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### **Mandate of the Special Rapporteur on the right to food**

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### **MANDATE OF THE SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD**

*Attached is a background document to the report presented to the Human Rights Council session of March 2009 by Prof. Olivier De Schutter, the UN Special Rapporteur on the right to food, following his mission to the World Trade Organisation (A/HRC/10/005/Add.2). This document contains a longer set of references, as well as certain developments, which could not be included in the official version of the report due to volume restrictions.*

**Background document prepared by the UN Special Rapporteur on the Right to Food,  
Mr. Olivier De Schutter,  
on his mission to the World Trade Organization (WTO),  
presented to the Human Rights Council in March 2009  
(background study to UN doc. A/HRC/10/005/Add.2)**

## **EXECUTIVE SUMMARY**

**The present report seeks to explore the relationship between the Agreements concluded under the framework of the World Trade Organization (WTO), particularly the Agreement on Agriculture, and the obligation of the Members of the WTO to respect the human right to adequate food. It is based on the mission of the UN Special Rapporteur on the Right to Food to the WTO.**

**The report argues that, if trade is to work for development and to contribute to the realization of the right to adequate food, it needs to recognize the specificity of agricultural products, rather than to treat them as any other commodities ; and to allow more flexibilities to developing countries, particularly in order to shield their agricultural producers from the competition from industrialized countries' farmers. The main impacts the current multilateral trade regime on the right to food include (1) increased dependency on international trade, which may lead to loss of export revenues when the prices of export commodities go down, to threats to local producers when low-priced imports arrive on the domestic markets, against which these producers are unable to compete, and to balance of payments problems for the net food-importing countries when the prices of food commodities go up ; (2) potential abuses of market power in increasingly concentrated global food supply chains and further dualization of the domestic farming sector ; and (3) potential impacts on the environment and on human health and nutrition, impacts that are usually ignored in international trade discussions, despite their close relationship to the right to adequate food.**

**The report proposes ways to reconcile trade with the right to food, addressing the failure of global governance mechanisms to tackle the lack of coordination between human rights obligations and trade commitments – a failure which mechanisms ensuring a better coordination at the domestic level may not be able to compensate for. The report invites States to assess the impacts of trade agreements on the right to food and ensure they do not accept undertakings under the WTO framework which would be incompatible with their right to food obligations.**

## **I. INTRODUCTION**

This report seeks to explore the relationship between the Agreements concluded under the framework of the World Trade Organization (WTO) and the obligation of the Members of the World Trade Organization to respect the human right to adequate food, as recognized under international law. The most important achievement of the General Agreement on Tariffs and Trade (GATT) and, since 1994, the WTO, has been to provide States with a rule-based, predictable international trade system, backed by sanctions. This report asks which impact the multilateral trading system thus set up has on the ability of the WTO members to comply with their obligations towards the right to adequate food. The objective of this inquiry is to assist States in the negotiation and implementation of their commitments under the multilateral trade framework, in order to ensure that their commitments under trade agreements will support, rather than undermine, their efforts to realize the right to food at domestic level.

This report is based on the mission of the Special Rapporteur to the World Trade Organization (WTO). Meetings were held with the WTO secretariat and its Director-General, Mr Pascal Lamy, on

25 June 2008. In recognition of the fact that WTO is driven principally by its Members, the Special Rapporteur also had meetings with a number of Ambassadors to the WTO or other members of permanent representations to the WTO, between June and October 2008. Those consultations were prepared by one expert meeting, held at Paris 1-Panthéon-Sorbonne on 16-17 June 2008, and complemented by various consultations with various stakeholders, including non-governmental organizations and farmers' organisations. The Special Rapporteur would like to record his deep appreciation to all those who generously made available their time, knowledge and expertise, and he would like to mention, in particular, the cooperative spirit in which the WTO secretariat and its Director-General provided assistance to the mission.

The report is divided in five chapters. It recalls the normative framework under which the relationship between the obligation to respect the human right to adequate food and the undertakings under the WTO agreements should be analyzed (II.). It then describes the challenges the full realization of the right to adequate food faces in the world today (III.). Only if we correctly understand those challenges can we evaluate the potential impacts of the WTO agreements on the enjoyment of the right to adequate food and on the ability of the members of the WTO to realize this right (IV.). The report concludes by suggesting which solutions may be found to reconcile the right to food with a workable trading system (V.).

## II. THE NORMATIVE CONTENT OF THE RIGHT TO ADEQUATE FOOD

The right to adequate food is recognized under Article 25 of the Universal Declaration on Human Rights and under Article 11 of the International Covenant on Economic, Social and Cultural Rights. Under these instruments, States must *respect* existing access to adequate food, by abstaining from adopting measures which may result in preventing such access ; they must *protect* the right to food by adopting measures ensuring that enterprises or individuals do not deprive individuals of their access to adequate food ; finally, they must *fulfil (facilitate)* the right to food, by pro-actively strengthening people's access to and utilization of resources and means to ensure their livelihood. In addition, 'whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to *fulfil (provide)* that right directly'.<sup>1</sup>

The realization of the right to adequate food should guide the establishment of efforts aimed at developing a multilateral trading system. Article 28 of the Universal Declaration of Human Rights states that 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. This provision recognizes the co-dependency of national and international measures in the fulfilment of human rights. The right to adequate food can only be fully realized by States within a multilateral trading system which enables them to pursue policies aimed at realizing the right to food. Such a system should not only refrain from imposing obligations which directly infringe upon the right to food. It should also ensure that all States have the policy space they require to take measures which contribute to the progressive realization of the right to food under their jurisdiction. As stated by the Committee on Economic, Social and Cultural Rights, the International Covenant on Economic, Social and Cultural Rights requires that they 'move as expeditiously as possible towards that goal' by making 'full use of the maximum available resources'.<sup>2</sup> This obligation must be facilitated, not impeded, by the organisation of the multilateral trade regime. Indeed, Article 11(2) of the Covenant recognizes the need to ensure that trade contributes to the enjoyment of the right to food : 'recognizing the fundamental right of everyone to be free from hunger', the States parties undertake to adopt, 'individually and through international cooperation, the measures, including specific programmes, which are needed, 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'.

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<sup>1</sup> U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), *The right to adequate food (art. 11)*, U.N. doc. E/C.12/1999/5, at para. 15.

<sup>2</sup> E/C.12/1999/5, para. 9.

An approach to international trade based on the right to food shifts the perspective from aggregate values – from the benefits of trade for the country as a whole – to the impacts of trade on the most vulnerable and food insecure. It leads to emphasize the dimensions of participation and accountability in the negotiation and implementation of trade agreements. And it takes into consideration, not only the need to ensure a sufficient intake of calories for each individual, but also the availability and accessibility of *adequate* food, i.e., containing the required micronutrients for the physical and mental development of the individual, and culturally acceptable. All these dimensions are generally absent from discussions about the impact of trade on food security. This report will seek to bring them back in.

### III. THE CURRENT CHALLENGES FACING THE REALIZATION OF THE RIGHT TO ADEQUATE FOOD

In order to identify which regulation of international trade is most conducive of the realization of the human right to adequate food, we need to understand clearly the nature of the threats it is currently facing. These threats fall under two categories. First, there arises the question whether, in the future, agriculture will be able to feed the planet, and whether each country will be able to feed its population, through a combination of local production and food imports. Population growth, combined with the switch to more protein-rich diets in a large portion of developing countries which are succeeding in their fight against poverty, increases the pressure on the supply side of the global equation. Climate change, in addition, is threatening the ability of entire regions, particularly of regions living from rainfed agriculture, to maintain actual levels of agricultural production. In sub-Saharan Africa, as well as in Eastern Asia and South Asia, climate change will affect rains, increase the frequency of droughts and average temperature, and threaten the availability of fresh water for agricultural production. The UNDP reports an estimate according to which by 2080, the number of additional people at risk of hunger could reach 600 million, as a direct result of climate change.<sup>3</sup> In Sub-Saharan Africa, arid and semi-arid areas are projected to increase by 60-90 million hectares, and the Intergovernmental Panel on Climate Change has estimate that in Southern Africa yields from rainfed agriculture could be reduced by up to 50 percent between 2000 and 2020.<sup>4</sup> Another research estimates that, while losses in agricultural production in a number of developing countries, particularly in Sub-Saharan Africa, would be partially compensated by gains in other regions, the overall result would be a decrease of at least 3 percent in productive capacity by the 2080s. But the losses would be 16 percent if the anticipated carbon fertilization effects fail to materialize, so that ‘a prudent range for impact on global agricultural capacity by the 2080s (...) [could] lie in the range of reductions of 10 to 25 percent’, with most severe losses in agricultural productivity being located in developing countries, particularly in Africa and Latin America.<sup>5</sup> These findings are further confirmed by a recent article published in *Science*.<sup>6</sup>

It comes as no surprise if, in this context, food security is said to be achievable by improved trade, particularly in order to satisfy the needs of net-food-importing countries. Food imports are predicted to more than double between 2000 and 2030 under a business-as-usual scenario, that is, if we do not

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<sup>3</sup> UNDP, *Human Development Report 2007/2008. Fighting Climate Change: Human solidarity in a divided world*, 2007, p. 90 (citing Rachel Warren, Nigel Arnell, Robert Nicholls, Peter Levy and Jeff Price, ‘Understanding the Regional Impacts of Climate Change’, Research Report prepared for the Stern Review on the Economic of Climate Change, Research Working Paper No. 90, Tyndall Centre for Climate Change, Norwich).

<sup>4</sup> IPCC, *Climate Change 2007: Climate Change Impacts, Adaptation and Vulnerability. Working Group II Contribution to the Fourth Assessment Report of the Intergovernmental Panle on Climate Change* (S. Solomon, D. Qin, M. Manning, Z. Chen, M. Marquis, K.B. Averyt, M. Tignor and H.L. Miller, eds), Cambridge Univ. Press, Cambridge and New York, chapter 9.

<sup>5</sup> William R. Cline, *Global Warming and Agriculture. Impact Estimates by Country*, Center for Global Development and the Peterson Institute for International Economics, 2007, at p. 96.

<sup>6</sup> David B. Lobell, Marshall B. Burke, Claudia Tebaldi, Michael D. Mastrandrea, Walter P. Falcon, and Rosamond L. Naylor, ‘Prioritizing Climate Change Adaptation Needs for Food Security in 2030’, *Science*, 1 February 2008, vol. 319, pp. 607-610 (showing, on the basis of an analysis of climate risks for crops in 12 food-insecure regions, that South Asia and Southern Africa are two regions that, without sufficient adaptation measures, will likely suffer negative impacts on several crops that are important to large food-insecure human populations).

massively invest in improving agriculture in Africa and if we do not improve the capacity of the concerned countries to cope with climate change.<sup>7</sup> And indeed, Article 11(2) of the Covenant alludes to the fact that, while certain regions may be producing too little food to feed their population, other regions may have surpluses : the free flow of food commodities would therefore be desirable, in that it allows to link the supply from food-surplus regions to food-deficit regions.

However, the presumption that trade permits the efficient transfer of food supplies from surplus to deficit regions fails to take into account the wide differences in purchasing power of different regions, and the fact that hunger and malnutrition are generally not the result of the lack of food availability, but rather of the inability for the poorest segments of the population to have access to food at an affordable price. Under a hypothetical fully liberalized trade regime, in the absence of transaction costs, food commodities would flow not from surplus to deficit regions, but from regions where food is produced at the most competitive prices to regions where there is a solvent demand, i.e., where the purchasing power of the populations is sufficient, in comparison to other markets, including the domestic markets of the source country. Certain countries are net exporters of food, while at the same time have a large segment of their population which is hungry.

Indeed, food availability, while certainly a necessary condition for the enjoyment of the right to adequate food, is not a sufficient condition. Food insecurity exists even in countries where there is food in abundance, due to the lack of purchasing power necessary to purchase within segments of the population. Some 11 percent of households in the United States (and 18 percent of children) – 12.6 million people – lack access to adequate food at some point in the year. Yet, even after exports, the domestic supply of food in the U.S. is about double the amount which would be required to feed all the population.<sup>8</sup> Thus, the second part of the challenge we are facing – indeed, the most pressing challenge today – is one of accessibility of food for the poor and the marginalized. Trading more food will not help them if they are excluded from production and have no means to buy the food which arrives on the markets ; and producing more food will not assist them in purchasing food if their incomes remain too low. The majority of hungry people in the world are located in developing countries, live in rural areas, and depend on agriculture directly or indirectly for their livelihoods. They are hungry because they are poor : they are mostly net buyers of food,<sup>9</sup> and their incomes, which are on average significantly lower than those of the nonrural populations,<sup>10</sup> are insufficient to buy the food which they do not produce themselves. 50 percent of the hungry are smallholders, living off 2 hectares of cropland or less. 20 percent are landless laborers. 10 percent are pastoralists, fisherfolk, and forest users. The remaining 20 percent are the urban poor.<sup>11</sup> Any trade regime which does not benefit these categories, far from solving it, is likely to lead to further violations of the right to food.

Our challenge today is not simply to produce more food. It is to produce it in a way which preserves the environment, particularly by reducing the amount of greenhouse gas emissions which contribute to global warming ; and it is to organize such production so that it raises the incomes of those who are, today, most food insecure – smallscale farmers and agricultural laborers in developing countries –, and so that it allows States to adequately protect the urban poor. The question is whether the reform programme pursued in the WTO framework contributes to these objectives, or whether it may make

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<sup>7</sup> Mark W. Rosegrant, Siwa Msangui, Timothy Sulser, and Claudia Ringler, 'Future Scenarios for Agriculture: Plausible Futures to 2030 and Key Trends in Agricultural Growth', background paper prepared for the World Development Report 2008.

<sup>8</sup> Sophia Murphy, *Securing Enough to Eat*, International Institute for Sustainable Development (IISD), January 2005

<sup>9</sup> The World Bank, *World Development Report 2008 - Agriculture for Development*, Nov. 2007, at p. 109 (box 4.7.)

(comparing the representation among the poor smallholders of net buyers of food, self-sufficient or net sellers: in all seven countries surveyed (Bolivia, Ethiopia, Bangladesh, Zambia, Cambodia, Madagascar and Vietnam), the two first categories are a strong majority among the poor smallholders).

<sup>10</sup> M. Ataman Aksoy, 'The Evolution of Agricultural Trade Flows', in M. Ataman Aksoy and John C. Beghin (eds), *Global Agricultural Trade and Developing Countries*, The World Bank, Washington, D.C., 2005, 17, at 19 (noting that '[o]n average, farmers are poorer than nonfarmers in developing countries (...). In all developing countries, rural households have lower average incomes than nonrural households. The ratio of rural incomes to nonrural incomes ranges from 40 to 75 percent, a relationship that remains consistent across groups of developing countries').

<sup>11</sup> U.N. Millennium Project, *Halving Hunger: It Can be Done, Summary Version of the Report of the Task Force on Hunger* (New York: The Earth Institute at Columbia University, 2005), p. 6.

them more difficult to achieve – and if the latter, which measures can be taken to channel international trade in a direction which is more conducive to the realization of the right to adequate food.

#### IV. THE REFORM PROGRAMME IN AGRICULTURE

While other agreements concluded under the WTO framework, particularly the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Intellectual Property Rights (TRIPs), may have an impact on the right to adequate food – since they affect access to productive resources by food producers –, the Agreement on Agriculture (AoA) constitutes the most important of the WTO agreements in the context of this report, and it is on this agreement that the report is focused (see also E/CN.4/2002/54).<sup>12</sup>

##### 1. The Agreement on Agriculture and the Doha Round

Although agriculture was never formally exempted from the GATT disciplines, agriculture did occupy a highly specific position until the successful completion of the Uruguay round of trade negotiations, which put an end to its insulation from the trade liberalization process. The AoA essentially imposes on the parties three sets of obligations.

(1) First, they must increase market access for agricultural products. Under the AoA, all quantitative restrictions or other non-tariff measures except those justified by health and safety reasons should be replaced by tariffs (Art. 4.2), and Members should subsequently bind themselves to reduce these tariffs (Art. 4.1).<sup>13</sup> Products that are the predominant staple in the traditional diet of a developing country may be exempted from the tariffication obligation, however (Art. 5).

The process of tariffication and subsequent lowering of tariffs did not work for the benefit of developing countries. Developing countries rely more on agricultural products than on manufactured goods for their export revenues. Yet, average agricultural tariffs remain much higher than tariffs for non-agricultural products. Moreover, high tariffs were maintained on developing country export products such as cotton, sugar, cereals and horticulture. Tariff peaks were maintained, and the tariffs on tropical products remain higher and more complex tariffs than temperate zone products. In addition, tariff escalation, which protects the processing industries of importing countries, creates an obstacle to diversification of exports and the export by developing countries of higher value-added products.

(2) Second, the members must reduce the level of domestic support (calculated through the concept of ‘Aggregate Measure of Support’ (AMS)), although such subsidies are treated differently depending on how much they are considered trade-distorting. All Members may provide product specific support up to a *de minimis* threshold (5 % of the total value of production of the good concerned per year for developed countries ; 10 % for developing countries), and non-specific support for the same percentage, for instance to provide seeds or fertilizers to producers. Few developing countries in fact have the financial means required to reach those levels of support. Beyond the *de minimis* threshold, Members must refrain from the introduction of new forms of support and reduce the existing domestic support they provide to their agricultural producers by 20 % from the base period of 1986-1988 for developed countries, and by 13.3 % for developing countries (LDCs are not under any obligation to

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<sup>12</sup> See also Melaku G. Desta, ‘Food Security and International Trade Law : An Appraisal of the World Trade Organization Approach’, 35 *J. of World Trade* 449 (2001) ; Chris Downes, ‘Must the Losers of Free Trade Go Hungry ? Reconciling WTO Obligations and the Right to Food’, 47 *Virginia J. of Int. L.* 619 (2007) ; Carmen G. Gonzales, ‘Institutionalizing Inequality : The WTO Agreement on Agriculture, Food Security, and Developing Countries’, 27 *Colum. J. Environmental L.* 433 (2002) ; Kerstin Mechlem, ‘Harmonizing Trade in Agriculture and Human Rights: Options for the Integration of the Right to Food into the Agreement on Agriculture’, *Max Planck Yearbook of United Nations Law*, Vol. 10, 2006, pp. 127-190 ; Mark Ritchie & Kristin Dawkins, ‘WTO Food and Agricultural Rules : Sustainable Agriculture and the Human Right to Food’, 9 *Minnesota J. of Global Trade* 9 (2000).

<sup>13</sup> Developed countries were to cut their tariffs by an average of 36% over 6 years ; developing countries were to reduce their tariffs by an average of 24% over 10 years ; least-developed countries are not imposed any reduction commitments (see AoA, Art. 15.2).

reduce domestic support, although they are to bind support levels). Since these percentages are calculated on the basis of the Base Total Aggregate Measurement of Support in the base period, the arrangement is most beneficial to countries which already had high levels of support during the base period, since their advantage can be to a certain extent maintained.

These reduction commitments concern the measures under the ‘Amber Box’. Some measures do not fall under such undertakings. ‘Blue Box’ measures are direct payments made against production-reducing commitments and are therefore considered to be less trade-distorting, since they do not encourage overproduction and dumping on the international markets. These measures are exempted from reduction commitments under the AoA. Finally, ‘Green Box’ measures are considered not to distort trade or to distort trade only minimally ; they too are exempt. Domestic support measures may be placed in this category (a) if they are ‘provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers’; and (b) if they not have the effect of providing price support to producers (Annex 2 AoA, 1). Such measures are, for instance, investments in research, in marketing and promotion, or the provision of rural infrastructures (although the ‘subsidized provision of on-farm facilities other than for the reticulation of generally available public utilities’ and ‘subsidies to inputs or operating costs’ are explicitly excluded), but also public stockholding for food security purposes or domestic food aid, provided it is distributed ‘subject to clearly-defined criteria related to nutritional objectives’.

(3) Third, the Members must reduce existing export subsidies, and may not introduce new export subsidies not already in operation in the 1986-1990 base period. Developed countries must reduce their export subsidies by 36% in value terms and by 21% in terms of the volumes benefiting from subsidies over a period of six years, as compared to the base period. Developing countries are subjected to fewer obligations in this regard, and they have longer implementation periods. The LDCs are under no obligation to reduce whichever export subsidies they may have. However, since the introduction of any new export subsidies is prohibited, the system has in fact been advantageous to the developed States, which were the only category of States to have significant export subsidies in place prior to the entry into force of the AoA. Export subsidies are the most harmful form of subsidies for the developing countries. They lead to subsidized products arriving on domestic markets and displacing local production, which typically cannot benefit from levels of support which would allow it to remain competitive. The domestic agricultural sector therefore is unable to attract investment, leading to a cycle in which leads this sector, because if faces unfair competition, further loses competitiveness.

A number of provisions seek to accommodate what the preamble of the AoA refers to as ‘non-trade concerns’, among which ‘food security and the need to protect the environment’ are explicitly mentioned. In particular, measures adopted by developing countries which seek to encourage agricultural and rural development, investment subsidies in agriculture, and agricultural input subsidies generally available to low-income or resource-poor producers in those countries, are exempted from domestic support reduction commitments that would otherwise be applicable to such measures (Art. 6.2). A number of provisions aim at ensuring special and differential treatment for developing countries, in the form of longer implementation periods and reduced commitments (Art. 15). Yet, overall, the obligations established under the AoA clearly fit under a programme of trade liberalization in agricultural products. The expectation, when the Uruguay round was completed, was that this programme would lead to increased food prices.<sup>14</sup> Article 16 of the AoA therefore provides that, in order to counteract the negative impacts this might produce on net food-importing developing countries, developed country Members shall take the measures provided for under the Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries (‘Marrakesh Decision’). In sum, while food security is recognized as a legitimate objective, it is to be achieved in principle not by retreating from the

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<sup>14</sup> More recent analyses have sought to estimate the increases of real international commodity prices following complete trade liberalization : for example, increases are estimated to be 20.8 % for cotton, 15.1 % for oilseeds, 11.9 % for dairy products, 7.0 % for coarse grains, or 5.0 % for wheat (The World Bank, *World Development Report 2008*, cited above, p. 107 (fig. 4.6)).

programme of trade liberalization in agriculture, but by supporting countries through the reform programme.

In the Ministerial Doha Declaration of 14 November 2001, the WTO members committed themselves to ‘comprehensive negotiations aimed at : substantial improvements in market access ; reductions of, with a view to phasing out, all forms of export subsidies ; and substantial reductions in trade-distorting domestic support’. And they agreed to make special and differential treatment for developing countries ‘an integral part of all elements of the negotiations’.<sup>15</sup> At the Hong Kong WTO Ministerial Meeting of 2005, it was agreed that export subsidies will end by 2013 ; that developing countries can themselves designate some products as ‘special products’ for which tariff reductions will not be very stringent ; and that developing countries can retain their permissible *de minimis* level of domestic subsidy. At the time of writing, the Doha round of trade negotiations still has not been concluded. It is stumbling particularly on the discussions surrounding the trade-distorting impacts of various forms of domestic support provided by developed countries to their farmers, and on the special safeguard measure which a number of developing countries insist on including in the agreement. The purpose of this report, however, is not to offer any detailed commentary of these negotiations. Rather, it is to identify whether this reform programme, thus summarized, is compatible with the members’ obligations towards the right to food.

There is general agreement that the current regime of international trade is not a satisfactory one. In particular, it has not worked for the benefit of smallholders in developing countries, which form the majority of those who are hungry in the world today. On the one hand, on their own domestic markets, agricultural producers from developing countries have often been facing unfair competition from highly subsidized products exported by farmers from OECD countries. Government support to farmers in OECD countries was 258 billion USD in 2007, representing 23% of total farm receipts in these countries.<sup>16</sup> This is the lowest level of support since 1986 (when the estimates first were available) in proportion of the production value, but it still represents a very high level of support, against which developing countries are unable to compete. On the other hand, producers from these countries have been facing important obstacles when seeking to access to the high-value markets of industrialized countries. They have failed even to benefit even from preferential schemes such as the African Growth and Opportunity Act or the Caribbean Basin Initiative of the United States, the Everything But Arms initiative adopted by the European Union in favor of Least-Developed Countries, or the Cotonou Agreement between the EC and the ACP countries.<sup>17</sup> This failure may be attributed, in part, to the complexity of the rules involved – particularly the requirements resulting from rules of origin –, and to the non-tariff barriers which potential exporters face, linked in particular to standards requirements, including not only standards adopted under the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade, but also standards set by private buyers.<sup>18</sup> Finally, as already mentioned, many agricultural products are currently facing tariff peaks and tariff escalation (higher tariffs on processed products) which discourage diversification into higher value-added products, leading developing countries to an excessive dependence on an often

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<sup>15</sup> WT/MIN(01)/DEC/1, para. 13.

<sup>16</sup> *Agricultural Policies in OECD Countries : At a Glance*, OECD, Paris, June 2008.

<sup>17</sup> For Africa, see UNCTAD, *Economic Development in Africa 2008 – Export Performance Following Trade Liberalization : Some Patterns and Policy Perspectives*, 2008, chap. 2.

<sup>18</sup> M. Garcia Martinez & P. Poole, ‘The Development of Private Fresh Produce Safety Standards : Implications for Developing and Mediterranean Exporting Countries’, *Food Policy*, 29(3), pp. 229-55 ; L.J. Unnevehr, ‘Food Safety Issues and Fresh Food product Export from LDCs’, *Agricultural Economics*, 23(3), pp. 231-40. See however, for a less pessimistic view, Steven M. Jaffee and Spencer Henson, ‘Agro-Food Exports from Developing Countries : The Challenges of Standards’, in M. Ataman Aksoy and John C. Beghin (eds), *Global Agricultural Trade and Developing Countries*, cited above, chap. 6 (showing that in countries where the private sector is well organized and in which the public sector supports the efforts of exporters, producers have been able to enter markets such as for seafood and fresh fruit and vegetable). In their study of the vegetable export chain in Senegal, Johan F.M. Swinnen and Miet Maertens conclude that exports grew despite tightening standards : such tightening, they conclude, led to a shift from smallholder contract farming to integrated estate production, leading poorest households to benefit through being employed on such estates rather than by producing themselves for the global markets (M. Maertens & J.F.M. Swinnen, ‘Trade, Standards and Poverty : Evidence from Senegal’, LICOS Centre for Institutions and Economic Performance & Department of Economics, KUL, 2008).

limited number of primary commodities.<sup>19</sup>

## 2. The illusory notion of a "level playing field"

The negative impacts of the current distortions are real. It does not follow, however, that the solution consists simply in the removal of the existing distortions. Instead, if trade is to work for development and to contribute to the realization of the right to adequate food, it needs to allow more flexibilities to developing countries, particularly in order to shield their agricultural producers from the competition from industrialized countries' farmers ; and to recognize the specificity of agricultural products, rather than to treat them as any other commodities. The reason for this is obvious, and it is at the heart of what justifies special and differential treatment for developing countries : even after the removal of existing trade-distorting measures, which currently are disproportionately benefiting developed countries, the productivity per active laborer in agriculture will remain much lower in developing countries, on the average, than in developed countries. In 2006, agricultural labour productivity in LDCs was just 46 percent of the level in other developing countries and below 1 percent of the level in developed countries. In addition, these massive differences in productivity are increasing : labour productivity grew by only 18 percent in LDCs between 1983 and 2003, by 41 percent in other developing countries and by 62 percent in developed countries.<sup>20</sup> Depending on the kind of equipment available to farmers in LDCs or in developing countries, some estimates suggest that the differences in productivity per active agricultural labourer between the most efficient and the least efficient producers amount to 1/1000 or more.<sup>21</sup>

In this context, the idea of establishing a 'level playing field' is meaningless. The deepening of the reform programme under the AoA (improved market access, limits on domestic support and the phasing out of export subsidies) will not result in agricultural producers in developing countries being able to compete on equal terms with producers in industrialized countries, unless wages in developing countries are repressed at very low levels to compensate for a much lower productivity per active laborer. Certain developing countries have a highly mechanized agricultural sector and, particularly since the wages in the agricultural sector remain comparatively low in comparison to those in OECD countries, have a strong comparative advantage in agriculture and would clearly benefit from the removal, or at least the lowering, of the trade-distorting subsidies of the developed countries.<sup>22</sup> But in other developing countries, particularly LDCs, agriculture remains a fragile sector, as a result of lack of investment in agriculture for a number of years. Encouraging these countries to open up their agricultural sector to competition by binding themselves to low rates of import tariffs may therefore be inappropriate, particularly if we take into account that food insecurity is mostly concentrated in the rural areas and that a large portion of the population in the countries which are most vulnerable depends on agriculture for their livelihoods : in 2000–2003, 70 % of the economically active population was engaged in agriculture in the LDCs, as against 52 % in other developing countries, and 3 % in the developed countries.<sup>23</sup>

Neither the failure of many developing countries to invest sufficiently in agriculture, nor the damage caused to their agricultural sector by the lowering of import tariffs on agricultural products, are attributable to the disciplines of the WTO. The main responsibility for this situation lies with the international financial institutions, particularly with the structural adjustment programmes imposed on States, as a condition for their access to loans, in the 1980s. Domestic policies too may often be faulted for having paid too little attention to agriculture, and for having sacrificed the long-term interest

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<sup>19</sup> A.F. McCalla & J. Nash, *Reforming Agricultural Trade for Developing Countries. Key Issues for a Pro-Development Outcome of the Doha Round*, vol. I, World Bank, Washington D.C., 2007.

<sup>20</sup> UNCTAD, *The Least Developed Countries Report, 2006 – Developing Productive Capacities* (UNCTAD/LDC/2006), p. 137.

<sup>21</sup> Marcel Mazoyer, 'Pauvreté paysanne, sous-alimentation et avenir de l'humanité', in St. Desgain & O. Zé (dir.), *Nourrir la planète*, éd. Luc Pire, pp. 10-29, at p. 20.

<sup>22</sup> This is the case, in particular, for countries in the Cairns Group (Argentina, Brazil, Chile, Colombia, Costa Rica, Indonesia, Malaysia, Philippines, South Africa, Thailand and Uruguay).

<sup>23</sup> UNCTAD/LDC/2006, p. 137.

of the country in strengthening their agricultural sector, to the short-term interest of governments in the arrival of food at low prices on local markets. Conversely, adequate domestic policies can be a condition for any opportunities created by improved market access to materialize, for example by removing supply-side constraints facing producers or by helping to meet adjustment costs.

But attributing blame is of limited usefulness. What matters is to assess the impact of trade liberalization by taking into account the reality of these constraints facing governments, which in many cases makes it difficult or impossible for them to implement policies at domestic level which would allow them to maximize the benefits from trade, while minimizing the negative impacts, particularly by fully using the flexibilities they are allowed. It would be irresponsible to simply presume that such complementary domestic policies can be implemented adequately in the countries concerned, with a speed commensurate to the impact of trade liberalization itself. Indeed, to a large extent, as a result of the wide differences between the applied and the bound tariff rates in agriculture, the current *applied* regime of agricultural trade is not far removed from what would result from any further commitments as should result from the successful conclusion of the Doha round of negotiations. Yet, with few exceptions, developing countries' governments having been unable to take the measures which would alleviate the problems referred to above – insufficient market access for producers from developing countries and a vulnerability of these producers to import surges on their own domestic markets – . The lesson is that we should not too lightly presume that these countries have the ability to adapt to the context shaped by international trade : while governments may be unable to take all appropriate measures to do so – for instance, in sub-Saharan Africa in particular, as a result of the removal of State institutions (such as crop marketing boards) which supported agricultural producers until the early 1980s<sup>24</sup> –, there may be no private sector robust enough to adjust and seize what some describe as the opportunities of trade liberalization.

## V. THE IMPACTS OF THE REFORM PROGRAMME IN AGRICULTURE ON THE RIGHT TO FOOD

The impacts of the removal of barriers to trade in agriculture on the right to food are examined at three levels. At the macro-economic level, trade liberalization may increase the vulnerability of countries as a result of their dependency on international trade, and it may further fragilize the situation of agricultural producers in certain developing countries (1.). At the micro-economic level, it contributes to reshaping the global food supply chain in a way which favors transnational corporations, whose freedom to act is broadened at the same moment as the regulatory tools States may resort to are being limited (2.). But the economic impacts are not all that matters. International trade in agricultural commodities also has profound impacts on the environment, and on nutrition and health, which States cannot ignore (3.).

These impacts cannot be attributed to the implementation of the WTO Agreements considered in isolation, and indeed, this report argues that many of these impacts can be mitigated even within the framework set by the reform process launched by the AoA. But neither can it be ignored that the WTO Agreements are implemented in a specific context, which is such that developing countries all too often have been unable to gain from the opportunities these agreements created, while having had to suffer the consequences from trade liberalization on their economies. And the pillars of the AoA – improved market access, and reduction of domestic support and export subsidies – are not matched by corresponding obligations imposed on States to act cooperatively to limit volatility of prices of commodities on international markets, to regulate the commercial practices of transnational corporations along the global food supply chain, or to take into account environmental and health dimensions in their trade policies. It is this mismatch which is at the source of the concerns raised by trade liberalization : governments should pay as much attention to the need to develop trade sustainably, as they do to remove existing distortions to trade.

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<sup>24</sup> UNCTAD, *Economic Development in Africa 2008 – Export Performance Following Trade Liberalization : Some Patterns and Policy Perspectives*, 15 September 2008, chap. 2, pp. 37-47.

A double-track strategy may therefore be recommended. First, States should strengthen their own agricultural sector, and thereby to allow the poorest segment of the population to benefit from an increased income and additional source of employment. In the long term, due to the unavoidable rise of the cost of transport, there is no other way to sustainable food security. That is not to say that there is no role for international trade. But it should work for the benefit of those who, today, are most food insecure, and it should be made more environmentally sustainable. This will not happen by chance ; it can only happen by design. This should form a second part of the strategy.

### **1. The macro-economic impacts of trade liberalization : increased dependency on international trade**

Trade liberalization encourages each country to specialize into the production in which it has a comparative advantage. However, whether or not a country has such a comparative advantage in the production of any particular commodity depends, not only on its natural endowments, such as soil or climate, but also, increasingly, on specific public policies, or on the order in which the respective trading partners have achieved economies of scale in particular lines of production. Comparative advantage is constructed, rather than revealed. Although countries are constrained by natural factors in what they may produce, whether or not they are competitive in the production of agricultural commodities primarily depends on choices which are of a political nature – how much is invested in rural infrastructure, in irrigation, or in developing access to micro-credit, or how much support is given to farmers to compensate for insufficiently remunerative prices. The question therefore is which incentives result for States, in the construction of their comparative advantage, from the opening of international trade. On the one hand, States may seek to improve the ability of their producers to benefit from the opportunities of international trade, and particularly, for developing countries, from better access to the high-value markets of industrialized countries. On the other hand, States may find that importing certain goods, such as processed foods, may be cheaper than producing them locally, and they may therefore increase their dependence on imports for feeding their population. Specialization according to comparative advantage thus leads to two forms of dependency : first, for the acquisition of foreign currency, on the value of exports ; second, for the ability of countries to feed their population, on the price of imports.

The example of sub-Saharan African countries is illustrative. Due in part to the highly penalizing structure of tariffs in OECD countries through tariff peaks and tariff escalation, and in part, to the presence on international markets of highly subsidized foods produced in industrial countries, sub-Saharan Africa has remained dependent on traditional non-fuel primary commodity exports such as coffee, cotton, cocoa, tobacco, tea and sugar, and was essentially unable to develop into an exporter of processed food : South Africa, the largest African exporter of processed food, had a global market share of only 1 percent in the period 2000-2005.<sup>25</sup> At the same time, while many African countries were net food-exporting countries until the 1970s, they have become for the most part net food-importing countries since the 1980s, due partly to the lack of investment in agriculture, and partly to the agricultural subsidies in developed market economies, which itself in turn discouraged agricultural investment.<sup>26</sup> The result is well known : it has led to increased vulnerability of these countries both to worsening terms of trade and to fluctuations in commodity prices – fluctuations which are particularly important in the agricultural sector due to the sensitivity of this sector to weather-related events and the low elasticity of both supply and demand –. More precisely, the dependency on international trade may lead to three consequences : to loss of export revenues when the prices of export commodities go down ; to threats to local producers when cheap imports arrive on the domestic markets, against which these producers are unable to compete ; and to balance of payments problems for the net food-importing countries when the prices of food commodities go up. The WTO agreements sought to

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<sup>25</sup> OECD, Business for Development 2008, Promoting Commercial Agriculture in Africa. A development Centre Perspective, Paris, 2008.

<sup>26</sup> UNCTAD, The Changing face of commodities in the twenty-first century. TD/428. Note prepared by the UNCTAD secretariat, UNCTAD XII, Accra, Ghana, 20–25 April 2008.

address the latter two problems ; since the phasing out of the commodity stabilization agreements of the 1960s and 1970s, the first problem has been addressed not at all.

In the future, more attention should be paid to the need to develop tools to limit the volatility of prices on the international markets of commodities. Such volatility makes States which are most dependent on international trade most vulnerable to shocks, such as overproduction or harvest failures in other States, leading to brutal price increases or declines. However, it is the dependency of countries on food imports for the food security of their population which produces the most immediate impacts on the right to adequate food. These impacts are twofold :

First, import surges may threaten the ability for the local producers in net food-importing countries to live from their crops, when such import surges lead to such low prices on the domestic markets that they are driven out of business. Such surges have been a frequent occurrence, both before and after the entry into force of the Agreement on Agriculture. 12000 cases of import surges were documented in a survey covering 102 developing countries over the period 1980-2003. The FAO concluded that, using the definitions contained in Article 5 AoA, the frequency of import surges exceeded 20% (i.e., one every five years) for all basic food commodities, with particularly high frequencies for rice (40.1%), sugar (40.4%), palm oil (36.6%), cheese (36.4%) and wheat (35.9%). These frequencies have generally increased all in the post-1994 period, except for wheat, rice, maize and palm oil. The countries most affected were India and Bangladesh in Asia, Zimbabwe, Kenya, Nigeria, Ghana and Malawi in Africa, and Ecuador and Honduras in Latin America.<sup>27</sup>

Such import surges threaten the livelihoods of farmers and agricultural labourers living off these crops.<sup>28</sup> For instance, in Ghana, rice imports increased from 250,000 tonnes in 1998 to 415,150 tonnes in 2003. Domestic rice, which had accounted for 43 percent of the domestic market in 2000, captured only 29 percent of the domestic market in 2003. As a result, 66 percent of rice producers recorded negative returns.<sup>29</sup> In the same country, tomato paste imports increased by 650 percent from 3,300 tons in 1998 to 24,740 tons in 2003, a significant proportion (36%) coming from Italy. Local producers – which are mostly smallscale farmers, suffering from a lack of competitiveness and investment – lost 35 percent of the share of the domestic market. In Cameroon, poultry imports increased nearly 300 percent between 1999 and 2004. Some 92 percent of poultry farmers dropped out of the sector. 110,000 rural jobs were lost each year from 1994 to 2003. In Cote d'Ivoire, poultry imports increased 650 percent between 2001 and 2003, causing domestic production to fall by 23 percent. The falling prices forced 1,500 producers to cease production and led to the loss of 15,000 jobs. In Mozambique, vegetable oil imports (palm, soy and sunflower) saw a fivefold increase between 2000 and 2004, as local production was unable to supply the rapidly increasing local demand. In a context of declining prices, with the domestically refined oils following the price movements of imported refined oil, the margins of local producers shrank drastically, leading to plant closings and to an overall reduction of the volumes of locally produced oil.

These import surges experienced by developing countries are the result of the lowering of import tariff barriers at levels significantly below the tariffs bound under the AoA, which these countries consented to as part of the structural adjustment programmes imposed on them as a conditionality to receive loans. Combined with the declining prices on the international markets, partly attributable to subsidies provided to their agricultural producers by OECD countries and the resulting overproduction, this led to the arrival of cheap commodities on domestic markets which the local producers in developing countries were unable to compete with. The supply-side constraints facing these producers vary from country to country, but they include low productivity due to reliance on low agricultural technology, lack of access to credit and agricultural inputs, lack of training and technical assistance, and lack of

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<sup>27</sup> FAO Brief on Import Surges – Issues, available on [ftp://ftp.fao.org/docrep/fao/009/j8675e/j8675e00.pdf](http://ftp.fao.org/docrep/fao/009/j8675e/j8675e00.pdf) (consulted on 15 November 2008).

<sup>28</sup> See, for a series of case studies, the FAO Briefs on Import Surges, <http://www.fao.org/es/esc/en/378/406/index.html> (consulted on 15 November 2008).

<sup>29</sup> See also A. Paasch (ed) et al., *Trade Policies & Hunger. The impact of trade liberalisation on the Right to Food of rice farming communities in Ghana, Honduras and Indonesia*, FIAN and the Ecumenical Advocacy Alliance, October 2007.

rural infrastructural services. While these constraints could be partly removed by increased investments in agriculture and public policies supporting farmers, this represents a medium- to long-term perspective which does not constitute a response, in the short term, to the inability of farmers affected to increase supply in response to demand, and to improve their competitiveness in the face of competition from imports.

The provisions contained in the current version of the AoA are insufficient to allow countries to react to the disruptions caused by import surges. Under the AoA, members which resorted to tariffication of their non-trade barriers may impose 'special safeguard measures' (SSG) in the form of additional tariffs when confronted to import surges of certain products – i.e., imports exceeding a specified trigger level, or whose price falls below a specified trigger price (Art. 5). However, most developing countries did not use tariffication. 39 WTO Members, including 22 developing countries, have reserved the right to resort to the special safeguard option on hundreds of products. The SSG mechanism was triggered by only 10 Members, including 6 developing countries, between 1995 and 2001 ; and between 1995 and 2004, developing countries triggered the SSG in only 1 percent of the cases in which they could have applied it.<sup>30</sup> These figures may be compared with the number of import surges experienced by developing countries. As a protection against such surges, the current SSG mechanism is ineffective.

A second impact on the right to adequate food of developing countries' dependency on food imports occurs when prices undergo increases on international markets. In such circumstances, net food-importing countries may undergo balance of payment problems : the difficulties these countries encountered through the period of 2007-2008, when these prices rose significantly, provided a vivid illustration of this risk.

The Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries ('Marrakech Decision'), which is part of the WTO agreements, was intended to provide an answer to such a situation. In that Decision, the members note that, as a result of the reform programme, least-developed and net food-importing developing countries (NFIDCs) 'may experience negative effects in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs'. Four response mechanisms are provided. These are : (1) the provision of food aid at a level which is sufficient to continue to provide assistance in meeting the food needs of developing countries ; (2) the provision of technical and financial assistance to least-developed and net food-importing developing countries to improve their agricultural productivity and infrastructure ; (3) favorable terms for agricultural export credits ; and (4) short-term financing facilities benefiting developing countries in order to allow them to maintain normal levels of commercial imports.

The Marrakesh Decision has not been adequately implemented. It is striking that there exists within the WTO no mechanism to systematically monitor the impact of the AoA reform process on the NFIDCs.<sup>31</sup> Furthermore, the notion of 'adequate supplies' of basic foodstuffs –which NFIDCs should be able to obtain from external sources 'on reasonable terms and conditions' throughout the reform process – remains undefined, although it is this notion which should trigger the mechanisms provided for under the Decision. Finally, there are difficulties with each of the four mechanisms which the Marrakesh Decision establishes :

(1) The Marrakesh Decision refers to the need to review the level of food aid established periodically by the Committee on Food Aid under the Food Aid Convention 1986 and to 'initiate negotiations in the appropriate forum to establish a level of food aid commitments sufficient to meet the legitimate

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<sup>30</sup> See FAO, Trade Policy Briefs on Issues Related to the WTO Negotiations on Agriculture, No. 9 A Special Safeguard Mechanism for Developing Countries, available at: <ftp://ftp.fao.org/docrep/fao/008/j5425e/j5425e01.pdf>.

<sup>31</sup> UNCTAD, Impact of the Reform Process in Agriculture on LDCs and Net Food-Importing Developing Countries and Ways to Address Their Concerns in Multilateral Trade Negotiations, UN Doc. TD/B/COM.1/EM.11/2 and Corr.1 of 23 June 2000, paras. 25 and ff.

needs of developing countries during the reform programme'. The 1995 and 1999 Food Aid Conventions (FACs) were a result of this proclaimed objective. The Marrakech Decision also included a commitment to 'adopt guidelines to ensure that an increasing proportion of basic foodstuffs is provided to least-developed and net food-importing developing countries in fully grant form and/or on appropriate concessional terms in line with Article IV of the Food Aid Convention 1986'. However, Article VII (a) of the Food Aid Convention provides that food aid under the Convention may be provided to least-developed countries and low-income countries, as well as to 'lower middle-income countries, and other countries included in the WTO list of Net Food-Importing Developing Countries at the time of negotiation of this Convention, *when experiencing food emergencies or internationally recognised financial crises leading to food shortage emergencies, or when food aid operations are targeted on vulnerable groups*'. Thus, as regards the NFIDCs which are neither LDCs nor low income countries, more restrictive conditions are stipulated under the FAC than would be required in order to ensure an adequate implementation of the Marrakesh Decision.<sup>32</sup> The FAC could be amended in order to put an end to this discrepancy. In addition, the guidelines referred to in the Marrakesh Decision could be adopted, in order to impose an obligation on the States parties to the FAC to provide food aid at levels which ensure that NFIDCs will at all times be able to ensure an adequate protection of the right to food under their jurisdiction.

(2) The provision of assistance to LDCs and NFIDCs in order to allow them to improve their agricultural productivity and infrastructure has been insufficient over the last two decades. Both the proportion of official development assistance dedicated to agriculture and the proportion of national budgets going to agriculture have declined significantly since the early 1980s.<sup>33</sup> While commitments have been made in various fora to reverse this trend, it remains to be seen whether there will be sufficient political will to implement these resolutions.

(3) The Marrakesh Decision provides that appropriate provision should be made in any agreement on agricultural export credits for differential treatment of LDCs and NFIDCs. For the moment, the shares of these countries in total agricultural exports remain small. Yet, little progress has been achieved on this point.

(4) Para. 5 of the Marrakesh Decision provides for the possibility for NFIDCs experiencing balance of payment difficulties to draw on 'existing facilities, or such facilities as may be established' in order to enable them to address their financing difficulties. The main facility which has been considered to satisfy this requirement is the IMF Compensatory Financing Facility (CFF), initially established in 1963. The CFF was expanded in 1981 to cover excess cereal import costs, following requests of the World Food Council and the FAO, and in consideration of the high volatility of food prices in the 1970s. In fact however, this facility has been of little usefulness to NFIDCs.<sup>34</sup> Access to the CFF is restricted to countries experiencing temporary balance of payments difficulties linked to factors largely beyond the control of the authorities, such as a rise in cereal import costs, a condition which very few countries have been considered to meet. In addition, access to loans are subject to conditionality, which the Marrakesh Decision recognizes explicitly by referring to facilities extended 'in the context of adjustment programmes'. Finally, here too, there is a discrepancy between the CFF and the Marrakesh Decision : the CFF is limited to cereals only, whereas the Decision covers all basic foods.

On 25 April 2001, a group of 16 developing country Members of WTO submitted a proposal which called for, inter alia, the establishment of an Inter-Agency Revolving Fund (RF)<sup>35</sup> under which, in

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<sup>32</sup> The countries concerned are Barbados, Mauritius, St. Lucia, Trinidad and Tobago.

<sup>33</sup> The World Bank, *World Development Report 2008 – Agriculture for Development*, 19 October 2007, p. 7.

<sup>34</sup> It is significant that, in order to assist countries to face the balance of payments difficulties in 2008 as a result of the brutal increases in prices of food commodities on international markets, the International Monetary Fund provided additional balance of payments support by augmented access to 12 countries under Poverty Reduction Growth Facility (PRGF) arrangements.

<sup>35</sup> Proposal to Implement the Marrakesh Ministerial Decision in Favour of LDCs and NFIDCS, G/AG/W/49, 19 March 2001, and Add.1 (23 May 2001), and Add.1/Corr.1 (27 June 2001).

addition to technical and financial assistance to LDCs and NFIDCs for specific projects linked to improving agricultural productivity and related infrastructure, financing would be provided at concessional terms without requiring any justification other than evidence that import bills were excessive. This system was conceived as self-financing : borrowing countries would assume the obligation to repay their loans, for instance within a period of two years. The UNCTAD later elaborated on this proposal, which was included by the WTO Doha Ministerial Conference among the implementation issues<sup>36</sup> and led to an Inter-Agency Panel being established to examine the issue.<sup>37</sup> No follow-up was given, at yet, to the proposal for a revolving fund. It is therefore to be welcomed that the Exogenous Shocks Facility (ESF) has been revised in September 2008 in order to allow the IMF to help its members cope with events such as commodity price changes, by including a rapid-access component in the facility and by providing concessional terms of financing, focused on the adjustment to the underlying shock but with less emphasis than previously on broader structural adjustments.

## **2. The micro-economic impacts of trade liberalization : the impact on the shape of the global food supply chain and the dualization of the farming sector**

Increased cross-border trade in agricultural products implies that, as the production of food is reorientated towards serving the foreign markets rather than the domestic markets, the role of transnational corporations – commodity traders, food processors, and global retailers – increases. These corporations serve an indispensable function in linking producers, particularly from developing countries, to markets, particularly to the high-value markets of industrialized countries. But since these corporations have activities in different countries and can choose the country from which they source, they may be difficult to regulate, particularly as regards their buying policies. This constitutes a source of dependency for the farmers who supply them. And it encourages the segmentation of the farming sector, increasingly divided between one segment which has access to high-value markets and, as result, to the best technologies, inputs (including land, water, and state support), credit, and political influence, and another segment which is left to serve only the low-value, domestic markets, and is comparatively neglected and marginalized.

Concentration in the food system is significant. This results in widening the spread between world and domestic prices in commodity prices for wheat, rice, and sugar, for instance, which more than doubled between 1974 and 1994 ; and, since most large commodity buyers are based in the OECD countries, this limits the portion of the value captured by developing countries. In its World Development Report 2008, the World Bank highlights high concentration rates in coffee, tea, and cocoa : ‘Coffee is produced by an estimated 25 million farmers and farm workers, yet international traders have a CR4 of 40 percent, and coffee roasters have a CR4 [the share of market of the 4 dominant actors] of 45 percent . There are an estimated 500 million consumers. The share of the retail price retained by coffee-producing countries—Brazil, Colombia, Indonesia, and Vietnam account for 64 percent of global production—declined from a third in the early 1990s to 10 percent in 2002 while the value of retail sales doubled. Similar concentrations are observed in the tea value chain where three companies control more than 80 percent of the world market. Cocoa has a CR4 of 40 percent for international traders, 51 percent for cocoa grinders, and 50 percent for confectionary manufacturers. Developing countries’ claim on value added declined from around 60 percent in 1970–72 to around 28 percent in 1998–2000’.<sup>38</sup> Farmers in industrialized face the same constraints, resulting from the need to go through commodity traders which have a dominant position : two companies control 40 percent of the grain exports from the United States.<sup>39</sup> Similar trends towards increased concentration occurs in the retail sector,<sup>40</sup> although the speed of concentration here seems to have decreased in recent years.<sup>41</sup>

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<sup>36</sup> Decision on Implementation-Related Issues and Concerns, WTO Doc. WT/MIN(01)/17 of 20 November 2001, para. 2.2.

<sup>37</sup> Inter-Agency Panel on Short-Term Difficulties in Financing Normal Levels of Commercial Imports of Basic Foodstuffs, Report of the Inter-Agency Panel, WTO Doc. WT/GC/62 G/AG/13 of 28 June 2002.

<sup>38</sup> At p. 136.

<sup>39</sup> Sophia Murphy, ‘Concentrated Market Power and Agricultural Trade’, *EcoFair Trade Dialogue Discussion Papers*, 14 (Aug. 2006).

<sup>40</sup> See *Special Feature: Globalization, Urbanization and Changing Food Systems in Developing Countries*, FAO (2004) (reporting that FDI in food industries increased from \$743 million to more than \$2.1 billion from 1988 to 1997, far outpacing

The results of the expansion of global supply chains are ambiguous. On the one hand, this creates opportunities, by giving farmers from developing countries access to high-value markets, particularly where these farmers have certain comparative advantages such as lower land and labour costs and longer growing seasons, and where they are relatively close to those markets – as are Sub-Saharan producers to European markets. On the other hand however, global sourcing increases the number of suppliers and, thus, the competition between them, leading to pricing policies by buyers which reduce the share of the final value of the product which goes to the producers – the farmgate price, as opposed to the retail price. Given the increased concentration of market power in the agricultural commodities system, in the hands of commodity buyers and large retailers, these actors impose their prices on producers; they impose standards which many smallscale farmers are unable to meet; particularly for crops like wheat or soybean, for which economies of scale represent important productivity gains, smallscale farmers are unable to compete, and they are relegated to the low-value, local markets, which puts them at a strong disadvantage in the competition for land, water, or other productive resources, unless they end up working as badly paid agricultural labourers.

Certain strategies could be developed to avoid smallscale farmers being squeezed out by the development of global supply chains: they include cooperatives, outgrower schemes, public-private initiatives and regional initiatives.<sup>42</sup> However, these strategies are still underdeveloped and clearly not sufficient, at present, to counteract the trend towards more concentration and increased dualization of the farming sector. This is particularly the case since large buyers seek to minimize transactions costs, which are high when they seek to source from smallscale farmers who are dispersed geographically and are far removed from centralized collection facilities. In addition, large agricultural producers are better equipped to adapt to shifting demand and to comply with volume and traceability requirements, as well as with environmental and food safety standards which global retailers increasingly seek to monitor compliance with.<sup>43</sup>

### **3. The non-economic impacts of trade liberalization : environmental and health dimensions**

Reliance on international trade in order to achieve food security cannot ignore its impact on the environment and on nutrition. These elements are mostly ignored in discussions on international trade. They are nevertheless crucial. As recalled above, climate change constitutes the single most important threat to the future ability of the planet to feed its population: any measure which contributes to further global warming should be therefore avoided. And the right to food cannot be equated with a sufficient daily of calories intake: it is a right to adequate food, which *requires* that the diet as a whole contains a mix of nutrients for physical and mental growth, development and maintenance, and physical activity, requiring from States that they maintain, adapt or strengthen dietary diversity and appropriate consumption and feeding patterns.<sup>44</sup>

#### *a) Environmental dimensions*

The lowering of barriers to international trade leads to increased competition between producers located in different countries, each with their own policies aimed at controlling emissions of greenhouse gases (GHG) and the depletion of soils, particularly through the use of chemical fertilizers. This leads to the fear that investors and buyers may turn to jurisdictions which impose fewer

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agricultural investments, and noting that the 30 largest supermarket chains now account for about one third of food sales worldwide); or, for example, 'Horticultural Producers and Supermarket Development in Indonesia', World Bank Report No. 38543-ID at vi and vii (2007) (noting that traditional retail loses about 2 percent of its share each year in Indonesia).

<sup>41</sup> Tim Reardon and Ashok Gulati, *The Rise of Supermarkets and Their Development Implications: International Experience Relevant for India* IFPRI Discussion Paper 00752, 17 (2008).

<sup>42</sup> See, highlighting the measures which could facilitate cooperation between supermarkets and smallholder farmers, Oli Brown & Christina Sander, 'Supermarket Buying Power: Global Supply Chains and Smallholder Farmers', *International Institute for Sustainable Development* 11 (March 2007).

<sup>43</sup> C. Dolan & J. Humphrey, (2001) 'Governance and Trade in Fresh Vegetables: The Impact of UK Supermarkets on the African Horticultural Industry', *Journal of Development Studies* 37(2) (2001), p. 175.

<sup>44</sup> E/C.12/1999/5, para. 9.

constraints, and whose producers are therefore put at a competitive advantage. While this concern has been mainly expressed as regards industries relocating, it may also be relevant to agricultural production, since agriculture produces significant effects on climate change, not only through the production and release of greenhouse gases such as carbon dioxide, methane, and nitrous oxide, but also by altering the earth's land cover : land use change such as deforestation and desertification is a major anthropogenic source of carbon dioxide. For the moment, however, there seems to be no evidence that countries are discouraged from imposing restrictions on agricultural practices, with a view to limiting their GHG effects or their impact on soils, because of the potential impact of such restrictions on the productivity of their producers.

But there is more to the relationship between trade liberalization and the environment. Long production chains imply long distances in transport. It has been stated that 'about three quarters of the energy consumption in the food system takes place beyond the farm gate, and energy used to transport foods to rich country markets from around the globe, 365 days a year, regardless of seasons, accounts for a significant part of total energy consumption in the food system'.<sup>45</sup> General conclusions are difficult to draw, since the impact of the transportation of food over long distances, as encouraged by the globalisation of supply chains, depends on the mode of transportation used, and may be offset to some extent if food imported to an area has been produced in an environmentally more sustainable way than the food available locally. For example, a case study showed that it can be more sustainable (at least in energy efficiency terms) to import tomatoes from Spain than to produce them in heated greenhouses in the United Kingdom outside the summer months.<sup>46</sup> What is clear however is that road transport and air transport (representing respectively 74 percent and 12 percent of the GHG emissions produced by transport, which itself is responsible for 23 percent of the world energy-related GHG emissions),<sup>47</sup> which are typically used for the transport of fresh food, have a serious impact on climate change. This impact is increasing as consumers are encouraged to expect all foods to be available, at all times of the year, without regard for the seasons. A study done on the 'food miles' of food consumed in the United Kingdom for instance highlighted that air freight is the fastest growing mode of food transport, accounting for 11 per cent of the food industry's transport emissions despite only carrying 1 per cent of the food and making up just 0.1 per cent of the food miles.<sup>48</sup> Such modes of food consumption are not sustainable in the long term.

Most importantly, the various modes of agricultural production may have widely different impacts on global warming. If clearing forest to create farmland is included, agriculture is estimated to be responsible for about 30 percent of total global anthropogenic emissions of GHGs.<sup>49</sup> The conversion of tropical forests to agricultural land, the expansion of rice and livestock production (31 percent) and the increased use of nitrogen fertilizers (38 percent) have all been significant contributors to GHG emissions, in the form of methane and nitrous oxide. While both of these gases are released in much smaller quantities than carbon dioxide, but they have a much greater global warming potential : one tonne of nitrous oxide or methane have a far greater impact on climate change than a tonne of carbon dioxide.<sup>50</sup> While the progressive switch to more intensive forms of agricultural production, with the attendant environmental impacts and negative consequences for global warming, cannot be attributed directly to the increase of global trade in agricultural commodities, this is nevertheless a trend which is encouraged by the specialization of countries in cash crops for exports. More importantly, the future regulation of international trade in agricultural commodities should take into account the impact of various modes of agricultural production on climate change, in order to allow countries to provide incentives in favour of forms of production which better respect the environment. Agro-industrial forms of agricultural production are also unsustainable because of their threats to agro-biodiversity,

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<sup>45</sup> W. Sachs and T. Santarius, *Slow Trade – Sound Farming*, p. 24.

<sup>46</sup> *Id.*, p. v.

<sup>47</sup> These are figures from the International Energy Agency for 2004.

<sup>48</sup> The Validity of Food Miles as an Indicator of Sustainable Development: Final report, DEFRA, July 2005, p. ii.

<sup>49</sup> World Agriculture towards 2015, FAO, 2003,

<http://www.fao.org/docrep/005/Y4252E/y4252e00.HTM>.

<sup>50</sup> Friends of the Earth, Food and Climate Change – Briefing, October 2007, see [www.foe.co.uk/resource/briefings/food\\_climate\\_change.pdf](http://www.foe.co.uk/resource/briefings/food_climate_change.pdf) (last consulted on November 15th, 2008).

and because of their dependence on cheap oil. Reversing the trend towards a generalization of these forms of production is important if we aim at food security, considering the threat of climate change on our ability to maintain current levels of agricultural productivity in many regions.

#### *b) Nutrition and health dimensions*

Partly as a result of tariff escalation in developed countries and partly as a result of comparative advantage, developing countries mostly export commodities, including fresh fruit and vegetables, and they import processed foods from developed countries. This has led to shifts in dietary habits in developing countries, whose populations increasingly consume 'Western' diets rich in salt, sugar, and fat. Higher rates of obesity resulted, as well as diseases such as heart disease and type 2 diabetes. Overweight is now 'among the top five risk factors for loss of disability-adjusted life years (DALYs) in both developed countries and low-mortality developing countries (although underweight still ranks higher)'.<sup>51</sup> Urbanization and increased employment of women, which leads to heavier reliance on foods prepared outside the home, including foods available from supermarkets, have played a significant role in this evolution ; but reliance on imported foods has also been a factor, which governments should take into account in their trade policy decisions.

## VI. RECONCILING TRADE WITH THE RIGHT TO FOOD

### **1. The challenge of fragmentation**

The previous chapter identified a number of potential impacts of trade liberalization on the ability of States to comply with their obligation towards the human right to adequate food, as required in particular by Article 25 of the Universal Declaration of Human Rights and Article 11 of the International Covenant on Economic, Social and Cultural Rights. Yet, their human rights obligations and the commitments they make through the conclusion of agreements under the WTO framework remain uncoordinated. At international level, this lack of coordination is one example among others of the problem of fragmentation of international law into a number of self-contained regimes, each with their own norms and dispute-settlement mechanisms, and relatively autonomous both vis-à-vis each other and vis-à-vis general international law.<sup>52</sup> All too often, this failure of global governance mechanisms to ensure an adequate coordination between the obligations imposed on States under these different regimes is replicated at domestic level : trade negotiators either are not aware of the human rights obligations of the governments they represent, or they do not identify the implications for their position in trade negotiations<sup>53</sup>; even when they are well informed about the potential intersections, they routinely express the view that any potential incompatibility should be addressed through appropriate policies at domestic level, where the two sets of commitments should be reconciled.

This approach thus leaves it to each State to ensure, in its domestic policies, a consistency which is not sought after in the international legal process. This is not satisfactory. It amounts to treating obligations incurred under trade agreements as equivalent in normative force to human rights obligations. This not only fails to recognize that, both as a result of Article 103 of the UN Charter<sup>54</sup>

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<sup>51</sup> Karen Rideout, 'Food and Trade – An Ecological Public Health Perspective', Oxfam Canada, 27 February 2005, p. 12 (referring to Chopra M, Galbraith S, Darnton-Hill I. A global response to a global problem: the epidemic of overnutrition. *Bulletin of the World Health Organization* 80 (2002):952-958).

<sup>52</sup> Report of the Study Group of the International Law Commission, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, U.N. doc. A/CN.4/L.702, 18 July 2006, para. 8 ; B. Simma, 'Self-contained regimes', *Netherlands Yearbook of International Law*, vol. 16, 1985, pp. 111-136.

<sup>53</sup> Only seldomly have WTO members referred to the right to food in the context of trade negotiations within the WTO : this was done by Mauritius and Norway (Committee on Agriculture, Special Session, Note on Non-Trade Concerns, WTO Doc. G/AG/NG/W/36/Rev.1, 9 November 2000, paras. 44 and 57 ; WTO Doc. G/AG/NG/W/101, 16 January 2001, paras. 6 ff.) ; and by Burkina Faso (WTO Doc. TN/AG/R/10 of 9 September 2003, para. 35).

<sup>54</sup> As members of the Organization of the United Nations, all States have pledged under Article 56 of the UN Charter to 'take joint and separate action in cooperation with the Organization for the achievement of the purposes' of the Charter, which include 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to

and because human rights norms have the status of peremptory norms of international law – no court could recognize as valid and apply a treaty adopted in violation of internationally recognized human rights –, human rights should prevail over any other international commitments. It also creates the risk that, faced with situations of conflict, States will opt for compliance with their obligations under trade agreements : since these agreements are commonly backed by the threat of economic sanctions – as is the case within the WTO, under the Dispute Settlement Understanding –, setting aside their human rights obligations will appear to governments less costly economically and even, often, politically.

The belief that compatibility between trade law and human rights law is best assured at the level of implementation in national policies also overestimates the ability of domestic political processes to compensate for the fragmentation of international law, at the same time that it underestimates the contribution an enabling international environment can make to the fulfilment of human rights at national level. The imbalance created at international level between trade commitments backed by the threat of economic sanctions, on the one hand, and human rights treaties which are not enforced through similar means, on the other hand, cannot be easily rescued in national political processes : self-determination is illusory when it is exercised in such incentives structure. This is so, in particular, to the extent that human rights require progressive implementation : apart from their immediate obligations to respect and protect human rights, States must fulfil human rights through measures which may require time to be fully implemented. For the adoption of such measures, States must have a certain policy space available, and they may need resources ; certain trade policies adopted in implementation of trade agreements, however, may limit both, without this being always possible to predict in advance.

One safeguard does exist : commitments under the WTO framework must be interpreted, to the fullest extent possible, so as to be compatible with general international law, as well as with the rules of any treaty applicable in the relationships between the parties to the dispute giving rise to the question of interpretation, as such rules may develop, in particular, through adjudication.<sup>55</sup> In the system of the WTO, the requirement that the agreements be interpreted in accordance with the other international obligations of the Members is further strengthened by the fact that the authoritative interpretation of the agreements lies in the hands of the Members themselves, within the Ministerial Conference or the General Council,<sup>56</sup> and the Members cannot ignore their human rights obligations in providing such interpretations. Yet, this does not provide a satisfactory answer to situations of real conflict which no conform interpretation could avoid. And such a principle of integrity in the interpretation of WTO agreements does not address the ‘chilling effect’ which the norms established in these agreements may cause, when the Members do not know whether or not any particular measure they take, in order to comply with their human rights obligations, will be considered acceptable by the other Members or instead expose them to retaliation, particularly when they seek to adopt measures which, although not

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race, sex, language or religion’. It follows from Article 103 of the Charter that this obligation prevails over any other international agreement.

<sup>55</sup> The Appellate Body of the WTO takes the view that commitments under the WTO framework cannot be treated ‘in clinical isolation’ from general international law (Appellate Body Report of 20 May 1996, *United States – Standards for Reformulated and Conventional Gasoline (United States v. Brazil and Venezuela)*, WT/DS2/AB/R). Article 3.2. of the Dispute Settlement Understanding confirms that WTO norms may be ‘clarified ... in accordance with customary rules of interpretation of international law’, which the Vienna Convention codifies. Article 31, para. 3 (c) of the Vienna Convention on the Law of Treaties stipulates that the interpretation of treaties must take into account ‘any relevant rules of international law applicable in the relations between the parties’. The ‘relevant rules of international law’ referred to by Article 31 para. 3 (c) of the Vienna Convention on the Law of Treaties are not deemed to be static, but may evolve, particularly, as a result of legal interpretation : see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, I.C.J. Reports 1971, p. 16 at p. 31, para. 53 ; *Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, I.C.J. Reports 1997, pp. 76-80, paras. 132-147. On the need for an evolutionary interpretation, see Appellate Body Report, 12 October 1998, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (United States v. India, Malaysia, Pakistan, Thailand)*, WT/DS58/AB/R, para. 129.

<sup>56</sup> See Article IX(2) of the WTO Agreement, also referred to in Article 3.9. DSU. And see C.-D. Ehlermann and L. Ehring, ‘The Authoritative Interpretation Under Article IX :2 of the Agreement Establishing the World Trade Organization : Current Law, Practice and Possible Improvements’, *Journal of International Economic Law*, vol. 8(4), 2005, pp. 814-815.

strictly required by human rights treaties, nevertheless would contribute to the progressive realization of human rights.

We therefore must ensure that the human rights obligations of the parties are taken into consideration at the negotiation stage of trade agreements : later may be too late. Unless adequately regulated, increased liberalization may lead to further import surges threatening the livelihoods of the local producers in the importing country, or alternatively to sudden increases in the prices of food commodities against which the poorest food buyers are not adequately protected. It may lead to the expansion of global supply chains which will benefit some but may marginalize many others who are already the most vulnerable. It will increase competition between, on the one hand, farmers from OECD countries and well-equipped, highly mechanised farmers from certain developing countries, and on the other hand, farmers in many other developing countries whose productivity per active laborer is one hundred times lower. It may encourage forms of agricultural production, and the lengthening of supply chains, at the risk of further damages to the environment and of more GHG emissions. In a world in which those who are hungry are smallscale farmers and other food producers, including agricultural labourers, as well as urban poor, and in which climate change constitutes the single most important threat to food security in the future, pursuing along the route of trade liberalization while ignoring these potential consequences would be unacceptable. On the basis of the findings made above, the following proposals seek to assist States in better taking into account their human rights obligations in the negotiation and implementation of their commitments under the framework of the WTO. A first set of proposals are procedural in nature : they seek to ensure that trade negotiations are conducted in conditions which facilitate taking into consideration the right to food. A second set of proposals are substantive : they explore solutions to the impacts identified in chapter V. Together, these proposals should promote the right of peoples and sovereign States to democratically determine their own agricultural and food policies, without these choices being dictated by the international trade regime ; and they should channel this regime towards one which contributes not only to increased production and allocative efficiency, but also to the realization of the right to food.

## **2. The procedural dimensions : guiding trade negotiations towards the full realization of the right to food**

### **2.1. Assessing the impact of trade agreements on the right to food**

States should not accept undertakings under the WTO framework without ensuring that these commitments are fully compatible with their obligation to respect the right to food. This requires that they assess the impact on the right to food of these commitments.<sup>57</sup> It also requires that any commitments they make be limited in time, and re-evaluated subsequently, since the impacts of trade liberalization on the ability of States to respect the right to food may be difficult to predict in advance, and may become visible only after a number of years of implementation. For instance, whatever the results of the current round of negotiations launched in Doha in November 2001, these results should be explicitly treated as provisional, and a sunset clause should be appended to the outcome in order to allow for a renegotiation, following a period of a few years of implementation, on the basis of an independent review of the impact on the enjoyment of the right to adequate food.<sup>58</sup>

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<sup>57</sup> See Committee on Economic, Social and Cultural Rights, Concluding Observations regarding Ecuador, 7 July 2004, E/C.12/1/Add.100 at para. 56; Committee on the Rights of the Child, Concluding Observations regarding El Salvador, 30 June 2004, CRC/C/15/Add.232 at para. 48/ ; Committee on the Elimination of Discrimination Against Women, Concluding Observations regarding Colombia, 2 February 2007, CEDAW/C/COL/CO/6, at para. 29; Committee on the Elimination of Discrimination Against Women, Concluding Observations regarding Philipines, 25 October 2006, CEDAW/C/PHI/CO/6 at para. 26; Committee on the Elimination of Discrimination Against Women, Concluding Observations regarding Guatemala, 2 June 2006, CEDAW/C/GUA/CO/6 at para. 32.

<sup>58</sup> See already Art. 20 AoA, which partially fulfils this objective in the current agreement.

Impact assessments are a useful tool in order to help a State understand the implications of the agreements it enters into.<sup>59</sup> They have a powerful democratizing effect, since they should provide an opportunity for civil society to participate in the evaluation of trade policies,<sup>60</sup> and allow national parliaments and civil society organizations to rely on their results in their dialogue with governments.<sup>61</sup> To the extent that impact assessments are based on the normative requirements of the human right to adequate food, and the corresponding indicators,<sup>62</sup> they can strengthen the negotiating position of governments in trade negotiations, particularly since the reference to the right to food is to an obligation imposed on all States under international law, which they cannot ignore in the context of trade negotiations.

Yet, important though as they are, impact assessments remain reactive – or defensive – in nature : they are tools to measure the consequences of the decisions which are taken, but they do not indicate, in and by themselves, which trade policies should be implemented in order to further the realization of the right to food. Mechanisms should be set up to allow for the adoption of such policies, in addition to – and not as a substitute for – a regular monitoring of the impact of trade agreements and their implementation on the right to food.

## **2.2. International trade as a component of national strategies for the realization of the right to food**

States should ensure that the positions they take in trade negotiations – for example, as to which special products to protect, as to which schedules of commitments to accept, or as to which services to open up to foreign competition – will not result in obstacles to the realization of the right to food. States should define their positions in trade negotiations in accordance with national strategies for the realization of the right to food. The adoption of such strategies is recommended by the Committee on Economic, Social and Cultural Rights (General comment No. 12, para. 21), and their content is further clarified by the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security adopted by States members of the General Council of the FAO on 23 November 2004. Such strategies should also be seen as tools to guide trade negotiations : only by mapping food insecurity and identifying which actions should be taken to combat hunger, will it be possible for those negotiating trade agreements to ensure that the commitments they make in trade negotiations will facilitate, rather than impede, efforts towards the fulfilment of the right to food of their population. Indeed, the usefulness of adopting such national strategies, based on a reliable mapping of food insecurity and vulnerability, goes far beyond the assistance it would provide negotiators in the WTO context. These strategies also should support the position of governments in their discussions with international financial institutions, with donors, or in bilateral trade negotiations. It is a particular source of concern that, in a large number of cases, States have been unable to use flexibilities allowed under the WTO agreements – or to apply certain tariffs remaining under their bound tariffs –, because of prescriptions from such institutions or because of bilateral free trade agreements. Adopting a national strategy for the realization of the right to food would strengthen the position of States in their discussions with these partners, at the same time that it would improve the accountability of governments to the rights-holders.

## **2.3. Transparency and participation in trade negotiations**

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<sup>59</sup> See generally James Harrison and Alessa Goller, ‘Trade and Human Rights : What Does ‘Impact Assessment’ Have to Offer ?’, *Human Rights Law Review* 8 (2008), pp. 587-615.

<sup>60</sup> OHCHR, Analytical study of the High Commissioner for Human Rights on the fundamental principle of participation and its application in the context of globalization, 23 December 2004, E/CN.4/2005/41.

<sup>61</sup> See Office of the High Commissioner for Human Rights, *Report on indicators for monitoring compliance with international human rights instruments: a conceptual and methodological framework* (HRI/MC/2006/7, 11 May 2006), para. 3.

<sup>62</sup> See, for a table of indicators based on the normative content of the right to food, Office of the High Commissioner for Human Rights, *Report on indicators for monitoring compliance with international human rights instruments* (HRI/MC/2008/3, 16 May 2008), at p. 24.

Right to food impact assessments and the adoption of national strategies for the realization of the right to food are tools which should support negotiators in ensuring that they will not adopt positions at international level which, at national level, would impede the realization of the right to food for all. In addition however, it is essential that national parliaments and civil society are provided opportunities to monitor the positions adopted by governments in trade negotiations. They should not be presented, at the very final stage of the negotiation process – once agreement has been reached –, with a set of commitments made by the Executive from which, at that stage, it will be politically very difficult or impossible to retreat from. National parliaments should regularly hold hearings about the positions adopted by the government in trade negotiations, and all groups affected, including in particular farmers organisations, should have an opportunity to take part. The democratizing potential of right to food impact assessments will only fully materialize if such procedures are put in place at domestic level, in order to avoid a disconnection between commitments made at international level and efforts developed at national level for the realization of the right to food. This is particularly important in the context of trade agreements relating to agriculture, given the risks of an increased dualization of the farming system as a result of policies favoring the export sector, which is partly the result of disproportionate political influence being exercised in some countries by a relatively small number of very large agricultural producers – whereas smallscale farmers, in contrast, are poorly organized politically, and often unable to mobilize due to their geographical dispersion.<sup>63</sup>

### **3. The substantive dimensions : taking into account the right to food in the multilateral trade regime**

#### **3.1. Limiting the dependency on international trade**

States should avoid excessive reliance on international trade in the pursuit of food security. Their short-term interest in procuring from international markets the food which they cannot produce locally at lower prices should not lead them to sacrifice their long-term interest in building their capacity to produce the food they need to meet their consumption needs. There are two reasons for this. First, while reasonings promoting allocative efficiency on the basis of specialization according to comparative advantage emphasize the aggregate benefits, at country level, of trade liberalization, a perspective based on the right to food requires that we examine the impacts on the most vulnerable. Throughout the developing world, agriculture accounts for around 9 % of GDP and over 50 % of total employment. In the countries where more than 34 % of the population are undernourished, agriculture represents 30 % of GDP and 70 % of employment.<sup>64</sup> Across all countries, the incomes of agricultural workers are significantly lower than in non-rural areas.<sup>65</sup> Therefore, for the realization of the right to food, there is no alternative but to strengthen the agricultural sector, with an emphasis on smallscale farmers.

Second, by developing their capacity to feed their populations, States limit the vulnerability which results from the volatility of prices on international markets. As noted by the World Bank, “managing grain price risk is a fundamental requirement in a world characterized by more volatile international grain prices and recurring supply shocks that will likely result from global warming”.<sup>66</sup> Consultations should be led on the needs to re-establish commodity stabilizing agreements for tropical products, cereals and oilseeds, sugar and cotton, all of which are of particular importance to developing countries, and on measures which could avoid the negative impacts of non-commercial speculation on the futures markets of those commodities. The creation of a virtual global food reserve would constitute a first important step in this direction. In the short term, we have to draw the consequences from the volatility of prices on international markets.

#### **3.2. Maintaining flexibilities**

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<sup>63</sup> See The World Bank, *World Development Report 2008 - Agriculture for Development*, Nov. 2007, at p. 43.

<sup>64</sup> FAO, *The State of the Food Insecurity in the World 2003*, p. 16.

<sup>65</sup> See above, n. 14.

<sup>66</sup> *Framework Document for proposed loans, credits, and grants in the amount of US\$ 1.2 billion equivalent for a Global Food Crisis Response Program (GFRP)*, 29 May 2008, at 6.

At present, a relatively small proportion of the food produced, estimated at 15 %, is traded internationally.<sup>67</sup> Yet, the prices fixed on international markets have an important impact on the ability of farmers in the world to make a decent living, since, as a result of trade liberalization, there is a tendency for domestic and world prices to converge, insofar as imported goods compete with domestically produced goods on local markets. States, particularly developing States in accordance with the principle of special and differential treatment, must therefore retain the freedom to take measures which insulate domestic markets from the volatility of prices on international markets. Unless the trade agreements they conclude provide for the necessary flexibilities, States may find themselves bound by certain disciplines which will make them vulnerable to the variations of prices on the international markets.

One risk is that local producers will be driven out by import surges. It is this which the establishment of a special safeguard measure seeks to avoid. Indeed, the measures States may take in order to strengthen their agricultural sector, including the measures which fall under the ‘Green Box’ of allowable forms of domestic support to agriculture, will remain ineffective in the absence of such a flexibility. Measures such as supply management schemes which guarantee a certain price to producers, should also be possible, although this requires that States remain free to maintain import tariffs at levels allowing them to protect their agricultural sector from the impact of the arrival on domestic markets of low-priced products. It is particularly perplexing that certain management supply schemes, which seek to adapt production to demand and shield both producers and consumers from sudden shifts in prices, while at the same time ensuring processors a reasonable profit margin, would be threatened by proposals to reduce over-quota tariffs, even for products designated as sensitive because they are placed under such management schemes. Such schemes insure both producers and consumers against the fluctuations of prices on international markets. Their removal would be a retrogressive step in the realization of the right to food.

Another risk is that the net food buyers are made vulnerable to increases in prices, particularly since many developing States have little or no safety nets which protect the poorest segments of the population from such impacts. The Marrakesh Decision should insure net-food importing developing countries against this risk, but the answer it provides remains partial. For this Decision to be fully effective, it would need to include a mechanism to systematically monitor the impact of the AoA reform process on the NFIDCs ; it would need to define the notion of ‘adequate supplies’ of basic foodstuffs (which, under the Decision, NFIDCs should be able to obtain from external sources ‘on reasonable terms and conditions’ throughout the reform process) by reference to the need to ensure that each individual has access at all times to adequate food or to means for its procurement – i.e., that the increased prices which may result from the reform process shall not result in violations of the right to food ; and it would need to be fully implemented, which it is not for the moment.

Implementing adequately the Marrakesh Decision would be consistent with the obligation of the WTO Members to respect the right to food, not only towards their own populations, but also towards populations in other States, including their commercial partners which are impacted negatively by the reform programme resulting from commitments under the AoA. Yet, even with an improved operationalization of the Marrakesh Decision, the problems of vulnerability of countries as a result of their dependency on international trade, and of the hidden costs of trade as a solution to achieving food security, remain real. More food aid and more easily accessible and less conditional financing facilities to meet balance of payments problems, are no substitutes for the strengthening within all countries of the agricultural sector, both in order to enhance their food security and as a means to reduce poverty and, thus, hunger.

The measures suggested above seek to ensure that reliance on international trade will not have adverse consequences on the realization of the right to food at domestic level. The adoption of such measures

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<sup>67</sup> The percentages are 6.5 for rice, 12 for corn, 18 for wheat and 35 for soybeans. M. Ataman Aksoy and John C. Beghin (eds.), *Global Agricultural Trade and Developing Countries* (Washington, D.C., the World Bank, 2005), pp. 177-179.

requires a form of international cooperation : that all States work towards the establishment of a system of international trade which facilitates efforts done at national level in order to achieve food security. This is consistent with their obligation to comply with the right to food. The Committee on Economic, Social and Cultural Rights has identified ‘the failure of a State to take into account its international legal obligations regarding the right to food when entering into agreements with other States or with international organizations’ as a specific instance of violation of the right to food.<sup>68</sup> Indeed, their obligations towards the right to food are imposed on States not only towards persons found on their national territory, but also towards persons situated outside the national borders, taking into account the sovereign rights of the territorial State. For instance, where a State heavily subsidises agricultural products which are exported by economic actors based under its jurisdiction, thus crowding out the local producers in the receiving markets, this should be treated as a violation of the right to food by the exporting State, since it constitutes a threat to food security in the importing country.<sup>69</sup> This is also the spirit of the General Comment which the Committee on Economic, Social and Cultural Rights adopted on the relationship between economic sanctions and respect for economic, social and cultural rights, in which the Committee noted that States imposing sanctions should not, in doing so, jeopardize the economic, social and cultural rights of the population in the targeted State.<sup>70</sup> As members of the United Nations, all States have committed themselves to cooperate internationally for the fulfillment of human rights (Article 56 of the UN Charter). The Universal Declaration of Human Rights refers to the right of everyone to an international social order which is conducive to the full realization of human rights. States are therefore under a duty to cooperate in the establishment of a multilateral regime of international trade which supports the right to food.

### **3.3. Controlling market power in the global supply chains and counteracting the risk of increased dualization of the farming system**

One major imbalance in the current multilateral trade regime is that, while disciplines are imposed on States, transnational corporations, whose freedom to act has been significantly increased as a result, are not subject to any obligations as regards the exercise of their power on the market. This is an important gap in global governance. In the medium to long-term, a multilateral framework may have to be established to ensure a more adequate control of these actors. In the short term, States should act in accordance with their responsibility to protect human rights by adequately regulating actors on which they may exercise an influence, including in situations where these actors operate outside the national territory of the States concerned.<sup>71</sup> While the exercise of extra-territorial jurisdiction constitutes one option in this regard, other initiatives could be taken by States, such as the imposition of transparency or reporting requirements, or the imposition of conditions for access to export credits,

<sup>68</sup> U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), *The right to adequate food (art. 11)*, U.N. doc. E/C.12/1999/5, at para. 19. See also para. 36 : ‘States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end’.

<sup>69</sup> See, *mutatis mutandis*, as regards the appropriate provision of food aid, U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), *The right to adequate food (art. 11)*, U.N. doc. E/C.12/1999/5, at para. 39 (‘Food aid should, as far as possible, be provided in ways which do not adversely affect local producers and local markets, and should be organized in ways that facilitate the return to food self-reliance of the beneficiaries’).

<sup>70</sup> U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 8 (1997): The relationship between economic sanctions and respect for economic, social and cultural rights, U.N. doc. E/1998/22.

<sup>71</sup> See, eg. U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2000/4 (2000), para. 39; or U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11 (26 November 2002), para. 31. In these general comments, the Committee affirms that States parties should ‘prevent third parties from violating the right [protected under the International Covenant on Economic, Social and Cultural Rights] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law’. Similarly, in 2007 the Committee on the Elimination of Racial Discrimination called on Canada to ‘...take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable’ (CERD/C/CAN/CO/18, paragraph 17 (Concluding Observations / Comments, 25 May 2007)).

in order to ensure that commodity buyers, food processors, and global retailers, contribute to the realization of the right to food and abstain from practices which might threaten its enjoyment. In cooperation with the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, the Special Rapporteur shall organize transparent and inclusive consultations on this issue in order to identify which concrete measures could be recommended in this regard. Such measures could include rewarding or encouraging the best practices identified in the global food supply chain. Particular attention could be paid to the possibility of using competition law in order to protect not only end consumers, but also farmers selling their crops, from excessive concentration or abuse of dominant positions on the market.

Another risk which trade liberalization in agriculture entails is that the largest agricultural producers, which will benefit more easily from the opportunities resulting from improved market access, will crowd out smaller farms, for the reasons stated above. In many countries, the smallscale farmers are among the most vulnerable segments of the population. States therefore owe them a special responsibility to counteract this tendency by supporting smallscale agriculture, in particular as regards access to land, water, genetic resources, and credit ; and by investing in, and improving their access to, rural infrastructures.

#### **4. Towards socially and environmentally sustainable trade**

The expansion of international trade in agricultural products may have hidden costs for the environment and for human health and nutrition ; it may result in the smallest producers being offered prices so low for their crops that their revenues will hardly be sufficient to feed themselves and their families ; and it may depress the wages of agricultural workers, as a result of increased international competition. The future regulation of international trade in agricultural commodities should take into account the impact of various modes of agricultural production on climate change, in order to allow countries to provide incentives in favour of forms of production, like organic farming or agroecological practices, which better respect the environment, while at the same time contributing to food security.<sup>72</sup>

In the future, the experience of fair trade schemes and other incentives-based initiatives should be studied, in order to examine whether they should be expanded and if so, how, in order to encourage socially and environmentally more sustainable trade. It may be asked, for example, whether inspiration could be sought from guidelines such as the Ethical Trading Initiative's smallholder guidelines, in order to promote sourcing practices which are more sustainable and which, instead of contributing to the dualization of the farming system, strengthen the capacities and increase the incomes of smallscale farmers. The Special Rapporteur offers to deepen his consultations on this issue in the future.

## VII. CONCLUSIONS AND RECOMMENDATIONS

**The Special Rapporteur concludes with the following recommendations:**

**The WTO Member States should :**

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<sup>72</sup> See the UNCTAD/UNEP, *Organic Agriculture and Food Security in Africa*, [http://www.unep-unctad.org/cbtf/publications/UNCTAD\\_DITC\\_TED\\_2007\\_15.pdf](http://www.unep-unctad.org/cbtf/publications/UNCTAD_DITC_TED_2007_15.pdf)

(showing the potential of organic agriculture in increasing agricultural productivity and raising incomes through reliance on low-cost, locally available technologies, without causing environmental damage, but also highlighting the need for an enabling policy and institutional support in order to scale-up organic agriculture and its associated positive side-effects). This study is only the latest in a series of studies whose conclusions converge on this point. See in particular Jules Pretty et al. (2006), 'Resource Conserving Agriculture Increases Yields in Developing Countries', *Environmental Science & Technology*, vol. 40, No. 4 (2006) (reviewing 286 agricultural projects in 57 countries and concluding that low external input agriculture improves food crop productivity by an average of 79%).

- Ensure, notably through transparent, independent and participatory Human Rights Impact Assessments, that their undertakings under the WTO framework are fully compatible with their obligation to respect, protect and fulfil the right to food;
- Define their positions in trade negotiations in accordance with national strategies for the implementation of the right to food;
- Encourage national parliaments to hold regular hearings about the positions adopted by the government in trade negotiations, with the inclusion of all groups affected, including in particular farmers' organizations;
- Avoid excessive reliance on international trade in the pursuit of food security and build capacity to produce the food needed to meet consumption needs, with an emphasis on smallscale farmers;
- Maintain the necessary flexibilities and instruments, like supply management schemes, to insulate domestic markets from the volatility of prices on international markets;
- Fully implement the Marrakesh Decision and, in order for it to be fully effective, ensure it includes a mechanism to systematically monitor the impact of the AoA reform process on the NFIDCs and provides a definition of the notion of 'adequate supplies' of basic foodstuffs that refers to the need to ensure that each individual has access at all times to adequate food or to means for its procurement – i.e., that the increased prices which may result from the reform process shall not result in violations of the right to food ;
- Adequately regulate private actors over which the State may exercise an influence, in discharge of their obligation to protect the right to food;
- Explore ways to reorient trade towards products and modes of production which better respect the environment and do not lead to violations of the right to food.

**The WTO Secretariat should:**

- Maintain the existing constructive dialogue with the Office of the High Commissioner for Human Rights ;
- Encourage WTO Members to conduct Human Rights Impact Assessments prior to the conclusion of trade agreements or to accepting new schedules of commitments, with the assistance of the Office of the High Commissioner for Human Rights.

**The international community should:**

- Explore means of limiting the volatility of prices on the international markets of commodities, particularly for tropical products, oilseeds, sugar and cotton, for instance through commodity stabilization agreements ;
- Take steps towards the establishment of a multilateral framework regulating the activities of commodity buyers, processors, and retailers, in the global food supply chain, including the setting of standards by these actors and their buying policies.