contamination of water supplies, depletion of aquifers, and degradation of wildlife habitat.⁷² In short, ethanol production appears to benefit the large corporations that receive government subsidies at the expense of the food security and environmental quality in the Global North and the Global South.

In addition, the biofuels boom and the increase in food prices have spawned an extraordinary number of negotiations between private investors and Southern governments for the sale or long-term lease of agricultural lands.⁷³ These so-called “land grabs” have been prompted by the desire of investing countries to guarantee food supplies at a time of market volatility, to offset domestic shortages of arable land and irrigation water, and to tap into the growing demand for biofuels through offshore production.⁷⁴ While the financial crisis has slowed the pace of these

FOOD CHALLENGE, *supra* note 10, at 68, 70.

67. *See id.* at 68, 70-71.

68. *See id.* at 75-76.

69. *See* FAO, STATE OF AGRICULTURE COMMODITY MARKETS 2009, *supra* note 4, at 19-21; U.N. Conference on Food and Development, *supra* note 5, at 6-8.

70. *See* Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 74 Fed. Reg. 24,904, 25,043, tbl.VI.C.1-2, tbl. VI.C.1-3 (proposed May 26, 2009) (to be codified at 40 C.F.R. pt. 80).

71. *See* U.N. ENV'T PROGRAMME, TOWARDS SUSTAINABLE PRODUCTION AND USE OF RESOURCES: ASSESSING BIOFUELS 67-68 (2009), available at http://www.unep.fr/scp/rpanel/pdf/Assessing_Biofuels_Full_Report.pdf.

72. *See* William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 STAN. ENVTL. L.J. 213, 251-72 (2009).

73. *See* Alexandra Spieldoch & Sophia Murphy, *Agricultural Land Acquisitions: Implications for Food Security and Poverty Alleviation*, in LAND GRAB? THE RACE FOR THE WORLD'S FARMLAND 39, 39 (Michael Kugelman & Susan L. Levenstein eds., 2009), available at http://www.wilsoncenter.org/topics/pubs/ASIA_090629_Land%20Grab_rpt.pdf [hereinafter LAND GRAB?].

74. *See* Michael Kugelman, *Introduction*, in LAND GRAB?, *supra* note 73, at 2; Spieldoch & Murphy, *supra* note 73, at 41-42.

transactions, they nevertheless pose a number of risks, including interference with food production, degradation or depletion of natural resources, and dispossession of small farmers.⁷⁵ For example, small farmers who do not have formal title to the lands they traditionally cultivate may be expelled by foreign investors or by local elites eager to sell or lease these lands to foreign investors.⁷⁶ Indeed, even farmers possessing formal title may be persuaded or coerced to sell vast tracts of productive land for export-oriented agricultural production despite chronic domestic food insecurity.⁷⁷ The substitution of labor-intensive subsistence production with export-driven chemical-intensive industrial agriculture may depress domestic food availability, increase poverty by reducing rural employment, accelerate agrochemical contamination of water supplies, diminish agrobiodiversity, deplete the land through intensive cultivation, and divert or exhaust water resources needed by local communities.⁷⁸

Finally, climate change itself poses risks to global food security. Notwithstanding their negligible contribution to climate change, the world's poorest countries will be disproportionately affected due to their dependence on agricultural production, their vulnerable geographic locations, and their limited resources for adaptation and for response to natural disasters.⁷⁹ Small farmers will experience the most acute hardships—particularly those who cultivate marginal or degraded lands.⁸⁰ Climate change-induced temperature increases and severe weather events (such as droughts and hurricanes) will likely reduce agricultural yields, place additional pressure on already strained water resources, and degrade valuable ecosystem services.⁸¹

IV. THE WAY FORWARD: FURTHER LIBERALIZATION OR ADDITIONAL REGULATION?

Phasing out agricultural protectionism in industrialized countries is an essential first step toward eliminating the double standards in international agricultural trade that contribute to food insecurity in the Global South, but it is not sufficient to address the problem. What is required is a fundamental reorientation of policy at the national and international levels

75. See Spiel dock & Murphy, *supra* note 73, at 43-48.

76. See Raul Q. Montemayor, *Overseas Farmland Investments—Boon or Bane for Farmers in Asia?*, in *LAND GRAB?*, *supra* note 73, at 101-02.

77. See *id.* at 101-03.

78. See Ruth Meinzen & Helena Markelova, *Nuance: Toward a Code of Conduct in Foreign Land Deals*, in *LAND GRAB?*, *supra* note 73, at 74; Montemayor, *supra* note 76, at 102-05; Spiel dock & Murphy, *supra* note 73, at 46-47.

79. See RUCHI ANAND, *INTERNATIONAL ENVIRONMENTAL JUSTICE: A NORTH-SOUTH DIMENSION* 35-41 (2004).

80. See OXFAM, *PEOPLE-CENTERED RESILIENCE: WORKING WITH VULNERABLE FARMERS TOWARDS CLIMATE CHANGE ADAPTATION AND FOOD SECURITY* 33 (Nov. 2009), available at http://www.oxfam.org.uk/resources/policy/climate_change/downloads/bp135_people_centred_resilience_en_171109.pdf; Hirsch, Lottje & Windfuhr et. al., *supra* note 10, at 80-82.

81. See Anthony Nyong, *Climate Change Impacts in the Developing World: Implications for Sustainable Development*, in *CLIMATE CHANGE AND GLOBAL POVERTY* 43, 47-51 (Lael Brainard et al. eds., 2009).

away from deregulation toward targeted and thoughtful regulatory strategies designed to respect, protect, and fulfill the human right to food.

The International Covenant on Economic, Social and Cultural Rights recognizes the “fundamental right of everyone to be free from hunger” and requires state parties to:

take, individually and through international co-operation, the measures, including programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.⁸²

Countries that are not parties to this treaty are nevertheless obligated to protect the human right to food pursuant to the Universal Declaration of Human Rights, which is widely regarded as part of customary international law or as a codification of general principles of law reflected in the national constitutions of a large number of countries in various regions and legal systems of the world.⁸³ What follows is an illustrative but by no means exhaustive list of the measures that governments might take at the domestic and the international level to promote food security in the developing world.

First, governments must reinvest in the agricultural sector and redirect resources toward small farmers and toward the protection of the natural resource base necessary for food production. In recent decades, the diminished role of Southern governments in agricultural production has left poor farmers without social safety nets and has deprived the agricultural sector of badly needed infrastructure, technology, education, credit, insurance, input subsidies, price supports, and marketing assistance.⁸⁴ International financial institutions must support renewed investment in Southern agriculture and the targeting of resources toward small farmers and toward sustainable food production. This recommendation is consistent with the findings of an independent, multi-

82. International Covenant on Economic, Social and Cultural Rights, *supra* note 1, art. 11(2).

83. See Universal Declaration of Human Rights, *supra* note 1, art. 25; BERTA ESPERANZA HERNÁNDEZ-TRUYOL & STEPHEN J. POWELL, JUST TRADE: A NEW COVENANT LINKING TRADE AND HUMAN RIGHTS 56-57 (2009); Olivier De Schutter, *A Human Rights Approach to Trade and Investment Policies*, in THE GLOBAL FOOD CHALLENGE, *supra* note 10, at 15.

84. Ha-Joon Chang, *Rethinking Public Policy in Agriculture: Lessons from History, Distant and Recent*, 36 J. PEASANT STUD. 477, 478, 480-81 (2009); See U.N. Conference on Food and Development, *supra* note 5, at 9-11.

stakeholder agricultural assessment initiated by the World Bank and the FAO and approved by fifty-eight governments in Johannesburg, South Africa, in April 2008.⁸⁵ This assessment recognizes the important role of small-scale diversified farming as a means of addressing poverty, food security, and conservation of agrobiodiversity, and calls for a systemic redirection of investment toward the needs of small farmers and toward the protection of natural resources.⁸⁶

Second, multilateral and bilateral trade agreements must give developing countries the policy flexibility to utilize an appropriate mix of tariffs and subsidies to encourage domestic food production, protect the livelihoods of small farmers, and promote rural development. As an initial matter, developing countries should make aggressive use of the existing exceptions in the WTO Agreement on Agriculture that exempt certain forms of support to low-income farmers from subsidy reduction commitments.⁸⁷ In addition, trade agreements must give developing countries greater latitude to use tariffs and import barriers for food security purposes as well as the right to exclude from trade agreements those agricultural commodities of greatest importance to domestic nutritional needs and rural livelihoods (e.g. corn in Mexico). Indeed, these were among the demands put forth by a coalition of developing countries and by non-governmental organizations during the Doha Round of WTO negotiations.⁸⁸ Policy flexibility is necessary in order to rebuild the agricultural sector, to protect small farmers from devastating import surges, and to nurture higher value-added food processing industries.

Third, multilateral and bilateral trade agreements must facilitate the transition from agro-export specialization to a more diversified economic base capable of generating steady and reliable revenue streams. As explained in Part I, the world's most food insecure developing countries are those that export a narrow range of tropical commodities, and are thereby subject to chronically sluggish export earnings and market volatility that make it difficult to afford increasingly expensive imported food. Economic history teaches us that nearly all industrialized countries (including the United States, France, the United Kingdom, Germany, and Japan) achieved economic prosperity through the use of a broad range of protectionist measures, such as subsidies, tariffs, and state financing of major industries.⁸⁹ Unfortunately, the current WTO framework precludes developing countries from utilizing many of the development strategies

85. See INTERNATIONAL ASSESSMENT OF AGRICULTURAL KNOWLEDGE, SCIENCE AND TECHNOLOGY FOR DEVELOPMENT (IAASTD), GLOBAL REPORT: AGRICULTURE AT A CROSSROADS (2009) at vii, available at [http://www.agassessment.org/reports/IAASTD/Agriculture%20at%20a%20Crossroads_Global%20Report%20\(English\).pdf](http://www.agassessment.org/reports/IAASTD/Agriculture%20at%20a%20Crossroads_Global%20Report%20(English).pdf).

86. *Id.* at 379, 411, 497.

87. See Agreement on Agriculture, *supra* note 54, art. 7; Gonzalez, *supra* note 29, at 481-82; Tobias Reichert, *Agricultural Trade Liberalization in Multilateral and Bilateral Trade Negotiations*, in *THE GLOBAL FOOD CHALLENGE*, *supra* note 10, at 29, 33.

88. See Reichert, *supra* note 87, at 34-35.

89. See HA-JOON CHANG, *BAD SAMARITANS: THE MYTH OF FREE TRADE AND THE SECRET HISTORY OF CAPITALISM* 40-60 (2008); HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* 19-51, 59-66 (2002).

deployed in the past by the Global North to promote those industries most likely to enhance long-term economic well-being.⁹⁰ A key demand of developing countries in multilateral and regional trade negotiations must therefore be greater policy space for development.

Fourth, international regulation is necessary to discipline the oligopolistic power of transnational agribusiness. By ignoring the distortions caused by market concentration in the agricultural sector while reducing the ability of the state to intervene on behalf of farmers and consumers, the free market policies promoted by international trade and financial institutions reinforce the economic dominance of transnational agribusiness at the expense of the poor in the developing world.⁹¹ Thus, in addition to phasing out Northern subsidies and import barriers, it is essential to develop international legal regimes to regulate the anti-competitive practices of transnational corporations.⁹²

Fifth, governments must resist the siren song of technological, supply-side fixes—such as genetically modified organisms—to problems grounded in poverty and inequality. As I have argued elsewhere, profit-driven, corporate-dominated biotechnology threatens to replicate the anti-poor bias of the Green Revolution (with expensive patented seeds in addition to chemical inputs); to reinforce the power of transnational agribusiness; to displace indigenous food crops and biodiverse cultivation techniques; to undermine farmers' rights to save, share, and modify seeds; and to accelerate the loss of cultural knowledge regarding environmentally friendly methods of food production.⁹³ In addition, biotechnology introduces novel environmental risks, namely the transfer of transgenes from genetically modified crops to their wild relatives with unknown but potentially serious impacts on biodiversity.⁹⁴

Sixth, foreign acquisition of Southern agricultural lands must be carefully regulated to make sure that these transactions benefit affected communities, uphold the fundamental human right to food, and utilize natural resources in a sustainable manner. The first step is to strengthen the domestic law of the host state, including property law, water rights law, environmental law, tax law, and the laws governing foreign direct investment, and to ensure that the host state has the capacity to enforce these laws.⁹⁵ The second step, as discussed in Part V below, is to develop international investment agreements that impose substantive human rights and environmental obligations on the foreign investor and the foreign

90. See LEE, *supra* note 29, at 9-13.

91. See Gonzalez, *supra* note 37, at 489-92.

92. See, e.g., Carmen G. Gonzalez, *Genetically Modified Organisms and Justice: The International Environmental Justice Implications of Biotechnology*, 19 GEO. INT'L ENVTL. L. REV. 583, 637-39 (2007) (discussing efforts to regulate corporate anti-competitive behavior within the WTO framework).

93. See *id.* at 602-11 (examining the environmental and socioeconomic impacts of genetically modified crops).

94. See *id.* at 608-09.

95. See CARIN SMALLER & HOWARD MANN, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, A THIRST FOR DISTANT LANDS: FOREIGN INVESTMENT IN AGRICULTURAL LAND AND WATER 9 (2009), available at http://www.iisd.org/pdf/2009/thirst_for_distant_land.pdf.

investor's home state.⁹⁶

Finally, an analysis of potential regulatory approaches to commodity speculation and biofuels is beyond the scope of this Comment. However, it is important to recognize that the promotion of food security requires decisive measures to prevent the formation of speculative bubbles⁹⁷ as well as thoughtful and deliberate reassessment of biofuels legislation in the United States and the European Union in order to develop socially just and ecologically sustainable solutions to the climate and energy crises.

V. INTEGRATING TRADE, ENVIRONMENT, AND HUMAN RIGHTS

In addition to the strategies enumerated in Part IV, vindication of the human right to food will require a holistic re-conceptualization of international law that integrates human rights, environmental protection, and trade and investment law rather than relegating them to separate spheres. Such a vision must be premised on the hierarchical superiority of human rights norms and must regard trade and investment as means toward the realization of human rights and environmental objectives rather than as ends in themselves.⁹⁸ This integrated vision of international law must be explicitly incorporated into trade agreements rather than raised defensively for the first time before dispute resolution tribunals. This Comment concludes with a few suggestions to achieve this objective.

First, trade and investment agreements should explicitly provide that human rights and environmental norms shall take priority in the event of a conflict with the terms of trade and investment agreements.⁹⁹ Such an approach is not unprecedented. The North American Free Trade Agreement (NAFTA), for example, contains a conflict of norms provision that gives hierarchical superiority to certain enumerated environmental treaties in the event of a conflict with NAFTA provisions.¹⁰⁰

Second, trade and investment agreements should contain broad human rights and environmental exceptions designed to give the contracting parties maximum flexibility to regulate in the public interest. Such exceptions are widely used in the area of trade and investment law and include, among others, the exceptions contained in GATT Article XX.¹⁰¹

Third, countries should require *ex ante* human rights and environmental impact assessments of all trade and investment agreements

96. See *id.* at 9-13.

97. See Wahl, *supra* note 66 at 76-77 (recommending that trade in food on the spot or on derivative markets be limited to registered traders and that highly speculative activities such as short-selling be prohibited); INST. FOR AGRIC. TRADE POL'Y, COMMODITIES MARKET SPECULATION: THE RISK TO FOOD SECURITY AND AGRICULTURE 10-11 (2008) (proposing national and global regulatory strategies to address agricultural commodity market speculation), available at <http://www.iatp.org/iatp/publications.cfm?accountID=451&refID=104414>.

98. See HERNÁNDEZ-TRUYOL & POWELL, *supra* note 83, at 284-88; Gonzalez, *supra* note 92, at 626-28; De Schutter, *supra* note 83, at 15-16.

99. See Gonzalez, *supra* note 92, at 626-28.

100. See North American Free Trade Agreement, art. 104, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

101. See HERNÁNDEZ-TRUYOL & POWELL, *supra* note 83, at 282-83.

in order to identify and address any potential negative impacts. The assessment should be performed as early as possible in the negotiation process and should involve extensive public participation and consultation. The assessment should disaggregate the impact according to gender, race, ethnic origin, geographic region, and other variables so as to better evaluate the distribution of gains and losses from the trade and investment agreement.¹⁰² In the United States, for example, Executive Order 13,141, issued in 1999, requires environmental review of trade agreements.¹⁰³ However, Executive Order 13,141 is deficient in several respects, including failure to require review of extraterritorial and human rights impacts and failure to mandate the periodic review of trade agreements already in place. Nevertheless, this Executive Order represents a good starting point.

Fourth, trade and investment agreements should contain simplified waiver procedures in the event that these agreements subsequently conflict with human rights and environmental considerations.¹⁰⁴ Such waiver provisions have been used under the WTO framework, most recently to waive limitations imposed upon the least developed countries by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in cases of national medical emergencies.¹⁰⁵

Fifth, trade and investment agreements should contain sunset clauses, akin to Article 20 of the WTO Agreement on Agriculture.¹⁰⁶ Such clauses should require ex post evaluation of these agreements' human rights and environmental impacts, and should mandate renegotiation of the trade and investment agreements taking into account the results of the evaluation.¹⁰⁷

Finally, multilateral and bilateral investment agreements should specify the rights and obligations of the foreign investor, the host state, and the home state. Human rights and sustainable development should be the express overarching objective of these agreements.¹⁰⁸ This approach could be used to impose standards of conduct on transnational corporations, to require the home country of the foreign investor to more closely monitor and regulate the extraterritorial activities of its companies, and to expand the rights of victims of environmental and human rights abuses.¹⁰⁹ Such

102. See De Schutter, *supra* note 83, at 23-24.

103. See Exec. Order No. 13,141, 64 Fed. Reg. 63,169 (Nov. 16, 1999).

104. See De Schutter, *supra* note 83, at 23.

105. *Id.*

106. Agreement on Agriculture, *supra* note 54, art. 20.

107. See De Schutter, *supra* note 83, at 25.

108. See AARON COSBEY ET AL., INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, INVESTMENT AND SUSTAINABLE DEVELOPMENT: A GUIDE TO THE USE AND POTENTIAL OF INTERNATIONAL INVESTMENT AGREEMENTS 29-35 (2004), available at http://www.iisd.org/pdf/2004/investment_invest_and_sd.pdf. The International Institute for Sustainable Development has drafted a model investment agreement and produced an accompanying handbook with numerous suggestions on ways to balance investor rights and host country policy space. See *International Institute for Sustainable Development Model Agreement on Investment*, IISD.ORG, <http://www.iisd.org/investment/model> (last visited Apr. 16, 2010); see also INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT, IISD MODEL INTERNATIONAL AGREEMENT ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT (2006), available at http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf.

109. See COSBEY, *supra* note 108, at 29-35; HOWARD MANN, INTERNATIONAL INSTITUTE FOR

agreements could serve as important elements of developing countries' regulatory strategy with respect to the growing number of "land grabs" in the Global South. In addition, developing countries should reject "economic stabilization" clauses in investment contracts between the host state and the foreign investor that insulate foreign investors from lost profits associated with subsequent changes in the host state's laws (e.g. laws that impose environmental standards or place limits on the export of food).¹¹⁰ These clauses may impair the host state's ability to comply with its human rights and environmental obligations or subject the country to substantial penalties for fulfilling these obligations.

VI. CONCLUSION

The food crisis, the financial crisis, and the climate crisis have created new challenges to the attainment of global food security. However, these crises have at long last brought international attention to the plight of the small-scale farmers who cultivate the majority of the world's crops and who protect the world's diminishing reserves of biodiversity. Understanding the underlying structural causes of food insecurity is critical if we are to promote just and equitable long-term solutions rather than relying on short-term technical, supply-side fixes to problems that are rooted in poverty and inequality.

SUSTAINABLE DEVELOPMENT, INTERNATIONAL INVESTMENT AGREEMENTS, BUSINESS AND HUMAN RIGHTS: KEY ISSUES AND OPPORTUNITIES 13-15 (2008), available at http://www.iisd.org/pdf/2008/ia_business_human_rights.pdf.

110. De Schutter, *supra* note 83, at 18-19; SMALLER & MANN, *supra* note 95, at 10.