THE RIGHT TO FOOD AND THE WORLD TRADE ORGANIZATION'S RULES ON AGRICULTURE: CONFLICTING, COMPATIBLE, OR COMPLEMENTARY?

Student: Rhonda Ferguson

Supervisor: Dr. Shane Darcy

Irish Centre for Human Rights

College of Business, Public Policy and Law

National University of Ireland Galway

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DECLARATION OF ORIGINALITY

I, Rhonda Ferguson, certify that this thesis is all my own work and I have not obtained a degree from this University, or elsewhere, on the basis of this work.

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LIST OF ABBREVIATIONS

AoA	Agreement on Agriculture
AIDCP	Agreement on the International Dolphin Conservation Program
CESCR	Committee on Economic, Social and Cultural Rights
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
CRC	Convention on the Rights of the Child
CEDAW	The Convention on the Elimination of all Forms of Discrimination Against Women
CPPCG	The Convention on the Prevention and Punishment of the Crime of Genocide
DSU	WTO Dispute Settlement Understanding
FAO	Food and Agriculture Organization of the United Nations
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
GATT	General Agreement on Tariffs and Trade
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
OHCHR	Office of the High Commissioner for Human Rights
OP-ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
SCM	Agreement on Subsidies and Countervailing Measures
TBT	Agreement on Technical Barriers to Trade
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Commission
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

1. INTRODUCTION

Often referred to as the fragmentation of international law, the trend towards highly specialized rule regimes is commonly illustrated through developments in international human rights law and international trade law, which seem to operate in relative isolation from one another and from other areas of international law.[1] Among the effects of these developments is the increased potential for overlapping subject-matter and jurisdiction, and ultimately, conflicts between legal norms.[2] While there is little agreement as to what exactly constitutes a conflict of norms in international law, the tensions between international human rights law and international trade law are sometimes framed as such. Previous studies have used the language of norm conflict theory to investigate and describe the relationship between the human right to food and international trade rules, though in some cases, without applying such theory.[3] The former Special Rapporteur on the Right to Food expresses concern over "whether [the] agricultural trade reform programme is compatible with Members' obligations towards the right to food."[4] He subsequently provides a preliminary investigation and suggests further research

[1]International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the
[2] Christopher J. Borgen, 'Resolving Treaty Conflicts' (2005) Legal Studies Research Paper Series Paper #06-0017 St. John's University 573, 574; ILC (n 1) paras 8, 14; Jan Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011), 193; For conflict as an 'unavoidable' aspect of international law, see also Wilfred Jenks 'The Conflict of Law-Making Treaties' (1953) 30 British Yearbook of International Law 401, 402
[3] United Nations General Assembly, 'Preliminary report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler' (23 July 2001) A/56/210; Christine Breining-Kaufmann, 'The Right to Food and Trade in Agriculture' in Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi (eds), *Human Rights and International Trade* (Oxford University Press 2005); Hans Morten Haugen, *The Right To Food and the TRIPS Agreement* (Martinus Nijhoff Publishers, 2007); Chris Downes, 'Must the Losers of Free Trade Go Hungry? Reconciling WTO Obligations and the Right to Food' (2007) 47 Virginia Journal of International Law 619; United Nations Human Rights Council 'Report of the Special Rapporteur on the right to food, Olivier De Schutter: Mission to the World Trade Organization' (4 February 2009) A/HRC/10/5/Add.2 (Mission to the World Trade Organization); Olivier De Schutter, *International Trade in Agriculture and the Right to Food*, No. 46 Dialogue on Globalization (Friedrich-Ebert-Stiftung, November 2009); Olivier De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' Activity Report (November 20011) <https://www.wto.org/english/news_e/news11_e/deschutter_2011_e.pdf> accessed 15 August 2015; Lily Endean Nierenberg, 'Reconciling the Right to Food and Trade Liberalization: Developing Country Opportunities' (2011) 20 Minnesota Journal of International Law 619
[4] UNHRC 'Mission to the World Trade Organization' (n 3) para 9

in the form of a 'compatibility review.'[5] Similarly, a report of the High Commissioner for Human Rights warns of the potential for overlap between the obligations of each regime and questions how human rights might operate as exceptions to the World Trade Organization (WTO) rules.[6] De Schutter also asserts that, "it is critical to have a clear picture of whether current WTO rules on agriculture provide States with sufficient flexibility to allow them to meet their obligations under international human rights law to respect, protect and fulfill the right to food. This picture remains unclear."[7] Despite these concerns, there has yet to be a comprehensive analysis of the technical compatibility between the legal norms of the WTO's agriculture trade rules and the human right to adequate food undertaken through the lens of legal norm conflict theory.[8] As such, the primary objective of the following research is to fill that gap by exploring the relationship between the Agreement on Agriculture and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), particularly Articles 2 and 11.[9] The relationship is situated within the broader debates over the state of international law as fragmented or systemic and the status of the right to food as an international legal norm.

1.2 Rationale

In addition to the abovementioned comments made by UN experts, which are the impetuses behind this research, developments within the particular regimes of international human rights law and international trade law make this analysis especially timely. First, the application of trade disciplines to agriculture is a relatively recent development in the history of international trade (in the lexicon of the WTO, commitments are frequently described as disciplines, as they attempt to discipline the use of measures that impede market access and the

[5] De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 3) 4, 17
[6] United Nations Commission on Human Rights 'Analytical Study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization' (15 January 2004) UN Doc E/CN.4/2004/40 para. 27
[7] De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 3) 3
[8] A selection of similar, though not identical studies are listed in footnote 3
[9] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Agreement on Agriculture (15 April 1994) 1867 UNTS 410

provision of subsidies through reduction commitments and, when necessary, the dispute settlement mechanism). Until 1995 international trade was governed by the General Agreement on Tariffs and Trade (GATT), which, in practice, made no significant impact on agricultural trade between countries, nor did it significantly alter domestic policies on agriculture and food.[10] Instead, agriculture was seen as an exception to the project of global trade liberalization and States continued to exercise a large degree of regulatory autonomy and protectionist measures in their agriculture and food processing sectors.[11] The Uruguay Round of negotiations that took place between 1986 and 1994 resulted in the adoption of Marrakesh Agreement Establishing the World Trade Organization and a number of annexed agreements (the 'WTO Agreement' and 'covered agreements' respectively).[12] Its adoption marked the first time that State parties to the international trade regime made clear commitments toward reducing support and protection of their agriculture industries. Through this round of negotiations, agricultural trade commitments became subject to legal enforcement through the organization's newly judicialized dispute settlement mechanism.[13]

Following the entry into force of the WTO Agreement, it was not immediately clear how the new agreements would preserve or, conversely, constrain Members' freedom to pursue polices geared toward the realization of the right to food and other 'non-trade' objectives, as they are often referred. This was due to Article 13 of Agreement on Agriculture, known as 'the Peace Clause,' which exempted from legal challenge measures permitted under the Agreement on Agriculture but challengeable under other WTO agreements.[14] In other words, State parties could continue to support and protect their agricultural industries in contravention of their obligations under other WTO agreements

[10] Melaku Geboye Desta, *The Law of International Trade in Agricultural Products* (Kluwer Law International 2002) 6
[11] ibid
[12] Marrakesh Agreement Establishing the World Trade Organization (adopted April 15, 1994, entered into force 1 January 1995) 1867 UNTS 154 (WTO Agreement)
[13] Understanding on Rules and Procedures Governing the Settlement of Disputes (adopted 15 April, 1994, entered into force 1 January 1995) 1869 UNTS 401 LT/UR/A-2/DS/U/1
[14] Agreement on Agriculture (n 9) art 13

without challenge, so long as the measures in place were permitted under the Agreement on Agriculture, specifically Annex 2, Article 6, or Part V. Since the Peace Clause expired in 2003, there is now over a decade of post-Peace Clause jurisprudence through which the impact of the full exercise of WTO rights and obligations on domestic policy and practice can be better understood.

Second, events occurring in the present trade negotiation, the Doha Round, raise new questions about the ability of States to ensure the right to food in their countries under current and future WTO rules. In 2014, a group of developing countries led by India rejected the Trade Facilitation Agreement, which imposes stricter disciplines on all areas of trade, without a guarantee that their domestic food security measures would not be challenged.[15] The arguments put forward by developing country Members and the impasse that ensued suggest that certain domestic policies aimed at realizing the right to food may be legally incompatible with WTO rules. Indeed, the fact that such policies can be challenged through the organization's dispute settlement mechanism supports this idea. However, whether this means that the right to food itself as a norm of international law actually conflicts with any particular trade rules is a matter to be determined. Although the WTO still fails to incorporate explicit concern for the right to food or other human rights into its agreements, it has made some progress in terms of admitting food security concerns into the discourse of the organization.[16]

Third, while still marginalized within academic, political, and legal discourse, socio-economic rights including the right to food have gained momentum and acceptance as legal rights. A growing body of case law from municipal legal systems in which the right to food is invoked disproves arguments that socio-

[15] WTO, *Bali Ministerial Decision* (7 December 2013) WT/MIN(13)/34, WT/L/909; WTO General Council, *Public stockholding for food security purposes, Decision of 28 November 2014* (27 November 2014) WT/L/939

[16] For an overview, see WTO, 'Agriculture Issues: Food Security' (n.d.) <https://www.wto.org/english/tratop_e/agric_e/food_security_e.htm> accessed 24 August 2015

economic rights are non-justiciable.[17] The right to food is bolstered by the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) in 2013, establishing an individual complaint and inquiry mechanism, and thereby enhancing the enforceability of socio-economic rights.[18] Increased engagement with socio-economic rights by experts such as the Special Rapporteur on the Right to Food, scholars, and civil society organizations has also been influential in the development and improved understanding of the right to food in international law and politics. However, the still-limited jurisprudence involving the right to food exposes its vulnerability as a vaguely defined international legal norm open to competing conceptions. Interpretations by courts, treaty bodies, States, and experts are necessary, yet when these interpretive communities produce inconsistent versions of the scope and content of the right they may inadvertently weaken the normative force of the right to food.[19] Interpretations that envision a wide range of entitlements and obligations present more opportunities for conflict with States' other international legal obligations, such as those in the WTO regime, while narrow interpretations promote the harmony of international legal norms but might serve to minimize the scope and content of the right to food.

Fourth, despite some development in terms of its status as an international legal norm, former Special Rapporteur Jean Ziegler asserts, "the overall trend is one of regression, rather than the progressive realization of the right to food."[20] The reality of persistent hunger and malnutrition in 2016, when sufficient food is produced to adequately feed the entire global population, means that such suffering is entirely unnecessary and preventable.[21] Indeed, the 'food riots' that

[17] For a compendium of cases see involving the right to food, see Ben Saul, David Kinley, and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights Commentary, Cases, and Materials* (Oxford University Press 2014) 861-967

[18] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) A-14531

[19] Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law 905, 906, 946

[20] Jean Ziegler, Christophe Golay, Claire Mahon, Sally-Anne Way, *The Fight for the Right to Food; Lessons Learned* (International Relations Development Series, Palgrave Macmillan 2011) 1

[21] UNGA, 'Preliminary report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler' (n 3) para 4

spanned the globe in 2008 evince the growing demand for States to respect, protect, and fulfill socio-economic rights, particularly by ensuring the economic accessibility of the necessities of life. The food riots were a response to the convergence of global crises – food, energy, financial, environmental – a point that highlights the interconnectivity of these issue areas and the need for coherent international law and policy responses, including from within the multilateral trade system. De Schutter argues that the crisis can be leveraged "as an opportunity […] to advance the realization of the right to food by the adoption of structural measures, leading to a profound reform of the global food system."[22] Initiatives by the Committee on Global Food Security propose a Global Strategic Framework for Food Security and Nutrition to this end.[23] Because international trade is a fundamental part of the global food system, it is important to uncover how it might exacerbate or alleviate conditions of poverty, hunger, and malnutrition.

1.3 METHODOLOGY

Using the lens of norm conflict theory, an assessment of the technical and normative compatibility between specific rules within the two regimes is possible. Narrow approaches to norm conflict admit only situations wherein adherence to one norm necessarily violates another, whereas broad approaches incorporate other types of incompatibilities that, in reality, can be just as detrimental to the full exercise of a norm.[24] As will be shown, the relationship between the Agreement on Agriculture and the ICESCR, and specifically the right to food, challenge the usefulness of these theories to address real incompatibilities that do not necessarily constitute genuine conflicts. This is due to the inadequacy of the definitions of norm conflict used most commonly

[22] UNHRC 'Report of the Special Rapporteur on the right to food, Olivier De Schutter: Building resilience: a human rights framework for world food and nutrition security' (8 September 2008) A/HRC/9/23, para 6

[23] Committee on World Food Security, 'Global Strategic Framework for Food Security and Nutrition' (2011, 2013) < http://www.fao.org/fileadmin/templates/cfs/Docs1213/gsf/GSF_Version_2_EN.pdf > accessed 21 October 2015

[24] *Infra* ch 3.6

by international courts and also to the special features of the regimes in question.

This research will draw from and expand upon that conducted by the former Special Rapporteurs on the Right to Food, particularly reports produced between 2001-2011. Related studies on the conflict of international legal norms are influential to this research as well. Haugen's thorough examination of the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) in light of the right to food means that an analysis of intellectual property rights is unnecessary here, though some of his methods and findings are noted.[25] Pauwelyn's definition and analysis of how WTO rules relate to other norms of public international law is partially adopted here with some additional considerations, such as those proposed by Vranes who also draws on his study.[26] Pulkoswki's approach to conflicts between treaties and his consideration of political factors is useful for a broader level of analysis.[27] Gray's examination of the relationship between the right to food and world trade rules is significant in that there is overlap with the present topic, although what is presented here is more extensive, applies norm conflict theories, considers the international legal and political landscape, and incorporates the body of case law that has developed since his study.[28] Downes' research on whether the obligations under the WTO agriculture rules and the right to food conflict and how such conflicts might be reconciled within the WTO framework is also highly relevant and informs sections of this work.[29] Although Downes adopts the language of norm conflict theory, he does not actually apply such theories to his investigation. This is far from an exhaustive list of scholars that have written on the topic of treaty conflict more broadly,

[25] Hans Morten Haugen, *The Right To Food and the TRIPS Agreement* (n 3)
[26] Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press 2003); Erich Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17(2) The European Journal of International Law 395
[27] Dirk Pulkowski, *The Law and Politics of International Regime Conflict (*Oxford University Press 2014)
[28] Kevin Gray 'Right to Food Principles vis-à-vis Rules Governing International Trade' (2003) British Institute of International and Comparative Law < http://www.cid.harvard.edu/cidtrade/Papers/gray.pdf > accessed 21 October 2015
[29] Downes (n 3)

some of who are noted at various points throughout this analysis. In short, the abovementioned authors provide key pieces of the foundation of this research, and their astute critical arguments influence its direction, though they are distinct in focus, narrative, and findings.

1.3.1 SCOPE

This research is premised on the assumption that the right to food is a legally binding norm for State parties to the ICESCR, and the content of the right is confined to those elements that have reached the 'threshold of legality.'[30] In other words, the elements of the right to food are binding on States, as evidenced by their inclusion in a legally binding instrument or determination as such by a relevant tribunal. This research looks primarily to the instruments, as well as to the Committee on Economic, Social and Cultural Rights ('the Committee') to understand the scope and content of the right to food. It looks to the WTO panels and the Appellate Body to clarify relevant trade rules, though it also employs the 'crucible approach' to interpretation advocated by the International Law Commission and experts, and suggested in the Vienna Convention, which weighs all elements of a norm - the text, the intent of its authors, and its object and purpose in context - together to determine its meaning.[31] According to the Vienna Convention, interpretations should be undertaken "in good faith in accordance with the ordinary meaning […of] the terms of the treaty in their context and in the light of its object and purpose."[32] While the approach advocated by the Vienna Convention is commonly used in the regimes in question, the WTO dispute settlement tends to place more emphasis on the language of the treaties and it has been said to adhere "to the cannon of textualism," while international human rights law (most notably

[30] Prosper Weil, 'Towards a Relative Normativity in International Law' (1983) 77 American Journal of International Law 413, 415
[31] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 31.1; Richard K. Gardiner, *Treaty Interpretation* (Oxford University Press 2008) 10-11
[32] ibid

regional courts and the Committee) tends to prioritize the object and purpose of a norm or treaty over other aspects.[33]

Having emphasized the central importance of norms that have reached the threshold of legality, it is also recognized that international law is not simply 'accumulated past decisions,' but also a 'process.'[34] For this reason, limited 'pre-normative elements' and 'soft law' are incorporated into this research to the extent that they provide insight into States' interpretations of the scope and content of the right to food and related obligations. Therefore, the right to food and corresponding obligations are sourced primarily from the ICESCR Articles 2 and 11, but informed by elaborations presented by the treaty body, specialized agencies such as the Food and Agriculture Organization of the United Nations (FAO), and State practice, in addition to international and regional (and in some cases, national) jurisprudence.[35] This research does not undertake an exhaustive assessment of the WTO regime and its compatibility with the right to food, but examines the rules particular to agricultural trade. Therefore, the Agreement on Agriculture is the central focus, though GATT (1994), the Agreement on Subsidies and Countervailing Measures, and a number of the covered agreements will be considered to the extent that they are relevant.

Compatibility is assessed primarily through examination of rights and obligations (including commands, prohibitions, permissions and exemptions) of States enumerated in the two agreements. The extent to which key elements of the right to food are, or might be, permitted within the WTO as the basis of legal derogations or exemptions from existing trade rules, or as legitimate objectives in themselves to be pursued through the WTO rules, is of great interest. This is determined through analysis of the legal texts, State commentary, and decisions. The right to food is not merely a claim against the State to provide basic nutrients; it aims to ensure that people, including

[33] Krista Nadakavukaren Schefer, *Social Regulation in the WTO* (Edward Elgar Publishing Limited 2010) 121
[34] Pauwelyn (n 26) 7
[35] ICESCR (n 9)

vulnerable members of a community, can feed themselves with dignity. This research therefore looks at how measures aimed at one or more of the following aspects of Article 11 are, or might be, received within the WTO. Article 11 enumerates the entitlements and obligations related to the right to food:

> 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
>
> 2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
>
> > (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
> >
> > (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

As will be discussed, Article 11.2 contains the most relevance to the WTO rules, and thus the most likelihood for overlap and conflict, while Article 11.1 contains a number of objectives that intersect with the stated aims of the WTO regime. Overall, the content of Article 11 is considered in light of the concepts introduced in General Comment 12, such as food security, sustainability, and international cooperation, and how these concepts might be accommodated within the WTO regime.[36]

[36] Committee on Economic, Social and Cultural Rights, General Comment 12, Right to adequate food (Twentieth session, 1999) UN Doc. E/C.12/1999/5 (1999) paras 7, 15, 37, 38 (General Comment 12)

1.3.2 Approach to Analysis

The relationship between the WTO rules and human rights might be analyzed from the perspective of the individual rights-holder or from the perspective of the duty-bearer. The former approach considers how trade rules impact the lives of individuals who live in jurisdictions where both regimes apply. More specifically, it looks at how the enjoyment of rights is impacted by trade rules. This approach appears to be most frequently employed by authors writing on the relationship between trade and human rights to date.[37]

However, if the objective is to determine whether or not a conflict of norms is present, and whether conflict rules might apply to determine which rule takes priority, this approach may not be entirely reliable. Although violations of the right to food stem from a State's breach of obligations under the Covenant, not every instance of a lack of full enjoyment of the right to food is attributable to the State, and much less so to the State as it acts in accordance with its WTO obligations. Individuals may be unable to enjoy their rights, such as the right to food, and this is not necessarily the result of – or even related to – a State's legal obligations owed in another area of international law. Even aside from the specific topic of norm conflict, attributing any one specific right to food-related issue – of negative or positive impact - to the implementation of WTO rules is complicated by numerous trade and investment agreements as well as the historical, cultural, and political factors that all play significant roles in shaping agriculture and food trends and, by extension, the enjoyment of the right to food.[38] The breadth of the policy area that is potentially encapsulated by ICESCR hints at the difficulty of identifying causal relationships between an international rule or policy and the level of enjoyment of the right to food.

[37] For example, see Susan Ariel Aaronson, Jamie M. Zimmerman, *Trade Imbalance* (Cambridge University Press 2008); James Harrison, *The Human Rights Impact of the World Trade Organisation* (Hart Publishing 2007)

[38] For a discussion on the historical relationship between trade and human rights, see Aaronson and Zimmerman (n 37) Introduction

Norm conflict theory, as it exists in the literature and as courts apply it, places constraints on what can be labeled an inquiry into a genuine conflict or compatibility between international legal norms. Prevailing norm conflict theories do not readily accept consideration of individual experiences as indicative of norm conflict; the interaction of two international legal norms, or the effect of a breach of a norm by a State owed in reciprocity to (an)other State(s), is typically absent from considerations. To adopt a definition that admits the impact of breaches of international norms on individuals would depart from the existing debate and judicial realities of norm conflict to such an extent that the definition applied might ultimately render the research obsolete. Therefore, this research looks at how the norms of each regime interact in a legal sense from the perspective of the human rights duty-bearer: the State. For example, it considers what limitations each treaty imposes on the exercise of rights and obligations enshrined by the other treaty in question. This level of analysis responds to the question of whether States can adhere to their obligations under both treaties, simultaneously, since the direct and indirect impacts of WTO rules on individuals are difficult to ascertain conclusively.

It is worth noting, however, that the two approaches are not mutually exclusive. The work by two former Special Rapporteurs on the right to adequate food, Jean Ziegler and Olivier De Shutter, consider the legal dimensions of the debate in international law and also assess the impact of international trade on the right to food on the ground. Their findings are taken as the starting point for the current analysis of norm compatibility. The linkages that they and other experts have identified between trade and the right to food inform and enrich the analysis.

1.4 Structure

This study encompasses conceptual issues that have proven divisive among scholars and experts as well as an empirical analysis. Chapter 2 forms the foundation of the thesis by exploring the topic of fragmentation in international

law. The material presented in Chapter 2 gives way to a more nuanced discussion of a problem associated with fragmentation according to scholars and practitioners: that of international legal norm conflict. A variety of definitions as well as the established avoidance and resolution techniques are presented. Before the analysis can begin, however, the contents and contours of the right to food, and particularly State's obligations, must be understood - without which it is not possible to determine how the WTO rules on agriculture might interact with them. As such, in Chapter 4 the right to food is discussed in detail, including how its arguably vague normative content has enabled a wide debate on its scope and content, justiciability, and the nature of violations. An analysis of the relationship and the potential for conflict or compatibility between the two regimes in question is first presented in Chapter 5, which shines a spotlight on the WTO market access provisions. In Chapter 6 the focus shifts to the rules of the Agreement on Agriculture pertaining to agricultural subsidies. It examines provisions relating to both domestic and export subsidies.

Given that one stated aim of the WTO is to reduce barriers to trade in order to improve standards of living, the reality that so many people continue to live in extreme poverty and without access to the necessities for life, such as adequate food and clean water – with poverty worsening for some groups - raises serious questions about its capability of promoting the advantages it espouses, now and in the future.[39] Moreover, the vagueness and relative under-development of socio-economic rights in comparison to civil and political rights calls into question their usefulness as instruments to protect against abuses by States and non-State actors, acting individually or as members of an international organization. It is hoped that this research will contribute to a better understanding of the particular challenges that WTO rules present to the protection of the right to food and how they might be addressed.

[39] WTO Agreement (n 12) Preamble

2. THE FRAGMENTATION OF INTERNATIONAL LAW; THE WORLD TRADE ORGANIZATION AND INTERNATIONAL HUMAN RIGHTS REGIMES

2.1 INTRODUCTION

This chapter presents and analyses key issues surrounding the topic of fragmentation in international law, which are often considered to be detrimental to the function of a coherent international legal system. Technical concerns include the increased potential for conflicts between legal norms, overlapping jurisdiction, and discordant rulings.[40] Conceptually, it has been argued that fragmentation erodes general international law, challenges its systemic nature, and thereby weakens its role in international relations.[41] Norm conflict – a key aspect of the fragmentation debate and central to the present research – is set aside here and picked up again in Chapter 3, which is dedicated in its entirety to technical and theoretical considerations of the matter. Here, the fragmentation of international law is considered as a topic of broad scholarly debate that contextualizes the present research, and also as it relates more directly to the WTO and human rights regimes.

2.2 WHAT IS FRAGMENTATION?

Before discussing the perceived detriments of fragmentation, it is useful to clarify what exactly it means. Given the International Law Commission's (ILC) extensive work and expertise on the topic, it is fitting to begin by looking at the description provided in the report of its Study Group of the

[40] His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, 'The proliferation of international judicial bodies: The outlook for the international legal order' (Speech to the Sixth Committee of the General Assembly of the United Nations 27 October 2000) <http://www.icj-cij.org/court/index.php?pr=85&pt=3&p1=1&p2=3&p3=1> accessed 14 November 2015; His Excellency Judge Gilbert Guillaume, President of the International Court of Justice (Speech to the General Assembly of the United Nations 30 October 2001) <http://www.icj-cij.org/court/index.php?pr=82&pt=3&p1=1&p2=3&p3=1> accessed 14 November 2015; International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) A/CN.4/L.682, paras8-15

[41] See for example, His Excellency Judge Gilbert Guillaume, President of the International Court of Justice 'The proliferation of international judicial bodies: The outlook for the international legal order' (n 40); His Excellency Judge Gilbert Guillaume, President of the International Court of Justice (Speech to the General Assembly of the United Nations 30 October 2001) (n 40); ILC (n 40) paras 8-9; Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden Journal of International Law 553

Fragmentation of International Law.[42] According to the Study Group, fragmentation represents the international legal angle of the process of 'functional differentiation' that is occurring in various aspects of society.[43] Crucially, the "emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice" illustrate fragmentation in international law.[44] It can therefore be explained by two main phenomenon: the proliferation of legal instruments, institutions, and courts as well as their increasing specialization.

2.2.1 Academic and Practitioner Concerns

The topic of unity or lack thereof in international law is far from novel.[45] However, developments throughout the last century, and particularly since the end of the Cold War have made the topic more relevant than ever.[46] The increase in the number of treaties and institutions, the expansion of law into new and more complex areas of life, the overlapping territorial and subject-matter jurisdiction of international and regional courts, and the inclusion of non-State actors as both subjects and objects of international law all explain its popularity in academic and practitioner discourse. By the end of the 1980s, such a transformation was underway in the field of international law that the UN General Assembly sought to promote and study its continued development and labeled the period of 1990-1999 the 'United Nations Decade of

[42] ILC (n 40)
[43] ibid para 7
[44] ibid para 8
[45] Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands' (2004) 25 Michigan Journal of International Law 903, 903; Koskenniemi and Leino (n 41) 'Abstract'
[46] Furthermore, specialization and proliferation of treaties that occurred before the establishment of the Permanent Court of Justice (1920) was not as problematic to the unity of international law due to the fact that adjudication during that time only took the form of inter-State arbitration; therefore overlapping jurisdiction and conflicting rulings were nonissues. See Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 New York University Journal of International Law 919, 922. Currently there are over 200,000 treaties and 'related actions' registered with the United Nations Treaty Collection. United Nations Treaty Series, 'Overview' <https://treaties.un.org/pages/Publications.aspx?pathpub=Publication/UNTS/Page1_en.xml> Accessed 31 July 2015; a similar point is made in Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands' (n 45) 904

International Law.'[47] Scholars and practitioners have, with few exceptions, met the changes that have transpired throughout recent decades with unease. This much is evident from even a cursory glance at the contents of articles on the topics related to fragmentation expressing 'anxiety,' 'concern,' and 'worry' over the 'proliferation' of treaties and the subsequent 'difficulties' emerging - some even 'pathologizing' developments in the field.[48] Even the descriptor, 'fragmentation,' suggests something broken and imbues the discussion with a pessimistic tone, opposed to words such as 'differentiation,' 'diversity,' or some variation of 'global legal pluralism' – as Simma describes as more *ersatz* terms that could be used.[49] The recent emergence of seemingly independent subsystems like the WTO warrant thorough consideration within academic circles and beyond, though it may not represent the threat to international law that some perceive.

As noted by Koskenniemi, the three speeches delivered by judges of the International Court of Justice (ICJ) to the United Nations General Assembly between 1999 and 2001 exemplify the concern circulating among legal practitioners during that time.[50] In 1999, ICJ President Judge Stephen M. Schwebel expressed anxiety over the proliferation of international tribunals, which he warned might lead to conflicting rulings.[51] To prevent this, he suggested that the ICJ provide Advisory Opinions on matters "of importance to the unity of international law" at the request of other tribunals.[52] Subsequently, President and Judge Gilbert Guillaume reiterated many of Judge Schwebel's

[47] Mario Prost, *The Concept of Unity in International Law* (Hart Publishing 2012) 2
[48] Prosper Weil, 'Towards a Relative Normativity in International Law' (1983) 77 American Journal of International Law 413, 413; His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, 'The proliferation of international judicial bodies: The outlook for the international legal order'(n 40); Gerhard Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law' (2004) 25 Michigan Journal of International Law 849, 856; ILC (n 40). See also Koskenniemi and Leino (n 41); Prost (n 47) 2-5
[49] Bruno Simma, 'Fragmentation in a Positive Light' (2004) 25 Michigan Journal of International Law 845, 847
[50] Koskenniemi and Leino (n 41) 553-555
[51] His Excellency Judge Stephen M. Schwebel, President of the International Court of Justice, 'Address to the Plenary Session of the General Assembly of the United Nations' (Speech to the General Assembly of the United Nations) 26 October 1999 <http://www.icj-cij.org/court/index.php?pr=87&pt=3&p1=1&p2=3&p3=1> accessed 15 November 2015
[52] ibid

concerns and highlighted the potential for forum-shopping and conflicting interpretations in 2000.[53] Then in 2001 Judge Guillaume pressed the General Assembly for a second time to promote the idea that new international courts should be created only after ruling out the ICJ as a possible forum for handling the relevant cases, and that they should be encouraged to seek advisory opinions from the Court.[54] He once again cautioned that aspects of fragmentation such as the proliferation of specialized tribunals threaten the unity of international law.[55]

Specialization simultaneously denotes the progress of international law and its deepening challenges.[56] It signifies human development and increased awareness in areas ranging from the environment to foreign direct investment.[57] More specialized treaty regimes encourage compliance through the formation of 'better law' that more closely reflects the interests of the State parties to a given treaty.[58] The proliferation of treaty regimes that focus on particular aspects of life and society (the environment, trade, human rights etc.) also symbolize an increased tendency to prevent and solve disagreements through diplomatic means rather than through the use of force.[59] But fragmentation not only qualifies rules as specialized, or revolving around more refined subject-matter; it also implies their tendency to 'branch out' from general international law. The challenge according to many is that specialized regimes may become so specific and complex that their relationship with general international law is endangered.[60] As Abi-Saab points out, the more specialized regimes become, "the greater the need for the preservation of the unity of the whole that makes

[53] ibid; His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, 'The proliferation of international judicial bodies: The outlook for the international legal order' (n 40)
[54] His Excellency Judge Gilbert Guillaume, President of the International Court of Justice (Speech to the General Assembly of the United Nations 30 October 2001) (n 40)
[55] ibid
[56] ILC (n 40) paras 8 -15; Abi-Saab (n 46) 925; Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands' (n 45) 904
[57] ILC (n 40) para 15
[58] Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (n 45) 904; Hafner, 'Pros and Cons Ensuing from Fragmentation of International law' (n 48) 859
[59] Christopher J. Borgen, 'Resolving Treaty Conflicts' (2005) Legal Studies Research Paper Series Paper #06-0017 St. John's University 573, 574; Koskenniemi and Leino (n 41) 554-555
[60] See, *inter alia*, ILC (n 40) para 8

specialization possible and meaningful, but which becomes harder to maintain because of the centrifugal effects of specialization."[61] It is not simply that the subject-matter of specialized regimes becomes so particular that it evolves past general international law that is of concern; rather, it is the deliberate opting out of general international law. The concomitant emergence of secondary or procedural rules within specialized fields enable subsystems to operate in relatively autonomous 'functional orbits.'[62]

Certainly, if international law provides an avenue for the non-violent resolution to inter-State disputes, and its ability to function depends on its systemic nature, the lack of clarity about the impact of fragmentation is disconcerting. As Koskenniemi observes, "[s]ince the 17th century […] law has presented itself as the antithesis to fragmentation, leading from the chaos of civil war to the unified nation, from inter-State anarchy to an international legal community."[63] McNair believes that an international legal system is a solution to violence, and suggests that eventually an international constitutional law will emerge because individuals naturally prefer peace and security to violence.[64] However, positioning fragmentation as intrinsically imperiling international law, or the rule of law in inter-State relations, may overstate the problem. As Yearwood argues, "fragmentation does not mean that the international legal system has collapsed into chaos of anything goes" rather, it simply suggests that a universal system cannot fully govern the multiplicity of subsystems currently in operation.[65] Though perhaps it must be asked whether a universal system has ever existed, and how perspectives on this question shape the concerns and solutions identified in the fragmentation debate.

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[61] Abi-Saab (n 46) 925
[62] Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 British Yearbook of International Law 401, 404
[63] Martti Koskenniemi, 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought' (Speech at Harvard University 5 March 2005) 3 <http://www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d[1].pdf> accessed 20 November 2015
[64] Arnold D. McNair, 'International Legislation' (1933-34) 19 Iowa Law Review 177, 189
[65] Ronnie R.F. Yearwood, T*he Interaction Between World Trade Organisation (WTO) Law and External International Law* (Routledge 2012) 31

2.2.2 NARRATIVES

The position at which one arrives on the debate about fragmentation – whether it has occurred, when it began, what its effects are or will be, and how it should be addressed – depends largely on the historical narrative one ascribes to international law more generally. Here it is asked if international law is actually transitioning into something different than it has been and, if so, what marks this transition? If one subscribes to the notion that international law is merely a 'simple set' of rules and 'not really law at all,' then fragmentation is neither a new phenomenon nor is it threatening.[66] Although if one conceives of international law as similar to 'primitive law,' but something that will develop into a proper system akin to municipal law as Hart argued, fragmentation might represent a departure from this trajectory.[67] Similarly, McNair depicts the direction of modern international law as originating as fragmented and relatively weak (in comparison to municipal systems) and predicts its gradual transformation into a unified system that will encompass stronger judicial, legislative, and administrative mechanisms and ultimately, an international constitution.[68] In short, underpinning concerns about fragmentation often lies the following basic presuppositions: that there was or should be a unified international legal order.[69] Following from this premise is the idea that its systemic character needs to be protected.

On the surface, the debate about the nature of international law may seem too abstract to be relevant to a practical assessment of conflict or compatibility between rules. However, the narrative one ascribes to the essential character of international law determines the starting point from where conflicting norms are identified and addressed. As Michaels and Pauwelyn explain, "the ontological question—whether international law actually is a system – [is used]

[66] H.L.A. Hart, *The Concept of Law* (Third Edition, Oxford University Press 2012) 234
[67] Yearwood (n 65) 31
[68] Arnold D. McNair, 'International Legislation' (1933-34) 19 Iowa Law Review 177, 184-186
[69] Koskenniemi 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought' (n 63) 2; Scott Sheeran, 'The Relationship of International Human Rights Law and General International Law: Hermeneutic Constraint or Pushing the Boundaries' in Scott Sheeran and Sir Nigel Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013) 83

to answer the technical question of how to deal with conflicts and interrelation between its rules."[70] This is because conflict of norms rules should be selected if international law is viewed as a single system, whereas conflict of laws rules apply if international law is argued to consist of a plurality of subsystems.[71] The former encapsulates rules of hierarchy and balancing, and the latter uses rules used to determine which substantive norms prevail from among two more domestic legal systems all having some bearing on a matter (i.e. private international law).[72] The problem here is not so much that international law is understood one way or another, but that it can be seen either way - an ambiguity that impedes legal certainty, as there is a lack of clarity over which conflict rules are applicable in a given context and which judicial body might oversee a related dispute. These problems are addressed through normative narratives. A closer look into the history of thought on the topic uncovers that whether one conceives of international law as fragmented or unified, now or in the past, is largely 'in the eye of the beholder.'[73]

Normative narratives attempt to prescribe, rather than simply describe, how to manage the phenomenon of fragmentation and the ensuing challenges. Arguments for the priority of one legal rule over another rule encourage (formal or informal) hierarchies not only of conflict avoidance or resolution rules, but also of sources, norms and institutions. The diversity of values and concerns held by international actors mean that establishing any group of norms as universally superior is unlikely. In fact, the heterogeneity of States is one of the causes of fragmentation in the first place. Koskenniemi observes, "to present the world as fragmented, chaotic, senseless, is often a prologue for a hierarchy in which the speaker's perspective is imposed on the world."[74] He continues, "unity is a hegemonic project. It seeks the predominance of my perspective,

[70] Ralf Michaels and Joost Pauwelyn, 'Conflict of norms or conflict of laws? Different techniques in the fragmentation of public international law' (2011) 22 Duke Journal of Comparative and International Law 349, 349
[71] ibid
[72] ibid 351
[73] ILC (n 40) para 20
[74] Koskenniemi, 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought' (n 63) 5

my institution."[75] In the absence of concrete universal hierarchies, and in the presence of competing conceptions of international law's nature and legitimacy, actors within special regimes may prioritize rules and values from within that regime over others.

Fragmentation is conceptualized here as a process natural to the system as it has developed thus far. Since there is no centralized authority from which rules emerge, there can be no overall project of international law or predetermined trajectory through which its expansion can or should be shaped. It has no agency and therefore no way to uncover how it ought to develop, aside from the will of its actors, who do not necessarily act with unanimity. Fragmentation itself is not perceived as necessarily detrimental to the evolution of international law, or its ability to protect individual or State interests. However, if a specialized regime fails to sufficiently take into account the rules of international law that are external to it, this can promote the prioritization of the rules of that regime over others.

2.3 Characteristics of a Fragmented International Legal Order

While international law has perhaps never been as unified as the legal systems of individual States, the discussion surrounding its coherence or lack thereof has not always centered on the proliferation of relatively autonomous specialized sub-regimes.[76] Instead, the problems identified prior to the Cold War era tended to be more theoretical in nature, relating to the basis of legitimacy of legal rules and how to strengthen the rule of law at the global level – issues that are perhaps inherent to a legal order with no *a priori* hierarchy; notably, the difficulty of achieving universal acceptance of treaties, the limited jurisdiction of international courts, the existence of multiple municipal legal systems, and regionalism were discussed with much of the same language and tone that one can observe in the fragmentation debate,

[75] ibid
[76] ILC (n 40) para 493

though without the *terminus technicus* used today. The following presents elements of a fragmented legal order, including some of its historical antecedents.

2.3.1 Global Legal Pluralism

Prior to the emphasis on proliferation and specialization in legal and scholarly thought, differentiation within international law was evident along geo-political lines (rather than according to subject-matter). The hybridized international legal space in which a plurality of municipal legal systems interact with one another and also with general rules of international law might be characterized as fragmented, too. Teubner and Fischer-Lescano refer to the concurrence of global legal pluralism and the phenomenon of specialized regimes branching out from general international law as the 'double fragmentation:'

> The traditional differentiation in line with the political principle of territoriality into relatively autonomous national legal orders is thus overlain by a sectoral differentiation principle: the differentiation of global law into transnational legal regimes, which define the external reach of their jurisdiction along issue-specific rather than territorial lines, and which claim a global validity for themselves.[77]

The two kinds of fragmentation are not mutually exclusive and both co-exist at present. Accordingly, "territorial-segmental and thematic-functional differentiation" overlap.[78] One might consider a sort of triple fragmentation by adding to this intersection indigenous customary rules and their relationship with municipal legal systems and international norms, all in simultaneous operation, with accumulating and diverging norms.

[77] Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentatino of Global Law' (2004) 25 Michigan Journal of International Law 999, 1009
[78] Gunther Teubner and Peter Korth, 'Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society' in Margaret Young (ed) *Regime Interaction in International Law* (Cambridge University Press 2012) 6

2.3.1.1 REGIONALISM

Regionalism, as an example of geo-political differentiation, creates schisms between larger territories or blocks of States, and also between them and international law. International actors have different values and interests and commit to treaty regimes based on those values and interests, which may diverge from other treaty regimes and general international law (the European Union is one such example).[79] Although this trend may lead to the same dilemmas encountered in the debate about the fragmentation of international law more generally - particularly overlapping jurisdiction, conflicting interpretations and rulings, and forum-shopping - it may also be viewed as a functional response to the international system with its diverse values. Whereas the multiplicity of international actors may prevent the universal adoption of rules on a particular subject-matter (for example, human rights), agreements are more easily reached in groups of 'like-minded States' because there is less need to accommodate opposing ideological perspectives.[80] Pauwelyn asserts that "[t]raditionally, […] regimes operated in virtual isolation from each other" and this promoted the adoption of stronger language and more concise obligations than international agreements, which often revert to vague norms and imprecise obligations for the sake of adoption.[81]

Universal acceptance of any rule seems unlikely given the multitude of global divisions along political, economic, and cultural lines and also along municipal and regional jurisdictions – units that influence the development of international law through the acceptance or rejection of rules. A vaguely formulated treaty promotes the widest possible ratification, particularly when the parties hold significantly different ideological positions. Simma explains that "[e]very treaty-making process, and especially multilateral ones, must come to terms with the conflict between juridical rigour and textual

[79] ILC (n 40) para 218; For a study on this particular example, see Jan Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press 2014)
[80] Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands' (n 45) 903
[81] ibid

unambiguity on the one hand, and the acceptability of the text to the desired circle of participants on the other."[82] Vaguely defined rules offer a wide margin of appreciation to States, which can help prevent genuine conflicts from the position of the State, yet they also present possibilities for divergent interpretations and rulings that in turn contribute to fragmentation.

Regionalism presents possibilities not only for specialized law-making, but also for interpreting existing international law according to shared values of the group.[83] 'Third World' approaches, or indigenous approaches, can also interpret international rules with a shared ethos – 'a certain homogeneity' - even if key actors are not in immediate proximity to one another.[84] Groupings based on geography and values mean that States and communities can confront the competing or opposing interests of more powerful States on particular matters.[85] Yet regionalism can be seen as a hegemonic exercise in itself when the group is comprised of already powerful actors which are banded together, at times in opposition to the interests of less powerful actors, within international negotiations.

2.3.2 VOLUNTARISM

That consent is the basis of international legal obligation finds support in three basic principles: the sovereign equality of States (perhaps stemming from *cujus religio, ejus regio* as Abi-Saab contends), *pacta tertiis nec nocent nec prosunt*, and *pacta sunt servanda*.[86] This means that, respectively, States bear sovereign authority equally, including the authority to enter into agreements with other States; if a State does not consent to be bound to an agreement, it is therefore not bound, and; once a State consents to be bound, the agreement must

[82] Bruno Simma, 'Consent: Strains in the Treaty System' in R.St.J Macdonald and D.M. Johnston (eds), *The Structure and Process of International Law* (Martinus Nijhoff 1983) 489
[83] ILC (n 40) para 199-204
[84] ibid para 204. Although it is recognized here that this is an oversimplification, as there is diversity within these classifications. They are, however, less diverse than the full range of international actors.
[85] ibid para 208
[86] Georges Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 New York University Journal of International Law and Politics 919, 921

therefore be kept. Though a foundational maxim of international law, and also the basis of the presumption against conflict, the consent requirement is in some ways in tension with the concept of a unified international legal system.[87]

The voluntary nature of international legal obligations forestalls the evolution of international law into more coherent system. The fact that obligations cannot be imposed on subjects (with the exception of *jus cogens*) contrasts with municipal systems. Since domestic analogy is often used as an attempt to legitimize international law, the less it mirrors the strength of domestic systems, the more questions about the basis of its legitimacy hang in the balance.[88] As McNair argues, 'international legislation' is a misnomer in that:

> The essence of 'legislation' is that it binds all persons subject to the jurisdiction of the body legislating, whether they assent to it or not, whether their duly appointed representatives have assented to it or not. International legislation does not. It only binds parties who have duly signed the law-making treaty and, where necessary, as it usually is, have ratified it.[89]

Jenks recognizes similar challenges to the systemic development of international law, which, in addition to its other shortcomings, such as the absence of a central legislator, increases the potential for conflict between treaties.[90] Jenks writes,

> [T]he world is still too large and various to permit of a unified legislative process [and] in this situation the optional or adoptive character of international legislation necessarily results in the degree of application of the existing body of international legislation differing for each member of the world community.[91]

Decades later Pauwelyn contends that rather than an emerging phenomenon, fragmentation is inherent to the very nature of international law in which consent is the basis of its binding force, due to the fact that the ability to opt in

[87] Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands' (n 45) 903
[88] Koskenniemi and Leino (n 41) 558
[89] McNair (n 64) 177-189
[90] Jenks (n 62) 403-404
[91] ibid

(or out) of a treaty regime fuels the creation of more treaty regimes around specific issue-areas.[92]

2.3.3 INDETERMINACY

The language of international law is often imprecise and subject to interpretation by lawyers and courts, among other actors, as a consequence of voluntarism. Despite procedural rules on interpretation such as those contained in the Vienna Convention, there remains a degree of flexibility and therefore a vulnerability to interpretive discord. A term can often be successfully argued from two different perspectives that project two different meanings onto it, as Koskenniemi highlights:

> It is possible to defend any course of action – including deviation from a clear rule – by professionally impeccable legal arguments that look from rules to their underlying reasons, make choices between several rules as well as rules and exceptions, and interpret rules in the context of evaluative standards.[93]

To some extent, the meaning of a word – or even a rule – can change depending on the forum in which it is being applied. This relates to the problem of conflicting jurisprudence on matters with similar material facts and the problem of legal uncertainty, which are lamented as causes and effects of fragmentation.[94] As noted in the ILC report, the examination of the same material facts by different institutions might result in different outcomes due to the "differences in the respective context, object and purpose, subsequent practice of the parties and *travaux preparatoires*."[95] Legal uncertainty is magnified in the international setting wherein similar or identical rules might be decided by courts operating with distinct ethos, in different cultural and

[92] Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Interconnected Islands' (n 45) 903
[93] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue, Cambridge University Press 2005) 591
[94] See, *inter alia*, ILC (n 40) para 9; His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, 'The proliferation of international judicial bodies: The outlook for the international legal order' (n 41)
[95] ILC (40) para 11

political contexts, and in the absence of an international doctrine of *stare decisis*. Though, even before an opportunity for discordant decisions arises, the very potential for such divergences contributes to the problem of forum shopping.

The laconic language used in treaty provisions is more pronounced in the field of socio-economic rights than in other areas of international law. The instruments, as well as the academic discourse that surrounds them, is constituted by 'evaluative terminology' such as 'equity' and 'dignity, for example, from which it is difficult to ascertain a clear meaning – much less a universal meaning.[96] A benefit of this kind of language is that it permits State parties a wide margin of appreciation and respects cultural differences between them; however, such terms also risk becoming overly accommodating of State policies.

For Koskenniemi, indeterminacy refers not only to the mutability of the language of international law, but also to the unstable position of its norms and the arguments that serve to legitimize them. For him, indeterminacy relates to the challenge of legitimizing international legal norms; arguments about their objectivity and universal applicability, which are rooted in 'utopian' ideals of a 'natural normative order,' tend to lapse into political apologism when pressed for their authoritative source. But when international law is accused of being political, or hegemonic, there is an appeal its universal character.[97] This instability illustrates the challenge of proving that international law is "simultaneously normative and concrete."[98] Although Koskenniemi does not focus on human rights in his seminal work on indeterminacy, his ideas are highly relevant to the present research. International human rights discourse professes the apolitical, even 'anti-political,' nature of rights as universal

[96] Koskenniemi, *From Apology to Utopia* (n 93) 39
[97] ibid 21
[98] ibid 17

values.[99] As Mégret notes, it enables "people to make claims about certain things being inherently true without any of the dirty work of political confrontation."[100] Despite their celebrated universality based on the idea of human dignity, the legality of human rights obligations remains rooted in the positivist notion of consent (with the possible exception of *jus cogens*).[101] Yet if norms find their legal basis in the voluntary acquiescence of States, who are both the authors and the primary subjects of international law, the fragility of its authority becomes apparent again.

Mégret contends that human rights are able to advance ideas about what a 'just,' 'good,' or 'democratic' society looks like without the political baggage that other approaches carry.[102] Yet, as Koskenniemi notes, it does so with very little guidance on how to achieve such ends.[103] In addition to the general problem of indeterminacy of international legal norms, these qualities of human rights discourse make it especially prone to utopian argumentation. Indeed socio-economic rights have been accused of being just that.[104] Although well-intentioned, the language of human rights, for example, 'universality' and 'inherent dignity,' can be used to mask political agendas, particularly those of powerful political actors in international law and politics. Relatively powerful States or actors can present an interpretation of socio-economic rights - and more importantly, the means by which they should be achieved - as *the* correct version.[105] Economic policies that serve some States, or groups, can be promoted internationally and legitimized by employing the objective language of socio-economic rights and related concepts (for example, terms like

[99] Frédéric Mégret, 'The Apology of Utopia: Some Thoughts on Koskenniemian Themes, with Particular Emphasis on Massively Institutionalized International Human Rights Law' (2013) 27 Temple Comparative and International Law Journal 455, 465
[100] ibid
[101] Sheeran, 'The Relationship of International Human Rights Law and General International Law: Hermeneutic Constraint or Pushing the Boundaries' (n 69) 83, 84
[102] Mégret (n 99) 465
[103] Martti Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 1 Humanity: An International Journal of Human Rights, Humanitarianism, and Development 47, 55
[104] Maurice Cranston, 'Human Rights, Real and Supposed' in Morten Emanuel Winston (ed) *The Philosophy of Human Rights* (Wadsworth Publishing Company 1989) 127
[105] Koskenniemi seems to suggest as similar point when he argues that "to empower human rights preferences may be to end up supporting the wrong preferences." Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (n 103) 55

'development,' 'equity,' 'nondiscrimination,' and 'food security'). In this way, socio-economic rights might be in danger of becoming an extension of hegemonic liberal politics.[106]

2.3.4 Hierarchy, or the Absence Thereof

The increased potential for conflict between norms poses a greater dilemma in international law than in domestic settings due the fact that in municipal law there is a clear hierarchy of sources that organizes how some laws defer to others in the event of conflict. In international law there is no *a priori* hierarchy (with the exception of *jus cogens* norms).[107] The sources of law outlined in Article 38(1)(a)-(c) of Statute of the International Court of Justice - general principles, customary law, and treaties – are of equal value.[108] Judicial decisions are "subsidiary means of determination" and are therefore important to the development of international legal rules.[109] In addition to the sources listed in Article 38, unilateral acts of States and acts of international organizations are widely considered to be significant.[110]

Despite the absence of formal hierarchies, in addition to *jus cogens* there appear to be other categories of norms that occupy an elevated status in comparison to what one might call the 'regular' or 'ordinary' norms of international law.[111] Without consensus on which norms are 'graduated' norms, a preliminary list might include: The Charter of the United Nations, UN Security Council decisions, norms that give rise to *erga omnes* obligations, and human rights.[112] Without a formal hierarchy of sources, "practice has developed a vocabulary that gives expression to something like an informal hierarchy in international

[106] See for example, the discussion in Chapter 4 Section 4.2.1 and Chapter 6 Section 6.4.3, 6.4.3.1
[107] Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press 2003) 94
[108] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art 38
[109] ibid art 38
[110] Michael Akehurst, 'Notes: The Hierarchy of the Sources of International Law' (1975) 47 British Yearbook of International Law 273, 280-281
[111] Weil (n 48) 425
[112] Some authors include 'public interest norms' and '*inter se* norms' in this category. See Jenks (n 62) 99-109

law."[113] Informal hierarchies express narratives that assign relative values to the norms, sources and institutions operating at the international level, but they may not reflect universal priorities. By their very nature, informal hierarchies promote the superiority of some norms over others, and therefore some interests over others. According to Weil, hierarchically organizing norms disrupts the maxims of voluntarism and neutrality – both of which are essential to the proper functioning of international law.[114]

2.3.4.1 *JUS COGENS* NORMS

The topic of *jus cogens* has been dealt with extensively in scholarly literature and such norms represent the clearest departure from the horizontal depiction of international law.[115] In the context of the problem of norm conflict, peremptory norms provide insight into the relative value that norms can have, which affects their posturing vis-à-vis regular norms. Article 53 of the Vienna Convention describes a peremptory norm as a "norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[116] All States agree that such norms exist, though establishing which norms constitute *jus cogens* remains a contentious matter.[117] Some authors argue that the Vienna Convention's omission of a list delineating such norms is telling of the lack of agreement among global actors about which ones have achieved the status.[118] At the same time, the absence of a concrete list enables them to develop over time and prevents any such list from acting as a limitation. According to Jiménez de Aréchaga, a more 'dynamic' approach permits "certain principles which safeguard values of vital

[113] ILC (n 48) para 327
[114] Weil (n 48) 418-419, 420-421
[115] Among many others, see also Alfred Verdross '*Jus Dispositivum* and *Jus Cogens* in International Law' (1966) 60 American Journal of International Law 55; Dina Shelton, 'Normative Hierarchy in International Law' (2006) 100 The American Journal of International Law 291, 297- 317; Antonio Cassese, 'For an Enhanced Role of *Jus Cogens*' in Antonio Cassese (ed) *Realizing Utopia* (Oxford University Press 2012); Erika De Wet, '*Jus Cogens* and Obligations *Erga Omnes'* in Dinah Shelton, (ed) *The Oxford Handbook of International Human Rights Law* (Oxford University Press 2013)
[116] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention) art 53
[117] Cassese (n 115) 158, 159
[118] For example, France regarded any such list as 'suspicious' and has not ratified the Vienna Convention because of its "opposition to j*us cogens*." De Wet (n 115) 542. See also Verdross (n 115) 57

importance for humanity and correspond to fundamental moral principles […the possibility of…] future development."[119] The Inter-American Court has stated that *jus cogens* norms extend beyond those enshrined by treaties.[120]

To attain the status of *jus cogens,* a norm must be recognized as a legal norm first, and as a peremptory norm second, by the majority of States.[121] There must also be evidence of such acceptance.[122] Although Article 53 appears rooted in the notion of voluntarism (peremptory norms are those "accepted and recognized by the international community of States as a whole"), complete consensus among States is not always requirement;[123] even an objecting State might be bound to a norm of *jus cogens*.[124] In this way *jus cogens* represents a deviation from the consent-based legitimacy of international law. Judicial and quasi-judicial bodies have, on occasion, pointed to sources other than consent and treaty law to locate *jus cogens* norms, including customary, natural, and 'ancient' law concepts "derived from a higher order."[125]

Though the content of *jus cogens* norms remains debatable today, their emergence is relatively accepted. They are found not to "exist to satisfy the needs of the individual States but the higher interest of the whole international community."[126] The ICJ recognizes the exceptional character of some norms in its Advisory Opinion concerning Reservations to the Genocide Convention when it states:

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[119] Cassese (115) 160 at footnote 3
[120] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No. 18 (17 September 2003) [99]
[121] Akehurst (n 109) 284, 285
[122] ibid
[123] Vienna Convention on the Law of Treaties (n 116) art 53
[124] *Michael Domingues v United States*, Merits, Inter-American Commission on Human Rights, Case 12.285, Report No. 62/02 (22 October 2002) [50]; Jure Vidmar, 'Norm Conflicts and Hierarchy in International Law: Towards a Vertical International System?' in Erika de Wet and Jure Vidmar (eds), *Hierarchy in International Law: The Place of Human Rights* (Oxford University Press 2012) 28
[125] *Victims of the Tugboat "13 de Marzo" v Cuba*, Inter-American Commission on Human rights, Case11.436, Report No. 47/96 (16 October 1996) [79]; *Michael Domingues v United States* (n 123) [49]. See also *Juridical Condition and Rights of the Undocumented Migrants* (n 120) Concurring Opinion of Judge A. A. Cançado Trindade
[126] Verdross (n 115) 58

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. […] In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'etre* of the Convention.[127]

It later notes that the prohibition of genocide 'is assuredly' a preemptive norm of international law.[128] Peremptory norms are exceptional therefore not because of the authorial source from which they emanate, but their content.

To tie this discussion into the research topic more directly, it is noteworthy that some scholars contend that all, or many, international human rights are norms of *jus cogens*. Shelton understands the European Court of Justice's decision in *Kadi v Council* as an indication that the corpus of human rights law constitutes *jus cogens*.[129] Specifically, the court's statement regarding the "mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute 'intransgressible principles' of international customary law."[130] If one agrees with Shelton's reading, then the right to food, as an international human right, is a preemptive norm - an idea that does not appear to have widespread acceptance. Even if it can be reasonably argued that some aspects of the right to food amount to *jus cogens*, for example those elements that overlap with, *inter alia*, the right to life or the crime of starvation, it is not evident how (or where) a line would be drawn between its constituent elements. States' preference for non-binding agreements on the clarification and promotion of limited aspects of the right to food indicates that the full range of

[127] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep. 15 [28]
[128] *Case Concerning Armed Activities in the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep. 6 [64]; Shelton, 'Normative Hierarchy in International Law (n 115) 306
[129] Shelton, 'Normative Hierarchy in International Law'(n 115) 312; Case T-315/01 *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities* [2005] ECR II-3659
[130] Shelton, 'Normative Hierarchy in International Law' (n 115) 312; *Kadi v Council* (n 129) [231]

entitlements proposed by the Committee are not acknowledged by States as legally binding, much less *jus cogens*.[131]

More commonly, experts take the view that the number of *jus cogens* is actually "very, very few in number."[132] Among the more accepted norms are: (a) the prohibition of aggressive use of force; (b) the right to self-defense; (c) the prohibition of genocide; (d) the prohibition of torture; (e) crimes against humanity; (f) the prohibition of slavery and slave trade; (g) the prohibition of piracy; (h) the prohibition of racial discrimination and apartheid, and (i) the prohibition of hostilities directed at a civilian population ('basic rules of international humanitarian law').[133] Regional courts and experts also recognize a number of other rights, for example, the Inter-American Court of Human Rights recognizes the right to life and the right of access to justice.[134]

2.3.4.2 The Charter of the United Nations

Arguments over the status of the Charter of the United Nations within international law range from attempts to position it as a world constitution to insisting that it is just another piece of international law.[135] A moderate view recognizes the Charter as a privileged treaty, though falling short of a constitutional character. The Charter asserts its primacy primarily through Article 103, in which it is written that:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under

[131] Shelton argues that States clearly delineate between which norms are legally binding and which are not through the adoption of soft or hard law. Shelton, 'Normative Hierarchy in International Law' (n 115) 320-231

[132] Rosalyn Higgins, 'A Babel of Judicial Voices? Ruminations from the Bench,' (2006) 55 International & Comparative Law Quarterly 791, 801 in Marko Milanovic 'Norm Conflict in International Law: Wither Human Rights?' (2009) 20 Duke Journal of Comparative and International Law 69, 93 footnote 104

[133] ILC (n 40) para 374

[134] *Victims of the Tugboat "13 de Marzo" v Cuba* (n 125) [79]; Although there are some caveats to the right to life as *jus cogens;* for example combatants may fall outside of the scope of the right to life as *jus cogens*

[135] For the Charter as constitution see Verdross (n115) 62; For opinions on the Charter as "nothing other than conventional rules" see Weil (n 48) 425

> any other international agreement, their obligations under the present Charter shall prevail.[136]

It must be questioned whether it is the Charter itself that is of some kind of elevated importance, or merely the obligations under it.[137] Its special status is sometimes confused with the elevated status of norms to which the Charter refers (rather than the Charter itself, as a whole). To clarify, one should be careful to acknowledge that peremptory norms referred to in the Charter have emerged as such due "not to their inclusion in an instrument supposed formally to be of superior normative status, but to their actual subject matter."[138] Weil argues that:

> [T]he fact that Article 52 of the Vienna Convention on the Law of Treaties speaks of the threat or use of force 'in violation of the principles of the Charter of the United Nations' (and not 'in violation of the Charter of the United Nations') derives partly from an intention to make the point that the prohibition of coercion is a rule of general international law whose peremptory character and even normativity are independent of its formal inclusion in the Charter.[139]

Article 103 reads as a conflict clause, and not a hierarchical rule *stricto senso*.[140] Unlike instances wherein a conflict involving a peremptory norm renders a conflicting norm (or treaty) null, norms or treaties conflicting with the Charter continue as valid.[141] Article 103 "also precludes or removes any wrongfulness due to the breach of the conflicting norm."[142] This is important because according to some understandings, a conflict engaging Article 103 and another rule (or between any two rules of international law) is only truly resolved if "a state bears no legal cost for disregarding one of its commitments in favor of another."[143]

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[136] Charter of the United Nations United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 103
[137] Milanovic (n 132) 77-78
[138] Weil (n 48) Footnote 44
[139] Weil (n 48) 425
[140] Milanovic (132) 77
[141] ibid 76; See also ILC (n 40) paras 333-34
[142] ibid 77
[143] ibid 74

The Charter's superiority is largely self-referential; it is important because it says so. It has special characteristics, such as the fact that reservations to the Charter provisions are not permitted, however, it emanates from the same fundamental source as all other international agreements: States. Regardless, the relatively exceptional status of the Charter is re-affirmed by the Vienna Convention, which states that in regard to the codification of rules of successive treaties with the same subject-matter, such rules are 'subject to' Article 103 of the Charter.[144] In light of fragmentation, the Charter can be used to demonstrate two opposing view points: It represents the enhanced unity of international law and international society as a whole, particularly if one views it as a sort of world constitution, and conversely, it is an example of an emerging hierarchy that gives rise to fragmentation.

UNITED NATIONS SECURITY COUNCIL RESOLUTIONS

Related to the discussion on Article 103, the UN Security Council enjoys unparalleled discretion when compared with any UN or other international bodies. It is established and granted authority under the Charter, Chapters (V)-(VII).[145] Though the Council enjoys broad powers related to the maintenance of peace and security, including the authority to make binding resolutions, which can impact rights and obligations of States in 'concrete cases,' it is not a legislative body *per se*.[146] It is by virtue of the Charter that Security Council resolutions are of a relatively elevated status when compared with regular norms of international law.

In a case heard first before the House of Lords, and then by the European Court of Human Rights, the relationship between the Security Council resolutions and other norms of international law is illuminated. This case is particularly interesting because in it, it is reasoned that Security Council resolutions can

[144] Vienna Convention on the Law of Treaties (n 116) art 30(1)
[145] Charter of the United Nations United Nations (n 136) Chapters V-VII
[146] Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (The Lawbook Exchange, Ltd. 1951) 295

override even norms of *jus cogens* in situations of conflict. In *Al-Jedda* before the House of Lords, appellant Al-Jedda alleged that his treatment by British forces in Iraq amounted to a violation of his rights under, *inter alia*, the European Convention on Human Rights Article 5(1).[147] The Secretary of State argued that British forces in Iraq acted in accordance with the obligations set forth in Security Council Resolution 1546 (2004), which allowed them to preemptively detain individuals for security reasons.[148] The court considered, *inter alia*, whether the UK was in fact obligated to detain Al-Jedda and whether the obligation prevails over Al-Jedda's right under Article 5(1) as per Article 103 of the UN Charter.[149] Although the Security Council resolution did not explicitly obligate the UK to detain the Appellant, Lord Bingham of Cornhill determined that sufficient case law exists to determine that the primacy of obligations imposed by the Security Council detailed in Article 103 extends to Security Council authorizations in addition to obligations.[150] In fact Lord Bingham claimed that in the event of conflict, Security Council resolutions are intended to supersede all other human rights obligations, including *jus cogens* norms.[151] It was decided that the State's actions, authorized by the Security Council resolution prevailed pursuant to Article 103.[152] It was, however, noted, that in the event of apparent conflicts with human rights, "the right [in Article 5(1)] is qualified but not displaced."[153]

The European Court of Human Rights took a slightly different view when the matter came before it. The Court found that because the Security Council resolution had not specifically imposed an obligation on the UK or other member States to act in breach of their human rights obligations there was no

[147] *R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58 [2007] 1AC, [1]
[148] ibid [30], [133]. See also: UNSC Resolution, 1546 (8 June 2004) UN Doc. S/RES/1546
[149] ibid [26]
[150] ibid [33]
[151] ibid [35]. Lord Bingham argues that "[t]he decisions of the International Court of Justice […] give no warrant for drawing any distinction save where an obligation is *jus cogens* and according to Judge Bernhardt it now seems to be generally recognised in practice that binding Security Council decisions taken under Chapter VII supersede all other treaty commitments."
[152] ibid [33]-[35], [39]
[153] ibid [126]

conflict and therefore Article 103 was not applicable as a conflict avoidance tool.[154] The Court asserted that the Security Council resolution should be interpreted harmoniously with States' 'other requirements.'[155] At the same time, however, it did not rule out the possibility that a Security Council resolution might prevail over human rights obligations; it explains that "it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law," which suggests that although harmony with human rights obligations is preferred, the Security Council *could* obligate States to take measures in contravention of their international human rights obligations.[156] Yet at least one author argues against this possibility, stating that the legal validity of Security Council Resolutions is limited by the provisions of the Charter, meaning that human rights – as obligations under the charter – would act as a limitation: Milanovic contends, "there can be no doubt that, as a matter of substantive law, an *ultra vires* decision of the Council which is contrary to the Charter has no binding force."[157]

Turning to an example more closely related to the central research topic, Security Council resolutions that authorize or obligate economic and commercial sanctions might be used to justify a WTO Member States' derogation from WTO rules (i.e. market access-related obligations).[158] Considering that GATT XIX permits exceptions to WTO rules for security purposes, and also considering the relative weight of Security Council resolutions, authorized trade sanctions with human rights-related objectives could foreseeably enable legal derogations from WTO rules.[159] In this way Security Council resolutions may indirectly strengthen the role of human rights

[154] *Al-Jedda v The United Kingdom* App no. 27021/08 (ECtHR 7 July 2011) [101], [105], [110]
[155] ibid [102]
[156] ibid; Milanovic (n 132) 94-95
[157] *Al-Jedda v The United Kingdom* (n 154) [102]
[158] See for example, UNSCR 661 (6 August 1990) UN Doc. S/RES/0661 "[A]ll states shall prevent: the import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom […]. "
[159] General Agreement on Tariffs and Trade (30 October 1947) 55 UNTS 194, art XIX

concerns (those addressed by the Security Council) in the WTO such that they act as constraints on WTO obligations in particular situations.

2.3.4.3 *ERGA OMNES* OBLIGATIONS

Lastly, obligations *erga omnes* are in a unique position in international law, though whether or not they occupy a relatively elevated position among international norms is another matter of contestation. *Erga omnes* obligations arise from the subject-matter of the norms from which they emanate, and the idea that the international community has an interest in protecting them. The ICJ introduced the term in *Barcelona Traction* (1970), in which the Court stated that *erga omnes* refers to:

> [T]he obligations of a State towards the international community as a whole, [so that] all States can be held to have a legal interest in their protection….Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[160]

Though the ICJ did not explicitly clarify the relationship between *erga omnes* obligations and *jus cogens*, it suggested that *jus cogens* norms give rise to obligations *erga omnes*, (although the reverse is not necessarily true).[161] Examples of norms that produce *erga omnes* obligations according to statements by the ICJ and ILC include the crimes of aggression, genocide, the prohibition against torture, as well as self-determination, some international humanitarian law obligations and international human rights principles.[162] The Human Rights Committee does not distinguish between civil, political and economic, social and cultural human rights when it posits that all States have "a legal interest in the performance by ever other State Party of its obligations. This flows from the fact that the 'rules concerning the basic rights of the human

[160] Case Concerning the *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v Spain)* [1970] ICJ Rep. 3 [33]-[34]
[161] ibid [34]
[162] Sheeran (n 69) 95

person' are *erga omnes*."[163] Assigning an *erga omnes* character to some or all of the obligations related to the right to food impact its position in norm conflicts, as it can affect who has standing to raise the issue of a conflict between Article 11 and another norm of international law in various fora.

2.3.5 SPECIALIZATION

The tendency toward highly specialized regimes is a product of the development of international law and society. The ILC suggests three main ways in which specialized rules or regimes contribute to the fragmentation of international law:

(a) Conflicts between general law and a particular, unorthodox interpretation of general law;
(b) Conflicts between general law and a particular rule that claims to exist as an exception to it; and
(c) Conflicts between two types of special law.[164]

The latter two situations are most relevant to this section. A special rule of international law may authorize derogation from a general rule, which is at the root of the concern over specialization. After all, it is often the case that "new rules or regimes develop precisely in order to deviate from what was earlier provided by the general law."[165] Though the ILC does not see the emergence of increasingly specialized subsystems as inherently problematic. It reports that:

> The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law.[166]

Alongside the development of more specialized fields of international law has been the increasingly nuanced expertise of individuals responsible for drafting and interpreting instruments. Highly skilled negotiators and drafters can

[163] ibid 94; UNHRC, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant U.N. Doc. CCPR/C/21/Rev.1/Add.13 (29 March 2004) para 2
[164] ILC (n 40) para 47
[165] ibid para 15
[166] ibid para 8

navigate their respective domains, but may not consider the harmonious interaction between the rules they draft and other norms of international law. Furthermore, dispute resolution mechanisms may not have the technical expertise or concern for the impact of its decisions outside of their regime. Specialized adjudicatory bodies have limited jurisdiction and competence to contemplate issues that require the interpretation of external rules.[167] Such is the case within the WTO dispute settlement mechanism, and although the panels and Appellate Body are able to consider *amicus curiae* briefs, which could inform them on the impact of WTO rules on external international law, this option is not commonly exercised, and it is especially rare in regard to unsolicited submissions.[168]

2.3.5.1 Self-Contained Regimes

Closely related to the topic of specialization, and more problematic, is the development of so-called self-contained regimes. It is with regard to the self-containment of new regimes that the potential for conflict, and the displacement of general international law, is most glaring. Jenks argues that conflicts 'of law-making treaties' are inevitable in a world with burgeoning specialized areas, which he likened to compartmentalized municipal legal systems.[169] However, for Jenks, highly specialized regimes are not fully autonomous in the sense of self-contained regimes; rather they are segregated instruments that continue to influence each other. [170]

The Permanent Court of International Justice originally introduced the term 'self-contained' in 1923 in the *S.S. Wimbledon* decision, with reference to

[167] Understanding on rules and procedures governing the settlement of disputes (Adopted 15 April, 1994, entered into force 1 January 1995) 1869 UNTS 401 (DSU) art 1.1
[168] WTO, 'Dispute Settlement Training Module; Participation in Dispute Settlement Proceedings' <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm> accessed 30 March 2016; Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 European Journal of International Law 815, 834; DSU (n 167) art 13; WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R [104]
[169] Jenks (n 62) 402-404
[170] ibid 403

specific provisions of the Treaty of Versailles.[171] Interest in the impact of fragmentation escalated within the academic community shortly after the phrase was expanded upon in the *Tehran Hostages* case, where the Court held that the "rules of diplomatic law, in short, constitute a self-contained regime."[172] The term subsequently appeared in a series of ILC reports, which neglect to distinguish between a subsystem of international law and a true self-contained regime with its own set of secondary rules.[173] As such, like most terms and concepts considered in this chapter, there is little agreement and perhaps some confusion about what it means and the degree of isolation such regimes might exhibit.[174]

This confusion is recognized by Simma, who argues in 1985 that a self-contained regime should refer exclusively to:

> [A] certain category of subsystems, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules. A 'self-contained regime' would then be a subsystem which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts […].[175]

Simma more or less reiterates this position in 2006 when he cautions that the term should be used only "to designate a particular category of subsystems, namely those that embrace a full, exhaustive and definitive, set of secondary rules."[176] When regimes replace general international law rules with specialized procedural rules they also begin to correspond with Hart's conception of a legal system in their own right; that is, "the union of primary and secondary rules."[177] In Special Rapporteur Arangio-Ruiz's ILC report, he defines self-contained

[171] Bruno Simma and Dirk Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 European Journal of International Law 483, 491 (citing *Case of the S.S. "Wimbledon"* PCIJ Rep. Series A, No. 1 < http://www.icj-cij.org/pcij/serie_A/A_01/03_Wimbledon_Arret_08_1923.pdf> accessed 4 September 2015 [24])
[172] Simma and Pulkowski (n 171) 491 citing *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep. 3 [83]
[173] Bruno Simma, 'Self-contained Regimes' (1985) 16 Netherlands Journal of International Law 111, 117
[174] ibid 118; Simma and Pulkowski (n 171) 491
[175] Simma, 'Self-Contained Regimes' (n 173) 117
[176] Simma and Pulkowski (171) 490
[177] Hart (n 66) ch V

regimes as sets of rules that are hermetically isolated from international law, and he finds that "none of the supposedly self-contained regimes seem to materialize *in concreto*."[178]

Though the ILC has adopted various positions on the possibility of self-contained regimes throughout the years in regard to state responsibility, its final report in 2006 concludes that the alarm over the development of fully 'self-contained regimes' is unfounded, based on the fact that sub-regimes necessarily emerge within the context of general international law and revert back to it when gaps appear in the special law.[179] Furthermore, no treaty regimes have explicitly opted out of general international law.

2.4 Regimes of relevance

Judging by the ILC's conclusions and the decisions of the relevant tribunals, the WTO and international human rights law cannot act as self-contained regimes, yet their relationships with each other are still unclear. The desire to untangle this relationship and integrate specialized regimes with one another and the wider corpus of international law so as to preserve or encourage the systemic nature of international law is evident within the fragmentation debate.

2.4.1 World Trade Organization

The transition from the GATT system, which was primarily concerned with the trade of goods, to the WTO system, which includes rules for trade of services, intellectual property, and agriculture, marked the establishment of what Palmeter refers to as "one of the most comprehensive collections of primary obligations existing in the field of public international law."[180] The evolution of the world trading system represents what Celso Lafer describes as a 'thickening

[178] Sheeran (n 69) 83
[179] ILC (n 40) paras 191-193
[180] David Palmeter, *The WTO as a Legal System; Essays on International Trade Law and Policy* (Cameron May Ltd, 2003) 326

of legality.'[181] Lafer is commenting on the development of a body of secondary rules that now accompany the primary rules originating in GATT. This sophisticated set of rules, including what some claim to be the constitutional aspects of the WTO agreement, along with the exclusive legislative authority of Members and the compulsory jurisdiction of the dispute settlement mechanism make the WTO regime comparable to municipal legal systems.[182] Recalling Simma's definition of self-containment and Hart's conception of a legal system, the WTO resembles a self-contained regime perhaps more closely than any other area of international law.[183]

2.4.1.1 THE WORLD TRADE ORGANIZATION AND GENERAL INTERNATIONAL LAW

While scholars generally agree that the WTO is part of, and not separate from, general international law, the dynamics of this relationship are still unfolding.[184] A textual inquiry into the WTO agreements is the first logical step in understanding this relationship. Such an approach respects the emphasis on textualism apparent in the regime.[185] The Appellate Body spoke to this effect in *Japan – Taxes on Alcoholic Beverages* when it noted that "[t]he proper interpretation of the Article is, first of all, a textual interpretation."[186] However, a reading of the relevant instruments using the ordinary meaning of the text offers limited insight due to the fact that the WTO instruments make few references to outside law. A list of rules applicable to the dispute settlement

[181] ibid 262
[182] Petersmann has frequently argued the constitutional aspects of WTO. See generally, Ernst-Ulrich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations, and Dispute Settlement* (Klewer Law International Ltd. 1997) 47-8; Ernst-Ulrich Petersmann, 'Theories of Justice, Human Rights, and the Constitution of International Markets' (2003) 37 Loyola of Los Angeles Law Review 407, 427-8; Ernst-Ulrich Petersmann, 'Introduction and Overview' and 'Section 1: International Trade Law: Constitutionalisation and Judicialisation in the WTO and Beyond' in Christian Joerges and Ernst-Ulrich Petersmann (eds) *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart Publishing 2006); Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights' (2006) 3 Journal of International Economic Law 19, 20. See also Palmeter (n 180) 305-339
[183] Simma, 'Self-Contained Regimes' (n 173) 117; Hart (n 66) 91
[184] Joost Pauwelyn, 'The Role of Public International Law in the WTO; How Can We Go?' (2001) 95 American Journal of International Law 535, 538
[185] Krista Nadakavukaren Schefer, *Social Regulation in the WTO* (Edward Elgar Publishing Limited 2010) 121
[186] WTO, *Japan: Taxes on Alcoholic Beverages – Report of the Appellate Body* (1 November 1996) WT/DS1/AB/R, WT/DS10/AB/R, WT/DS22/AB/4 [19]

mechanism is entirely absent from WTO texts - a point that seems to have fuelled past questions about the potential of its self-containment.[187] Tracthman argues that WTO adjudicatory bodies are "not authorized to apply general substantive international law or other conventional law" and that only procedural rules of general international law apply.[188] However, as will be shown, the jurisprudence of the court disproves this point.

To avoid confusion, many authors writing on the relationship between WTO rules and external international law make a point of differentiating between rules over which the adjudicatory bodies have jurisdiction and rules that are applicable to disputes, and this distinction is worth reproducing here.[189] Jurisdiction includes the agreements listed in its Appendix 1 ('covered agreements') as determined by the Dispute Settlement Understanding Articles 1(1), 3(2), 7(1), 11, 23.1 and this is reaffirmed in *Brazil - Measures Affecting Desiccated Coconut*.[190] Applicability refers to the external rules that can be invoked by a party to a treaty as a defense, or applied by the panels and the Appellate Body to assist in the interpretation of terms or to help determine disputes but cannot be decided on as such.[191] Any rule must still be 'relevant' to the parties in order to be applicable to a dispute (a point which solidifies the

[187] ILC (n 40) para 45; See also Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press 2009) 13

[188] Joel Trachtman, 'The Domain of WTO Dispute Resolution' (1999) 40 Harvard International Law Journal 333, 342; ILC (n 40) para 167

[189] See for example: David Palmeter and Petros C Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92 American Journal of International Law 398, 398-399; Lorand Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings' (2001) 35 Journal of World Trade 499, 501-502; Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (n 184) 554-566; Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 European Journal of International Law 753, 757-779; Anja Lindroos and Michael Mehling, 'Dispelling the Chimera of 'Self-Contained Regimes' International Law and the WTO' 16 European Journal of International Law (2005) 857, 860-866; Isabelle Van Damme, 'Jurisdiction, Applicable Law, and Interpretation' in Daniel L. Bethlehem, Donald McRae, Rodney Neufeld, Isabelle Van Damme (eds) *The Oxford Book of International Trade Law* (Oxford University Press, 2009) 299, 315; ILC (note 40) para 45

[190] "[t]he 'covered agreements' include the QTO Agreement, the Agreements in Annexes 1 and 2, as well as any Plurilateral Trade Agreement in Annex 4 where its Committee of signatories has taken a decisoin to *apply the DSU*." WTO, *Brazil - Measures Affecting Desiccated Coconut* (21 February 1997) WT/DS22/AB/R [13]

[191] "The jurisdiction of WTO panels is limited. The applicable law between them is not." Pauwelyn, *Conflict of Norms in Public International Law* (n 107) 472, 473. However Marceau argues a different view: "WTO applicable law refers to the law binding on states, as WTO Members, which can be enforced (by effective remedies) by WTO adjudicating bodies which have been granted compulsory and exclusive jurisdiction over such WTO matters" Marceau (n 188) 756

idea that the right to food, if producing obligations *erga omnes*, can be raised by any Member in regard to a dispute at the WTO).[192] Crucially, the omission of reference to outside law in the WTO agreements does not mean that such law is entirely irrelevant; unless negotiating parties specifically state their intent to opt out of prior commitments of international law, those commitments remain in tact.[193] Moreover, even if the WTO appears to opt out of some international law rules, this does not imply that it opts out of international law as a whole.[194]

Insight into how general international law and WTO law relate, and how WTO rules relate to the rules of other special regimes, can be better gleaned from the decisions of the panels and the Appellate Body. However there is also a caveat to this mode of inquiry: Given that Members have exclusive interpretive and amendment rights granted under Articles IX(2), IX(3), and X of the WTO Agreement, the ultimate interpretive authority rests with States.[195] Members may reject or alter interpretations of a panel through a three-fourths majority vote.[196] They may also reject the recommendations of a panel or the Appellate Body by refusing, through reverse consensus, the adoption its recommendations.[197] In fact, Members may prevent the formation of a panel altogether through reverse consensus, although in practice these scenarios are highly unlikely given that the party seeking the formation of a panel or for

[192] Holger P. Hestermeyer, 'Economic, Social, and Cultural Rights in the World Trade Organization' in Eibe Riedel, Gilles Giacca, Christophe Golay (eds.) *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford University Press 2014) 273. See also discussion in: WTO, *EC and Certain Member States: Large Civil Aircraft – Report of the Appellate Body* (18 May 2011) WT/DS316/AB/R, [839]-[855]; Pauwelyn, *Conflict of Norms in Public International Law* (n 107) 263-264

[193] WTO, *Korea: Measures Affecting Government Procurement – Report of the Panel* (1 May 2000) WT/DS163/R [7.96] footnote 755; See also: Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (n 184) 541

[194] Pauwelyn, *Conflict of Norms in Public International Law* (n 107) 39

[195] Marrakesh Agreement Establishing the World Trade Organization (adopted April 15, 1994, entered into force 1 January 1995) 1867 UNTS 154 (WTO Agreement) art XI(2), XI(3), and X; Understanding on rules and procedures governing the settlement of disputes (Adopted 15 April, 1994, entered into force 1 January 1995) 1869 UNTS 401 (DSU) art 3(9); Van Damme, 'Jurisdiction, Applicable Law, and Interpretation' (n 189) 338-339. See also: Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?'(n 184) 535

[196] WTO Agreement (n 195) art IX(2); 'Jurisdiction, Applicable Law, and Interpretation' (n 189) 339

[197] DSU (n 195) art 16.4, 17.14; Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?'(n 184) 553

whom recommendations benefit would also have to reject then.[198] This is simply to say that the extent to which external international law might influence the interpretation of WTO rules cannot be uncovered in absolute terms by looking at the instruments or past decisions alone.

In *United States – Standards for Reformulated and Conventional Gasoline* (1996), the first case brought before the newly established WTO dispute settlement mechanism, Venezuela argued that the United States' 'gasoline rule' violated, *inter alia,* GATT Article III (which requires Members to treat products that are foreign-produced and domestically-produced, equally) by discriminating against gasoline imported from Venezuela and Brazil.[199] The United States argued that such discrimination was justified under GATT Article XX (b), (d), and (g).[200] The panel sided with Venezuela and Brazil and the case was subsequently appealed by the United States.[201] While the Appellate Body upheld the panel's ruling, it disagreed with its application of GATT Article XX (g), citing that the panel "overlooked a fundamental rule of treaty interpretation" most clearly enshrined in the Vienna Convention on the Law of Treaties Article 31.[202] The Appellate Body acknowledged that Article 31 has "attained the status of a rule of customary or general international law" and must therefore inform interpretation of the GATT according to DSU Article 3(2).[203] Most important to the question at hand regarding the relationship between WTO law and general international law is that the Appellate Body declared, "the General Agreement is not to be read in clinical isolation from public international law."[204] Hence, the rules of interpretation included in the Vienna Convention and other rules of public international law are applicable to the WTO.

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[198] DSU (n 195) art 6(1); Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?'(n 184) 553
[199] WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Panel* (29 January 1996) WT/DS2/R [3.1]
[200] ibid [3.4]
[201] ibid [8.1]
[202] WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Bod*y (29 April 1996) WT/DS2/AB/R [16]
[203] ibid [17]
[204] ibid

In *Korea – Measures Affecting Government Procurement* (2000) the United States requested a panel be established to consider the procurement practices associated with airport construction in Korea.[205] The United States claimed that benefits reasonably expected under the Agreement on Government Procurement had been nullified or impaired.[206] It was found that Korea had not violated its obligations; however, according to the non-violation doctrine unique to the DSU, injured parties may still seek remedies for nullified or impaired benefits resulting from 'non-violation.'[207] Because the error in understanding on the part of the United States resulted from the negotiation process, the panel referred to the Vienna Convention Article 65, which rendered the agreement null. The panel stated:

> We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.[208]

The excerpt highlights the panel's willingness to include rules of general international law and it indicates that without it, there are gaps in WTO law. In this sense, it falls back on general international law wherever WTO law is silent on a matter. Yet the excerpt also suggests that, in the event that an external law 'implies differently' than WTO law (as it has in this case), WTO law prevails.

The panel saw no reason to conclude that the terms of reference "are meant to exclude reference to the broader rules of customary international law in

[205] WTO, *Korea: Measures Affecting Government Procurement – Report of the Panel* (n 193) [1.1]
[206] ibid [7.87]
[207] ibid
[208] ibid

interpret[ation][…].”[209] A footnote to the text explains that there is “no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply.”[210] Thus reaffirming that the absence of a clear list of applicable law does not signify that the regime opts out of it, or that it is inapplicable to disputes. It was ultimately decided that while the case would be deliberated on the basis of the special non-violation doctrine particular to the DSU, as an extension of the general international law principle of *pacta sunt servanda*, it would do so within the broader framework of international law.[211]

2.4.1.2 The World Trade Organization and Other Special Law

In the controversial case of *European Communities - Measures Concerning Meat and Meat Products* (1998), the panel and subsequently the Appellate Body considered how an external principle would relate to rules under GATT and the SPS.[212] The United States complained that the European Community’s ban on the importation of beef treated with certain natural and synthetic hormones was incompatible with its obligations under the Agreement on Sanitary and Phytosanitary Measures (SPS) and resulted in a violation of their rights as exporters under the GATT.[213] The SPS agreement permits exceptions to Members’ obligations under the agreement provided that such actions are, *inter alia,* based on ‘scientific evidence.’[214] The European Community argued that its ban on hormone-treated beef was based on the precautionary principle, which does not require ‘*all* scientists’ to find a risk to human health arising from the use of hormones in beef production; rather, it merely requires that there is uncertainty about its safety.[215] It also argued that the precautionary

[209] ibid footnote 755
[210] ibid footnote 753
[211] ibid footnote 755
[212] WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) - Report of the Appellate Body* (16 January 1998) WT/DS26/AB/R; WT/DS48/AB/R [120]-[125]
[213] ibid [1]
[214] ibid [174], [177]
[215] ibid [121] (emphasis original)

principle has become part of customary international law.[216] The Appellate Body opted not to apply the precautionary principle to determine whether or not the European Community was justified in refusing imports of beef that had been treated with hormones.[217] It stated that the principle "has not been written into the SPS agreement as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that agreement."[218] This statement, and the Appellate Body's decision in this case, demonstrates the WTO's insularity to some degree. Yet, in the same paragraph, the Appellate Body notes that:

> [T]he precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from a duty of applying the normal (i.e. customary international law) principles of treaty interpretation in reading the provisions of the SPS agreement.[219]

Therefore, here again, although the precautionary principle does not justify derogations from WTO rules, general international law rules on treaty interpretation clearly apply. The rejection of the precautionary principle in this case stems from the panel and Appellate body's uncertainty as to its status in international law, rather than a refusal to consider an external standard.[220] The Appellate Body clearly states that deference is given to Members to apply standards that exceed international standards, but that this is a qualified right.[221]

More to the point regarding WTO rules and other special rules of international law, the Appellate Body acknowledges that the precautionary principle may have crystalized into "customary international *environmental* law" – a comment that illustrates the siloing of the trade and environmental law regimes in the international sphere.[222] The remark indicates that although general international law applies, rules that are perceived as belonging to a special regime like

[216] ibid
[217] ibid [124]
[218] ibid
[219] ibid
[220] ibid [123]
[221] ibid [124]; See Chapter 5 Section 5.2.2.3 for further discussion on this point.
[222] ibid [123] (emphasis added)

environmental law may not. This is problematic in regard to fragmentation because even if the precautionary principle is found to be a norm particular to environmental law, it is nonetheless a norm of international law.

In *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998) however, the Appellate Body was more open to consulting international environmental law to aid in its determination of terms in GATT Article XX (g).[223] Specifically, the Appellate Body referenced he United Nations Convention on the Law of the Sea (UNCLOS), the Convention on Biological Diversity, and the Convention on the Conservation of Migratory Species of Wild Animals, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora among others to inform its interpretation of terms such as 'natural resources' and 'exhaustible.'[224] It determines that such terms are 'by definition evolutionary' and require reinterpretation in light of contemporaneous challenges faced by member States.[225]

2.4.2 International Human Rights Law

Human rights treaties do not follow a typical contractual treaty structure in which rights and obligations are granted in reciprocity between subjects. As the Human Rights Committee explains in General Comment No. 24: "Such treaties […] are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights."[226] Human rights treaties are special not so much because of their structure, but because of their subject-matter and object and purpose. Like the WTO regime, international human rights law is often regarded as branching out from general international law

[223] WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R
[224] ibid [130]
[225] ibid [129] – [130]
[226] UNHRC, 'General Comment 24 on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant' (4 November 1994) UN Doc. CCPR/C/21/Rev.1/Add.6, para 17

through its specialized rules, particularly procedural rules.[227] However, that international human rights law is not an autonomous regime is abundantly clear from the numerous decisions and treaty body references to outside law (in addition to the ILC's findings on self-contained regimes more generally).[228] The issue here is not to look for evidence of its self-containment or the relationship between international human rights law and general international law as in Section 2.4.1.1, but rather to highlight the parameters of this specialness, particularly through a look at the interpretive practices of treaty bodies and courts.

2.4.2.1 Interpretation of Human Rights Instruments; Replacing or Filling in for General International Law

Specialized rules of interpretation and the uniform 'normative vision' that 'interpretive communities' adopt can serve to isolate a special regime from other areas of international law.[229] When the common interpretive approach employed by key actors in a particular regime differs from that of general international law it creates an informal hierarchy that seeks to prioritize the rules of that regime. Although the prioritization of international human rights law might strengthen the protection of individuals, its proponents have also been criticized for separatist tendencies, single-mindedness, 'human rights triumphalism,' and denying the place of human rights within the larger corpus of international law.[230]

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[227] Sheeran (n 69) 82; ILC (n 40) paras 161-164; Simma and Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (n 170) 524-529

[228] ILC (n 40) para 172. See for example, *Al-Adsani v the United Kingdom* ECHR 2001-XI 35763/97 [55]. The court "reiterates that the Convention has to be interpreted in the light of the rules set out in the Vienna Convention on the Law of Treaties of 23 May 1969, and that Article 31 § 3 (c) of that treaty indicates that account is to be taken of 'any relevant rules of international law applicable in the relations between the parties.'"

[229] Michael Waibel, 'Interpretive Communities in International Law' (2014) University of Cambridge Faculty of Law, Legal Studies Research Paper Series Paper No. 62/2014 <http://ssrn.com/abstract=2513411> accessed 20 May 2015, 8

[230] Sheeran (n 69) 79; Alain Pellet, 'Human Rightism and International Law' Gilberto Amato Memorial Lecture (18 July 2000); Alain Pellet, 'Reservations to treaties and the integrity of human rights' in Scott Sheeran and Sir Nigel Rodley (eds), *Routldege Handbook of International Human Rights Law* (Routledge 2013) 323

Pellet has been particularly critical in this regard, accusing key actors (most notably, treaty bodies) in the human rights regime of "thinking that the rules of general international law are sound, but totally unsuited to this branch of law."[231] He illustrates this point with reference to the issue of reservations to human rights treaties.[232] It appears as though treaty bodies have departed from the view expressed in the law of treaties to some extent; for example the Human Rights Committee has stated that the Vienna Convention "provisions [on reservations] are inappropriate to address the problem of reservations to human right treaties."[233] This is despite the fact that the Vienna Convention is applicable to all treaties, and Article 19(c) encompasses the 'object and purpose test' devised by the ICJ when considering the issue of reservations, which stipulates that a State that makes a reservation that defeats the object and purpose of the treaty can not be considered a party to the treaty.[234] The Committee's assertions reflect the ICJ's Advisory Opinion that the object and purpose of the Genocide Convention, which is of a humanitarian and civilizing nature, limits States' freedom to make reservations.[235] In any event, in the same General Comment the Committee acknowledges, "the matter of reservations under the Covenant and the first Optional Protocol is governed by international law."[236]

Others such as Sheeran and Mechlem present somewhat similar points on the specialized interpretation processes of treaty bodies (with a more neutral tone, however). Sheeran argues that "human rights treaty bodies [are] sometimes at odds with the VCLT's State-centric position on interpretation" and that they have "distinguished their interpretive methodology from the ICJ and other general adjudicative bodies" by adopting dynamic interpretations.[237] Dynamic or evolutionary approaches to interpretation might prioritize the object and

[231] Alain Pellet, 'Human Rightism and International Law' Gilberto Amato Memorial Lecture (n 230)
[232] ibid; Alain Pellet, 'Reservations to treaties and the integrity of human rights' (n 230) 323
[233] General Comment 24 (n 226) para 17
[234] Vienna convention (n 116) art 19(c); Sheeran (n 69) 103; *Reservations to the Genocide Convention* (n 127) [15], [18]
[235] *Reservations to the Genocide Convention* (n 127) [13]
[236] General Comment 24 (n 226) para 8
[237] Sheeran (n 69) 102

purpose of the treaties opposed to the original intention of the parties, but this does not mean that they replace general international law with specialized rules. Furthermore, the practice of international human rights tribunals clearly indicates that the general rules of interpretation still apply. For example, the Inter-American Court of Human Rights applies the rules of treaty interpretation found in the Vienna Convention while also recognizing the 'distinct' character of human rights treaties.[238] It addresses this character through the adoption of the *pro homine* principle, which essentially prioritizes the individual and the maximum enjoyment of their rights over other elements of interpretation advocated by the Vienna rules.[239] But it has, in a multitude of cases, referred to general and external rules of international law. Similarly, the European Court of Human Rights clearly recognizes the 'special character' but it has also stressed that the Convention must be "interpreted in harmony with other rules of international law."[240]

2.4.2.2 The Place of Economic, Social and Cultural Rights in International Human Rights Law

The idea that a common interpretive hermeneutic pervades international human rights law, and that it veers the regime away from general international law, is even less accurate with respect to the sub-branch of economic, social, and cultural rights. Indeed, describing international human rights law as 'a regime' at all may be inaccurate, as this field is comprised of numerous treaties, monitoring bodies, and tribunals. Despite being interdependent and

[238] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)* Advisory Opinion OC-2/82, Inter-American Court of Human Rights Series A No 2 (24 September 1982) [29], [31]

[239] See *inter alia*, ibid; *Case of Ricardo Canese v Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-American Court of Human Rights, Series C No. 111(31 August 2004) [181]; *Juridical Status and Rights of Undocumented Migrants* Advisory Opinion OC-18/03, Inter-American Court of Human Rights, Series A No. 18 (17 September 2003), [47] (37, 73, 80); *Compulsory Membership in an Association prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)* Advisory Opinion OC-5/85, Inter-American Court of Human Rights, Series A No. 5 (13 November 1985) [12]

[240] See *inter alia*, *McElhinney v Ireland* ECHR 2001-XI 31253 [36]; *Al-Adsani v the United Kingom* (n 228) [55]. For a more thorough exploration of the European Court of Human Rights' use of general international law, see Jonas Christofferson, 'Impact on General Principles of Treaty Interpretation' in Menno T. Kamminga and Martin Schienen, *The Impact of Human Rights Law on General International Law* (Oxford University Press 2009) 37

interrelated, socio-economic rights are distinct from civil and political rights in terms of their development, acceptance, compliance, and justiciability (more on this in Section 4.2).

Although the rules of treaty interpretation in the Vienna Convention on the Law of Treaties applies to the interpretive work of the Committee, it has been criticized for failing to adhere to it – or any consistent approach to interpretation.[241] This is problematic in that, without a consistent interpretive methodology, the effect of their elaborations are minimized:

> [W]hereas courts can rely on the fact that their judgments are legally binding in a formal sense, the degree of de facto legal force that accrues to the output of treaty bodies depends on the extent to which the concluding observations are convincing and persuasive.[242]

Mechlem argues that "the consistent use of an accepted and appropriate method [of interpretation]" would further legitimize and strengthen the force of the interpretations put forward by treaty bodies.[243] Without a common approach, the meaning of these norms is more vulnerable to competing interpretations, which in turn prevents their crystallization in international law.

Even where priority is given to a human rights norm, in the event of conflict or otherwise, the ILC has always claimed that recourse to the Vienna Convention is discretionary rather than obligatory.[244] Christofferson suggests that interpretation is more of an art than a science, echoing the assertions that the rules of the Vienna Convention are not meant to be rigid or to confine the interpreter to a formula for interpretation, but rather to offer guidance.[245] With the variety of sources from which human rights flow, it is unsurprising that different treaty bodies and courts might take slightly different interpretive

[241] Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law 905, 905
[242] ibid 924
[243] ibid 909
[244] Christofferson (n 240) 40
[245] ibid

approaches, while still operating within the framework of general international law.

2.5 Conclusion

International law may have emerged as a system that lacked coherence – fragmented along various political, geographical, cultural, and legal lines – however the advent of highly specialized regimes in fields such as trade, environment, investment, and human rights, and the multiplication of norms in these fields have exacerbated the divides between them in some respects. Still, these regimes do not appear to introduce specialized rules that are intended to displace general rules of interpretation. Rather, general international law is still commonly used to fill the gaps of the rules of specialized regimes. As the ILC suggests, new regimes inevitably arise within the context of international law; there is no metaphorical space to exist fully outside of it. All States have preexisting international legal obligations that they must balance and maintain when new and increasingly specialized regimes emerge.

International trade law and international human rights law represent two of the most commonly cited regimes in the discussion surrounding fragmentation, yet despite some unique features in each, they do not constitute self-contained regimes, which is arguably the greatest concern among scholars and experts over the impact of fragmentation. Still, the jurisprudence of both regimes offers little insight into how they relate to one another technically, and how the norms of each constrain or reinforce those of the other. Because some human rights are argued to occupy a superior position in international law (to varying degrees), they might be assigned different values in a situation involving a conflict between them and other norms of international law, depending on the forum in which a dispute is heard.

3. Conflict of Norms in International Law; Theories and Practice

3.1 Introduction to conflict of norms

Authors dating back to Grotius have expressed the presumption against conflict of international legal norms.[246] It serves to promote the systemic integration of norms in international law and it is premised upon the assumption that States act consistently and do not enter into agreements that contradict pre-established rights or obligations.[247] Despite this, the potential for conflicting norms and rulings has always existed within international law (and municipal law, for that matter). The potential for conflict is arguably greater in international law today, in its current manifestation (whichever narrative one ascribes to it, as having always been fragmented or recently so) given its ever-expanding breadth, highly specialized nature, the multitude of actors involved in negotiating and consenting to international legal norms and the number of institutions adjudicating at the international level.[248] Indeed, it is the success of international law - and particularly treaties - as evinced by its expansion and multiplication that has led to concern over more instances of conflict.[249]

A limited 'toolbox' of rules and principles exist in the law of treaties, customary international law, and in some treaties to avoid and resolve conflicts when they genuinely appear. For example Article 30 of the Vienna Convention expresses some of these rules, such as *lex prior*, *lex posterior*, whereas Article

[246] Hugo Grotius, *De Jure Belli ac Pacis Libris Tres/Law of War and Peace* (first published 1625, Francis W. Kelsey tr 1925) Book II, chapter 16; International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) A/CN.4/L.682, para 17 footnote 1

[247] 'Right' here might refer to a "claim, competence, permission, liberty and privilege." See Erich Vranes 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17 The European Journal of International Law 395, 407

[248] Stating the increasing potential for conflict, see *inter alia*, Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 British Yearbook of International Law 401, 402-403; Sir Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, first published 1973, Manchester University Press 1984) 93; Joost Pauwelyn, *Conflict of Norms in Public International Law; How the WTO Relates to Other Rules of International Law* (Cambridge University Press 2003) 19; Christopher J. Borgen, 'Resolving Treaty Conflicts' (2005) Legal Studies Research Paper Series Paper #06-0017 St. John's University 573, 574; Anja Lindroos, 'Addressing Norm Conflict in a Fragmented Legal System: The Doctrine of *Lex Specialis'* (2005) 74 Nordic Journal of International Law 27, 33; ILC (n 264) para 8; Marko Milanovic 'Norm Conflict in International Law: Wither Human Rights?' (2009) 20 Duke Journal of Comparative and International Law 69, 69;

[249] Borgen (n 248) 574; Jenks (n 248) 405; ILC (n 246) para 14

53 implies *lex superior*. The *lex specialis* maximum exists in customary international law for similar purposes, and clauses such as Article 103 of the Charter of the United Nations indicate a treaty's relationship to other rules of international law.[250] Moreover, specialized regimes sometimes opt for specialized rules of interpretation, for example, the dynamic interpretation preferred by the specialized human rights tribunals and treaty bodies, which some argue depart from the Vienna Convention's general rule.[251] The emphasis on harmonious interpretation - and preference for conflict avoidance, rather than recognition and subsequent resolution - is apparent throughout international court decisions, customary rules on interpretation, and is embodied in Vienna Convention Article 31.[252]

Yet none of these techniques sufficiently address the kinds of incompatibilities that appear to be emerging with greater frequency in the current context of international law. The application of conflict resolution techniques advocated by the Vienna Convention depend upon specific criteria, and are therefore of limited use to conflicts as they appear most likely to occur today: namely between treaties with only partially identical parties (as opposed to identical parties) and different (or at least not explicitly the same) subject-matter.[253] Specialized rules of interpretation often prioritize the norms of one regime or another, effectively creating informal hierarchies within international law that can elevate and minimize rules (and interests). The emphasis on effective interpretation risks denying that incompatibilities exist simply because they can be 'interpreted away.'[254] While coherence between norms of international law is preferable to chaos and conflict, if such a presumption leads to an inaccurate

[250] Charter of the United Nations United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 103
[251] Scott Sheeran, 'The Relationship of International Human Rights Law and General International Law: Hermeneutic Constraint or Pushing the Boundaries' in Scott Sheeran and Sir Nigel Rodley (eds), *Routldege Handbook of International Human Rights Law* (Routledge 2013) 102; See also Chapter 2 Section 2.4.2.1
[252] ibid 92; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention) art 31
[253] Borgen (n 248) 576-578
[254] Joost Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 178. See also Jan Klabbers, *Treaty Conflict in the European Union* (Cambridge University Press 2009) 89

understanding of the practical relationship between norms and limits the exercise of certain kinds of norms (for example, vague norms or those expressing permissions), it must be reconsidered in light of the changing nature of international law.

Even before avoidance or resolution techniques can be applied, a conflict must first be identified as such. Agreement between scholars and practitioners over what exactly constitutes a conflict of norms is still lacking. The relationship between international trade law and international human rights law appears incompatible, given that each touches on innumerable aspects of life but operate from different ethos.[255] This chapter explores which elements of international law have the ability to conflict according to the prevailing theory and practice, and considers the limitations of avoidance and resolution techniques, including harmonious interpretation, the construction of hierarchies, and the use of supremacy or derogation clauses. The work of the authors outlined below informs the methodology of this study.

3.2 Defining Parameters

3.2.1 The Focus on Norms in International Law

Examinations of conflict or compatibility in international law are typically limited to the relationship between specific rules as opposed to treaties in their entirety.[256] As such, the discussion throughout this research focuses on questions about the compatibility or lack thereof between particular norms of the WTO and the human rights regime. Moreover, the term 'norms' is used instead of 'obligations' because it captures a variety of 'deontic operators' used in treaties; in other words, it includes obligations as well as commands,

[255] ILC (n 246) para 15. See also: Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 European Journal of International Law 815, 816, 820. Alston writes that the WTO "is an institution which is dominated by producers, and in which the economic, social, cultural, political and various other interests of a great many people are not, in practice, represented" at 836

[256] Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 10

prohibitions, rights, permissions, and exemptions.[257] The majority of norms under examination throughout this research amount to obligations and rights of States vis-à-vis other States or individuals.

'Norm' is broad enough to include all the provisions that may conflict, yet it is also more accurate than the alternative, 'laws.' As Pauwelyn warns, to suggest that certain norms are laws "could be understood by some as elevating what are basically treaty norms […] of a contractual nature to the status of 'law.'"[258] The ICESCR is understood as a law-making treaty, while the Agreement on Agriculture is, arguably, contractual in nature.[259] Furthermore, referring to laws denotes a study on a 'conflict of laws,' which arises between separate legal systems.[260] This is important because conflicts between norms of different legal systems and those between norms of the same legal system are approached differently, using different techniques and, as noted in the previous chapter, all areas of international law comprise 'a system' even if it is fragmented.[261] For example, conflict resolution techniques that advocate a hierarchy of sources, or that a superior norm should prevail over another norm in the event of incompatibility, are only applicable in situations in which both norms are part of the same legal system.[262]

Lastly, this research assesses the possibility of horizontal conflicts, which include only norms at the international level (as opposed to 'vertical conflicts' which arise between norms of international law and a municipal law).[263] Although there are numerous examples of incompatibilities (real or alleged)

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[257] Vranes (n 247) 408. See also Hans Kelsen, *General Theory of Norms* (Michael Hartney (tr) Oxford University Press 1991) 96-97; Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 8-10
[258] Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 9
[259] Borgen (n 248) 581. Borgen notes the difference between law-making and contractual treaties: "Legislative treaties 'lay down rules for the behavior of the parties over a period of time in certain subject areas . . . [whereas contractual] treaties may provide for an exchange of certain goods or acts.'" See also, Joost Pauwelyn, 'The Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature' (2003) 14 European Journal of International Law 907, 950
[260] Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 8-9
[261] Michaels and Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' (2012) 22 Duke Journal of Comparative and International Law 349, 349-350
[262] ibid 350-351
[263] Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 10-11

between States' legislation and WTO rules – indeed, the primary method through which Members' compliance with WTO rules is determined is by assessing municipal legislation – this type of relationship is considered only indirectly.[264] International instruments may require State parties to adopt rules in their jurisdictions that can be assessed in light of their coherence with international obligations.

3.2.2 Legal norms, non-legal norms, and the threshold of legality

There appears to be little question, *prima facie*, about what legal norms are, since international law is quite simply "the aggregate of legal norms."[265] They are the essential parts of which international law is comprised. Yet the role of other norms of a 'pre-normative' or 'quasi-legal' character is also worth noting for the sake of differentiation and delimiting the scope of analysis to be undertaken.[266] Simply stated, non-legal norms have not met the 'normativity threshold' that is, they are not legally binding and would not be applied by a court. Non-legal norms (quasi-legal norms and pre-normative components) are essentially aspects of international law that, despite their importance, do not give rise to obligations, international responsibility, and according to most theories, cannot produce conflicts.[267] However, they may be important to the interpretation or the development of legal norms and of international law.[268]

Forms of 'soft law' such as declarations and resolutions do not fall under the category of legal norms and although they may be considered quasi-legal by some authors, determining the degree of legality of such norms is not attempted here.[269] For example, the FAO's *Voluntary Guidelines to support the*

[264] Hans Morten Haugen, *The Right To Food and the TRIPS Agreement* (Martinus Nijhoff Publishers, 2007) 215
[265] Prosper Weil, 'Towards a Relative Normativity in International Law' (1983) 77 American Journal of International Law 413, 413
[266] ibid 415-416
[267] ibid 415. See also Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 6-7. Pauwelyn does not categorically rule out the possibility of norm conflict with quasi-legal or non-legal norms, but limits his research to legal norms.
[268] ibid footnote 6
[269] Weil (n 265) 416

progressive realization of the right to adequate food in the context of national food security relates to the right to food and it may have normative qualities - in fact, it may be used to indicate State practice and a particular interpretation of the right - but it does not contain legally binding norms *per se*.[270] Similarly, pre-normative elements refer to texts and instruments important to the interpretation or development of rules, such as *travaux preparatoires*, though they are only considered here to the extent that they inform interpretations of legal norms.[271] The Committee's General Comments pose somewhat of a dilemma to the dichotomy of legal/non-legal norms as they are not legally binding but are commonly referred to in the discourse surrounding socio-economic rights (including by courts) and form an integral part of their interpretation.[272] Additionally, the non-binding resolutions, guidelines, and recommendations made by the Committee and the Special Rapporteurs seek to clarify the scope and content of the right to food and guide its implementation, but do not in themselves produce legal norms. Similarly, a number of key WTO ministerial declarations are useful for clarifying intentions or depicting State practice, but cannot add to or diminish Members rights under the WTO agreements.[273] Notwithstanding the legal limitations, some soft law instruments will be considered here because they serve an interpretive function for other legal norms and contribute to the identification and outcome of an incompatibility between two rules.

Some suggest that the legitimacy of a legal norm depends, at least in part, on its compliance pull, that is, something that compels States to adhere to the rule contained therein.[274] However, others such as Kelsen differentiate between the validity of a norm and its effectiveness, which is an important point for

[270] FAO, *The Right to Food Guidelines: Information Papers and Case Studies* (Food and Agriculture Organization of the United Nations 2006) 106 para 19
[271] Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 6-7
[272] FAO (n 270) 99 para 6; M. Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 91
[273] See for example, WTO, *Doha Declaration on the TRIPS Agreement and Public Health* (14 November 2001) WT/MIN(01)/DEC/2. See also James Thuo Gathii, 'The Legal Status of the Doha Declaration on TRIPS and Public Health under the Vienna Convention on the Law of Treaties' (2002) 15 Harvard Journal of Law and Technology 291
[274] Sepúlveda (n 272) 89

discussions involving economic, social, and cultural rights.[275] The strength of the relevant enforcement mechanisms has no bearing on the legality of a norm, nor does its vague expression in an international instrument.[276] Although these features may impact compliance, the prevailing view is that legality is based primarily on the source of a norm.[277] According to legal positivists, that legitimizing source is the explicit consent of States, with some exceptions such as *jus cogens*. Article 38 of the Statute of the International Court of Justice, often referenced as the authority on the sources of international law, recognizes treaty law, customary international law, general principles and judicial decisions as sources.[278] Questions and criticisms surrounding economic, social, and cultural rights stem from their lack of clarity in international instruments and supposed inability to establish legal norms at all, or else legal norms of a very limited scope (perhaps only 'to take steps').[279] Nonetheless, the right to food is a legal norm with proven justiciability in both municipal and regional courts.[280]

3.3 To Whom Are Obligations Owed, and Why Does it Matter to Norm Conflict Theories and Techniques?

To whom an obligation is owed has implications for how incompatibilities between it and another norm of international law might be recognized and addressed by traditional norm conflict avoidance and resolution techniques. Firstly because the type of norm, and particularly the type of obligation (bilateral, collective, objective, integral) incumbent upon State parties determines who has standing to raise the issue in a court, and therefore how an incompatibility might be acknowledged and ultimately addressed.

[275] Kelsen (n 257) 3
[276] Weil (n 265) 414
[277] ibid 77
[278] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993, art 38
[279] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 11(2); For a critical view of economic, social and cultural rights see, Maurice Cranston, *What are Human Rights?* (Bodley Head 1973) 54-65
[280] For a compendium of case law pertaining to the right to food, see also Ben Saul, David Kinley, and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights Commentary, Cases, and Materials* (Oxford University Press 2014) 867-923

According to Pauwelyn, norm conflict analyses "will always boil down to, and need examination in terms of, a conflict between rights and/or obligations resting on one or several states."[281] That is, international legal norm conflicts occur for a State and not 'in the air,' therefore they are assessed from the position of the State to which rights are owed or obligations imposed.[282] When considered thusly, human rights treaties pose an interesting dilemma to norm conflict analysis. Vierdag contemplates how breaches of human rights obligations resulting from an incompatibility with another norm of international law amount to violations of the rights of individuals, and not parties to the treaty:

> [B]reaches of human rights treaties are breaches vis-à-vis individuals, not vis-à-vis States. That is to say, if States lodge complaints about human rights violations by other States, they do not complain about violations of rights that must be respected vis-à-vis themselves.[283]

In considering this excerpt from Vierdag, Mus understands it as "exclude[ing] the possibility of conflict between human rights treaties and other treaties."[284]

However, the conclusion that human rights treaties exist outside the realm of norm conflict does not reflect reality and it also neglects two key aspects of human rights treaties: First, although rights and obligations are not provided in reciprocity, they are still interconnected. Violations of human rights enumerated in international treaties stem directly from the activities or omissions of States (when such acts are attributable to the State). Second, it neglects the objective character of human rights norms. Recall that at least some human rights produce integral, objective, or *erga omnes* obligations, which means that their subject-matter is such that all States parties to a human rights treaty, or the whole international community, have an interest in their

[281] Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 9 (emphasis omitted)
[282] ibid
[283] E. W. Vierdag, 'Some Remarks about Special Features of Human rights Treaties' (1944) 25 Netherlands Yearbook of International Law 119, 134. See also Jan B. Mus, 'Conflicts between Treaties in International Law' (1998) 45 Netherlands International Law Review 208, 224
[284] Mus (n 283) 224

compliance and have obligations toward this end.[285] In fact, Vierdag too acknowledges that human rights produce obligations *erga omnes,* and therefore it seems unlikely that he intended to exclude such treaties from the possibility of conflict altogether.[286]

Conversely, some identify genuine conflicts as occurring only between obligations of an objective nature, even if owed to different parties.[287] Objective obligations can produce conflicts when they cannot be performed simultaneously because they cannot be resolved by resorting to the intention of the parties.[288] This is highly relevant to situations involving obligations flowing from international human rights treaties due to the fact that the original intent of the parties may be of less importance than the dignity of individuals that it seeks to protect (the object and purpose, subject-matter, or otherwise stated).[289] Also worth noting is that the obligations set forth in the WTO agreements challenge the bilateral/collective dichotomy. The agreements themselves are multilateral and the obligations have been argued to have characteristics of collective or integral obligations (*erga omnes partes*, not *erga omnes*).[290] However, they can essentially be reduced to bilateral obligations between any two States, each having obligations to grant the other certain rights (to market access, for example).[291]

Finally, it has been argued that procedural and substantive rules cannot produce conflict, because of their fundamentally different character. Procedural rules are not owed to other States in the same way that obligations flowing from a contractual treaty are, nor are they owed towards individuals, in the same way that human rights obligations are. In *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, the ICJ stated that there can be no

[285] See Chapter 2, Section 2.3.4.3
[286] Vierdag (n 283)
[287] Jenks (248) 426
[288] ibid
[289] See Chapter 2 Section 2.4.2.1
[290] See for example, Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (n 259) 907
[291] ibid Conclusion

conflict between procedural and substantive rules, as procedural rules of immunity have no bearing on the substantive, in this case, *jus cogens*, norms violated by Germany.[292] It reasoned that, "[t]he two sets of rules address different matters."[293] However, in his dissenting opinion, Judge Cançado Trindade suggests that the classification of rules as one kind or another does not prevent an actual conflict:

> [T]he distinction […] between criminal and civil proceedings is not in line with the very essence of the operation of *jus cogens* rules: indeed, the criminal or civil nature of the proceedings at issue is not material, as what really matters is the fact that there was a violation of a *jus cogens* norm and thus any jurisdictional bar has to be lifted 'by the very interaction of the international rules involved.[294]

To rule out the possibility of conflict between procedural and substantive rules departs from the notion of systemic international law. It suggests procedural rules will not impact the functioning of substantive rules and therefore cannot conflict. It also challenges the ILC's position that substantive and procedural rules are 'intertwined.'[295] Considering this disjuncture, Sheeran points out that it "seems possible […] not to find a norm conflict with human rights where there clearly appears to be one."[296] He further remarks that the case law on immunities "illustrate[s] an implicit normative hierarchy – that is, individual rights give way to state sovereignty and interests […]."[297] In *Jurisdictional Immunities* it is clear that procedural rules only prevented the recognition of a conflict as such, it did not prevent the frustration of one norm by another.

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[292] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (Judgment) 2012 ICJ Rep 99 [93]. The court argued the reverse as well, that the nature of the substantive rules in question (and the seriousness of a breach of such rules) has no bearing on the exercise of procedural rules: "[C]ustomary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated" at [85]. The court clarified that "recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation" at [93].
[293] ibid [93]
[294] ibid (Dissenting opinion of Judge Cançado Trindade) [132]
[295] Sheeran (n 251) 91; ILC (n 246) para 139
[296] Sheeran (n 251) 91
[297] ibid 91-2

3.3.1 'AB:AB' AND 'AB:AC' TYPES OF CONFLICTS

According to most definitions, if there is no overlap *ratione materiea, ratione personae* and *ratione temporis* treaties cannot conflict.[298] Here, the focus is on the meaning and significance of *ratione personae*. Different types of conflicts are sometimes expressed by authors in the alphabetical form of AB:AB or AB:AC style conflicts. In the former variety, State A and State B are both subject to the rules or treaties in question. For example, a conflict may occur for State A, which cannot fulfill its obligations under Treaty 1 toward State B because of a conflicting obligation it has under Treaty 2, to which State B is also a party. Authors such as Jenks do not consider conflicts to be genuine if they occur between agreements with identical parties.[299] He argues that such issues 'resolve themselves' through resort to the intention of the parties.[300] For the most part, two treaties with identical parties have been of little interest to scholars and are often seen as more a problem of interpretation than "a question of a rule of law."[301] The AB:AB pattern allows State parties to negotiate and balance their obligations (and rights) in ways that are acceptable to all parties, as they are likely to have identical or reciprocal rights and obligations. Klabbers argues that, in fact, "conflicts are almost by definition conflicts involving different parties."[302]

AB:AC style conflicts involve only partially identical parties. There must always be at least one overlapping State in order for a conflict to arise.[303] In these cases, breaches can impact a State that is party to only one of the treaties. Problems can result from two separate treaties that apply to similar subject-matter with partially overlapping parties, or they might result from a new treaty created by some of the parties to an earlier one, or by *inter se* modifications to

[298] Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 165
[299] Jenks (n 248) 404
[300] ibid
[301] Lord Arnold McNair, The Law of Treaties (Clarendon Press, 1961) 219. See also Borgen (n 248) 583
[302] Jan Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' in Enzo Cannizzaro (ed.) *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 193 (emphasis added)
[303] Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 165

the first treaty adopted by only some of the parties.[304] Other formulations of partially identical parties which raise similar problems include situations where there are more or less parties to a second treaty or different combinations of partially overlapping parties: AB:ABCD or ABCDE:ACD, for example.[305] They are inherently more complicated issues to resolve and the Vienna Convention Article 30 is silent on this issue, insisting simply that both treaties remain valid and in effect for the respective parties.[306] Article 30 does not specifically preclude recognition of conflicts with partially identical parties, but it implicitly defers to the rules on state responsibility to address the challenge.[307]

The ICESCR and the Agreement on Agriculture could present something like an AB:AC style conflict if there are truly incompatible obligations and rights among the instruments (although involving many more parties). Conflicts between the rights and obligations in these agreements may result in a breach of obligations owed toward other States (as the parties are not identical, for example the United States is party to the Agreement on Agriculture but not the ICESCR), and also to individual rights holders (even if individuals are not technically a party to any treaty involved).

3.4 Apparent Versus Genuine Conflicts

Another distinction is that between apparent and genuine conflicts. Apparent conflicts are those that only appear to be conflicts at first glance but can be reconciled through the principle of effective interpretation implicit in Vienna Convention Article 31.[308] Apparent conflicts may be more aptly described as problems of interpretation, as Klabbers suggests: "[i]n much the same way as

[304] W. Czapliński and G. Danilenko, 'Conflicts of Norms in International Law' (1990) 21 Netherland Yearbook of International Law 3, 22-23
[305] Borgen (n 248) 582
[306] Vienna Convention on the Law of Treaties (n 252) art 30(4); Klabbers, *Treaty Conflict in the European Union* (n 254) 18
[307] Klabbers, *Treaty Conflict in the European Union* (n 254) 18; Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' (302) 195. See also Borgen (n 248) 578. The shortcomings of the Article 30 are discussed in greater detail in section 3.7.1
[308] Vienna Convention on the Law of Treaties (n 252) art 31(3); Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 240

Rosenne once astutely observed that breach of treaty may well be characterized as a difference of interpretation, so too can treaty conflicts sometimes be cast as interpretive disagreements."[309] In fact, Pauwelyn finds that it is most often the case that "what may seem like a conflict will not be a conflict[...]."[310] Depending on the author, apparent conflicts may also be referred to as 'divergences,' 'frustrations,' or 'figurative,' 'possible,' 'contradictory' 'potential,' 'perceived' and '*prima facie'* conflicts – all of which refer to situations in which a breach of one norm is preventable in some way, either by not exercising a permissive element or through reconciliatory interpretation or other conflict avoidance or resolution techniques.

Genuine conflicts may alternatively be stated as 'real,' 'contrary,' or 'necessary' conflicts. In these situations, the norms in question give contradictory directives, and they are likely obligations in the form of commands or prohibitions. Genuine conflicts are those that cannot be avoided through effective interpretation.[311] Instead, they must be resolved, either through balancing techniques or through the application of conflict rules that determine which norm is to prevail and which will be set aside (typically, only temporarily). The terms for genuine conflicts are used interchangeably in this research.

However, the distinction between genuine and apparent conflicts may be overstated in academic discourse; States are concerned with incompatibilities between treaties to which they are a party, even when they do not amount to genuine conflicts, if they place limits the its freedom to implement policies.[312] In the event of a genuine or apparent conflict where one norm still frustrates the exercise of another, "the questions for the policy maker are the same: Which treaty should prevail?"[313] According to Jenks, it is sometimes the case that the repercussions of apparent conflicts are as serious or detrimental to the State's

[309] Klabbers, *Treaty Conflict in the European Union* (n 254) 195
[310] Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 5-6
[311] ibid 178
[312] Borgen (n 248) 576
[313] ibid

freedom to act as genuine conflicts.[314] This research is concerned with both kinds of conflict, real or apparent, due to the fact that the latter can limit the enjoyment of rights or permissions, and can impinge upon the fulfillment of the object and purpose of a treaty. A distinction between these two kinds is also noted in literature claiming incompatibility between the WTO and the ICESCR right to food-related norms.[315] It will also consider policy-conflicts, which the ILC differentiates from other types, but nonetheless pertain to the problem of fragmentation, as they give rise to many of the same challenges.[316] This research aims to determine not only whether there is a conflict, but also what kinds of incompatibilities might arise when the relevant norms of each regime are engaged.

3.5 Problematizing the presumption against conflict

The strong presumption against conflict in international law is premised upon two central notions: that States, as the primary actors within international law, act consistently and are therefore unlikely to submit to contradictory terms, and that most conflicts can be avoided by effective treaty interpretation.[317] The principles of reasonableness and good faith also support this presumption.[318] Moreover, there is a tendency to assume that normative systems are logically consistent. Because of these principles and assumptions, the preference for harmonious interpretation has long been a maxim of law (international and municipal) and is applied in situations of ambiguity or apparent conflicts to avoid problems stemming from norms that otherwise "point in different directions."[319]

[314] Jenks (248) 426; Vranes (247) 401
[315] UNGA, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development; Report of the Special Rapporteur on the right to food, Olivier De Schutter' A/HRC/10/5/Add.2 (4 February 2009) para 35; Olivier De Schutter, *International Trade in Agriculture and the Right to Food*, No. 46 Dialogue on Globalization (Friedrich-Ebert-Stiftung, 2009) 39
[316] ILC (n 246) para 24
[317] ibid paras 37-38
[318] Jenks (248) 428
[319] ILC (n 246) paras 20, 24

The presumption against conflict is evident in the works of early influential legal scholars such as Grotius, and subsequently, Vattel, who advocate it as an approach to incongruent provisions of the same treaty and also between two separate treaties (with identical parties).[320] Vattel writes:

> For it is to be presumed that the authors of a deed had an uniform and steady train of thinking, that they did not aim at inconsistencies and contradictions, but rather that they intended to explain one thing by another, and, in a word, that one and the same spirit reigns throughout the same production or the same treaty.[321]

This reflects the principle of good faith, which suggests that based on assumptions about States' behavior, treaty rules should to be read in consonance with other treaties and with the general principles of international law. Although consent to adhere to general principles, such as that of good faith, is offered tacitly and not through signature as in the case of treaties, it is still presumed that States do not wish to contradict such principles. After all, general principles, by their very nature of being 'general,' apply to all actors and relate to all other norms that arise within international law. Oppenheim expresses a similar understanding:

> It is taken for granted that the contracting parties intend something reasonable […]. If, therefore, the meaning of a stipulation is ambiguous, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less reasonable, the adequate meaning to the meaning not adequate for the purpose of the treaty, the consistent meaning to the meaning inconsistent with generally recognized principles of International Law and with previous treaty obligations towards third States.[322]

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[320] Grotius (n 246) Book II, Chapter 16, section IV

[321] Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (first published 1798) in Béla Kapossy and Richard Whitmore (eds) *Natural and Enlightenment Classics; The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Liberty Fund, 2008) Book II, Chapter XVII, 275 (originally Section 286)

[322] Lassa Oppenheim, *International Law: A Treatise vol.I* in Ronald F. Foxburgh (ed) (3rd ed., first published 1920, The Lawbook Exchange Ltd. 2005) 702

In this excerpt, Oppenheim is speaking about interpretations of obligations that are owed toward third parties. However, there is no reason to limit the presumption; it is understood here as applying as much to the obligations that States undertake toward other (second) parties to a treaty and to the international community (as in the case obligations *erga omnes*).

Notwithstanding the importance of seeking agreeable interpretations of the rules of international law, the assumptions regarding the consistency of States' actions as well as international law as a normative, logical system may not be entirely accurate. First, States may unknowingly submit to contradictory terms. Because there is no central legislator in international law, treaties with similar (or dissimilar) subject-matter are negotiated and drafted across the various sub-regimes in operation by a number of separate actors.[323] The various State representatives or teams of representatives that negotiate different treaties often have highly specialized skills relevant to the particular subject-matter of a treaty regime.[324] Negotiators may have insufficient insight into the rules agreed to elsewhere across other treaty regimes.[325] For a variety of reasons, they may fail to ensure compatibility between obligations and rights across issue areas to which the State has binding obligations.[326]

Additionally, States' interests, values and objectives may not be consistent over time. Changes in the direction of domestic and foreign policy may reflect new leadership, the emergence of new challenges, and even development-related progress such as higher education and wealth accumulation – all of which could change the needs of the population over which the State has jurisdiction and the interpretation of a rule or obligation over time. Even a rule, which at the time of drafting was consistent with a State's other international obligations, may not be so at a later date. Moreover, evolutionary interpretations may, over time, push the boundaries of a norm beyond that to which States originally

[323] Nazmi Tolga Tuncer, 'The Definition of Norm Conflict in Public International Law: The Case of the World Trade Organization' (2012) 9 Ancara Law Review 27, 30; See also, Jenks (n 248) 429
[324] ILC (246) para 8
[325] Klabbers, *Treaty Conflict in the European Union* (n 254) 12, 33
[326] ibid

consented.[327] Though perhaps only tangentially related to the presumption against conflict, the diversity of international courts and tribunals, with their separate ethos and sources of legitimacy can also produce conflicting interpretations and decisions.[328]

Another consideration is the extent to which the written consent of a State reflects its free choice, the will of the State, and the will of the individuals within that State – and whether the nature or quality of consent is affected by such considerations in a practical sense. These considerations are most important in regard to the process through which State parties accede to the WTO regime, as the negotiation process has been widely argued to occur on an 'uneven playing field.'[329] It has been suggested that some developing country members lacked the expertise to negotiate effectively throughout the Uruguay Round, which ultimately resulted in rules that do not serve their best interests.[330]

The will and consent of a population further problematizes the presumption against conflict in situations involving human rights norms, as individuals who may not have consented to a treaty that impinges on their human rights must bear the burden of its negative repercussions. As Pogge argues:

> Most of the severely impoverished live in countries that lack meaningful democracy. Thus Nigeria's accession to the WTO was effected by its military dictator Sani Abacha, Myanmar's by the notorious SLORC junta […] [I]n so far as very poor people do consent, through a meaningfully democratic process, to some global institutional arrangements, the justificatory force of such consent is weakened by their having no other tolerable option, and weakened even further by the fact that their calamitous circumstances are partly due to those whose conduct this consent is meant to justify.[331]

[327] See for example discussion in Chapter 2 Section 2.4.2.1 and 2.4.2.2
[328] Abi-Saab, 'Fragmentation or Unification: Some Concluding Remarks' (1999) 31 New York University Journal of International Law and Politics 919, 927
[329] UNGA (n 340) paras 17-8; De Schutter (n 340) 17-8
[330] De Schutter (n 315) 17
[331] Thomas Pogge, 'The Role of International Law in Reproducing Massive Poverty' in Samantha Besson and John Tasioulas (eds) *The Philosophy of International Law* (Oxford University Press 2010)

These considerations do not factor into the basic presumption against conflict. The lack of alternatives to signing on to international agreements, which offer less than optimal conditions for some States, present philosophical and ethical dilemmas, but they do not constitute coercion. This point is worth noting given that situations involving coercion preclude State responsibility with respect to a breach of an international obligation. In situations where the breach of one international legal norm (for example, a WTO obligation) results from adherence to an international human rights treaty, a State is not excused from its responsibility because it willingly consented. The relationship between the will of the State, its people, and consent, however, is a more complicated philosophical issue. It is raised here only to allude to the fact that consent and coercion are not black and white issues when there appear to be no other viable options.

There are still other conditions under which States agree to rules of international law that contradict their current obligations. For example, a successor States may inherit obligations to which they have not explicitly consented.[332] Although the Vienna Convention on Succession of States in Respect of Treaties (1978) promotes the carrying over of obligations agreed to by their predecessor, this has not been the case in common practice; instead, State practice suggests a general preference for the 'clean slate' doctrine.[333] Newly emerging States may also maintain rules of their former colonizers temporarily or long-term that may not accurately reflect the values of the new State while ratifying agreements or seeking membership in organizations that impose incompatible rules. This can result in a vertical conflict, which is not the focus here, although it does highlight how a State may be quick to consent to rules to which it is unable to fully adhere. It is also possible that a State might consent to rules out of concern over reputation, in response to various pressures, because of the detrimental consequences for not doing so, or because

[332] Vienna Convention on Succession of States in Respect of Treaties (Adopted 23 August 1978, entered into force on 6 November 1996) 1946 UNTS 3, art 34. See section on the special nature of international human rights law and succession.
[333] Sheeran (251) 101

they are conditions for membership in a desirable organization or community. States may have little to lose by agreeing to certain norms that are vague or without strong enforcement mechanisms if they are preconditions for access to a desirable community, without concern as to whether or not they can or will adhere to them. It is also possible for a State to agree to certain rules with the intention of simply ignoring them, as the following paragraph discusses.[334]

3.5.1 Strategic Conflicts

Related to the abovementioned issues, the existence 'strategic conflicts' in international law challenges the presumption against conflict.[335] Strategic conflicts occur when States deliberately create agreements that contain provisions that conflict with those in previous agreements in an effort to repeal their pre-existing obligations or to re-interpret their meaning; it is essentially 'strategic fragmentation.'[336] While few authors have touched on this topic, the reality of strategically created conflicts has begun to be studied and is exemplified in State practice.[337] One such example provided by Ranganathan is the development of the WTO itself.[338] She explains that the withdrawal by the United States and the European Union midway through the Uruguay Round negotiations and their conclusion of a separate modified agreement, which they then encouraged other GATT parties to join exemplifies a strategic conflict.[339] The United States and the European Union transformed their trade-related obligations toward one another under this new bilateral agreement, and by encouraging wider membership they shifted the trade regime to an entirely new forum, away from GATT, to what eventually became the WTO.[340] Another related example she cites is the conclusion of a series of 'TRIPS-plus' bilateral agreements initiated by United States and the European Union and directed

[334] Klabbers, *Treaty Conflict in the European Union* (n 254) 33; Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge University Press 2014)
[335] Ranganathan (n 334) 7,
[336] Ranganathan (n 334) 7, 95. See also Klabbers, *Treaty Conflict in the European Union* (n 254) 33
[337] ibid 3. See also Klabbers (n 254) 33
[338] ibid 6-7
[339] ibid 6
[340] ibid

primarily at developing countries.[341] These agreements impose stricter intellectual property rules than those under the TRIPS and effectively override the intellectual property rights regime of the WTO. These second treaties are perfectly legal, as States retain the freedom to enter into agreements with other States, and WTO Members are explicitly entitled to enter into regional agreements under the Marrakesh Agreement.[342]

In regard to the treaties emphasized in the present research, there is nothing to suggest that the Agreement on Agriculture (or the WTO regime, as it is a 'single undertaking') is intended to override States' human rights obligations under the ICESCR. It seems more plausible that the drafters of the WTO agreements failed to consider economic, social and cultural rights altogether.[343] Ranganathan's work remains pertinent, however, as it presents concrete examples of States and other stakeholders shifting the meaning of pre-existing norms through the production of other kinds of materials that can essentially redirect the meanings of older terms. This is accomplished strategically, through what she refers to as the 'serial production' of documents and 'legality claims' through which States 'compete' to shape meanings.[344] Her work exemplifies the blatant manipulation of international instruments and the meaning of their terms to achieve overtly political objectives by powerful States.

In summation of this section, the presumption against conflict in international law is particularly suited to situations involving norms of general international law, between them and a treaty, and between norms of more than one treaty stemming from the same regime (i.e. WTO covered agreements), but may be less suited to situations involving treaties emerging from separate regimes, and particularly highly specialized ones. In fact, the presumption against conflict can stifle the full exercise of the vague, weaker, or permissive norm that allows

[341] ibid
[342] General Agreement on Tariffs and Trade (30 October 1947) 55 UNTS 194, art XXIV
[343] Alston (n 255) 820
[344] Ranganathan (n 334) 29-30

for a more flexible interpretation by urging a harmonious interpretation rather than identifying and addressing the actual incompatibility.

3.6 Defining Conflict of Norms

Scholars have put a number of definitions forward in an attempt to describe and also delimit the types of situations that might be labeled a conflict. It is useful to mention a small selection of them here in order to appreciate the changing definitions and rules alongside developments in international law. On one hand, there has been a gradual shift from narrow to broader understandings of what constitutes a conflict by some authors. Yet on the other hand, this movement has been limited to academic exercises; courts have been reluctant to broaden the scope of conflict, or even to define what such an incompatible relationship entails, and have tended to avoid recognizing frustrations between two rules as conflicting.[345]

[345] *Jurisdictional Immunities of the State* (n 252) [93]; *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v The United States of America)* (Request for the Indication of Provisional Measures: Order) General List No 89 [1992] ICJ Rep. 114. The court implicitly recognized a conflict between right (under the Montreal Convention) and an obligation (under a security council resolution) in Lockerbie. It found that the obligation under the security council resolution prevailed pursuant to Article 103: "Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court, which is at the stage of proceedings on provisional measures, considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention" at [42]; *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece),* Judgment of 5 December 2011, General List 142 [2011] ICJ Rep 644. In this case, the court considered a conflict between rights granted in the North Atlantic Treaty and duties under the interim accord. The Court did not explicitly find a conflict between the two due to the fact that the rights under a prior agreement were not intended to take precedence over an obligation [109]. It did not further comment on whether a duty in an earlier agreement would override an obligation in another agreement, as it found no such duty [110]. See also *Al-Jedda v The United Kingdom* App no. 27021/08 (ECtHR 7 July 2011) [101], [105], [110]. For a detailed discussion see Marko Milanovic (n 248) 90-102

3.6.1 Logical Inconsistency as Conflict in Normative Systems

It may seem that a basic logical equation can be applied in order to determine the compatibility between two norms, as "a logically inconsistent normative system is a bad one, independently of its ethical content."[346] A simple approach based on logical consistency would dictate that a norm that contradicts a valid and pre-existing norm (in a normative system) thereby conflicts. This approach works in situations where the integrity of the normative system is fundamentally dependent upon logical consistency.[347] The conflicting norm expresses something that cannot be true – or cannot be true relative to the pre-existing norm (which itself is presumed to be true, or valid). In the following example both norms cannot coexist within a normative system without disrupting the real or perceived usefulness of that system to provide criteria for assessing the nature of matter, due to the fact that they are logically incoherent:

> Norm 1: Ice floats on water
> Norm 2: All matter is heavier in its solid form

In this example the first norm happens to be true and the second norm is untrue.[348] The second norm contradicts the first and thus it is invalidated, as both cannot be true.

A similar idea about logical inconsistency as evidence of a conflict can be expressed through the oft-cited example of belief systems. As Vranes presents it, the two norms might express the following:[349]

> Norm 1: God exists
> Norm 2: God does not exist

A single system that purports both statements to be true at the same time would be illogical and by extension unacceptable.[350] Whichever norm is established as

[346] Carlos E Alchourron, 'Conflicts of Norms and the Revision of Normative Systems' (1991) 10 Law and Philosophy 413, 413
[347] ibid
[348] A true statement would read: *most* matter is heavier in its solid form
[349] Vranes (n 247) 399

true by the belief system or by the interpreter is necessarily contradicted by the second norm claiming the opposite, which must therefore be false. These types of statements work well to illustrate the *test of contradiction*, as well as its limitations. The test of contradiction simply posits that if one norm specifically contradicts another, there is a conflict.[351] This test is, however, inappropriate to determine conflicts in international law because, as Pulkowski notes, rules are not 'true or false' (only statements are).[352] While some authors have proposed re-formulating rules as statements in order to determine their logical coherence, the test is still concerned with determining consistency in terms of 'truths,' which fails to capture empirical inconsistencies.[353]

Validity was emphasized as a key component in norm conflict theory by early authors such as Grotius and Vattel. They advocated a version of the principle of *lex prior* in which a new treaty that conflicts with a pre-existing treaty is necessarily invalidated.[354] More recently Lauterpacht also expressed support for a similar version of the *lex prior* rule; during the debate over what is now Article 30 of the Vienna Convention, Lauterpacht proposed that when the "performance [of one treaty] involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties" it is thereby voided.[355] Although the *lex prior* rule may still be used, it is not commonly understood as necessarily invalidating the conflicting second treaty.

Kelsen explores the topic of conflict of norms through logical reasoning in his earlier writing, originally arguing that two norms conflict only if they logically contradict one another.[356] Like earlier authors, he contemplates the 'sphere of validity' of norms in situations of divergence but eventually divorces the

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[350] ibid
[351] Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford University Press 2014) 147. Pulkowski writes that the test of contradiction can be illustrated as: O_A prescribes conduct x, and O_B prescribes conduct $-x$.
[352] ibid
[353] ibid. For example, two rules with only partially overlapping *ratione termporis*.
[354] ibid. Though more recent scholars, such as Ranganathan (n 334) 62. See also ILC (246) para 258
[355] Czaplinski and Danilenko (n 304) 18
[356] Tuncer (n 324) 35 at footnote 23

concept of validity from logical consistency.[357] He determines that it is not logical consistency that obviates conflicts between norms in international law, and such methods are of limited use to the problem, as it exists in reality – largely because a "conflict of norms presupposes that both norms *are valid*."[358]

While logical consistency is desirable, the system itself is not 'unfit' for use once a conflict between two of its norms is identified; it is simply the case that one of the norms may be unfit for use, or of limited use, in a particular context.[359] The ILC notes that "[f]ocusing on a mere logical incompatibility mischaracterizes legal reasoning as logical subsumption. In fact, any decision will involve interpretation and choice between alternative rule-formulations and meanings that cannot be pressed within the model of logical reasoning."[360] Therefore, conflict "is not a logical contradiction, or even anything similar to a logical contradiction."[361] Kelsen posits that a conflict between two primary norms of international law requires derogation from one of them, which, to occur legally, requires a secondary norm permitting such action, a norm of derogation (i.e. a conflict clause).[362] He claims that it is derogation, by its very nature that 'repeals the validity' of one of the conflicting norms in international law.[363]

3.6.2 Narrow Definitions in International Law Doctrine

Though many early scholars discussed the topic, Vattel articulates what is perhaps the first definition of norm conflict as it pertains to international law:

> There is a collision or opposition between two laws, two promises, or two treaties, when a case occurs in which it is impossible to fulfill both at the same time, though otherwise the laws or treaties in question are not contradictory, and may be both fulfilled under different

[357] Kelsen (n 257) 107
[358] ibid 124 (emphasis added); Mus (n 283) 208 at footnote 5; Tuncer (n 324) footnote 23
[359] Vranes (n 247) 399
[360] ILC (n 246) para 25
[361] Kelsen (n 257) 124; Vranes (n 247) 399
[362] Kelsen (257) 108; Mus (n 283) 210
[363] Kelsen (n 257) 106; Mus (n 283) 210

> circumstances. They are considered as contrary in this particular case; and it is required to show which deserves the preference, or to which an exception ought to be made on the occasion.[364]

Vattel's understanding is interesting because he speaks not only of incompatibilities between laws or treaties in their entirety, which the discussion of norm conflict centered on at the time, but also of 'promises.' A promise to do, or not to do, something conceivably refers to obligations on State parties in the form of commands and prohibitions, and is closely aligned with the topic as it is understood today.

The definition of conflict most commonly cited in judicial decisions is surely that proposed by Jenks. According to Jenks, a conflict "arises where a party to the two treaties cannot simultaneously comply with its obligations under both treaties."[365] Narrow definitions like Jenks' reserve use of the term 'conflict,' for situations of mutual exclusivity, in which the observance of one mandatory obligation necessarily violates another. Simply stated,

> Norm 1: State A must do X
> Norm 2: State A must not do X

Clearly, for State A, the contradictory obligations that appear as a command and a prohibition, relating to the same subject-matter, render simultaneous compliance impossible.

Jenks does not admit other incompatible relationships that occur as a result of the exercise of rights, permissions (or exemptions) under this definition. Instead, incompatibilities arising from the exercise of permissive norms are 'divergences' and are excluded from the application of conflict resolution rules.[366] Other scholars add an additional criterion, arguing that if an incongruence can be resolved through the application of a conflict rule, it is not genuine, as only those relationships for which there is no other option for a

[364] Vattel (n 321) s 311
[365] Jenks (n 248) 426
[366] ibid 425-6

State but to breach one or both of the norms constitutes a conflict.[367] Similarly Klein suggests that a true conflict occurs only when the matter 'cannot be resolved' through reconciling interpretation, balancing, or proportionality.[368]

3.6.2.1 Problematizing Narrow Definitions

Narrow or conservative approaches limit the recognition of conflict to cases where a decision must be made of which obligation to breach. They exclude situations wherein a State party is unable to adhere to two norms simultaneously if the *optional* directive of one of the norms is undertaken in practice. While it is true that simply not exercising the full permissive norm or right might avoid a breach, it still cannot be fully exercised in that case. To illustrate this point, divergences occur when the exercise of non-mandatory norm is prevented by a mandatory norm:

> Norm 1: Jack may raise his right hand
> Norm 2: Jack must not raise his right hand

Here Jack can choose not to exercise the permission to raise his right hand and remain compliant with Norm 2; however, this defeats the purpose of Norm 1.[369] In fact, exercising the first norm represents a breach of the second if rules are read in reverse. Jenks appears to speak to this point when he states, "there may be a question as to which of two apparently conflicting treaties should be restrictively interpreted on the basis of the presumption."[370]

Jenks recognizes that divergences between the provisions of different instruments may have equally detrimental impacts on the full exercise of one or both norms in question as a genuine conflict would. He states that divergences:

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[367] Engisch and Karl argue that even conflicts that can be resolved through the application of conflict rules are not 'genuine' by virtue of the fact that they can be resolved: "if a conflict of norms can be resolved by way of application of a derogation norm, they speak of a figurative conflict." Mus (n 283) 211
[368] Tuncer (n 324) 34
[369] Vranes (n 247) 401
[370] Jenks (n 248) 429

> [N]evertheless defeat the object of one or both of the divergent instruments. Such a divergence may, for instance, prevent a party to both of the divergent instruments from taking advantage of certain provisions of one of them recourse to which would involve a violation of, or failure to comply with, certain requirements of the other. A divergence of this kind may in some cases, from a practical point of view, be as serious as a conflict; it may, for instance, render inapplicable provisions designed to give one of the divergent instruments a measure of flexibility of operation which was thought necessary to its practicability. Thus, while a conflict in the strict sense of direct incompatibility is not necessarily involved when one instrument eliminates exceptions provided for in another instrument or, conversely, relaxes the requirements of another instrument, the practical effect of the coexistence of the two instruments may be that one of them loses much or most of its practical importance.[371]

Essentially, divergences that do not amount to genuine conflicts require restrictive interpretation of one or more obligations, in order to ensure that they remain harmonious.[372] Restrictive interpretation can be balanced with the principle of effectiveness, which, *inter alia*, ensures that all the terms of a provision are given meaning and cannot be reduced to inutility (*ut res magis valeat quam pereat*) for the sake of a harmonious reading of two norms.[373] International legal practice has tended to apply his narrow definition of conflict without consideration of the warnings in the above-mentioned excerpt.[374]

Situations of only partial temporal overlap may also frustrate one another by creating conditions that prevent the realization of both norms simultaneously or in some circumstances. Below, a breach does not necessarily occur if the norms are read from one direction, however, if the order is reversed, there can be a unilateral conflict:

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[371] ibid 426 - 27

[372] However, Pauwelyn might object to this point; he argues instead that that the presumption against conflict "ought not to lead to a restrictive interpretation of the new, allegedly conflicting norm." Pauwelyn (n 248) 242. Yet the implication in Jenks statement is precisely this. Moreover, the principle of political decision, implicit in Vienna Conveniton Article 30(4)(b) appears to support restrictive interpretations. See infra Section 3.7.1.2.

[373] WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R [23]. "One of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." See also WTO, *Japan: Taxes on Alcoholic Beverages - Report of the Appellate Body II* (4 October 1996) WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R [12]

[374] See infra section 3.6.4

Norm 1: Jack must raise his right hand for five minutes
Norm 2: Jack must raise his right hand for ten minutes

Here it is possible to comply with the second norm "after having complied with the first one."[375] In the first order, there is no conflict because after the five minutes have passed, "it is still possible" to comply with the second.[376] However, there is an implicit negative permission ("permission not to") for Jack to lower his hand after compliance with the first norm.[377] Accordingly, an incompatibility can be recognized here, though one falling beyond the scope of most definitions and would not be captured by the *test of contradiction*.

The *test of joint compliance* is another test for determining compatibility, though it has also historically been used to assess two obligations that cover the same period of time.[378] The *test of joint compliance* is also of limited use in situations where there is only partial temporal overlap. In the example above, in which Jack is faced with two obligations covering different time spans, the *test of joint compliance* would not identify a conflict because after Jack completes the obligation of the first norm, he can simply continue to raise his hand and comply with the second; it does not recognize that Norm 1 implies a permission *not to do* something after the set time period. However, its main shortcoming is that it fails to see permissive norms as conflicting, as it is possible to comply with a permissive norm by simply refraining from exercising it.

Although coherence is always more desirable than conflict, striving to achieve compatibility by limiting the exercise of one or both of the norms in question runs the risk of diminishing rights and permissions as well as vague norms. Narrow definitions can promote a 'legal reductionism,' "which both oversimplifies the manner in which norm conflicts are understood, and which

[375] Vranes (n 247) 413
[376] ibid 414
[377] ibid
[378] ibid 413-4; Pulkoswki (n 353) 148

narrows the possible range of their solution."[379] To decline a thorough examination of the relationship between two inconsistent norms on the basis that they do not constitute a genuine conflict fails to mitigate the negative effects of an increasingly fragmented international legal system.

3.6.3 Broadening the Scope of Conflict

In practice, conflicts involving two mandatory norms are exceptional. Far more common are discordant relationships in the form of potential conflicts, divergences or frustrations. Broad definitions have undoubtedly been influenced by the work of Engisch, who discusses conflicts more generally and not necessarily pertaining to international law. Engisch refers to them as generally occurring in situations wherein "a given type is at the same time prohibited and permitted, or prohibited and prescribed, or prescribed and not prescribed [o]r if incompatible ways of conduct are prescribed at the same time."[380] This understanding clearly includes permissions as well as negative permissions (that is, permissions to refrain from doing something).

Kelsen, whose earlier work offers a more restrictive definition, eventually embraced a wider understanding as well.[381] Kelsen was the first to present the *test of violation*, which overcomes some of the problems with the other tests by focusing on a breach of one or more norms when both are engaged, instead of questioning whether a State can possibly comply with both.[382] Kelsen suggests that a "conflict between two norms occurs if in obeying and applying one norm, the other one is necessarily or possibly violated."[383] This test appears to include the possibility of conflict involving permissive norms by referring to situations

[379] Andreas Fischer-Lescano and Gunther Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of International Law' (2004) 25 Michigan Journal of International Law 999, 1002
[380] Vranes (n 247) 406; Tuncer (n 324) 35
[381] Vranes (n 247) 414
[382] ibid 395
[383] Kelsen (n 257) 123; Vranes (n 247) 415

in which one norm is *possibly* violated. However, Vranes argues that Kelsen did not intend to imply that permissions could produce conflict.[384]

Pauwelyn also focuses on breach as a determining factor and advocates a broad definition. He argues that "[e]ssentially, two norms are […] in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other."[385] His understanding shares similarities with Kelsen's *test of violation*, but it recognizes that conflict may occur between any kind of norm, thus ensuring that permissions are included. He argues that this approach repositions the debate over an appropriate definition away from trying to determine "the abstract relationship between two norms of international law to the more concrete […] question of 'when is there a breach of a given norm?'"[386] This further ensures that conflicts are determined and resolved more objectively, and do not rely on the subjective intentions of parties involved.[387] For Pauwelyn, it is important to recognize even potential or avoidable conflicts, otherwise "one risks solving a conflict by not realising that there is one."[388]

Vranes also expands upon Kelsen's ideas and suggests that "[t]here is a conflict between two norms, *one of which may be permissive*, if in obeying or applying one norm, the other one is necessarily or possibly violated."[389] He includes situations of unilateral conflict; whereas narrow definitions focus on the mutual exclusivity of norms, he proposes that if a sequence of norms, read from either direction, produce incompatible results then a conflict is present.[390] He also considers how using the implied 'jural opposite' of the norms in question can aid in determining a conflict.[391] Therefore, in the abovementioned example of 'Jack' there is a negative permission not to raise his hand after five minutes have passed, which would be considered using Vranes methodology.

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[384] Vranes (n 247) 415
[385] Pauwelyn, *Conflict of Norms in Public International Law* (248) 176 (emphasis omitted)
[386] ibid
[387] ibid
[388] ibid
[389] ibid 418
[390] ibid 404
[391] ibid 410

Aspects of the frameworks put forward by Pauwelyn, Vranes, and the ILC are adopted here and underpin the analysis. Like the others, the ILC "adopts a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem."[392] Where Pauwelyn's seminal work ends - that is, before embarking on an analysis of the interplay between specific WTO rules and external international rules - is the point of departure for the present research.[393] The four conflict situations recognized by Pauwelyn are adopted here as criteria with which to assess the compatibility of provisions of the ICESCR and the Agreement on Agriculture:

> (a) Between two commands (expressed using language such as 'shall do');
> (b) Between a command and a prohibition (expressed using language such as 'shall not do');
> (c) Between a command and a right (permission or exemption)
> (d) Between a prohibition and a right.[394]

The possibility of unilateral conflicts as Vranes proposes is also considered.

3.6.3.1 Clashes of Values as Norm Conflict

One final variation of conflict, which is not easily represented by equations, and which cuts across the various classifications, must also be highlighted here: That is, conflicts involving 'competing rationalities.'[395] This is essentially a clash of values upon which norms are based, such that the exercise of the norms seems to branch out into different directions. Divergent values reflect the fragmentation of civil society that stems from the development of highly specialized knowledge areas, and which contributes to the process of international legal fragmentation:[396]

> At core, the fragmentation of global law is not simply about legal norm collisions or policy conflicts, but rather has its origin in contradictions

[392] ILC (n 246) para 25
[393] Pauwelyn, *Conflict of Norms in Public International Law* (248) 3
[394] ibid 179
[395] Fischer-Lescano and Teubner (n 379) 1028
[396] ILC (246) para 5

> between society-wide institutionalized rationalities […] Legal fragmentation is merely an ephemeral reflection of a more fundamental, multidimensional fragmentation of global society itself.[397]

Examples of the manifestations of competing rationalities are not difficult to locate in international law. Value clashes underpin the adoption of a series of declarations on the relationship between public health objectives and intellectual property rules under the WTO. The *Doha Declaration on the TRIPS Agreement and Public Health* is particularly illustrative of competing value systems in operation.[398]

The very existence of the declaration suggests acknowledgement that the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) can stifle access to medicines.[399] The agreement imposes an intellectual property regime on State parties, which serves to promote inflated prices and discourages the production and sale of generic drugs, and otherwise lacks the flexibility to ensure drug access to vulnerable populations.[400] The WTO Members sought to clarify the relationship between their public health objectives and TRIPS obligations. The declaration affirms that:

> The TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.[401]

The agreement emphasizes the right of Members to use the flexibilities permitted in the TRIPS agreement to pursue its public health objectives, including through the use of compulsory licenses for generic products.[402]

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[397] Fischer-Lescano and Teubner (n 379) 1004
[398] WTO, *Doha Declaration on the TRIPS Agreement and Public Health* (14 November 2001) WT/MIN(01)/DEC/2
[399] WTO, *Trade-Related Aspects of Intellectual Property Rights* (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299
[400] Haugen (n 264) 324-5
[401] Doha Declaration (n 398) art. 4
[402] ibid art 5(b)

Clashes of values amount to conflicts when values are juridified to some degree, and interact with other legal norms. In this instance the divergence is mitigated, though not entirely reconciled one might argue, due to the fact that the legal effect of the Doha Declaration is uncertain.[403] Although it can guide the interpretation of the TRIPS agreement in a direction that is more compatible with States' public health objectives, the basis for intellectually property rights – to "prevent others from using their inventions, designs or other creations" - is intuitively at odds with the maximization of access to medicines, not to mention its apparent disconnect from objectives of the WTO, which include increasing competition and trade.[404]

Examples of clashes between the values espoused by municipal legislation of a State and those that underpin the WTO are numerous and lead to vertical norm conflicts. This type of divergence is illustrated through a series of ongoing cases in which United States' legislation concerned with the safety of dolphins in tuna fishing collides with GATT and WTO norms. In *United States — Restrictions on Imports of Tuna* (1991), Mexico argued that measures imposed under the United States' Marine Mammal Protection Act of 1972, which restricts importation of tuna, were inconsistent with its obligations.[405] It was found that the United States' measures were inconsistent with its obligations under GATT and could not be justified under Article XX.[406] Article XX lists a limited number of objectives that members may invoke to exempt themselves from WTO obligations, namely: to protect public morals; to protect human, animal or plant life or health; relating the products of prison labour; and relating to the conservation of exhaustible natural resources.[407] However, this report

[403] "The United States has maintained that Doha was a political declaration with no legal authority." James Thuo Gathii, 'The Legal Status of the Doha Declaration on TRIPS and Public Health Under the Vienna Convention on the Law of Treaties' (2002) 15 Harvard Journal of Law & Technology 291, 315.
[404] Marrakesh Agreement Establishing the World Trade Organization (adopted April 15, 1994, entered into force 1 January 1995) 1867 UNTS 154 (WTO Agreement), preamble. See also WTO, 'Understanding the WTO: The Agreements, Intellectual Property: Protection and Enforcement' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm> accessed 1December 2015
[405] GATT, *United States: Restrictions on Imports of Tuna – Report of the Panel* (3 September, 1991) GATT BISD DS21/R [3.1]
[406] ibid [7.1]
[407] General Agreement on Tariffs and Trade (n 342) art XX

was not adopted. The European Community challenged the same legislation in 1994 and the panel reached similar conclusions.[408] Years later, in *United States — GATT Dispute Panel Report on Restrictions on Imports of Tuna* (2011), the United States' measures aimed at the protection of dolphins was again challenged.[409] It was argued that the *Dolphin Protection Consumer Information Act,* which established criteria for using the 'dolphin safe' label on products entering the United States was inconsistent with the country's obligations under GATT and the Agreement on Technical Barriers to Trade (TBT).[410]

Mexico argued, *inter alia,* that the measures were not based on a 'relevant international standard' as required by Article 2.4, as they did not fully adhere to established international standards on dolphin protection under the Agreement on the International Dolphin Conservation Program (AIDCP).[411] Of the greatest interest for the present purposes, Mexico contended that the unilateral measures imposed by the United States were unnecessary and do not fulfill the 'legitimate objectives' according to Article 2.2.[412] This case highlights the ability of a WTO dispute body – an unelected international body - to assess the legitimacy of States' environmental policy in the context of the international trade regime.[413] The language used in the TBT is value-laden, suggesting that a limited number of concerns are 'legitimate' and can therefore be pursued (even if inconsistent with a State's WTO obligations), while others are not.

[408] GATT, *United States: Restrictions on Imports of Tuna – Report of the Panel* (16 June 1994) GATT BISD DS29/R [3.1], [6.1]
[409] WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Panel* (15 September 2011) WT/DS381/R
[410] ibid [3.1], [4.4], [4.5]
[411] ibid [3.1], [4.213] [4.4], [4.5]
[412] ibid [4.5]
[413] "Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products." Agreement on Technical Barriers to Trade (adopted April 15, 1994, entered into force 1 January 1995) BISD 26S/8 1186 UNTS 276, art 2.2; General Agreement on Tariffs and Trade (n 342) art XX

The panel found that the measures are more trade-restrictive than necessary, and therefore inconsistent with Article 2.2.[414] However it noted the protection of dolphins is a legitimate objective, even if based on presumption rather than incontrovertible evidence that certain fishing methods negatively impact dolphin populations.[415] It quoted a previous decision to reaffirm that deference is to be given to Member's to determine what are legitimate objectives and how such issues should be addressed - at least to the extent that they do not conflict with GATT:

> WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.[416]

It also found that the United States' measures are not inconsistent with Article 2.4.[417]

Upon appeal, Mexico contended that the United States' measures had a 'coercive objective' in that "its purpose is to 'coerce' another WTO Member to change its practices to comply with the unilateral policy of the United States."[418] However, the Appellate Body disagreed with Mexico on this point, and determined the measures were not inconsistent with Article 2.2 in this regard.[419] Finally, it upheld the panel's finding that the measures were not inconsistent with Article 2.4 but found that the panel had erred in determining that the *Agreement on the International Dolphin Conservation Program* would be a 'relevant international standard' upon which such measures could be

[414] WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products - Report of the Panel* (n 426) [7.620]
[415] ibid [7.737]
[416]ibid [7.441]
[417] ibid [8.1(c)]
[418] WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body* (16 May 2012) WT/DS381/AB/R [96]
[419] ibid [342]

justified under the TBT.[420] This suggests that even if environmental measures adhere to international standards deemed appropriate by the instituting country, such standards may not be recognized as legitimate under the WTO system. In short, a State that adheres to objectives and standards set in an instrument that reflects the values of its society, but is not recognized by the WTO as an appropriate standard, does not excuse it from its WTO obligations.

Once the United States had amended the *Dolphin Protection Consumer Information Act*, Mexico requested a compliance panel to determine whether the amendments were consistent with GATT Articles I.1 and III.4 as well as Article 2.1 of the TBT.[421] The United States once again claimed that inconsistencies were justified based on exemptions permitted under GATT XX.[422] The panel, and ultimately the Appellate Body, found that the measures could not be justified under GATT XX (although the two bodies reasoned differently).[423] GATT Article XX and TBT Article 2.2 set out the confines within which member States can address the concerns of civil society, including those related to public morals and natural resources, and implement policies towards those ends.

3.6.4 Conflict Definitions in Practice

International and regional courts have been reluctant to offer definitions of norm conflict. The ICJ has considered various dimensions of possible conflicts, and has resorted to Article 103 of the Charter of the United Nations to avoid or resolve them, though without offering a clear definition.[424] It offers limited commentary on what *does not* constitute a conflict of norms in *Jurisdictional*

[420] ibid [401]
[421] WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products from Mexico, Recourse to article 21.5 of the DSU by Mexico - Report of the Panel* (22 April 2015) WT/DS381/RW/Corr.1, WT/DS381/RW, WT/DS381/RW/Add.1 [2.3]
[422] ibid [7.505]
[423] ibid [7.611]. See Also *WTO, United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products from Mexico, Recourse to article 21.5 of the DSU by Mexico - Report of the Appellate Body* (20 November 2015) WT/DS381/AB/RW, WT/DS381/AB/RW/Add.1 [8.1(d)(ii)]
[424] See *supra* note 345

Immunities of the State (Germany v. Italy: Greece Intervening).[425] It states that conflicts must involve norms pertaining to the same subject-matter and also that norms dealing with procedural matters and those dealing with substantive matters can not conflict, as they deal with different matters:

> The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.[426]

While Judge Cançado Trindade, in his dissenting opinion, advocates a broader definition that includes situations where the full exercise of a norm is impaired as a result of the application of another norm, at least where the impaired norm constitutes *jus cogens,* this has not been adopted by the ICJ.[427]

As regards the WTO, a number of cases illustrate panel and Appellate Body preference for strict definitions, as well as its strong presumption against conflict, to the determinant of the full exercise of external rules in some cases. In the case of *European Communities - Regime for the Importation, Sale and Distribution of Bananas* the panel and Appellate Body consider conflict between external international law and WTO rules.[428] Ecuador, Guatemala, Honduras, Mexico and the United States challenged the European Community's banana trading scheme under the Lomé Convention, which regulates trade between the European Community and developing countries belonging to the African, Caribbean and Pacific Group of States.[429] The European Community was granted a waiver, which exempted it from certain obligations under GATT and permitted preferential market access to the group of African, Caribbean and Pacific States and stipulated the conditions of aid and

[425] *Jurisdictional Immunities of the State* (n 252)
[426] ibid [93]
[427] *Jurisdictional Immunities of the State* (n 252) Dissenting Opinion of Judge Cancado Trindade [296]
[428] WTO, *European Communities: Regime for the Importation, Sale and Distribution of Bananas – Report of the Panel* (27 May 1997) WT/DS27/R/ECU, WT/DS27/R/GTM, WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA
[429] ibid [3.1]

investment from the European Community.[430] The parties argued that the European Community's activity pursuant to the Lomé Convention was in violation of, *inter alia*, GATT Articles I, II, III, X, XI and XIII and the Agreement on Agriculture.[431] The European Community argued that the United States did not have a legal basis to bring such claims to the WTO under the Dispute Settlement Understanding because the Lomé Convention was outside of the WTO's jurisdiction.[432] However, the panel considered whether a conflict existed on two accounts: between the European Community's obligations under the Lomé Convention and GATT and also between the European Community's obligations under the Lomé Convention and the Agreement on Agriculture. Although the panel found that no such conflict exists, it noted:

> As a preliminary issue, it is necessary to define the notion of "conflict" laid down in the General Interpretative Note. In light of the wording, the context, the object and the purpose of this Note, we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.[433]

Part (ii) clearly indicates that the panel will consider the possibility of conflict between a prohibition (mandatory norm) and a permissive norm. This can be contrasted with the following WTO cases, which came after *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, and in which Jenks' narrow definition is adopted. However, the panel ultimately decided on the matter from a narrow perspective, stating that there are no 'mutually exclusive' obligations in the matter at hand.[434]

In *Indonesia - Certain Measures Affecting the Automobile Industry* (1998) complainants the European Community, Japan, and the United States argue that

[430] ibid [3.34]
[431] ibid [4.1] – [4.3]
[432] ibid [4.66]
[433] ibid [7.159]
[434] ibid [7.162]

Indonesia violated a number of provisions of GATT, the Agreement on Trade Related Investment Measures (TRIMS), the Agreement on Subsidies and Countervailing Measures (SCM), and TRIPS relating to the exemption of duties and luxury taxes on Indonesian–produced vehicles.[435] Indonesia argued that there is a conflict between certain provisions contained in the SCM Agreement and GATT Article III, and that according to the doctrine of *lex specialis* the provisions of the SCM prevail.[436] The SCM provides for special flexibilities (permissions) for developing countries to maintain certain subsidies for a given period of time. Whereas Article III is a mandatory norm as it prohibits discrimination between products based on country of origin (domestic or international). The panel considered Indonesia's claim that the SCM in its entirety, and through particular provisions, conflicts with Article III (referred to as 'general' and 'specific' conflicts, respectively).[437] It also considered whether the TRIMS and SCM agreement are in conflict.[438]

Indonesia argued that in order to adhere to the prohibitive norm outlined in Article III, its exercise of the permissions granted through the SCM would be reduced to 'inutility,' which runs counter to general rules of treaty interpretation.[439] In other words, to avoid recognition of a conflict, the permission to use subsidy flexibilities – which in this case Indonesia argues is *lex specialis* – is rendered meaningless. But the panel rejected this claim and recalled its findings in an earlier case in which it found that a Member does not have the freedom to interpret the text of an agreement in such a way so as to reduce "whole clauses or paragraphs of a treaty to redundancy or inutility."[440] In its reasoning, the panel recalled the presumption against conflict in international law and wrote that it "is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be

[435] WTO, *Indonesia: Certain Measures Affecting the Automobile Industry – Report of the Panel* (2 July 1998) WT/DS54/R WT/DS55/R WT/DS59/R WT/DS64/R
[436] ibid [5.128]
[437] ibid [14.28] – [14.36]
[438] ibid [14.47] – [14.55]
[439] ibid [14.27(2)], [14.37] – [14.40]
[440] ibid footnote 648

presumed that they are meant to be consistent with themselves, failing any evidence to the contrary."[441] The panel also reiterated the definition of conflict according to the Encyclopedia of Public International Law, in which it is stated that the treaties must have the same parties, cover the same subject-matter, and amount to 'mutually exclusive obligations.'[442] It also recalled, that the provisions "must cover the same *substantive* matter. Otherwise there is no conflict since the two provisions have different purposes."[443]

It is unclear whether the panel is alluding to the idea that substantive and procedural rules cannot conflict (as the ICJ decided in *Jurisdictional Immunities*), or whether it is simply reiterating that conflicting norms must contain overlapping *ratione materiea*. It did specify, however, that "[i]n short, Article III prohibits discrimination between domestic and imported products while the SCM Agreement regulates the provision of subsidies to enterprises."[444] In any event, it concluded that no general conflict exists between Article III and the SCM agreement, as the two agreements do not 'generally' cover the same subject-matter and impose different kinds of obligations.[445] It did not consider whether specific provisions of the agreements were in conflict. Lastly, in regard to this point, the panel found that no conflict existed between TRIPS and the SCM agreement, as they do not contain mutually exclusive obligations or overlapping subject-matter.[446] While the panel did not find a conflict between the norms in question, and it rejected the idea that the permissive norm here is diminished if Article III is applied, it is clear that such flexibilities for developing countries cannot be enjoyed (at least

[441] ibid [14.28] footnote 649. The Panel refers to the arguments of E.W. Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties' (1989) 59 British Yearbook of International Law 75
[442] ibid footnote 649
[443] ibid [14.29] (emphasis added)
[444] ibid [14.33]
[445] ibid [14.36] footnote 649. The panel referred to Jenks' assertion that the principle of *lex specialis* is inapplicable "between two treaties or between two provisions (one arguably being more specific than the other)[that] deal with the subject from different point of view or [is] applicable in different circumstances, or one provision is more far-reaching than but not inconsistent with, those of the other." See also Jenks (n 248) 425
[446] ibid [14.52]

not in the manner that they were challenged in this case) without leading to a breach of GATT Article III.[447]

In *Turkey – Restrictions on Imports of Textile and Clothing Products* the panel considered similar issues regarding conflict and the application of the *lex specialis* maxim.[448] In this case, India challenged Turkey's quantitative restrictions on Indian imports.[449] In its defense, Turkey argued that the restrictions are not inconsistent with its obligations under GATT Articles XI (prohibits the use of quantitative restrictions), XIII (quotas must not discriminate) and Article 2.4 of the Agreement on Textiles and Clothing (ATC) when read in light of GATT Article XXIV, which permits the establishment of regional trade agreements.[450] Turkey argued that this permission constitutes *lex specialis* and therefore prevails over Articles XI and XIII.[451] The panel relied on the understanding of conflict used in *Indonesia-Certain Measures Affecting the Automobile Industry* to determine the nature of the relationship between Articles XI, XIII and 2.4 on the one hand, and Article XXIV on the other; it recalled Jenks' assertion that "if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another" there is no conflict.[452]

The panel also found that the principle of effective interpretation prevented it from "reaching a conclusion on the claims of India or the defense of Turkey […] that would lead to a denial of either party's rights or obligations."[453] However, in the following excerpt, it is clear that Turkey's permission cannot be exercised if it is to remain consistent with its other obligations: "[T]hat Turkey's conditional right to form a regional trade agreement [is] compatible with Article XXIV, without violating Articles XI and XIII and Article 2.4 of the

[447] ibid
[448] WTO, *Turkey: Restrictions on Imports of Textile and Clothing Products – Report of the Panel* (31 May 1999) WT/DS34/R
[449] ibid [5.1]
[450] ibid [9.88]
[451] ibid [6.36], [9.88]
[452] ibid [9.92]
[453] ibid [9.96]

ATC, is confirmed by the flexibility offered by the wording of Article XXIV."[454] Its seems that the rights of member States to the expected benefits of the trade rules override the rights of some members to special flexibilities; here Vranes' distinction between different kinds of rights, as claims or permissions, is organized hierarchically by the panel.

Notwithstanding the fact that the panel found the flexible (permissive) nature of XXIV excludes the possibility of it conflicting with other provisions, it went on to examine its compatibility with measures 'otherwise prohibited' under Articles XI and XIII – a move which has been argued to demonstrate a disconnect between the definition espoused by the panel and its actual analysis.[455] However, the current author does not share this position. It appears as though the panel recognizes Article XXIV can still lead to a divergence, which is a kind of problem acknowledged by Jenks.[456] Therefore the panel's approach converges with Jenks' writing on the topic by employing a narrow definition but also recognizing how other norms that are not necessarily in genuine conflict, can still frustrate one another.

The case of *Appellate Body in Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico* has been cited numerous times as an example of the Appellate Body's preference for narrow definitions and therefore will not be discussed in detail here.[457] In it, the Appellate Body considers the relationship between provisions of the DSU and the Anti-Dumping Agreement and determines that a conflict is present if "adherence to the one provision will lead to a violation of the other provision."[458] Although it

[454] ibid [8.5]
[455] Vranes argues that the panel's activities are 'paradoxical' in light of the definition of conflict presented. Regardless, he is not concerned with criticizing this inconsistency. Vranes (n 247) 400-401
[456] Jenks (n 248) 426
[457] WTO, *Guatemala: Anti-Dumping Investigation Regarding Portland Cement – Report of the Appellate Body* (5 November 1998); Vranes (n 247) 416. See also Pauwelyn, *Conflict of Norms in Public International Law* (n 248) 194; Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35 Journal of World Trade 1081, 1085
[458] ibid [65]

does not mention Jenks specifically in this case, the Appellate Body's reasoning aligns with his thought on the topic.

3.7 Conflict Resolution; the Vienna Convention on the Law of Treaties and Techniques

Harmonious interpretation, conflict clauses, and the creation of informal hierarchies, have already been noted as methods of avoiding or resolving incompatibilities. The remainder of this chapter is devoted to the discussion of conflict rules and maxims, as they are the most relevant techniques for resolution. The consequence of conflict rules for the yielding norm typically amounts to derogation, supersession, or nullity.[459] Norms of derogation enable the partial, temporary or full repeal of one norm to occur legally.[460] For authors like Kelsen, norms of derogation must be 'positively stipulated,' that is, explicitly noted in a treaty as an exemption or conflict clause and cannot arise out of custom.[461] Vranes argues that these rules are inherent to international law as evidenced by the fact that States are vested with the authority to create new rules that derogate from old rules, which thereby perform the function of *lex posterior* and *lex specialis* principles.[462] Stated alternatively, the new rule, if it is in conflict with an old rule, is a rule of derogation of sorts. Of course, this can only be true to the extent that a new rule does not conflict with a norm of *jus cogens*; such norms preempt the creation of incompatible rules and in this way represent the limit to States' freedom to contract.[463] As one author States, in such instances "[s]overeignty has been compelled to bow before the law."[464] Suppression of one of the conflicting norms is likely the most common outcome, as there is an effort not to abolish rules to which States have asserted their will to be bound.

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[459] Erich Vranes, 'Lex Superior, Lex Specialis, Lex Posterior – Zur Rechtsnatur der "Konfliktlösungsregeln" (2005) 65 Zaö RV 391, 405
[460] Kelsen (n 257) 106, 111-112; Mus (283) 210
[461] Kelsen (n 257) 109; Vranes, 'Lex Superior, Lex Specialis, Lex Posterior' (n 459) 404
[462] Vranes, 'Lex Superior, Lex Specialis, Lex Posterior' (n 459) 404
[463] Quincy Wright, 'Conflicts Between International Law and Treaties' (1917) 11 The American Journal of International Law 566, 568
[464] ibid

Conflict rules essentially produce a hierarchy among divergent norms of international law where no inherent order exists. Typically applied by a court, they determine which is the prevailing and which is the yielding norm in the event that both cannot be simultaneously observed by a State. Their use is complicated by the lack of consensus over the "status, content, and implications of these principles" in international legal theory and practice.[465] The use of conflict rules and rules on interpretation predates the existence of the Vienna Convention.[466] Nonetheless, most have been codified in the convention (with the exception of *lex specialis)* and it is referred to as their formal source.

3.7.1 Limitations of the Vienna Convention on the Law of Treaties

Although Article 30 of the Vienna Convention is the most recognized source of rules, this does not mean that it is commonly applied to determine the outcomes of incompatibilities. In practice, conflicting norms are most often negotiated outside of the courtroom and amount to a political exercise rather than a legal one.[467] The consequences of ad hoc negotiations to resolve conflicts is that it does not provide legal certainty and the result may better reflect the political and power relations between the actors involved than any other consideration. Indeed, while such techniques may lead to successful outcomes, they:

> [H]ave little or nothing to do with legal principle and much to do with power and politics. Thus, the goals […] involved in treaty-making—decreasing the politicization of international relations and increasing rule-based decision making and conflict resolution—are actually undercut by their own efforts because treaty congestion leads to political bargaining, not principled action.[468]

The Vienna Convention on the Law of Treaties has been likened to a "vehicle that does not often leave the garage."[469] Negotiation may result in an outcome

[465] Vranes, 'Lex Superior, Lex Specialis, Lex Posterior' (n 459) 404
[466] ibid
[467] Borgen (n 248) 635
[468] ibid
[469] Antonio Cassese, 'For an Enhanced Role of Jus Cogens' in Antonio Cassese (ed) *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 160

that is less favourable to the State with the weaker negotiating position, or to an external or weaker norm that it values.

Sinclair views Article 30 as a residual rule to be invoked when the terms of a treaty do not explicitly address the potential for conflict.[470] He also asserts that the terms of Article 30 were purposely not well defined, so as to leave some room for States to further develop the rules on relationships between successive treaties.[471] Former Special Rapporteur Waldock explains that it was simply not possible to include a comprehensive set of conflict rules in Article 30, as there were too many possibilities.[472] The limited application of the Vienna Convention notwithstanding, it remains an important source of conflict resolution rules. As the 'treaty on treaties,' it sets the conditions under which *lex prior* and *lex posterior* might be used, though without naming the rules as such in Article 30.[473] Article 53 is also relevant in that it essentially suggests the use of *lex superior*.[474]

Recalling that incompatibility between regimes can appear not only in the form of divergent norms, but also as a 'clash of values,' resolution techniques are less useful in such situations.[475] Much of the research produced by the former Special Rapporteurs on the right to food warn of an incompatible relationship that appears more akin to a clash of values than genuine norm conflict. Fischer-Lescano and Teubner warn that "it is dubious whether the creation of judicial hierarchies can ever overcome a form of legal fragmentation that derives from structural social contradictions."[476] The issues explored surrounding fragmentation in the previous chapter are more than theoretical; the consequences of fragmentation are found not only in increased potential for norm conflicts but also in the limited ability to resolve them.

[470] Sinclair (n 248) 97, 98
[471] ibid 98
[472] Mus (n 283) 213
[473] Sinclair (n 248) 252
[474] Vienna Convention on the Law of Treaties (n 252) art 53
[475] Fischer-Lescano and Teubner (n 379) 99
[476] ibid 1007

3.7.1.1 SAME SUBJECT-MATTER AS A CRITERION

Some authors have understood the 'same subject-matter' phrase in Article 30 to mean a criterion according to which the rules contained therein can be employed.[477] Regarding the scope of application of the article, Waldock stated that the phrase, "should not be held to cover cases where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty."[478] Although, as Sadat questions, what is meant by 'indirectly?'[479] Does it apply only to situations wherein two norms direct actions on precisely the same issue between the same States? Such instances are the easiest to remedy given that the latter in time is likely meant to supersede the former. Little is offered in the text of the article to determine what amounts to overlapping subject-matter. Sinclair also supports a strict understanding of same subject-matter, while Borgen does not support such a limited application, but interprets Article 30 to mean as such.[480] However, the ILC rejects the notion that the same subject-matter is a requirement for the applicability of the rules contained in Article 30, it argues that to construe it as such:

> [R]emoves the applicability of article 30 when a conflict emerges for example between a trade treaty and an environmental treaty because those deal with different subjects. But this cannot be so inasmuch as the characterizations ("trade law", "environmental law") have no normative value per se.[481]

While various understandings of the same subject-matter, as a requirement or not, have been put forward, Vierdag's conception seems most useful to a wide variety of possible situations:

> [T]he requirement that the instruments must relate to the same subject matter seems to raise extremely difficult problems in theory, but may turn out not to be so very difficult in practice. If an attempted

[477] Borgen (n 248) 580, 639
[478] Seyed Ali Sadat-Akhavi, *Methods of Resolving Conflicts Between Treaties* (Martinus Nijhoff Publishers 2003) 60
[479] ibid
[480] Sinclair (n 248) 98; Borgen (n 248) 580, 639
[481] ILC (n 246) para 21

> simultaneous application of two rules to one set of facts or actions leads to incompatible results it can safely be assumed that the test of sameness is satisfied.[482]

Vierdag implies that when two norms both have the ability to impact a third subject, subject-matter, or object, there is overlap, which is useful to the assessment of the relationship between international human rights law and other international law.

Still, it is unlikely that most courts, including the WTO dispute mechanism, would recognize the two agreements to be analyzed in this research as having the same subject-matter. The panel in *Indonesia - Certain Measures Affecting the Automobile Industry* argued that the provisions of WTO agreements that both applied to the situation under consideration (GATT and the SMS, and TRIMS and the SCM) did not contain the same subject-matter and therefore cannot conflict.[483] There is, however, little question that trade rules impact the realization of human rights - both negatively and positively – however, a direct link is not always easy to point out. Only if the same subject-matter requirement can be understood as satisfied when the impact of a body of rules on the exercise and enjoyment of another body of rules, might the two agreements in this research meet the requirement.

3.7.1.2 Principle of Political Decision

Article 30(4)(b) of the Vienna Convention on the Law of Treaties provides that, in situations where there are only partially identical parties to two incompatible treaties (i.e. AB:AC style conflicts), "the treaty to which both States are parties governs their mutual rights and obligations."[484] Klabbers and subsequently Ranganathan note one of the shortcomings of this provision: It amounts to a deferral to the principle of 'political decision.'[485] Article 30(4)(b) does not

[482] Vierdag (n 441)100
[483] WTO, *Indonesia: Certain Measures Affecting the Automobile Industry – Report of the Panel* (n 435) [14.35] – [14.36], [14.52]
[484] Vienna Convention on the Law of Treaties (n 325) art 30(4)(b)
[485] Klabbers, *Treaty Conflict in the European Union* (n 254) 88; Ranganathan (n 334) 47

seem to provide any direction on how to actually resolve a conflict in such situations; a State cannot adhere to its rights and obligations to the other parties of both treaties if they are fundamentally incompatible. A State must choose which commitment to honour and which to violate.[486] Klabbers argues that this is, in fact, a useful provision in that the deficiencies of more concrete rules such as *lex prior* and *lex posterior* (outlined in the following sections) are avoided.[487] The principal of political decision "allows states and in particular decision makers (think of judges) to chose the treaty they deem the most worthy in the circumstances."[488] He continues, this enables other actors such as human rights activists to pressure States and decision makers to 'give preference' to a human rights treaty if it conflicts with another treaty.[489] This, he argues, promotes the participation of civil society and 'responsive politics' in international law.[490]

However, the opposite may also be true; a State may be more concerned with, for example, its economic interests than human rights or environmental advocates or other lobby groups. The State will presumably chose to breach the norm for which the repercussions are less detrimental. This is the crux of the problem when dealing with potential conflicts that involve socio-economic rights; because the enforcement mechanisms for socio-economic rights are relatively underdeveloped, the repercussions for the State in breach of its obligations under the ICESCR may be less serious. Moreover, because of the wide margin of appreciation afforded to States, determining an actual breach is relatively difficult. A State may simply refrain from fulfilling aspects of its socio-economic rights obligation that it otherwise would have (or could have), because of a norm that either conflicts or frustrates its full exercise.

[486] Klabbers, *Treaty Conflict in the European Union* (n 254) 88; Ranganathan (n 334) 50
[487] Klabbers, *Treaty Conflict in the European Union* (n 254) 90
[488] ibid
[489] ibid
[490] ibid

3.7.2 *LEX PRIOR*

Though typically reserved for instances involving only partially identical parties to conflicting treaties (pursuant to Vienna Convention on the Law of Treaties Article 30(4)(b)) *lex prior* was once considered a more viable conflict resolution technique. For example, recall that Lauterpacht not only prioritized use of *lex prior*, but also argued that a new treaty is void if it breaches an older treaty, as did many of his predecessors.[491] *Lex prior* supports the concept of legal certainty by ensuring that State parties to Treaty 1 can count on co-signatories to fulfill their obligations, regardless of their future activities, which may involve ratifying Treaty 2 that contains conflicting provisions.[492] It is unsurprising that the *lex prior* is less attractive today when one considers that the application of this rule would hinder the development of international law; every new departure from past rules could be rendered void.[493] Recall that the ILC recognizes that divergences are not mere accidents, but that new law is created for the purpose of changing or overriding past rules.[494]

Other problems associated with the use of *lex prior* relate to its practical application. It requires determining which treaty is, in fact, the earlier one. Therefore it must be decided whether the date of signature or the date of entry into force is the determining factor.[495] Consider the following scenario provided by Sadat-Akhavi: Treaty 1 was adopted in 1964 and came into force in 1968. Treaty 2 was adopted in 1965 and came into force in 1966.[496] Similarly, State A ratified a multilateral treaty in 1961 (entry into force 1962), and then in 1963 States A and B sign a bilateral treaty (entry into force 1964). The following year, State B ratified the multilateral treaty.[497] Because a number of dates could be chosen to illustrate which was 'first,' it was eventually

[491] United Nations, Report on the Law of Treaties Yearbook of the International Law Commission 1953 (1959), vol. II 137
[492] Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' (n 302) 196
[493] Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' (n 302) 197; United Nations (n 506) 156
[494] ILC (n 246) para 15
[495] Sadat-Akhavi (n 478) 75
[496] Sadat-Akhavi (n 478) 75
[497] Mus (n 483) 220

decided amongst the drafters of the Vienna Convention that the date of adoption determines the earlier in time treaty. However, not all scholars agree on this point. Vierdag rejects the date of adoption as the determining factor, arguing that if a treaty has not yet come into effect, the obligations therein similarly have no effect and therefore no genuine conflict has occurred; otherwise an (apparent) conflict would involve a pre-normative element(s), which cannot occur.[498] He argues that Article 30 contains "no relevant legal connection between the abstract legal rules contained in 'successive' treaties on the one hand, and the concrete rights and obligations of States on the other hand."[499]

3.7.3 *LEX POSTERIOR*

Lex posterior finds expression in the Vienna Convention Article 30(4)(a). The dilemmas listed above in regard to determining which treaty is in fact *lex prior* apply equally to *lex posterior*, yet one further point is worth noting here. The advantage of the *lex posterior* rules is that the later in time treaty reflects the will and values of States more accurately.[500] For this reason, Jenks and others advocate the later in time treaty when there are identical parties.[501] The danger is that if international law reflects State actors, or rather the present leadership of a State, too closely, there is a risk of it becoming shortsighted and populist, rather than maintaining long-standing values for the betterment of society or international community. This seems particularly detrimental to the protection of norms related to human life and wellbeing, such as human rights and international environmental norms. Borgen captures the problem with *lex posterior* in regard to human rights treaties perfectly in the following scenario:

> If States A, B, C, and D have a human rights treaty among themselves and then subsequently negotiate a trade agreement with implications

[498] Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties' (n 441) 93 - 97
[499] ibid 97
[500] Klabbers, 'Beyond the Vienna Convention: Conflicting Treaty Provisions' (n 302) 198-199
[501] Jenks (n 248) 428-429

> concerning human rights, it is questionable whether one should simply conclude that the earlier human rights treaty applies only to the extent that its norms are consistent with the trade accord.[502]

Klabbers would perhaps argue that if this scenario were considered before a judicial body (and assuming that a conflict was determined), the human rights treaty would override the trade agreement because it reflects important values, which are likely to be given priority.[503] He argues that this "is precisely what happens in some, perhaps most, cases of treaty conflict," however key cases in which conflicts were alleged by a party or parties does not appear to support this statement.[504]

3.7.4 *LEX SPECIALIS*

Lex specialis prioritizes the special rule over the general. Like the techniques discussed before it, the *lex specialis* maxim is far from novel in legal theory and practice. Though it is not a rule *per se*, today it is an accepted maxim used to determine the outcome of norm conflicts, even if it remains "impeded by its conceptual vagueness."[505] For example, the special rule could be that which is more detailed as opposed to a vague rule, or it could be the rule pertaining to a specialized regime rather than general international law. Alternatively, it could refer to the rule to which fewer States are bound, such as one found in a bilateral treaty instead of a multilateral treaty.[506] The ILC contends that *lex specialis* is determined by the context at hand, that is to say, "[g]enerality and speciality are thus relational."[507]

The Vienna Convention offers no insight into the criteria that might be used to determine which is a special norm and which is the general and reference to *lex specialis* is absent from the treaty altogether, though it was discussed during

[502] Borgen (n 248) 603-604
[503] Klabbers, *Treaty Conflict in the European Union* (n 254) 28
[504] ibid
[505] Lindroos (n 248) 27
[506] ILC (n 246) para 112
[507] ibid

drafting.[508] Working *lex specialis* into a concrete rule would require assessing the substantive content of norms (and what is, in fact, special), whereas the Vienna Convention is designed to address procedural issues exclusively: "[It] is built around a conception of the treaty as form, not substance (the treaty as an instrument, not as obligation), and eschews all considerations of substance."[509] A number of courts have applied the *lex specialis* maxim, including the WTO. The panels and the Appellate Body have never determined external international law to constitute *lex specialis*.

3.8 Conclusion

This chapter outlines the development of concepts central to the present research, particularly, norms, norm conflict, and conflict rules. While there is little consensus on many of the concepts presented, the lack of agreement also presents greater opportunity to contribute to the discussion. The fragmentation of international law poses unprecedented challenges for theories of norm conflict and the most widely accepted source of resolution techniques does not satisfactorily address them. Alternatively, the vagueness of the Vienna Convention is useful in that it allows space for the development of its rules to accommodate emerging issues. The difficulty in universalizing norm conflict rules lies not only in the absence of definitions about what constitutes a conflict or the same subject-matter, but also in the more fundamental disagreements about the nature of international law, the jurisdiction over rules pertaining to relatively isolated regimes, and whether norms other than *jus cogens* also hold a superior status (making them *lex superior* or *lex specialis*).

A broad definition of conflict is adopted throughout this research in order to assess the various ways in which the rules of the Agriculture Agreement and the ICESCR might interfere with one another. Although authors like Marceau, who presents related research on the potential for conflict between WTO

[508] ILC (n 246) para 65
[509] Klabbers (n 302) 200

Agreements and Multilateral Environment Agreements opted to adhere to a narrow definition because the WTO adjudicating bodies have done so, a strict definition would necessarily exclude from consideration key provisions under the WTO agreements and the ICESCR from further consideration.[510] A broad definition also reflects much of the contemporary scholarly writing on the topic, and the ILC's points as well.[511] Given that the ILC's fragmentation report is central to discussion of norm conflict, it is reasonable to follow in its footsteps.

[510] Marceau (n 257)
[511] ILC (n 246) para 25

4. The Human Right to Adequate Food and Corresponding Obligations

4.1 Introduction to the right to adequate food

The key source of the right to food in international law is ICESCR Article 11, according to which, State parties to the Covenant "recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food."[512] States also recognize "the fundamental right of everyone to be free from hunger."[513] In the remainder of the article, parties to the Covenant undertake to take steps in several areas related to the production and distribution of food. Overarching obligations for this and other socio-economic rights are set out in Article 2 of the same instrument.[514] The commitment to achieving aspects of the right to food have been reiterated numerous times in international fora and through the adoption of goals, plans of action, resolutions, and reports.[515]

Two important goals included in such agreements expired last year: the Millennium Development Goal 1 and the 1996 World Food Summit goal of reducing the number of hungry people in the world by half were to be achieved by the end of 2015.[516] Although significant progress has been made in the last two decades, including the achievement of these targets for a number of individual States, there are still an estimated 795 million undernourished people

[512] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1923 1976) UNTS 993 (ICESCR) art 11
[513] ibid
[514] ibid art 2
[515] For example, see: United Nations General Assembly Res 64/159 (adopted 18 December 2009) UN Doc. A/RES/64/159; UNGA Resolution 50/2 'United Nations Millennium Declaration' (8 September 2000) UN Doc. A/RES/55/2 para 15; FAO, *Rome Declaration on World Food Security and World Food Summit Plan of Action* (13 November 1996), preamble; FAO, *Declaration of the World Food Summit: five years later* (13 June 2002); UNHRC Res 7/14 'The Right to Food' (27 March 2008); UNGA res 62/164 (18 December 2007) UN Doc A/RES/62/164; United Nations Human Rights Council resolution 6/2 (27 September 2007); FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (adopted November 2004); Philip Alston, 'International Law and the Human Right to Food' in Philip Alston and Katarina Tomaševski (eds.) *The Right to Food* (Martinus Nijhoff Publishers 1984) 9
[516] UNGA, Resolution 50/2 'United Nations Millennium Declaration' (n 515) para 15; FAO, *Rome Declaration on World Food Security and World Food Summit Plan of Action* (n 515) preamble

around the world.[517] In recent years the rate of progress has decelerated due to "slower and less inclusive economic growth as well as political instability in some developing regions."[518] However, the causes of hunger and malnutrition are manifold: Conflict, occupation, environmental disaster, climate change, and poverty are all factors that contribute to widespread hunger and malnutrition within a State, frequently along side one another or in tandem with underdevelopment. In addition to the acts of omission by States that can lead to hunger in the abovementioned scenarios, deliberate starvation is also used as a 'readily available weapon' against populations, and a "low-cost method of political coercion."[519]

Broadly speaking, poverty is the most salient feature among those that are hungry.[520] Sen's study on famine found that cases of widespread hunger and starvation are caused not by the unavailability of food, but by lack of entitlements – essentially, a lack of economic access.[521] Just as when Sen wrote his seminal work in 1981, today the world still produces more than enough food to feed its population.[522] Today, the lack of entitlements faced by hungry and

[517] FAO, IFAD and WFP, *The State of Food Insecurity in the World 2015. Meeting the 2015 international hunger targets: taking stock of uneven progress* (FAO 2015) 9 ("*The State of Food Insecurity in the World 2015"*)

[518] ibid, Key Messages

[519] Simone Hutter, *Starvation as a Weapon* (46 International Humanitarian Law Series, Brilll Nijhoff 2015) 3

[520] It is useful to define the following terms using definitions by leading international food and agriculture agencies.

> Hunger: Chronic undernourishment.
> Malnutrition: An abnormal physiological condition caused by inadequate, unbalanced or excessive consumption of macronutrients and/or micronutrients. Malnutrition includes undernutrition and overnutrition as well as micronutrient deficiencies.
> Undernutrition: The outcome of undernourishment, and/or poor absorption and/or poor use of nutrients consumed as a result of repeated infectious disease. It includes being underweight for one's age, too short for one's age (stunted), dangerously thin for one's height (wasted) and deficient in vitamins and minerals (micronutrient malnutrition).

However, the term 'hunger' is frequently used to include other kinds of under- and malnutrition throughout this research.
FAO, IFAD and WFP, *The State of Food Insecurity in the World 2015* (n 517) 53

[521] Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford University Press 1981) 154

[522] Olivier De Schutter and Kaitlin Y Cordes, 'Accounting for Hunger: An Introduction to the Issues' in Olivier De Schutter and Kaitlin Y Cordes (eds) *Accounting for Hunger; The Right to Food in an Era of Globalization* (Hart Publishing 2011) 6; Jean Ziegler, Christophe Golay, Claire Mahon and Sally-Anne Way, *The Fight for the Right to Food; Lessons Learned* (International Relations Development Series, Palgrave Macmillan 2011) 3

malnourished people also creates what is called 'structural hunger.'[523] De Shutter finds that, because the majority of those hungry and malnourished are small-scale of subsistence food producers themselves, the structural obstacles they face, particularly in regard to unfair competition with large-scale food producers must be addressed.[524] Moreover, women and girls are disproportionately affected by hunger, and face even greater challenges to overcoming it due to gender-based discrimination that prevents their access to productive resources, markets, and income generation, all of which would enable them to secure their physical and economic access to food.[525] In contrast, because women produce up to 80 per cent of food crops in developing countries, when they are able to access education and secure other entitlements listed in the ICESCR, they have been shown to reduce hunger by up to 55 per cent in a survey of developing countries.[526] The demographics of hunger between and within countries show how discrimination based on class, gender, age, race or other identities might interact with context to the detriment of physical and economic access to food.

As much as social, economic and political factors affect levels of hunger, the reverse is also true: Widespread hunger and malnutrition inhibits economic growth and development on a nation-wide scale.[527] At the individual or household level, it results in lost productivity and income, because people become ill or do not have the energy to work.[528] When children are hungry, they are not able to learn properly, and when their bodies are stunted or harmed irreparably due to nutritional deficiencies in their early years, they face

[523] De Schutter and Cordes, 'Accounting for Hunger: An Introduction to the Issues' (n 522) 6
[524] ibid 6; Ziegler et al, *The Fight for the Right to Food* (n 522) 34
[525] UNHRC, Report submitted by the Special Rapporteur on the right to food, Olivier De Schutter, 'Women's rights and the right to food' A/HRC/22/50 (24 December 2012) paras 4-7; Ziegler et al., *The Fight for the Right to Food; Lessons Learned* (n 522) 23
[526] UNHRC, Report submitted by the Special Rapporteur on the right to food, Olivier De Schutter, 'Women's rights and the right to food' (n 525) paras 4-7; Ziegler et al., *The Fight for the Right to Food: Lessons Learned* (n 522) 23
[527] Ziegler et al., *The Fight for the Right to Food; Lessons Learned* (n 522) 2
[528] ibid. It is estimated that developing countries lose USD$ 500 billion per year due to lost productivity as a result of hunger

additional challenges throughout their life.[529] Hunger and underdevelopment are mutually reinforcing. If there is a conflict between the rules of the trade regime and human rights regime, it is not only a problem of technical norm conflict, but also an issue of individual wellbeing. In order to determine how WTO agriculture rules and the right to food complement or contradict one another, this chapter identifies the obligations and entitlements encompassed by the right to food. It looks primarily at its key sources in international law, drawing on judicial decisions where possible. Supplementary means of interpretation such as General Comments and non-judicial interpretations are sometimes used to 'confirm the meaning' of the key provisions.[530]

Numerous versions of the right to food call into question how accurately they reflect the actual legal obligations of State parties to the Covenant. This challenge is compounded by the relatively limited (but growing) application of the right to food and other socio-economic rights by courts, which might otherwise serve to guide its development in a particular direction.[531] Since non-binding instruments do not create binding obligations for States, and cannot conflict with other norms of international law, differentiating and untangling what the right to food ought to entail (*lex ferrenda*) from what it does entail (*lex lata*), is critical to the overall analysis. The questions that flow through the undercurrent of this chapter are: Do non-judicial interpretations (i.e. those promoted by civil society organizations, scholars) as well as judicial interpretive approaches (such as evolutionary interpretations) push the boundaries of the right beyond that to which States have consented? And, if so, what are the implications for the presumption against conflict, since consent and intent are central to it (and to avoidance techniques)?

[529] ibid 2, 3; UNHRC, Report of the Special Rapporteur on the right to food, Olivier De Schutter, 'Final report: The transformative potential of the right to food' (24 January 2014) A/HRC/25/57 para 5 ("Final Report")

[530] 1969 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (1969 VCLT) art 3

[531] Though there has been no consistent approach to adjudicating the right to food. In fact, considerations of violations of the right to food are usually framed in terms of violations of other rights, such as the right to life. See Christian Courtis, 'The Right to Food as a Justiciable Right: Challenges and Strategies' (2002) 11 Max Planck Yearbook of United Nations Law 317, 326

4.2 The Right to Food as an Economic, Social, and Cultural Right

Understanding the concrete legal dimensions of the right to food is complicated by its status as an economic, social, and cultural right. This category of rights has been the subject of much debate, most of which centers on the vagueness of entitlements and obligations, the resources required for their implementation (and how allocation of those resources would require impinging on democratic processes by judiciaries), and their justiciability.[532] Historically, this category of rights has been argued to be merely programmatic and aspirational, having moral but not legal force.[533] Regardless of the historical criticisms of economic, social and cultural rights, they are in fact legal rights by virtue of the fact that they are contained in legal instruments.[534]

At the other end of the spectrum are arguments that socio-economic rights are of some kind of *a priori* importance in relation to other international human rights because they deal with what are perhaps the most basic necessities of life (for example, food, water, and healthcare). Alston describes the polarity of narratives used to describe the relationship between categories of human rights, wherein one side promotes the superiority of economic, social and cultural rights over civil and political rights while the other denies their legality altogether.[535] Those who view economic, social and cultural rights as superior ask, "[o]f what use is the right to free speech to those who are starving and illiterate?"[536] However, the indivisibility and interdependence of all human

[532] See for example, E.W. Vierdag, 'The legal nature of the rights granted by the international Covenant on Economic, Social and Cultural Rights' (1978) IX Netherlands Yearbook of International Law 69, 103; Maurice Cranston, *What are Human Rights?* (Bodley Head 1973) 54-65; Maurice Cranston, 'Human Rights, Real and Supposed' in Morton Emanuel Winston (ed) The Philosophy of Human Rights (Wadsworth Publishing Company 1989) 127; Aryeh Neier, 'Social and Economic Rights: A Critique' (2006) 13 Human Rights Brief 1, 1

[533] Noting these criticisms, see: Alston, 'International Law and the Human Right to Food' (n 515) 55

[534] G.J.H. van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views' in Philip Alston and Katarina Tomaševski (eds.) *The Right to Food* (Martinus Nijhoff Publishers 1984) 99. See also: Prosper Weil, 'Towards a Relative Normativity in International Law' (1983) 77 American Journal of International Law 413, 414

[535] Philip Alston and Ryan Goodman, *International Human Rights* (Oxford University Press 2012) 277

[536] ibid

rights has been reiterated time and time again.[537] This is reinforced by the presumed non-hierarchical structure of international law.

Still, the indivisibility discourse "masks deep and enduring disagreement over the proper status of ESC rights generally."[538] In terms of implementation, economic, social and cultural rights lag far behind civil and political rights. Indeed, Rosas and Scheinin find the discrepancies between the implementation of the two categories of rights 'unsurprising' given that the approach to socio-economic rights is "often one of belittlement if not derision."[539] Specifically in regard to the right to food, Alston opens his seminal work on the right to food in 1984 with the following remarks:

> It is paradoxical, but hardly surprising, that the right to food has been endorsed more often and with greater unanimity and urgency than most other human rights, while at the same time being violated more comprehensively and systematically than probably any other right. What is perhaps more surprising is that the widespread violation of the right to food in practice has been accompanied and even facilitated by the almost total neglect, for all practical intents and purposes, of its theoretical, normative and institutional aspects.[540]

Since that time some progress has been made in terms of reducing hunger, and improving the development and justiciability of the right to food, though Alston's remarks remain relevant today.

[537] See *inter alia*: World Conference on Human Rights, Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23 (14-25 June 1993, published) 12 July 1993 para 5; UNGA res 60/251 Resolution Establishing the Human Rights Council UN Doc A/RES/60/251 (3 April 2006) preamble; UNGA res 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, UN Doc. A/RES/63/117 (10 December 2008) preamble

[538] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009) 15

[539] Allan Rosas and Martin Scheinin, 'Implementation Mechanisms and Remedies' in Asbjørn Eide, Catarina Krause, Allan Rosas (eds) *Economic, Social, and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers 1995) 355

[540] Alston, 'International Law and the Human Right to Food' (n 515) 9

4.2.1 The Proliferation of Voluntary Instruments on Economic, Social and Cultural Rights

When former Special Rapporteur on the Right to Adequate Food, Jean Ziegler commenced his work in 2001 he noted in his report to the General Assembly confusion over what exactly the right to food means.[541] It is defined in a number of different ways 'with minor variations,' he acknowledges in a separate report to the Commission on Human Rights.[542] Haugen argues that there have been more attempts at clarifying and reiterations of the right to food than perhaps any other right.[543] The former and present Special Rapporteurs on the Right to Food have produced numerous materials depicting issues relating to the right to food and contributing to understanding about what entitlements and obligations under the Covenant and other core human rights instruments entail. The Committee on Economic, Social and Cultural Rights has produced the most influential instruments to this end. General Comment 12 attempts to clarify the scope and content of Article 11 and is frequently referenced throughout this chapter.[544]

Voluntary instruments that aim to guide implementation of economic, social and cultural rights, particularly the right to food, respond to the increased awareness and demand for the realization of these rights in present contexts. The proliferation of voluntary instruments in international law also illustrates an increased tendency to replace treaties with 'soft law.'[545] Although the right to food is clearly enshrined in the Covenant and core human rights instruments already, subsequent elaborations and mentions are frequently included in

[541] UNGA, Preliminary report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler (23 July 2001) UN Doc. A/56/210 para 15
[542] UNCHR, Report by the Special Rapporteur on the right to food, Mr. Jean Ziegler, submitted in accordance with Commission on Human Rights resolution 2000/10 (7 February 2001) UN Doc. E/CN.4/2001/53 para 14
[543] Hans Morten Haugen, 'Book Reviews' (2012) 23 European Journal of International Law 1175, 1182
[544] CESCR, General Comment 12, Right to adequate food (1999) UN Doc. E/C.12/1999/5; CESCR, General Comment 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) (14 December 1990) UN Doc. E/1991/23
[545] "Strict legal rules move into the background only to be replaced by programmes and declarations parading in the garb of treaties." Bruno Simma, 'Consent: Strains in the Treaty System' in R.St.J Macdonald and D.M. Johnston (eds), *The Structure and Process of International Law* (Martinus Nijhoff 1983) 486

instruments that are non-binding in nature: the Rome Declaration on World Food Security and Plan of Action, Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, Declaration of the World Food Summit: five years later. There are also those that build on economic, social and cultural rights more generally: the MDGs, the Maastricht Guidelines and Limburg Principles similarly stop short of imposing stronger legal obligations on States.[546] One key exception is the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), which establishes procedures for individual communications, inter-state communications, and inquiries by the Committee.[547] In short, voluntary instruments have been influential in reinforcing existing obligations and adding to the cumulative pressure put on States (and companies, in some cases) in international fora and domestically, particularly through the work of the Committee, yet they may preempt the conclusion of more strongly worded binding agreements.

Just as the imprecision of socio-economic rights provisions in existing instruments allows for their evolution, it also leaves room for their reimagining in ways that can either expand or restrict the obligations to which States have agreed, perhaps along the lines of a particular political or economic ideology. The Committee has been accused of producing materials that are overly ambitious and demanding.[548] Rights proponents are likely to argue that the Committee (as well as civil society organizations) must do precisely that; demand more of States to fulfill socio-economic rights and produce ambitious material to this end in order to effectively respond to hunger and malnutrition-related issues. However, States - the primary duty bearers - are not necessarily on board with such interpretations; the United States has been particularly

[546] CESCR, General Comment 12 (n 542); FAO, *Rome Declaration on World Food Security and World Food Summit Plan of Action* (n 515)
[547] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (adopted 10 December 2008, entered into force 5 May 2013) A-14531
[548] Malcolm Langford and Jeff A. King, 'Committee on Economic, Social and Cultural Rights' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 477-478, 481. See also: Kerstin Mechlem, 'Treaty Bodies and the Interpretation of Human Rights' (2009) 42 Vanderbilt Journal of Transnational Law 905, 906, 946

critical of the Committee's work in this regard, arguing that its General Comments are 'revisionist' and amount to the "unilateral alteration in the substantive content of the Covenant."[549] Others submit that the Committee's insertion of obligations such as the respect, protect, fulfill typology, for example, is perhaps too creative and without a legal basis.[550] The Committee's use of the concept of a core minimum (discussed in Section 4.3.1.2) has been noted as a kind of 'mission creep' and a "misguided search for universal, transcendental components of ESC rights."[551]

The work of Petersmann illustrates how the absence of a single vision of socio-economic rights lends them to redefinition in ways that detract from their substance - and how their fulfillment can be presented as hinging on the adoption and entrenchment of particular economic framework.[552] Petersmann recognizes the need for the WTO to take consideration of human rights in order to reinforce its legitimacy as an international organization.[553] The way to do this, he argues, is to integrate human rights in the organization and to use the dispute settlement body to better protect them.[554] The problem is that Petersmann focuses only on economic liberties – negative freedoms, or 'freedoms from,' rather than 'rights to' - and he is specifically concerned with 'market freedoms' and property rights.[555] He asserts that there is a "neglect for economic liberty rights and property rights in the UN Covenant on economic and social human rights [which] reflects and anti-market bias."[556] Petersmann claims that realizing market freedoms will make people 'better economic actors,' which will lead to stronger economies that encourage the realization of

[549] ibid 480
[550] ibid 485. 490-491
[551] ibid 493, 494
[552] Ernst-Ulrich Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 European Journal of International Law 621
[553] ibid 624. See also Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights' (2002) 3 Journal of International Economic Law 19
[554] ibid 624
[555] ibid 629; Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 European Journal of International Law 815, 820; Courtis (n 531) 321-322
[556] Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (n 552) 628

other human rights.[557] Alston has argued that the result of Petersmann's ideas, if implemented, "would be to hijack […] international human rights law in a way which would fundamentally redefine its contours and make it subject to the libertarian principles […]."[558]

If international law is indeterminate, and its justification tends to oscillate between utopian ideals and political apology, socio-economic rights are particularly symptomatic of its fragility.[559] The absence of a mainstreamed version of the right to food can prevent a concerted effort to alleviate hunger and malnutrition even between specialized agencies within the UN system and international organizations that operate at arm's length from it; former Special Rapporteur Jean Ziegler notes how the FAO and World Food Programme among other agencies promote its implementation, while Bretton Woods institutions and the WTO, among others, contribute to greater inequality through their policies and activities.[560]

4.3 Key Formal Source in International Law: ICESCR

4.3.1 Overarching Obligations

Article 2 sets out the key legal obligations that apply to the entire Covenant. Article 2.1 reads:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of

[557] ibid 626
[558] Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (n 555) 816
[559] See generally, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue, Cambridge University Press 2005); See also Chapter 2, Section 2.3.3
[560] UNHRC, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Special Rapporteur on the Right to Food, Jean Zeigler' (10 January 2008) A/HRC/7/5 para 24

> the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[561]

ICESCR Article 2 differs from its counterpart in the ICCPR significantly. In the ICESCR, Article 2 obligates States to 'take steps' to the "maximum of its available resources" in order to 'achieve progressively' the rights contained therein.[562] In contrast, ICCPR Article 2 requires States to "undertake to respect and to ensure" the rights in the Covenant, by taking 'necessary measures,' including the adoption of laws or 'other measures.'[563] ICCPR Article 2 obligates States to 'ensure' that victims of violations have access to effective remedies, whereas such recourse is notably absent from the ICESCR, though the OP-ICESCR has made some progress in this regard, offering individuals the possibility of communicating directly with the Committee.[564] For these reasons, the ICESCR has been noted as being relatively weak in terms of its provisions on implementation.[565]

States are encouraged to adopt legislation to ensure the entitlements set out in the Covenant, and the Committee has argued that such measures "may even be indispensible."[566] Other appropriate means may be employed in order to achieve socio-economic rights as well, such as ensuring access to judicial remedy.[567] Additionally, a State may take actions to "improve macroeconomic performance, [including the] growth of export capacity," which can create an enabling environment for the realization of other socio-economic rights.[568]

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[561] ICESCR (n 512) art 2.1
[562] ibid
[563] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 2
[564] OP-ICESCR (n 547) art 1.1, 2
[565] Ssenyonjo (n 538) 51
[566] ibid para 3
[567] ibid para 5; See also UNCHR, Note verbale dated 86/12/05 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights (Limburg Principles) (8 January 1987) E/CN.4/1987/17 para 19; UNHRC, 'Report of the Special Rapporteur on the right to food, Hilal Elver' (12 January 2014) A/HRC/28/65
[568] Ssenyonjo (n 538) 57

4.3.1.1 PROGRESSIVE REALIZATION

The concept of progressive realization in the ICESCR offers a practical approach for States of varying levels of development to implement aspects of economic, social and cultural rights that can be resource intensive.[569] Because it is devoid of concrete timeframes, at first glance it seems to allow States to avoid or delay the full realization of rights; a measure aimed at realizing the objective of the right to food, so long as it is undertaken without discrimination and does not regress from the current level of enjoyment, might conceivably satisfy the obligation. The Committee has averted such problems to an extent by insisting that the obligations to guarantee that the rights enumerated in the Covenant are 'exercised without discrimination' (Article 2.2) and to 'take steps' toward the full realization of rights are of immediate effect.[570] Furthermore, such steps should be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."[571] The Limburg Principles reinforce this point and clearly state, "under no circumstances shall this be interpreted as implying for States the right to deter indefinitely efforts to ensure full realization."[572] Similarly, the International Commission of Jurists has articulated through the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights that a State party "cannot use the 'progressive realization' provisions in Article 2 of the Covenant as a pretext for non-compliance."[573] Scholars add that States must essentially, and at the very least, have a plan to "ensure that the measures adopted are 'reasonable,' 'effective'

[569] CESCR, General Comment 3 (n 544) para 9. See also: *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v Perú,* Judgment, Inter-American Court of Human Rights Series C No. 198 (1 July 2009) [102] in which the Court reiterated the Committee's assertion that progressive realization "is a necessary flexibility device, reflecting the realities of the real world […] and the difficulties involved in for any country I ensuring full realization of economic, social and cultural right[s]."
[570] ibid
[571] CESCR, General Comment 3 (n 544) para 2; See also CESCR 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (E/C.12/2007/1) 10 May 2007
[572] Limburg Principles (n 567) para 21
[573] International Commission of Jurists, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (26 January 1997) (Maastricht Guidelines) para 8

and produce results compatible with the Covenant."[574] The principle of progressive realization encourages the continuous improvement, rather than simply meeting absolute minimum standards. On the other hand, retrogressive measures demonstrate a failure to achieve progressive realization, and perhaps the violation of a right enumerated in the Covenant, unless they can be 'fully justified.'[575]

4.3.1.2 Available Resources

The obligation on States to 'take steps' appears conditional upon the State's 'maximum available resources.'[576] The provision leaves open the question of what 'available' means; it could be interpreted to refer to a budgetary surplus (which is uncommon in reality), or to the total available budget, or to the amount allocated to a particular issue. To prevent the condition of available resources from functioning as a kind of escape clause it is necessary to differentiate between a State's lack of will and its inability due to resource constraints when assessing violations.[577] The Committee has determined that steps must be 'adequate or reasonable,' and it will consider a host of factors to determine whether a measure meets this standard.[578] It also employs indicators

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[574] Ssenyonjo (n 538) 58; Magdalena Sepúlveda, *The Nature of the Obligations Under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 337-8

[575] CESR, General Comment 3 (n 544) para 9; Masstricht Guidelines (n 573) para 14 (e); The Inter-American Commission has also noted that progressive realizing implies continued and prolonged effort without retrogression: "The progressive nature that most international instruments confer on state obligations related to economic, social, and cultural rights imposes on states, with immediate effect, the general obligation to constantly seek to attain the rights enshrined in the instruments, without any backsliding. Therefore, a worsening in the effective observance of economic, social, and cultural rights may constitute a violation, among other provisions, of Article 26 of the American Convention" (footnote removed). *Second report on the Situation of human rights in Peru*, Inter-American Commission on Human Rights OEA/Series L/V/II.106 doc 59 rev (2 June 2000) ch VI para 11

[576] ICESCR (n 512) art 2

[577] Masstricht Guidelines (n 573) para 13

[578] "The Committee may take into account, inter alia, the following considerations: (a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfillment of economic, social and cultural rights;

> (b) whether the State party exercised its discretion in a non-discriminatory and non- arbitrary manner;
> (c) whether the State party's decision (not) to allocate available resources is in accordance with international human rights standards;
> (d) where several policy options are available, whether the State party adopts the option that least restricts Covenant rights;
> (e) the time frame in which the steps were taken;

in its concluding observations to assess compliance with this provision. It has considered what percentage of a national budget is "allocated to specific rights under the Covenant" in comparison to other policies and programmes that are unrelated to the realization of socio-economic rights.[579] Similarly, the Inter-American Commission on Human Rights has referred to indicators prepared by the United Nations Development Programme and the World Bank to determine compliance with socio-economic rights obligations.[580] General Comment 3 specifies that available resources include not only resources available within a country, but those offered by the international community as well.[581] A State might be required to show how resources are allocated to achieve the aims of the Covenant, regardless of the success or failure of a scheme.[582] If a State cannot provide this, "it fails to meet its obligation of conduct to ensure a principled policy-making process - one reflecting a sense of the importance of the relevant rights."[583] A State must therefore show that its human rights obligations were at least factored into resource allocation.

MINIMUM CORE

According to the Limburg Principles, States have obligations regardless of how developed the country is "to ensure respect for minimum subsistence rights."[584] The Committee has elucidated the scope of this provision through the concept of a minimum core of socio-economic rights, or minimum core obligations. It writes in General Comment 3, "that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to

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(f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk."

CESCR, An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant (n 571) para 8

[579] Ssenyonjo (n 538) 63

[580] Second Report on the Situation of Human Rights in Peru (n 575) para 11

[581] CESCR, General Comment 3 (n 544) para 13; CESCR 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (n 571) para 5; Limburg Principles (n 567) para 26

[582] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156, 180

[583] ibid 180-181

[584] Limburg Principles (n 567) para 25

ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances."[585] It further clarifies that the obligation to respect, in this regard, requires simply non-interference on the part of the State whereas the obligation to protect and to fulfill may require more resource intensive measures.[586] The concept of a minimum core has been useful in determining what constitutes a violation of socio-economic rights; according to the Maastricht Guidelines, States must provide basic necessities, regardless of resources "or any another factors and difficulties."[587] Similarly, the Committee explains that a State wherein a "significant number of individuals is deprived of essential foodstuffs […] is, *prima facie*, failing to discharge its obligations under the Covenant."[588] In situations of limited resources, the onus is on the State to demonstrate that 'every effort' is made to meet minimum obligations.[589]

The idea of minimum core or minimum core obligations as espoused by the Committee is an instance of a soft law doctrine that has gained some traction in the jurisprudence of courts in the Americas, Africa, and Asia. For example, the Inter-American Commission on Human Rights asserts that States "are 'obligated… regardless of the level of economic development to guarantee a minimum threshold of [ESC] rights."[590] With respect to the right to food, and in line with the Committee's assertion that States must at least *respect* the rights outlined in the Covenant, the African Commission on Human and Peoples' Rights finds that, "[w]ithout touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources."[591] Though some courts have embraced it conceptually, actually determining what

[585] CESCR, General Comment 3 (n 544) para 11
[586] CESCR 'An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" Under an Optional Protocol to the Covenant' (n 571) para 7
[587] Maastricht Guidelines (n 573) para 9
[588] CESCR, General Comment 3 (n 544) para 10
[589] ibid
[590] Inter-American Commission on Human Rights, Annual Report of the Commission on Human Rights (11 February 1994) OEA/Series L/V.85 Doc 9 rev, ch VI.I in Ssenyonjo (n 538) 66
[591] *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v Nigeria,* African Commission on Human and Peoples' Rights, Communication No. 155/96 (27 October 2001) [65]

is comprised by the minimum core has proven difficult for others: in *South African Supreme Court in Government of the Republic of South Africa v Grootboom* the Constitutional Court notes that, unlike the Committee, which has been able to develop the concept "over many years of examining reports by reporting states," it does not have access to the same kind of information.[592] The Court's reluctance to make use of it also reflects concerns over whether it possesses the institutional competence to make economic claims, and the importance of maintaining the separation between judicial and executive powers.[593] While the concept of minimum core is generally embraced, the lack of understanding over its precise meaning can prevent its application in some contexts.[594]

4.3.1.3 International Cooperation – Financial and Technical

Article 2 highlights the importance of international cooperation and assistance, financial and technical.[595] The Committee writes that all States are obligated to cooperate internationally "for development and thus for the realization of economic, social and cultural rights."[596] It notes the 'essential importance' of international cooperation for the realization of the rights in the Covenant, and particularly for Articles 11, 15, 22 and 23.[597] The Committee finds that this obligation is 'particularly incumbent' on richer or more developed States towards other, presumably less developed, States.[598] In General Comment 12, the Committee similarly reiterates the need for cooperation to achieve the right to food.[599] Technical cooperation for the achievement of the right to food might conceivably refer to a host of technologies from farm inputs such as fertilizers,

[592] *Government of the Republic of South Africa v Grootboom and Others* CCT 11/00 (4 October 2000) [32]
[593] *Minister of Health and Others v Treatment Action Campaign and Others* CCT 8/02 (July 5, 2002) [35]; Mesenbet Assefa, 'Defining the Minimum Core Obligations-Conundrums in International Human Rights Law and Lessons from the Constitutional Court of South Africa' (2010) 1 Mekelle University Law Journal 1, 12
[594] *Government of the Republic of South Africa v Grootboom and Others* (n 592) [30]
[595] ICESCR (n 512) art 2
[596] CESCR, General Comment 3 (n 544) para 14
[597] ibid para 13.
[598] ibid
[599] CESCR, General Comment 12 (n 544) para 36

to climate change technology, to assistance navigating the dispute settlement mechanism of the WTO.

How a State's failure to contribute assistance and to cooperate internationally might amount to a violation of obligations under the covenant is unclear, however, the Committee does stress their importance in its reporting procedure and in its Concluding Observations of some States.[600] The Committee recommends developed State parties contribute 0.7 per cent of their GDP to official development assistance, and has in recent years consistently urged States to comply with this recommendation in its Concluding Observations. For example, it urged Ireland to ensure that the amount it spends on annual international development cooperation increase "as quickly as possible" to the United Nations target of 0.7 per cent.[601] The Inter-American Commission has expressed its support for the obligation of developed countries in the region toward developing countries, based on the fact that socio-economic rights enumerated in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights are unlikely to be realized without it.[602]

Though whether the Covenant imposes legal obligations on States, and what those obligations entail, is not widely accepted. Saul et al. argue that the Covenant does not in fact impose binding obligations on States to cooperate internationally or provide assistance; instead, General Comment 3 confirms that the Covenant leaves the issue of assistance up to individual States.[603] Moreover, the *travaux préparatoires* of the ICESCR do not indicate that the

[600] CESCR, 'Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights' E/C.12/1991/1 (17 June 1991) Annex; UNCHR, 'Report from the Second Session of the Open-Ended Working Group to consider options for an Optional Protocol to ICESCR E/CN.4/2005/52 (10 February 2005) para 63. See also, Maastricht Guidelines (n 573) in which discussion of an obligation to cooperate and to assist is notably absent.

[601] CESCR, 'Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding observations of the Committee on Economic, Social and Cultural Rights' E/C.12/1/Add.77 (5 June 2002) para 38

[602] Alston and Quinn (n 582) 192

[603] Ben Saul, David Kinley, and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights Commentary, Cases, and Materials* (Oxford University Press 2014) 139

drafters intended to impose an obligation on States to provide international assistance or co-operation.[604] The Chairman himself noted that richer countries 'should' assist less resource rich countries, but he "stopped well short of identifying any formal legal obligation to provide assistance."[605] Indeed, when debate arose again over whether the Covenant imposes any legal obligation on States to cooperate internationally or to provide development assistance during the drafting of the Optional Protocol to the ICESCR, it was found that many countries including Canada, the United Kingdom, and France argued that cooperation and assistance in this regard amounts to a "important moral obligation but not a legal entitlement, and [they] did not interpret the Covenant to impose a legal obligation to provide development assistance or give a legal title to receive such aid."[606]

An obligation to cooperate can be derived from the Charter of the United Nations. The Committee stresses that the obligation is "in accordance with Articles 55 and 56, […] with well-established principles of international law, and with the provisions of the Covenant itself."[607] Article 56 requires all Members to "take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55" relating to "the creation of conditions of stability and well-being" including "universal respect for, and observance of, human rights and fundamental freedoms for all."[608] Although this article is also 'notoriously imprecise' it demonstrates what is perhaps a more commonly accepted source of obligation.[609] In fact, in General Comment 12 the Committee references the Charter as a source of obligation to cooperate and assist and notes that it is in

[604] Alston and Quinn (n 582) 191
[605] Alston and Quinn (n 582) 188
[606] CESCR, 'Revised General Guidelines Regarding the Form and Contents of Reports to be Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights' (n 600) para 76
[607] CESCR, General Comment 3 (n 544) para 14
[608] Charter of the United Nations United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, arts 55, 56
[609] Alston and Quinn (n 582) 187

this 'sprit' that States must recognize the importance of cooperation.[610] Saul finds that reference to the Charter in General Comment 3 suggests that the Committee relies on the Charter to do the "heavy-lifting of assigning responsibility for international assistance."[611] One might argue that, at least, the Covenant serves to reinforce the importance a pre-exiting obligation flowing from the Charter.

4.3.1.4 Responsibility and Individual States

The ILC's Articles on State Responsibility provides further insight into the obligational structure of the ICESCR. The ILC's commentary on the articles suggests that Article 2 produces obligations of result. An obligation of result is such that State parties are obligated to meet objectives of the Covenant, but the means by which they accomplish this are left to the individual States to determine.[612] The freedom of the State to choose its 'course of conduct' to achieve a result, while 'indicating a preference' for a certain kind of measure, is apparent in Article 2, which permits the State to employ 'all appropriate measures,' but emphasizes legislative measures.[613] If a specific course of action does not lead to the desired result, the duty-bearer has the opportunity to employ a new course of action without amounting to a breach of obligation.[614] The commentary explains that:

> [S]o long as the State has not failed to achieve *in concreto* the result required by an international obligation, the fact that it has not taken a certain measure which would have seemed especially suitable for that purpose—in particular, that it has not enacted a law-cannot be held against it as a breach of that obligation.[615]

Determining a breach of an obligation of result is complicated by the fact that a State may fail to meet the objectives, but may provide remedies *a posteriori,*

[610] Saul et al. (n 603) 139
[611] ibid
[612] International Law Commission, 2 Yearbook of the International Law Commission A/CN.4/SER.A/1977/Add.l (Part 2) (1977) 19 para 2
[613] ibid; ICESCR (n 512) art 2(1)
[614] ILC (Part 2) (n 612) 19 paras 3, 5
[615] ibid 23 para. 14

which may enable it to avoid responsibility, and this would have implications for using the breach of an obligation as evidence of norm conflict.[616]

When words such as 'necessary' and 'appropriate' are used, they recall the margin of discretion afforded to parties.[617] Although States may choose the means by which the results are achieved, according to Goodwin-Gill obligations of result are essentially a matter of effectiveness.[618] He continues with a point crucial to the analysis in Chapter 5 and 6:

> [T]aking the theoretically best appropriate measures of implementation is not conclusive as to the fulfillment of an international obligation, so failing to take such measures is not conclusive as to breach. The same principle applies with regard to a state's adoption of a potentially obstructive measure, so long as the measure itself does not create a specific situation incompatible with the required result; what counts is what in fact results."[619] The availability and effectiveness of local remedies will often determine the question of fulfillment or breach of obligation.

Regardless of how broad the obligations under the Covenant may be, State parties agree to undertake them 'in good faith' by virtue of their consent to be bound by the ICESCR, in accordance with the general principles of international law.[620]

The traditional view has been that socio-economic rights produce only obligations of result, however, the ILC, the Committee, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, and some scholars determine that the Covenant imposes both types of obligations.[621] The ILC cites Article 10.3 as an example of an obligation of conduct.[622] Article 10.3 states that the employment of children in dangerous or harmful

[616] ibid 19, paras 3-5; Sepúlveda (n 574) 187
[617] Guy S. Goodwin-Gill, 'Obligations of Conduct and Result' in Philip Alston and Katarina Tomaševski (eds.) *The Right to Food* (Martinus Nijhoff Publishers 1984) 113
[618] ibid
[619] ibid
[620] ibid 115
[621] General Comment 3 (n 544) para 1
[622] International Law Commission, 2 Yearbook of the International Law Commission A/CN.4/SER.A/1977/Add.l (Part 1) para 7; Sepúlveda (n 574) 188

environments should be punishable by law, therefore States must adopt legislative measures prohibiting child employment, and a breach occurs when a State fails to take such measures.[623] The Maastricht Guidelines insist that in order to achieve an obligation of conduct, an action must be 'reasonably calculated' to realize the Covenant right to which it relates.[624] Therefore, failing to take measures or implement programmes in accordance with Article 11.2 could in itself amount to a breach of an obligation of conduct, though, conversely, not every measure or programme undertaken by a State will fulfill its obligation.[625] Alston and Quinn explain the obligations as a 'hybrid mixture' between the two types; where the 'steps' to be taken are listed, they are obligations of conduct.[626] The Maastricht Guidelines assert that each of the respect, protect, and fulfill requirements encompass elements of both kinds of obligations as well.[627]

4.3.2 The Right to Food

The right to food in the ICESCR has two essential parts: Article 11.1 introduces the "right of everyone to an adequate standard of living […] including adequate food, clothing and housing and to the continuous improvement of living conditions," and Article 11.2 provides the "fundamental right of everyone to be free from hunger."[628]

4.3.2.1 Article 11.1

Pursuant to Article 11.1 States are to "take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."[629] States are thereby given a

[623] ILC (Part 1) (n 618) para 7
[624] Masstricht Guidelines (n 573) para 7
[625] ICESCR (n 512) art 11.2
[626] Alston and Quinn (n 582) 185; Sepúlveda (n 574) 189
[627] Masstricht Guidelines (n 573) para 7
[628] ICESCR (n 512) art. 11
[629] ICESCRS (n 512) art 11.1; During drafting, "the Guatemalan delegate argued that it is "not intended that States should be directed to do anything specific." Matthew C. R. Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on Its Development* (Clarendon Press 1998) 295

wide range of freedom to select the means by which the objectives set out in this provision will be achieved, so long as they are 'appropriate' or reasonable. Craven's close examination of the *travaux préparatoires* indicates that the inclusion of the word, 'ensure' implies the immediate effect of the obligation to 'take appropriate steps,' and not to an obligation to immediately achieve the realization of the right.[630] As such, it might be identified as an obligation of conduct.

Importantly, Alston argues that the phrase "based on free consent" does not mean that international cooperation is 'entirely optional.'[631] Although the *travaux préparatoires* do not provide insight into the intention behind the phrase, he suggests that the notion of consent was inserted to avoid the problem of dumping surplus food into foreign markets under the pretense of delivering aid, and not as a means through which States could neglect their responsibility to cooperate.[632] In essence, the 'free consent' element of international cooperation enables the recipient State to respect and protect the livelihoods of local food producers by mitigating the effects of (unnecessary) aid on local production, which in turn promotes their right to food in the medium and long-term. This offers another dimension of the concept of international cooperation and assistance; it reinforces the voluntary nature of international cooperation and assistance from the perspective of the recipient State. States also have an obligation to seek international assistance (and to not prevent assistance) in times of serious food shortage and hunger crises.[633]

Article 11.1 refers specifically to the right to an adequate standard of living, which *includes* "food, clothing and housing, and to the continuous improvement of living conditions."[634] Article 11.1 is more general than 11.2, incorporating food into the broader objective of an adequate standard of living.

[630] ibid
[631] Alston, 'International Law and the Human Right to Food' (n 515) 40
[632] ibid
[633] General Comment 12 (n 544) para 19; FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Food in the Context of National Food Security* (n 515) guideline 4.9; OHCHR and FAO, *The Right to Adequate Food, Fact Sheet No. 34* (United Nations 2010) 23
[634] ICESCR (n 512) art 11.1

From the drafting documents, Craven determines that food was understood as a 'component element' of the right to an adequate standard of living (along with clothing and housing).[635] Though because food is both the subject of a distinctive right *and* a component of the right to an adequate standard of living, this raises the question of whether the other components listed in Article 11.1 also amount to distinctive rights - for example, is there a right to the "continuous improvement of living conditions?"[636] The existence of such a right could contribute to the harmonious interpretation of the trade and international human rights regimes, as Marrakesh agreement - to which the Agreement on Agriculture is annexed - lists "raising standards of living" as an objective of economic activity under the WTO system.[637] Read this way, the Marrakesh agreement could be an example of a measure undertaken by Member States to achieve their obligations of result under Article 11.1, so long as some 'improvements' might be attributable to the international trading system. Although Haugen points out that literature on Article 11 does not typically include a substantive human right to the continuous improvements of living conditions.[638]

State commentary identified by Craven in the drafting documents support this position. For example, the Belgian delegate argued that "the primary aim should be to improve the living conditions of the most under-privileged; persons outside that category could hardly claim, at the current stage, to have a 'right' to continuous improvement of their living conditions."[639] Craven posits that if the right is not of an 'individual nature,' "*if* it is conceded that only the poor have a right to the 'continuous improvement of living conditions,'" then perhaps it is not a right in itself.[640] While there is insufficient evidence to support a right to the continuous improvement of living conditions, the phrase

[635] Craven (n 629) 289; Hans Morten Haugen, *The Right To Food and the TRIPS Agreement* (Martinus Nijhoff Publishers, 2007), 122
[636] Haugen, *The Right To Food and the TRIPS Agreement* (n 635)
[637] Marrakesh Agreement Establishing the World Trade Organization (adopted April 15, 1994, entered into force 1 January 1995) 1867 UNTS 154 (WTO Agreement) preamble
[638] Haugen, *The Right To Food and the TRIPS Agreement* (n 635) 122
[639] Craven (n 629) 294
[640] Craven (n 629) 295 (emphasis added)

is consistent with the aspect of progressive realization as well as with UN Charter Articles 55 and 56, which declares that the UN shall promote "higher standards of living, full employment, and conditions of economic and social progress and development."[641]

In General Comment 12 the Committee asserts that the human right to adequate food encompasses more than the requirement to prevent starvation, meaning that it cannot be reduced to the fulfillment of "minimum package of calories […]." [642] Instead, elements necessary for its full realization include considerations of the availability, accessibility, acceptability, and adequacy (including sustainability) of food, as well as food that fulfills dietary needs of the population and is free from adverse substances.[643] It is noteworthy that accessibility refers to food that is both economically and physically accessible.[644] Acceptability means that the 'non nutrient-based value' of food, resulting from cultural preference, religion, or value-system, should be considered a factor in the enjoyment of the right to food.[645]

4.3.2.2 ARTICLE 11.2

Article 11.2 "recognizes the fundamental right of everyone to be free from hunger."[646] It is more specific than Article 11.1, not only because hunger can be measured using quantitative indicators and the achievement (or failure thereof) can be empirically determined, but also because it sets out more specific measures that States ought to take. Given that the right to be free from hunger is the only human right in the international bill of rights specifically listed as 'fundamental,' it *prima facie* appears to occupy a superior position relative to other rights. The word 'fundamental' appears one other time in the Covenant, in Article 5.2, which prohibits "restrictions upon or derogations from

[641] Charter of the United Nations (n 608) arts 55, 56. See also, Haugen, *The Right To Food and the TRIPS Agreement* (n 635) 122-123
[642] General Comment 12 (n 544) para 6
[643] ibid paras 7-13
[644] ibid
[645] ibid
[646] ICESCR (n 512) art 11.2

any other fundamental human rights" that are recognized elsewhere.[647] Yet, aside from a suggested draft provided by then FAO Director General, which attempted to prioritize the right, the term is not found to have any particular legal significance for States.[648]

While certain States argued the importance of the right to food, Craven, Alston and Quinn find that the *travaux préparatoires* do not provide evidence that it "should be given any pre-eminence" in relation to other human rights.[649] The original proposal was formulated as the "fundamental *importance* of the right of everyone to be free from hunger," and the revision appears to have occurred more as an afterthought than a conscious attempt to prioritize the right.[650] In fact, during the drafting of the Universal Declaration, some States argued strongly against the inclusion of the word 'fundamental' in regard to economic, social and cultural rights listed therein. For example, in a communication to the UN Commission on Human Rights, South Africa claimed that:

> To declare them to be fundamental human rights, would therefore amount to an injunction by the United Nations to State members to move to the left, by assuming greater and greater economic control, an injunction, in fact, to move nearer to the communistic economic system, under which, in practice, many essential human rights are being denied.[651]

Nonetheless, the right to be free from hunger represents the most basic of needs for human life. No human rights, including the right to life, can be achieved when there is extreme depravation of this right.

Furthermore, freedom from hunger is intrinsically intertwined with the concept of dignity. As an overarching principle of international human rights law,

[647]ICESCR (n 512) 5.2. See also Ian Seiderman, *Hierarchy in International Law: The Human Rights Dimension* (Intersentia 2001) 289

[648] Noting the lack of significance of the term, see: Seiderman (n 643) 289; Alston, International Law and the Human Right to Food (n 515) 31

[649] Craven (n 269) 296 -299 (Japan is noted as arguing that Article 11 was special in that "it was concerned with life and death." Similarly, Israel noted the 'paramount importance' of the right to be free form hunger.' Australia noted that "no human right was worth anything to a starving man."); Alston and Quinn (n 582) 209

[650] Craven (n 269) 299 (emphasis added)

[651] Alston and Quinn (n 582) 181

dignity is related to all human rights, but it may have a particular connection with those rights needed for basic survival, and which are necessary preconditions for the realization of other rights. In *Government of the Republic of South Africa v Grootboom and Others* the court explains that "[t]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter."[652] This connection was also noted in *The Social and Economic Action Rights Centre (SERAC) v Nigeria* (2001), in which the African Commission on Human and People's Rights considered, *inter alia*, whether the State violated the right to food by failing to protect citizens against the activities of the Nigerian National Petroleum Company, a joint venture between the Nigerian government, the Shell Petroleum Development Company, and other international corporations.[653] The Commission recalled the State's obligations to respect, protect, promote and fulfill the rights outlined in the African Charter on Human and Peoples' Rights and the ICESCR.[654] The Commission read the right to life and other rights as encompassing the right to food:[655] "the right to food is implicit in the African Charter, in such provisions as the right to life (Art. 4), the right to health (Art. 16) and the right to economic, social and cultural development (Art. 22)."[656] The Commission further reasoned that, "[t]he right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfillment of such other rights as health, education, work and political participation."[657] Nigeria was ultimately found in violation of, *inter alia*, the right to food as implicit in Articles 4, 16, and 22 of the African Charter.[658] Although there is no consensus on what exactly dignity

[652] *Government of the Republic of South Africa v Grootboom and Others* (n 592) para 23
[653] *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v Nigeria* (n 591) [1]
[654] ibid [44]
[655] There is, however, aspects of the right to food are contained in the *African Charter on the Rights and Welfare of the Child* OAU Doc. CAB/LEG/24.9/49 (adopted 1990, entered into force 29 November 1999) art 14(2)(c) and (d); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa OAU Doc. CAB/LEG/66.6 (adopted 11 July 2003, entered into force 25 November 2005) art 15
[656] *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights v Nigeria* (n 591) [64]
[657] ibid [65]
[658] ibid 'Holding'

means, it would be difficult to argue that a person lives a life of dignity without the ability to procure or produce food.[659]

General Comment 12 elaborates the obligation of States to act cooperatively to achieve the right to food not only for citizens within their jurisdiction, but also for those external to it.[660] This includes respecting the right in other countries and also the provision of food aid when necessary.[661] States are also encouraged to include the acknowledgement of the right to food in international agreements.[662] Specifically, they must ensure that the right to food is "given due attention" in international agreements.

Article 11.2 (a) and (b) identify the measures States 'shall take' to ensure the fundamental right to be free from hunger. As such, measures are required:

> (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
>
> (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.[663]

These paragraphs are of great importance to the present study because aspects of both 11.2(a) and (b) relate to, or can be impacted by, specific provisions and overall objectives of the Agreement on Agriculture. They present the possibility for overlapping subject-matter with its provisions, which is necessary for the identification of conflicts between norms according to some theories. The use of the term 'shall take' here indicates a command, which confers a legal obligation to undertake measures, such as (but not limited) to: improve methods of production, conservation and distribution of food. These

[659] Ssenyonjo (n 538) 13
[660] CESCR, General Comment 12 (n 544) para 36
[661] ibid
[662] ibid
[663] ICESCR (n 512) art 11

commands might represent the hybrid obligations of result and conduct noted by Alston and Quinn; improvement is the ultimate objective, which suggests an obligation of result, however the means through which it can be achieved are loosely outlined (e.g. 'dissemination of knowledge of the principles of nutrition').[664]

TO IMPROVE METHODS OF PRODUCTION

To 'improve' is a concept that can be problematized in light of present-day challenges related to population growth, natural resource availability, and sustainability. On one hand, improving methods of production can refer to measures that feed a greater number of people, or that produce safer and more nutritious food, or both. On the other hand it can refer to measures that help to ensure that future generations will be able to use the same land to produce food. While these objectives may be undertaken simultaneously, it is also possible that in various contexts they would entail different kinds of practices and measures that relate to increased production and sustainable production, respectively.

The purpose of the improvements required by Article 11.2(a) is to achieve 'efficient development and utilization;' as Haugen questions, utilization in this regard "could be understood to emphasize '*using*' at the expense of '*conserving*.'"[665] Is 'efficient' resource development that which is geared toward the intensification of agriculture or does it imply concerns about sustainability? Given the time in which the article was drafted, it is more likely that drafters were focused on increasing the amount of food available as opposed to, and perhaps at the expense of, environmental sustainability concerns. It was indeed drafted prior Sen's study that demonstrates that hunger is not the result of a lack of food but rather a lack of access – meaning

[664] Alston and Quinn (n 582) 185
[665] Haugen, *The Right To Food and the TRIPS Agreement* (n 635) 146

that food availability was emphasized more than accessibility.[666] Environmental sustainability has become an integral aspect of the right to food through food security discourse; the Rome Declaration on World Food Security and FAO's Voluntary Guidelines among others have since incorporated the idea of efficiency in regard to sustainable agricultural development and production.[667] Today, the Committee also promotes sustainability as a key component of the right, arguing that the 'adequate food' encompasses not only the quantity and quality of food, but also for the concepts of 'sustainability' and 'food security.' It calls for the availability of adequate food for present *and future* generations.[668]

Consecutive Special Rapporteurs on the Right to Food have conducted significant research in effort to articulate what it is that the improvement of food systems for the benefit of present and future generations might entail in practice.[669] Former Special Rapporteur De Schutter finds that although developments in agricultural production tend to yield more food, this has not translated into a significant reduction in the number of hungry and malnourished people; in essence, food systems have failed to achieve the objectives of the right to food.[670] He notes that the primary aim of agricultural production since the Green Revolution (1930-1960) has been to increase yields and this stems from the notion that prevailed up until approximately the time of Sen's research.[671] Not only were the developments that took place throughout the Green Revolution inadequate, but they have also jeopardized the ability of future generations to meet their nutritional needs:

> It led […] to an extension of monocultures and thus to a significant loss of agrobiodiversity and to accelerated soil erosion. The overuse of chemical fertilizers polluted fresh water, increasing its phosphorus

[666] Sen (n 521)
[667] FAO, *Rome Declaration on World Food Security and World Food Summit Plan of Action* (n 515) para 25. See also FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (n 515) guideline 8(e)
[668] CESCR, General Comment 12 (n 544) para 7
[669] UNHRC, 'Final report' (n 529) para 3
[670] ibid paras 4, 6
[671] ibid para 6

> content and leading to a flow of phosphorus to the oceans that is estimated to have risen to approximately 10 million tons annually. Phosphate and nitrogen water pollution is the main cause of eutrophication, the human-induced augmentation of natural fertilization processes which spurs algae growth that absorbs the dissolved oxygen required to sustain fish stocks. The most potentially devastating impacts of industrial modes of agricultural production stem from their contribution to increased greenhouse gas emissions.[672]

A decline in agricultural productivity of approximately 2 per cent per decade is expected, though developing countries may experience changes between -27 per cent to +9 per cent for some staple crops.[673] This is especially alarming in light of FAO estimates that the world will have to increase production by 70 per cent by 2050 to feed the growing population.[674] With present and future challenges to the realization of the right to food, the task of improving production is clearly twofold: food systems must increase production *and* function sustainably.

To Improve Conservation

A plain language interpretation, bearing in mind the time of drafting, suggests that the improvement of methods of conservation relates to the conservation of food (for example, stockpiling), though it could relate to the conservation of resources necessary for the production of food (such as soil or land, water). De Schutter focuses more on the importance of conserving environmental resources required for production. Farm inputs used to produce food, such as fertilizers, herbicides, and pesticides, as well as farming techniques like tillage and irrigation, coupled with the transport, packaging and conservation required for food products creates 15 to 17 per cent of total man-made greenhouse gas emissions attributable to food systems.[675] He contends that improving food systems to achieve the right to food includes reducing waste and losses through

[672] ibid paras 6-7
[673] ibid 7
[674] ibid para 14
[675] ibid para 7

storage, transport and packing processes as well.[676] When food is wasted or lost, it means that the environmental burden placed on the land and resources did not contribute to improving nutrition for anyone; instead it produced only negative impacts on land and environments that will be needed for future food production.[677] He notes that in 2011 it was found that "1.3 billion tons of food produced for human consumption – about one third of the total – is lost or wasted."[678] Although losses as a result of waste are higher in developed countries, those that occur throughout the transportation and processing phases of getting food to markets in developing countries have the added to the negative impact by resulting in financial losses for food producers.[679]

Stockpiling may be useful to mitigate the effects of periodic food shortages resulting from natural disasters, and is therefore relevant to the issue of food conservation. However, stockpiling is only useful to achieving the right to food if the food is ultimately distributed with a view to ensuring access to vulnerable populations, in a timely and non-discriminatory way, and only when needed (so as not to distort local production). In *People's Union for Civil Liberties v Union of India* (2001) the Supreme Court of India considered whether starvation deaths that had occurred in Rajasthan at the same time that surplus grain was being stored in a nearby facility (but not released), constituted a violation of, *inter alia,* an implied right to food in the Indian constitution.[680] It was argued that 'innumerable starvation deaths' had occurred in Rajasthan while:

> [C]lose to 50 million tonnes of grain are lying idle in public godowns in Rajasthan and across the country. There is so much grain in the Government's reserves that […] the Food Corporation of India has run out of storage space. In some cases, there is barely a distance of 75

[676] ibid para 21
[677] ibid para 22
[678] ibid para 21
[679] ibid
[680] *People's Union for Civil Liberties v Union of India*, Petition (Interim Order of May 2, 2003) No. 196/2001 (28 November 2001)

> kilometers between the location of these godowns and the places where starvation is rampant, people are malnourished, and cattle are dying.[681]

In an interim order the Court instituted the famine code, which enables the release of grains in the months following the order and otherwise when required.[682] It emphasizes the importance of accessibility for vulnerable members of society, including those with disabilities, illness, and of old age, as well as indigenous peoples.[683] It also sought to implement various schemes to address the underlying causes of hunger, namely poverty.[684] It therefore recognized that while stockpiling may represent an opportunity to fulfill the right to food in particular situations, it must ensure accessibility in order to be effective.

TO IMPROVE DISTRIBUTION

Distribution concerns are closely tied to many of the essential elements of the right to food promoted by the Committee. For example, availability requires effective distribution systems that can "move food from the site of production to where it is needed in accordance with demand."[685] Food must be physically and economically obtainable for all, including those with mobility limitations, which means that it must be distributed in such a way that people can access it.[686] People must also be able to obtain food in such a way that it does not require them to sacrifice the fulfillment of other basic needs.[687] In accordance with its neutral position on political and economic systems, the Committee affirms that, "economic accessibility applies to any acquisition pattern or entitlement through which people procure their food."[688] In the case of food producers, accessibility might also imply access to farm inputs, other food, and

[681] *People's Union for Civil Liberties v Union of India & Ors, In the Supreme Court of India* (Original Jurisdiction, Writ Petition) No.196/2001 < https://www.escr-net.org/docs/i/401033> accessed 25 January 2016 [3], [18]
[682] *People's Union for Civil Liberties v Union of India*, Petition (Interim Order of May 2, 2003) (n 680)
[683] ibid
[684] ibid
[685] CESCR, General Comment 12 (n 544) para 12
[686] ibid para 13
[687] ibid para 13
[688] ibid

secure livelihoods. De Schutter finds that, to date, food systems "have failed to take distributional concerns into account."[689]

Increased specialization in agriculture prevents improvements in distribution in two key ways: First, it makes some items less physically available. While overall production has outpaced demand to date, it has coincided with a reduction in the variety of products grown because of the move toward monocropping geared for export, which has a negative impact on agribiodiversity and can also reduce variety in local diets.[690] Second, specialization "concentrate[es] benefits in the hands of large production units and landholders at the expense of smaller-scale producers and landless workers" and this contributes to inequality in rural areas and hinders their economic and physical access to nutritious diets.[691]

MAKING USE OF TECHNICAL AND SCIENTIFIC KNOWLEDGE

Article 11.2(a) also specifies that improvements are to occur by "making full use of technical and scientific knowledge."[692] Haugen contemplates the application of certain kinds of technical and scientific knowledge for the enjoyment of the right to food in his study on the relationship between the right to food and the Agreement on Trade-Related Aspects of Intellectual Property Rights.[693] Certain technological and scientific developments, coupled with the imposition of intellectual property rights schemes, may actually make necessary tools – inputs, technologies, and food - less accessible for producers and consumers.[694] Although Haugen concludes by acknowledging that interpreting the Covenant in a way that promotes the use of technical or scientific knowledge to the detriment of the enjoyment of right to food would be

[689] UNHRC, 'Final report' (n 529) para 10
[690] See for example Brian Thompson and Janice Meerman, *Narrowing the Nutrition Gap: Investing in Agriculture to Improve Dietary Diversity* (FAO 2010, Revised 2013)
[691] UNHRC, 'Final report' (n 529) para 10
[692] ICESCR (n 512) art 11.2(a)
[693] Haugen, *The Right To Food and the TRIPS Agreement* (n 635)
[694] ibid 136-137

inconsistent with its object and purpose and would not amount to a good faith interpretation.[695] He finds that:

> There is nothing which seems to justify that the drafters believed that the measures applied can actually impede the realization of the right to food. Rather, the drafters of the Covenant must be presumed to believe that to make full use of technological and scientific knowledge would contribute to the realization of the right to food, and not serve as an impediment.[696]

At the time the Covenant was drafted, scientific advancements such as those enabling the intensification of agriculture, forms of genetic modification, energy production from food sources, and strong intellectual property rights protections were not embedded in food systems as they are today. Moreover, the negative impacts of the applied technical advancements throughout the Green Revolution were not yet understood. It is unlikely that the drafters foresaw such developments and their potential affects – both positive and negative. Today tensions between technical developments that are meant to enhance production (the amount of food) and the ability of food producers and other low-income or income-less people to access food in developing countries are exacerbated by the trade regime that promotes export-based agriculture and intensified practices.[697]

AGRARIAN REFORM

The final measure to be undertaken pursuant to the obligations set forth in Article 11.2(a) is the development and reform or agrarian systems. Similar to the other measures enumerated in Article 11.2(a), reforms are to be undertaken with a view to the efficient development and utilization of natural resources. Again, this raises questions about balancing the costs and benefits (environmental, social, cultural, and health-related) of practices geared toward increasing productivity.

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[695] ibid 146 footnote 142
[696] ibid 137 foonote 101
[697] Human Rights Council, 'Report of the Special Rapporteur on the Right to Food, Olivier De Schutter (Addendum), Mission to the World Trade Organization' (9 February 2009) A/HRC/10/5/Add.2 para 31

It is the only provision within Article 11.2(a) over which there was extensive discussion during the drafting process.[698] It was made clear that improving "'agrarian systems' implie[s] both improved techniques of land exploitation and legal questions such as those of ownership."[699] Here too, the decision as to what constitutes 'reform' is left to each individual State to determine what measures work best under its particular circumstances.[700] Although the political and economic system in place will largely determine what reform might entail, this provision can increase or secure access to land for food production, pastoralism, fishing, or foraging purposes. States have reiterated their commitments to land and agrarian reform in *inter alia* the FAO's Voluntary Guidelines (Guideline 8(b)), the Rome Declaration on World Food Security, and the World Food Summit Plan of Action.[701] Reform has proven effective when coupled with greater access to farm inputs, credit, extension services as well as improved infrastructure and transportation.[702] Much of the agrarian reform referred to in Rome Declaration on World Food Security and the World Food Summit Plan of Action promotes reform in accordance with the rules of the WTO.[703]

Addressing the Problems of net Food Importing and net Food Exporting Countries

Article 11.2(b) is read in light of the overall obligation of Article 11.2, which is to take measures with a view to the problems of net food importing or net food exporting countries.[704] The emphasis on equitable distribution that responds to needs - rather than purchasing power, as in market-based distribution – is key. The drafting records do not provide insight into the meaning behind this, except

[698] Craven (n 629) 300
[699] ibid
[700] ibid
[701] FAO, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* (n 515) guideline 8(b); FAO, *Rome Declaration on World Food Security and World Food Summit Plan of Action* (n 515) objective 2.1 (d) and (e)
[702] Ziegler et al., *The Fight for the Right to Food; Lessons Learned* (n 522) 35-37
[703] FAO, *Rome Declaration on World Food Security and World Food Summit Plan of Action* (n 515) objective 4.2(c), 4.3, 4.3(b)
[704] ICESCR (n 512) Article 11.2

that the original draft focused on the distribution of food in relation to "the interests of both food producers and consumers."[705] This proposal was ultimately rejected, with the Chilean delegate arguing "the distribution of food supplies should be based not solely on the interest of the countries involved or on purely economic grounds but also on social and humanitarian considerations."[706] Alston illuminates the potential dilemmas associated with this provision by noting the historical context in which it was written, explaining that it:

> [R]eflects the fear of grain-exporting (developed) countries that the FAO Freedom From Hunger Campaign, which was launched in 1960 – three years prior to the drafting of article 11 – might interfere with the effective (i.e.) profitable operation of international grain markets.[707]

Net grain exporters worried that they would be obligated to export in times of inadequate global food supplies and they wanted to retain control over export decisions. Forced export of grain is rarely a concern for exporting countries today, which more commonly experience the opposite problem of how to dispose of surplus grain. This highlights the importance of ensuring distribution is equitable and in relation to need, in accordance with the rest of Article 11.2(b).

The Rome Declaration on World Food Security and World Food Summit Plan of Action include pertinent objectives, which contribute to the understanding of this provision in the context of the World Trade Organization. Objective 4.2 aims "[t]o meet essential food import needs in all countries, considering world price and supply fluctuations and taking especially into account food consumption levels of vulnerable groups in developing countries."[708] It asserts that States are to 'examine WTO-compatible options' to ensure that developing countries are able to import sufficient food to feed their populations.[709] It

[705] Craven (n 629) 301
[706] ibid
[707] Alston, 'International Law and the Human Right to Food' (n 515) 43
[708] FAO, *Rome Declaration on World Food Security and World Food Summit Plan of Action* (n 515)
[709] ibid 4.2(a)

encourages exporting countries to be reliable trading partners, to reduce subsidies, refrain from implementing restrictions on exports, and to implement the *Ministerial Declaration on Net Food Importing Developing Countries*, all in accordance with the rules agreed to under the Uruguay Round negotiations.[710]

4.4 Notes on the Committee on Economic, Social and Cultural Rights and General Comment 12

The General Comments produced by treaty bodies serve an important interpretive function. In the absence of an extensive body of case law, this role is even more pronounced for the Committee on Economic, Social and Cultural Rights, which has undertaken much of the interpretive work on this category of rights. Although the ICESCR does not specifically authorize the Committee to oversee its implementation, the fact that States requested it to elaborate Article 11 at the 1996 World Food Summit reinforces its authority as an interpretive body, reflective of State consent.[711] Furthermore, in 2007 the Human Rights Council resolved to rectify the legal status of the Committee and put it "on a par with all other treaty monitoring bodies."[712] Typically, General Comments amount to 'subsequent practice' pursuant to Vienna Convention Article 31.3(b), "which establishes the agreement of the parties regarding [the treaty's] interpretation."[713] General Comment 12 is undoubtedly the most frequently cited source on the elaboration of the entitlements and obligations relevant to Article 11 by scholars and courts.

General Comment 12 elaborates the obligations expressed in Articles 2 and 11 using the respect, protect, and fulfill tripartite obligational structure. Essentially, to respect the right to food requires States to simply refrain from infringement on people's rights (it is a negative obligation).[714] States must protect the right to food from the actions of non-State actors that could have

[710] ibid 4.2 (b), (c), (e), (f)
[711] CESCR, General Comment 12 (n 544) para 2
[712] UNHRC Res 4/7 (30 March 2007) UN Doc A/HRC/RES/4/7; Langford and King (n 548) 478
[713] Vienna Convention on the Law of Treaties (n 530) art 31.3(b)
[714] CESCR, General Comment 12 (544) para 15

detrimental consequences on its enjoyment.[715] This includes the actions of corporations and individuals. It implies both negative and positive obligations. The obligation to fulfill has two aspects, one is to undertake positive measures aimed at facilitating access to food and the second is to provide food when necessary.[716] The obligation to provide food arises when people are unable to produce or procure food on their own, either because of their socio-economic situation or because of natural or humanitarian disasters, including those resulting from conflict.[717]

4.5 Collective responsibility

Membership in an intergovernmental organization vested with certain competencies, which may impact the enjoyment of human rights, does not offer State parties the opportunity to abdicate their human rights obligations. As determined in *Matthews v United Kingdom*, even after certain responsibilities are transferred to an intergovernmental organization by a group of States, those parties have entered into the organization freely and "Member States' responsibility therefore continues even after such a transfer."[718] This was reaffirmed *inter alia* in *Beer and Regan v Germany*, in which the Court states:

> [T]hat where States establish international organisations in order to pursue or strengthen their co-operation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the [European Convention on Human Rights], however, if the Contracting States were thereby absolved from their responsibility under the convention in relation to the field of activity covered by such attribution. It should therefore be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective.[719]

[715] ibid
[716] ibid
[717] ibid
[718] *Matthews v United Kingdom* ECHR (GC) App No. 24833/94 [32]
[719] *Beer and Regan v Germany* ECHR (GC) App No 28934/95 [57]

While leaving in place the obligations and responsibility of individual States, an organization in which States have membership may incur responsibility for acts it commits for breaches of international legal norms including human rights.

The ILC has contributed to the development of the rules on the responsibility of States acting collectively in its Articles on the Responsibility of International Organizations. They are worth noting as they determine whether or not responsibility is attributable to organizations such as the WTO for breaches of the right to food. Article 61 addresses the possibility States circumventing their responsibility:

> A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.[720]

Since the State has not abdicated its human rights obligations under the ICESCR in the process of joining a collective organization, it retains the obligation to protect the rights of people from the activities of non-state actors, including intergovernmental organizations to which it is a member.[721] Furthermore, the Maastricht Guidelines assert that States obligations "extend also to their participation in international organizations, where they act collectively."[722] When States fail to take their human rights obligations into consideration when entering into international agreements with other States, organizations, or businesses, this failure may in itself constitute a breach of their socio-economic rights obligations.[723]

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[720] UNGA, Report of the International Law Commission, sixty-third session A/66/10 (2011) 161 (art 61.1)
[721] See for example, OHCHR, *Guiding principles on business and human rights: Implementing the United Nations "Protect, Respect and Remedy" framework* (2011) principle 10(a):
> "States, when acting as members of multilateral institutions that deal with business-related issues, should:
> (a) Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human right[…]"

[722] Maastricht Guidelines (n 573) para 19
[723] ibid para 15(j)

4.6 Concepts Related to the Right to Food

Non-state and non-judicial actors, such as scholars, Special Rapporteurs, and organizations have shaped the field of economic, social, and cultural rights perhaps more than any other area of international law, even if what they produce is at first non-binding and aspirational interpretations. Abi-Saab observes the importance of social forces in international legal norm creation:

> [I]nternational law, like all law, does not arise from a vacuum or a social void, and does not always emerge in the legal universe in some 'big bang'. In most cases, it is the result of progressive and imperceptible growth through the process of development of the values of a society; new ideas appear and take root; they strengthen into values which become more and more imperative in the social consciousness, to the point where they give rise to the irresistible conviction that they must be formally approved and protected. That is the point which marks the threshold of law.[724]

Similarly, Rosalyn Higgins asserts that law is more than 'just rules' and 'accumulated past decisions;'[725] the social context in which they arise is important to a comprehensive understanding. Therefore, the 'pre-normative' elements of international law, such as interpretations by prominent non-State and non-judicial actors, including soft law instruments, are relevant to the extent that they can be understood as impacting the scope of right to food in practice even though they do not constitute legal norms.[726] Despite the overall attempt to include only those norms that are binding because of the nature of norm conflict analysis, the impact of non-judicial interpretations on the development of a norm cannot be omitted entirely.

The role of various actors in the dissemination of information regarding the right to food serves to garner support for this category of rights and also to position them more firmly in mainstream human rights discourse and scholarship. Their influence has the potential to impact the development of the

[724] Ziegler et al., *The Fight for the Right to Food; Lessons Learned* (n 522) 4
[725] Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press 2003) 7
[726] ibid 6

norm in international law by reinforcing the objectives and obligations of the ICESCR and other instruments or by pushing the boundaries of the basic tenets agreed to by States in international treaties. Non-state and non-judicial engagement with the right to food can shift or increase its scope so that it retains relevancy in light of modern day challenges, as the former Special Rapporteurs on the right to food seem to have done. But they may also widen the gap between the civil society discourse surrounding the right on one hand, and political and legal practice on the other. The balance between the original intention of the parties to the Covenant and the present day needs of individuals must be considered carefully here in order not to impute meaning to Articles 2 and 11 that exceeds the scope and content of the substantive provisions.

This section highlights two concepts related to the right to food that have attracted different interpretations by various non-State and non-judicial actors. It demonstrates how a potential conflict of norms might appear between the right to food and aspects of the Agreement on Agriculture when scholars or other experts adopt expansive definitions of the right to food – definitions which, although useful and perhaps necessary, have not been thoroughly embraced by States or courts.

4.6.1 Food Security

In General Comment 12 'food security' is linked to the issue of sustainability and accessibility of 'adequate food' "for present and future generations," though the Committee does not define the term.[727] Food security and the right to food share common objectives (i.e. access to food and nutrition) but they are not interchangeable. The right to food encompasses a range of entitlements, and also emphasizes the role of overarching human rights principles such as non-discrimination, accountability and participation. It is also based on the concept of dignity and places the individual as the holder of legal

[727] General Comment 12 (n 544) para 7

entitlements.[728] The definition of food security has changed significantly over time, as new research and knowledge of the causes of hunger and malnutrition are uncovered, and according to the author of the definition. Historically, it was used to promote the availability of food at the national level and did not emphasize the individual or household level; it tended to focus specifically on price stabilization, production and the general availability of food. Food security was very much seen as a matter of economic policy, not one of individual rights; as economist and scholar Raj Patel explains, "[c]ritically, the definition of food security avoided discussing the social control of the food system."[729] Food security can be approached from international, national, household, and individual levels, but it is strictly policy-oriented.[730] State practice indicates a preference for the use of food security in place of the right to food in instruments (which have some influence in the interpretation of the right by experts and Courts).[731] When the 'right to food' is discussed in international fora, it is often reduced to a discussion about food security.

The definition of food security has shifted from an exclusive focus on availability of food to accessibility, necessarily entailing consideration of the social, economic, and political context in which food insecurity arises. The Rome Declaration and Plan of Action stipulates that food security "is achieved when all people, at all times, have physical and economic access to sufficient, safe and nutrition food to meet their dietary needs and food preferences for an active and healthy life."[732] It also emphasizes the essential role of participation in achieving food security and the right to food.[733] The Committee on World Food Security also produces research and guidelines aimed at achieving food security and the right of adequate food, and contributes to the discussion on

[728] ibid para 4
[729] Raj Patel, 'Food Sovereignty' (2009) 36 Journal of Peasant Studies 663, 665
[730] Kerstin Mechlem, 'Food Security and the Right to Food in the Discourse of the United Nations' (2004) 10 European Law Journal 631, 643
[731] At the 2002 World Food Summit, States' dedication to the realization of the right to food appeared to be regressing when a number of States argued (unsuccessfully) to have reference to the right to food removed from the 2002 Declaration. Ziegler et al., *The Fight for the Right to Food* (n 522) 6
[732] FAO, *Rome Declaration on World Food Security and World Food Summit Plan of Action* (n 515) para 1
[733] ibid commitment 1

how to implement aspects of Article 11, for example agrarian reform. Although the use of food security in place of the right to food in political discussion and instruments cannot detract from States' right to food obligations, it does shift the focus of the approach to combatting hunger and malnutrition to one that is economic policy-based rather than individual entitlements-based. As Simma warns, "strict legal rules move into the background only to be replaced by programs and declarations parading in the garb of treaties. Even more seriously disturbing, it is precisely in the regulation of politically explosive issues that treaties are today being replaced by a colourful array of 'soft law' instruments […]"[734]

Although both food security and the right to food are neutral in terms of political or economic systems needed to achieve their objectives, the malleability of food security enables its redefinition in line with specific economic policy objectives.[735] Interpretations promoted by organizations such as the WTO (which is reinforced the FAO Voluntary Guidelines) are not value-neutral or apolitical and must be considered critically in order to decipher their potential effects on individual rights-holders. Despite its vague normative content, as a legal norm the right to food can be used to shape economic policy rather than be redefined by it.

4.6.2 Food Sovereignty

The concept of food sovereignty is increasingly common in civil society discussions surrounding aspects of the right to food. The concept is gaining momentum as people become more concerned about maintaining control over the food systems that serve them, including the availability and accessibility of food, as well as safety and sustainability issues at the individual and community levels. International social movements, most notably, Via Campesina, promote food sovereignty as a peasant-based movement attempting to reclaim methods

[734] Simma, (n 545) 486
[735] Mechlem, 'Food Security and the Right to Food in the Discourse of the United Nations' (n 730) 643

of production and the distribution of food.[736] Former Special Rapporteurs Jean Ziegler and Olivier De Shutter have also outlined the concept in their reports and have argued the importance of food sovereignty, agroecology and small-scale farming to the realization of the right to food.[737] The food sovereignty movement advocates small-scale agriculture for local consumption.[738] It requires agrarian reforms that involve redistribution of power and resources.[739] It also demands an overhaul of the global agricultural trading system. Former Special Rapporteur Zeigler argues that:

> [I]n the face of mounting evidence that the current world trading system is hurting the food security of the poorest and most marginalized, and generating ever-greater inequalities, the Special Rapporteur believes that it is now time to look at alternative means that could better ensure the right to food. Food sovereignty offers an alternative vision that […] treats trade as a means to an end, rather than as an end in itself.[740]

The structural changes that the food sovereignty movement advocates could help to realize the right to food, particularly for vulnerable people and food producers.

However, while food sovereignty may be a valuable concept to the improvement of hunger and malnutrition, particularly for producers, locating it within State's current commitments in the ICESCR (or other legally binding instruments) requires creativity. Moreover, claiming that there is a right to food sovereignty, or that the right to food encompasses food sovereignty, may contribute to the confusion of what this right actually entails. The demand for a significant overhaul of the WTO regime (or its complete dismantlement) from the food sovereignty movement suggests incongruence with the right to food as

[736] La Via Campesina, 'What is La Via Campesina?' (9 February 2011) <http://viacampesina.org/en/index.php/organisation-mainmenu-44/what-is-la-via-campesina-mainmenu-45> accessed 25 January 2016
[737] See for example UNCHR, 'Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2003/25' (9 February 2004) E/CN.4/2004/10
[738] ibid para 30
[739] ibid para 31
[740] ibid para 33

the Rome Declaration and Plan of Action promote it, for example.[741] These kinds of discrepancies demonstrate competing interpretations of what the right to food entails and how it can be achieved globally. Noting the various meanings ascribed to the right to food, Alston cautions that the mainstreaming of inaccurate understandings and labels "have to a significant extent permitted a devaluation of the actual international law norm - the right to adequate food - by the use of surrogate terms purporting to affect international law but which are in fact devoid of any recognized normative content."[742] Ideally, States would commit to clarifying the right to food in international law and incorporate the concept of food sovereignty into their substantive obligations, however at present this is not the case.

Elements of food sovereignty can be detected in judicial interpretations of the right to food for indigenous peoples, with respect to their self-sufficiency in food production. This can be seen in *Indigenous Community Yakye Axa v Paraguay* in the partially dissenting opinion of Judge Fogel:[743]

> Interventions by the State must prevent, attenuate, and overcome risks such as malnutrition, prevalence of anemia, morbidity and mortality, creating basic conditions in terms of […] adequate nutrition, […] and income generation. Protective factors that must be guaranteed by the State, including […] conditions for self-production of food, and integration into community networks that ensure essential self-sufficiency […] the size of the group must enable social/communal self-sufficiency, and quality of the land must be adequate to prevent, attenuate, and overcome the risks.[744]

Fogel's opinion enriches the substance of the right to food by highlighting control and participation, as well as the idea that when individuals are able to enjoy the right to food through self-sufficiency, it is particularly congruent with the concept of dignity.

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[741] See for example La Via Campesina, 'The WTO Should Be Burried!' (27 July 2006) <http://viacampesina.org/en/index.php/actions-and-events-mainmenu-26/10-years-of-wto-is-enough-mainmenu-35/172-the-wto-should-be-buried > accessed 25 January 2016

[742] Alston, 'International Law and the Human Right to Food' (n 515) 9

[743] *Case of the Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C No. 125 (17 June 2004)

[744] ibid, Partially Concurring and Partially Dissenting Opinion of Judge Ramon Fogel [29]

4.7 CONCLUSION

Despite its enshrinement in international instruments, and regularly renewed commitments, the right to food still requires a strengthening in international law. What are in fact violations of socio-economic rights are often discussed instead in terms of 'social justice' issues.[745] Hunger and malnutrition are seen as matters of ineffective social policy or else natural phenomena.[746] Although the right to food is enshrined in international instruments, and States regularly recommit to its objectives, on World Food Day 2015, United Nations Secretary General Ban-Ki Moon still felt the need to stress that hunger is not simply a lack of food, but an 'injustice.'[747]

The flexibility permitted to State parties to the Covenant to achieve their economic, social and cultural rights obligations is useful to accommodate the unique situations, resources and capacity constraints of individual States. However, it also allows space for numerous, sometimes competing, interpretations of the right to food to permeate spheres of discourse. Some emerging concepts, such as food sovereignty, offer frameworks to achieve aspects of the right to food, particularly for vulnerable individuals, but without clear commitments to these ideals it is difficult to hold States accountable to them. It is suggested that when too many versions of the right to food appear, this does little to further the development of the norm in international law.

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[745] Ssenyonjo (n 538) 4
[746] ibid
[747] United Nations, 'Hunger is More than a Lack of Food — It Is a Terrible Injustice,' Says Secretary-General in Message for World Day, Urging Renewed Commitment' Press Release (15 October 2015) SG/SM/17229-DEV/3201-OBV/1533 <http://www.un.org/press/en/2015/sgsm17229.doc.htm> accessed 25 January 2015

5. Market Access

5.1 Introduction to the Concept of Market Accessibility

After having explored the international legal context in which conflicts between norms are more likely to occur, norm conflict definitions, and the scope and content of the right to food, this chapter begins the analysis of the compatibility between various provisions of the Agreement on Agriculture and the ICESCR. The analysis is divided across two chapters: the first, Chapter 5, examines market access disciplines under the agreement and how they interact with States' right to food obligations. The focus of the second, Chapter 6, is on agricultural subsidy disciplines. Chapter 6 comprises the rules on both domestic supports and expert subsidies. Therefore, these two chapters encompass the 'three pillars' of the Agreement on Agriculture.[748] The division of the discussion into two parts should not be understood as reflecting a mutual exclusivity of the topics; numerous threads interlink subsidies and market accessibility, and provisions in these respective areas frequently interact in ways that can enhance or detract from the expected benefits of trade liberalization. Each pillar also has multiple linkages with the right to food, however, because its realization depends on myriad factors, it is difficult to determine a causal relationship between trade rules and rights violations.[749] Notwithstanding this difficulty, expert research by Special Rapporteurs, specialized agencies, and authors identifies some of the impacts on individual rights-holders, which are discussed in sections 5.2.1 and 5.2.2 below. These

[748] Concessions on market access, domestic supports and export subsidies are frequently informally referred to as the 'three pillars' of the agreement. See for example, Melaku Geboye Desta, *The Law of International Trade in Agricultural Products* (Kluwer Law International 2002) 395

[749] José Alverez, 'How Not to Link; The Institutional Conundrums of and Expanded Trade Regime' (2001) 7 Widener Law Symposium Journal 1, 13; Chris Downes, 'Must the Losers of Free Trade Go Hungry? Reconciling the WTO Obligations and the Right to Food' (2007) 47 Virginia Journal of International Law 619, 634; See also, Mesfin Bezuneh and Zelealem Yiheyis, 'Has Trade Liberalization Improved Food Availability in Developing Countries?' (2014) 39 Journal of Economic Development 63, 69

concerns prompted former Special Rapporteurs Ziegler and De Schutter to suggest that further study of the relationship between rule regimes is needed.[750]

Market accessibility reflects the ease with which products from one country can penetrate a foreign market where they can be purchased. In the context of international trade, the permeability of foreign markets for a producer wishing to export products depends on the policies and measures in place in the importing country. Such policies and measures are the target of the agriculture agreement's market access provisions located primarily in Articles 4, 5 and Annex 5. These provisions relate to both tariff and non-tariff barriers. Tariff import barriers refer to taxes on an imported product, whereas non-tariff barriers can be anything other than a tariff that impedes the importation of a product, or that disadvantages the product in comparison to similar domestic products. Non-tariff barriers comprise a wide range of restrictions and border measures, including but not limited to quantitative import restrictions, customs valuation, investment performance requirements, technical standards, health and safety regulations, labeling laws, and inspection requirements.[751]

Tariff and non-tariff import barriers result in market distortions, disadvantages to the imported product, and to the exporting producer.[752] Accessing markets is important for food producers to sell their goods and improve their standard of living. At a macro-economic level, improved access can support development, and particularly rural development, for countries in which a significant portion of the population relies on agriculture for income. At the same time, however,

[750] Olivier De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (Activity Report, November 20011) <https://www.wto.org/english/news_e/news11_e/deschutter_2011_e.pdf> accessed 15 August 2015, 4. See also: UNGA, 'Preliminary report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler' (23 July 2001) A/56/210, paras 118-119; UNHRC, 'Report of the Special Rapporteur on the right to food, Olivier De Schutter, Mission to the World Trade Organization' (4 February 2009) A/HRC/10/5/Add.2 para 16 ('Mission to the World Trade Organization'); OHCHR, 'WTO defending an outdated vision of food security - UN food expert responds to Pascal Lamy' (News Release, 16 December 2011) 1 <http://www.srfood.org/images/stories/pdf/press_releases/20111216_wtoriposte_en.pdf> accessed 16 February 2016

[751] WTO, 'Agriculture Agreement: Explanation, Market Access' (2016) <https://www.wto.org/english/tratop_e/agric_e/ag_intro02_access_e.htm#prohibition> accessed 16 February 2016; Desta (n 748) 17

[752] Desta (n 748) 62

committing to certain market access levels restricts States' ability to refuse or limit the importation of products that compete with similar locally made products. It decreases the regulatory autonomy that a State has over the flow of products that may be harmful or perceived to be harmful to the importing society. For these reasons, market access and barriers are connected to the realization of various aspects of the right to food. Viewing the relevant provisions through the lens of norm conflict theories with consideration of the relevant WTO jurisprudence provides insight into the compatibility between them and States' right to food obligations. A norm conflict could signal the need for a State to chose which norm will prevail and which will be set aside or breached.

5.2 Market Access in the Multilateral Trade System; Divergent Opinions

Tariffs, or 'ordinary customs duties,' have been preferred over non-tariff barriers throughout the GATT and the WTO systems because they are quantifiable, and therefore assumed to be more transparent than non-tariff barriers.[753] International trade negotiations have historically sought to reduce market access barriers and prevent the unnecessary use of protectionist measures. As such, GATT 1947 resulted in provisions related to nondiscrimination and most-favoured nation treatment that underpin the world trade regime today.[754] Yet GATT rules suffered from a lack of enforceability and this, coupled with a wide degree of flexibilities and allowances in the form of waivers negotiated by specific parties, prevented the expected gains of increased market accessibility from manifesting.[755]

[753] WTO, *Chile: Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Report of the Appellate Body* WT/DS207/AB/R (23 September 2002) [200]. See also: Desta (n 748) 63; WTO, *WTO Analytical Index* (Second Edition, Volume 1, Cambridge University Press 2007) 331
[754] WTO, 'Principles of the Trading System' (2016) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed 16 February 2016
[755] Desta (n 747) 10-18

Market access barriers continued to be viewed as major obstacles to the liberalization of agricultural trade into the Uruguay Round of negotiation and therefore one of the objectives of the Round was to improve accessibility by translating non-tariff barriers into ordinary customs duties and setting binding upper limits.[756] This process is called 'tariffication.'[757] The Uruguay Round tariffication process led to approximately one fifth of the agricultural tariff lines for developed countries and less for developing countries.[758] The Agreement on Agriculture essentially prohibits "agriculture-specific non-tariff measures" and binds "virtually all agricultural products traded internationally."[759] Importantly, however, this is not the only WTO agreement that contains market access rules in regard to agricultural products; the Agreement on Subsidies and Countervailing Measures (SCM), the Agreement on Sanitary and Phytosanitary Measures (SPS), the Agreement on Technical Barriers to Trade (TBT), and GATT all apply concurrently and are incorporated into this research as necessary, though an in-depth examination of their rules is beyond the scope of this research.[760]

Arguments in favour and against the WTO's market access disciplines on agricultural products are presented below. It is important to recall that the Committee on Economic, Social and Cultural Rights has stated that the realization of the right to food does not require any specific economic regime, which suggests that it can be fully realized within a regime that promotes market openness or protectionist policies.[761] The most effective approach to reducing hunger and malnutrition is imagined differently by the WTO regime and the human rights regime, or perhaps more accurately the socio-economic

[756] GATT, *Ministerial Declaration on the Uruguay Round* (adopted 20 September 1986) MIN.DEC 6; Desta (n 748) 63, 65
[757] WTO, 'Agriculture Agreement: Explanation, Market Access' (n 751); Desta (n 748) 67
[758] ibid
[759] ibid
[760] Agreement on Subsidies and Countervailing Measures (15 April 1994) 1867 UNTS 14; Agreement on the Application of Sanitary and Phytosanitary Measures (15 April 1994) 1867 UNTS 493; General Agreement on Tariffs and Trade (15 April, 1994) 1867 UNTS 187 ('GATT 1994'); Agreement on Technical Barriers to Trade (15 April 1994) 1868 UNTS 120
[761] CESCR, General Comment 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) (14 December 1990) UN Doc. E/1991/23 para 8 ('General Comment 3')

rights sub-regime.[762] Empirical evidence can seemingly be used to both support and reject trade liberalization as contributing to an enabling environment for the realization of socio-economic rights; for example, what Herrmann categorizes as 'trade-centric' and 'development-oriented' perspectives tend to use different statistical analyses, variables, and indicators, which can shift the focus and message of data.[763] Trade-centric approaches tend to focus on short-term effects and measure the overall food security of a country and growth in terms of GDP. Whereas development-oriented approaches, similar to what might be called a socio-economic rights approach, consider the long-term effects and may emphasize the experiences of vulnerable groups. Herrmann's research highlights how narratives attempting to describe the relationship between market accessibility for agricultural products and aspects of the right to food are subjective and depend on preconceived notions about the benefits or drawbacks of trade liberalization more generally, what it means to achieve food security (or the right to food, as is concerned here), and the appropriate statistical analyses to be used. The differences in approaches can influence the understanding of the compatibility of market access rules and the right to food.

[762] WTO, 'Lamy rebuts UN food rapporteur's claim that WTO talks hold food rights 'hostage'' (14 December 2011) <https://www.wto.org/english/news_e/news11_e/agcom_14dec11_e.htm> accessed 16 February 2016. See also: WTO, 'Table ronde, La libéralisation du commerce et l'OMC: aide ou entrave au droit à l'alimentation?' (transcript) (11 May 2009) <https://www.wto.org/english/forums_e/debates_e/debate14_e.htm> accessed 16 February 2016. Lamy and DeSchutter discuss how reliance on imports and trade liberalization, among other things, impact enjoyment of the right to food. Lamy argues: "[j]e ne crois pas que la souveraineté alimentaire ou comme certains le disent l'autosuffisance alimentaire soit une solution et je pense au contraire que l'idée que le commerce international est mauvais pour la mise en pratique du droit alimentaire est une erreur. L'ouverture des échanges, à condition d'être renouvelée, est plutôt du côté de la solution." De Schutter explains that he is not talking about self-sufficiency, however, and explains that excessive dependency jeoprodizes important aspects of the right to food: "[j]e pense qu'effectivement les pays qui sont trop dépendants n'ont pas les moyens, au fond, de faire face à la volatilité des prix sur les marchés internationaux alors qu' on sait qu'elle va continuer et s'aggraver avec le changement climatique."

[763] Michael Herrmann, 'Agricultural Support Measures in Developed Countries and Food Insecurity in Developing Countries' in Basudeb Guha-Khasnobis, Shabd S. Acharya, and Benjamin Davis (eds) *Food Security: Indicators, Measurement, and the Impact of Trade Openness* (UNU-WIDER Studies in Development Economics, Oxford University Press 2007) 213, 215-216. For the an overview of the differences between the two approaches, and the deficiencies of the analyses typically used by 'trade-centric' approaches, notably equilibrium analyses and simulations, which focus on short-term effects of subsidies (and their removal) on food security: 222-229

5.2.1 Rationale for Reducing Barriers to Market Access in light of the Right to Food

Pro-liberalization arguments posit that protectionism should be minimized or avoided with exceptions for specific and necessary circumstances (for example, to combat import surges). Protectionism leads to market distortions, which means that "prices are higher or lower than normal, and […] quantities produced, bought, and sold are also higher or lower than normal — i.e. than the levels that would usually exist in a competitive market."[764] This reflects the neoliberal assumption that, without interference, the market operates according to natural forces, which leads to better - even fairer - market function and improved standards of living overall.[765] It purports that average economic growth (spurred by the gains of some actors and the division of labour) ultimately benefits poor individuals; this is the basis of the 'invisible hand' metaphor and the 'trickle down' economic theories implicit in the WTO regime.[766] Much of the literature that presents trade liberalization as supportive of the right to food and food security suggests that market access concessions, coupled with reductions in supports, encourage the following: an enabling environment in which the right to food might be realized, improved economic accessibility of food, more efficient use of resources and improved agricultural production, and greater availability of food. According to this perspective, the right to food can be best achieved through greater market openness.

[764] WTO, 'Understanding the WTO: The Agreements, Agriculture: fairer markets for farmers' (2015) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm> accessed 16 February 2016
[765] Anne Orford, 'Food Security, Free Trade, and the Battle for the State' (2015) 11 Journal of International Law and International Relations 1, 17-18; Ana Gonzalez-Pelaez, *Human Rights and World Trade* (Routledge 2005) 79; WTO, 'Understanding the WTO: The Agreements, Agriculture: fairer markets for farmers' (n 764); Adam Smith, *The Wealth of Nations* in Kathryn Sutherland (ed) (first published 1776, Selected Edition, Oxford University Press 1993) xxxvi-xxxvii
[766] As Joseph Stiglitz writes: "The theory of trade liberalization (under the assumption of perfect markets, and under the hypothesis that the liberalization is fair) only promises that the country as a whole will benefit. Theory predicts that there will be losers. In principle, the winners could compensate the losers; in practice, this almost never happens" in Olivier De Schutter, *International Trade in Agriculture and the Right to Food,* No. 46 Dialogue on Globalization (Friedrich-Ebert-Stiftung November 2009) 22

5.2.1.1 To Create an Enabling Environment

At the broadest level of discussion on the topic of trade liberalization and hunger appears the notion that economic growth, measured at the national level according to a country's GDP, is an essential factor in the improvement of socio-economic rights. Former WTO Director-General Lamy stressed the relationship between trade liberalization and the realization of socio-economic rights, arguing that:

> The opening of markets creates efficiency, stimulates growth and helps spur development, thereby contributing to the implementation of the fundamental human rights that are social and economic rights. One could almost claim that trade is human rights in practice! The reduction of trade barriers in agriculture, enhanced market access for agricultural products […] contribute to the same objective: the implementation of the right to food for all.[767]

Indeed, economists find that tariff reductions or elimination and subsidy reforms increase economic growth, improve standards of living, and create employment opportunities while reducing poverty in some developing countries – all of which are conducive to the realization of the right to food.[768] Research by the Organization for Economic and Development Co-operation (OECD) attributes the increase in standards of living in the last half century to trade liberalization under the initial GATT system that began in 1947.[769]

Further trade liberalization in agriculture is thought to be especially valuable to developing countries because their "interests in market access opportunities

[767] Pascal Lamy, 'Towards Shared Responsibility and Greater Coherence: Human Rights, Trade and Macroeconomic Policy' (Speech delivered at the Colloquium on Human Rights in the Global Economy, Co-organized by the International Council on Human Rights and Realizing Rights, Geneva) (13 January 2010) <https://www.wto.org/english/news_e/sppl_e/sppl146_e.htm> accessed 16 February 2016
[768] Kym Anderson, United Nations Conference on Trade and Development, 'Agriculture, Trade Reform and Poverty Reduction: Implications for Sub-Saharan Africa' Policy Series in International Trade and Commodities Study Series No. 22, 1; Gonzalez-Pelaez (n 765) 86-87
[769] Gonzalez-Pelaez (n 765) 87; Kym Anderson, 'Agriculture Policies: Past, Present and Prospective under Doha' in Baris Karapinar and Christian Häberli (eds) *Food Crises and the WTO; World Trade Forum* (Cambridge University Press 2010) 169

abroad are primarily in either farm products and/or light manufacturing."[770] Undertaken under the auspices of the WTO, liberalization is believed to:

> [S]timulate investment, production and trade in agriculture by (i) making agricultural market access conditions more transparent, predictable and competitive, (ii) establishing or strengthening the link between national and international agricultural markets, and thus (iii) relying more prominently on the market for guiding scarce resources into their most productive uses both within the agricultural sector and economy-wide.[771]

From a trade liberalization perspective, any negative repercussions on the enjoyment right to food are likely the result of the failure of the WTO to extinguish all protectionist measures, and not from the overall project of trade liberalization.[772] Market access barriers - particularly those that continue to be implicitly and explicitly permitted by the agriculture agreement - enable industrialized countries to protect their markets while simultaneously denying market access to products from developing countries.[773] This has led some developing countries to push for further trade liberalization rather than greater autonomy over their markets and agriculture policies (although this may be changing post-global food crises).[774]

5.2.1.2 To Enhance Economic Access For Food for Producers

The process of tariffication coupled with reduction commitments under Articles 4 and 5 signaled a pivotal change in the world trade system in terms of the potential for developing country producers' access to valuable markets. Greater access to international markets means the opportunity to generate more income, which ultimately improves the economic accessibility of food for producers and

[770] ibid 3
[771] WTO, 'Agriculture Agreement: Explanation, Market Access' (n 751)
[772] Downes (n 749) 635; Orford (n 765) 13; Baris Karapinar, 'Introduction' in Baris Karapinar and Christian Häberli (eds) *Food Crises and the WTO; World Trade Forum* (Cambridge University Press 2010) 1; Pascal Lamy, 'Trade is part of the answer, not part of the problem' (WTO Director-General's Opening Address to the Berlin Agricultural Ministers' Summit 22 January 2011) <https://www.wto.org/english/news_e/sppl_e/sppl183_e.htm > accessed 16 March 2016; De Schutter, *International Trade in Agriculture and the Right to Food* (n 766) 15
[773] Sarah Joseph, *Blame it on the WTO?* (Oxford University Press 2011) 187
[774] ibid 192

their families. Profits can then be reinvested into agricultural production to improve efficiency and generate higher yields. Because markets "divert to those who are willing to pay more," producers in developing countries might transition to producing higher-value products, for example switching from grain production to livestock, or from crops for human consumption to biofuel feedstock, which can then be exported to valuable markets.[775] Or they may switch from producing raw materials to higher value processed goods.

However, the owners and operators of large-scale agriculture operations are able to get products to international markets more easily than small-scale producers, landless workers, and subsistence farmers. Small producers do not typically have access to the same resources required to produce, conserve, and deliver competitive products to key markets; sufficient agricultural inputs, transportation, infrastructure, credit, and the capacity required to comply with international health and safety standards create additional obstacles to access markets, even when those markets are open to them.[776] Although there is potential for market access concessions to benefit small producers, they first require resources to ensure that they can deliver competitive products to the places where they can be purchased.

5.2.1.3 To Promote the Efficient use of Resources and Improved Production

The theory of comparative advantage underlies trade liberalization. This theory posits that countries should specialize in products that can be produced most efficiently and rely on imports for other products in which they do not have an advantage.[777] This way resources can be redirected, away from crops that are low yielding in a given environment and toward those that can deliver higher profits. On a macro-economic level, specialization is assumed to contribute to

[775] Joseph (n 773) 195
[776] UNGA, 'Report of the Special Rapporteur on the right to food' (21 October 2008) A/63/278 para 19; UNHRC, 'Mission to the World Trade Organization' (n 750) paras 25, 27-28; Joseph (n 773) 191
[777] Gonzalez-Pelaez (765) 79; see also UNHRC, 'Mission to the World Trade Organization' (n 750) para 20

an improved standard of living through economic growth generated by increased export of select products.[778]

The revenue from exported specialized products can be reinvested into production chains, improving overall production capacity of the country, and supporting the production of higher-value items. Furthermore, the promise of greater market access is argued to inspire investors to allocate more funds "towards expanding the now more-profitable activities and away from the now less-profitable ones. They are also willing to invest more in aggregate because of the reduced uncertainty associated with binding the reforms in WTO schedules."[779] Yet neither increased revenues nor foreign investment has fueled a significant transition into higher value products; developing countries in the southern hemisphere continue to produce low-priced raw agricultural products, such as tropical fruits, coffee, cacao for processing elsewhere. In fact, "developing countries' claim on value added [products] declined from about 60 per cent in 1970-72 to about 28 per cent in 1998-2000."[780]

If private and foreign investment in land is combined with measures to increase technical and human capacities, develop infrastructure, and promote employment in host developing countries, it can effectively enhance development and improve the competition of developing country products.[781] Indeed technology transfers and capacity building for developing countries are objectives of the Doha Round of negotiations (sometimes referred as the 'Doha Development Round'). They were explicitly confirmed in the Doha Ministerial

[778] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1923 1976) UNTS 993 (ICESCR) art 11; Downes (n 749) 637; UNHRC, 'Report of the Special Rapporteur on the right to food, Olivier De Schutter, Final report: The transformative potential of the right to food' (24 January 2014) A/HRC/25/57 para 10 ('The transformative potential of the right to food')

[779] Anderson, United Nations Conference on Trade and Development, 'Agriculture, Trade Reform and Poverty Reduction: Implications for Sub-Saharan Africa' (n 768) 12

[780] UNHRC, 'Mission to the World Trade Organization' (n 750) para 26

[781] UNHRC, 'Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge' (28 December 2009) A/HRC/13/33/Add.2 para 13

Declaration in 2001.[782] In the year following the Doha Declaration, however, developed countries offered little in terms of development support; a survey of OECD countries reveals that in 2002, "OECD countries provided development assistance to all [Least Developed Countries] LDCs of only US$12 billion – an amount equivalent to about two-weeks' worth of domestic agricultural support" in those same OECD countries.[783] The objective of capacity building was reaffirmed in the 'aid for trade' package outlined in the Bali Ministerial Decision in 2013.[784] Yet the underlying hypothesis that developing countries will transition to fewer specialized agricultural products and expand into other more profitable industries is also impractical given the large percentage of people in developing countries working in the agriculture sector, which cannot realistically be shifted to new industries (up to 70 per cent of the population in some countries).[785]

5.2.1.4 To Promote the Availability of Food for Consumers

For the importing country, reduced border tariffs can theoretically facilitate the fulfillment of the right to food by encouraging the importation of more food (enhancing the availability) at a lower cost (increasing the economic accessibility).[786] A wider variety of products that are both more readily available and cheaper can contribute to the improvement of nutrition for a given population. Yet there is research to suggest that in some cases the opposite can also occur; the influx of highly processed goods (primarily from developed countries) leads to a 'nutrition transition,' in which traditional whole food diets are replaced with foods that are more heavily processed and less nutritionally

[782] WTO, *Ministerial Declaration* (14 November 2001) WT/MIN(01)/DEC/1 ('Doha Ministerial Declaration')
[783] Herrmann (n 763) 215 (*footnote omitted*)
[784] WTO, *Bali Ministerial Decision* (7 December 2013) WT/MIN(13)/34, WT/L/909
[785] Downes (n 749) 637
[786] De Schutter, *International Trade in Agriculture and the Right to Food* (n 761) 14; United Nations High Level Task Force on the Global Food Security Crisis states that "more liberalized international markets would contribute to global food and nutrition security through increased trade volumes and access to diverse sources of food imports." United Nations High Level Task Force on Global Food Security Crisis, 'Updated Comprehensive Framework for Action' (September 2010) para 76

dense, particularly in rapidly developing countries.[787] Consequently, this transition contributes to the obesity epidemic, higher levels of non-communicable disease (such as heart disease, diabetes and some forms of cancer), and even a loss of agricultural biodiversity in the importing country.[788] Moreover, the chronic and non-communicable disease epidemics put a heavy burden on healthcare systems because these diseases tend to require long-term treatment.

While the expected net gains of increased trade liberalization are perceived as imperative to the realization of socio-economic rights, the negotiators of the agreement do acknowledge the potential for adverse effects on the accessibility of food for vulnerable individuals in developing countries.[789] Negative effects stemming from States' reduced ability to maintain regulatory autonomy over imports and supports are recognized in the *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries*, which is applicable to the Agreement on Agriculture.[790] Among other things, the decision acknowledges the potential negative effects on food availability and adequacy for 'least developing' and net food-importing developing countries.[791] Member States agree, *inter alia,* to negotiate food aid commitments in light of the Food Aid Convention to ensure that an 'increasing proportion' of food aid is in the form of grants or made on 'concessional terms.'[792] However, developing countries have stated that the decision has not become operational and has been of little

[787] UNHRC, 'The transformative potential of the right to food' (n 778) para 12
[788] UNHRC, 'Mission to the World Trade Organization' (n 750) para 32. See also: UNHRC, 'The transformative potential of the right to food' (n 778) para 34
[789] Lamy, 'Towards Shared Responsibility and Greater Coherence: Human Rights, Trade and Macroeconomic Policy' (n 767)
[790] WTO, *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries* < https://www.wto.org/english/docs_e/legal_e/35-dag_e.htm > accessed 16 February 2016. See also: De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' Activity Report (n 750) 15
[791] ibid para 2
[792] ibid para 3(i)-(iii)

practical use to them.[793] In addition to the decision, developing countries are offered less rigid reduction commitments and longer implementation period under Article 4 and they can exercise safeguard mechanisms under certain conditions as well.[794] These flexibilities are aimed at facilitating the protection of "non-trade concerns, including food security and the need to protect the environment."[795] The special mechanisms allow importing countries to protect their markets in some circumstances. Overall, and notwithstanding the potential detrimental effects of market access concessions, market barriers are perceived to be among the "largest obstacles to the realisation of the right to food" and should therefore be reduced.[796]

5.2.2 Rationale For Maintaining Regulatory Autonomy or Protectionist Measures Regarding Market Access in light of the Right to Food

The reluctance by States to allow unfettered competition or outside interference into their food systems predates the trade liberalization project under the WTO. For example, countries have long sought to combat starvation and chronic hunger by preventing food shortages through protectionist policies.[797] Moreover, humans have deep cultural connections not only to food, but also to the practice of agriculture.[798] Control over food and agriculture within a given territory is intertwined with conceptions of sovereignty, power and nationalism. For example, food shortages and increased dependence on food imports in wartime has been associated with the erosion of sovereignty and political clout

[793] James Hodge and Andrew Charman, 'An Analysis of the Potential Impact of the Current WTO Agricultural Negotiations on Government Strategies in the SADC region' in Basudeb Guha-Khasnobis, Shabd S. Acharya, and Benjamin Davis (eds) *Food Security; Indicators, Measurement, and the Impact of Trade Openness* (UNU-WIDER Studies in Development Economics, Oxford University Press 2007) 258
[794] Agreement on Agriculture (15 April 1994) 1867 UNTS 410; WTO, 'Understanding the WTO: The Agreements, Agriculture: fairer markets for farmers' (n 764)
[795] ibid preamble
[796] Kevin Gray 'Right to Food Principles vis-à-vis Rules Governing International Trade' (2003) British Institute of International and Comparative Law <http://www.cid.harvard.edu/cidtrade/Papers/gray.pdf> accessed 21 October 2015, 12
[797] Christine Breining-Kaufmann, 'The Right to Food and Trade in Agriculture' in Trade' in Thomas Cottier, Joost Pauwelyn, Elisabeth Bürgi (eds.), *Human Rights and International Trade* (Oxford University Press 2005) 341; World Trade Organization Committee on Agriculture, 'Note on Non-Trade Concerns' (22 September 2000) G/AG/NG/W/36 paras 16-19
[798] Breining-Kaufmann (n 797) 341

at the international level.[799] The magnitude of the loss of life combined with economic costs of hunger and malnutrition make it entirely unsurprising that States continue to employ protectionist measures through which they can retain control over production, distribution, and consumption of agricultural products within their territory. The political self-interest of governments is also a factor in the implementation of protectionist policies, as powerful lobby groups can be influential in political campaigns, especially through their financial support. As a result, these groups exert significant influence over agricultural policy decisions. In the context of trade negotiations, private non-State actors such as corporations and lobby groups can prevent the liberalization of trade of some products, or encourage biased rules that shield their particular industry from competition; the catering to corporate interests, primarily in developed and highly industrialized countries, in trade negotiations reflects what many have referred to as the 'democratic deficit' within WTO liberalization negotiations.[800]

5.2.2.1 To Protect Producer Livelihoods

States protect domestic goods from competition with foreign products, which might arrive in developing countries at artificially low prices due to export subsidies. Producers can maintain an advantage in the domestic market when there are fewer options for consumers to choose from. This protects their livelihood and thereby facilitates their ability to access food (through purchase). While some economists have found protectionist policies to be counterproductive to the long-term achievement of food security due to the tendency of protective regimes to support high prices and corrupt practices, many others have found that unfettered market access without necessary

[799] Downes (n 749) 630
[800] Joseph (n 773) 58. See also: UNHRC, 'Mission to the World Trade Organization' (n 750) para 40; Downes (n 749) 630.

supports can suppress, alter, or even decimate local production capacity in the importing country.[801]

Imports can threaten local production particularly in the event of import surges, wherein a high volume of imported products flood a market, driving down the price of similar products and reducing profits for the local producers or rending local production obsolete.[802] The FAO finds that "job losses, closure of firms and abandoned farms are some of the usual visible signs of the damage done by excessive imports and these problems may lead to social unease."[803] The WTO's Agreement on Safeguards defines surges as instances in which "a product is imported into a country in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive product." [804] Without defining import surges, the Agreement on Agriculture elaborates criteria according to which temporary measures can be justifiably taken by some States, and will be discussed further in section 5.3.3.[805] Despite these measures, the FAO concludes that import surges in agricultural products have increased after the implementation of the agriculture agreement and that the negative impact on local production is most acute in countries in South Asia, Africa, and the Caribbean (Central America and other regions are included in similar studies).[806] It determined that import surges in agricultural goods were frequent before and after the implementation

[801] Downes notes the tendency toward corruption in protectionist regimes see Downes (n 749) 635; De Schutter, 'Mission to the World Trade Organization' (n 750) para 22; De Schutter, *International Trade in Agriculture and the Right to Food* (n 766) 25-26; FAO, 'Import Surges: What are they and how can they be identified?' (Briefs on Import Surges No. 1, October 2006) 1 <ftp://ftp.fao.org/docrep/fao/009/j8671e/j8671e00.pdf> accessed 16 February 2016

[802] UNHRC, 'Mission to the World Trade Organization' (n 750) para 22; De Schutter, *International Trade in Agriculture and the Right to Food* (n 761) 25-26; FAO, 'Import Surges: What are they and how can they be identified?' (n 801) 4

[803] FAO, *Agricultural Import Surges in Developing Countries - Analytical Framework and Insights from Case Studies,* Manitra A. Rakotoarisoa, Ramesh P. Sharma and David Hallam (eds) (FAO 2011) 81

[804] WTO, Agreement on Safeguards 1869 UNTS 154, art 2

[805] Agreement on Agriculture (n 794) art 5. See also: General Agreement on Tariffs and Trade (n 755) art XIX

[806] De Schutter, *International Trade in Agriculture and the Right to Food* (n 761) 25; FAO, 'Import Surges: What are they and how can they be identified?' (n 801) 4; FAO, 'Import surges: What is their frequency and which are the countries and commodities most affected?' (Briefs on Import Surges No. 2, October 2006) 2-4

of the WTO rules, accounting for over 20 per cent of agriculture trade between 1980 and 2003.[807] The highest frequencies occurred in the trade of rice, palm oil and sugar in some studies, and vegetable oils, grains and meat in others – items in which some developing countries in the global south are expected to hold a comparative advantage.[808] Under such conditions, a country may not be able reap the benefits of this advantage when (often subsidized) competing products enter their markets. They may seek to safeguard local production by maintaining high tariffs or other border measures.

5.2.2.2 To Maintain Production Capacity and to Respect Current Levels of Food Access and Availability

Studies that compare trade balance (i.e. the ratio of the value of trade exports to trade imports) before and after the implementation of the WTO in attempt to determine the impact of the Agreement on Agriculture on food security show no great improvements in trade balance for many developing countries, and in many cases it is worse than it was prior to 1994.[809] For example, the trade deficit of Bangladesh increased by more than 38 per cent since the Agreement on Agriculture came into effect.[810] Nepal and Pakistan have experienced similar trade deficits.[811] In fact, Sri Lanka is noted as the only South Asian country to improve its agricultural self-sufficiency after the implementation of the WTO rules.[812] This does not necessarily support the rationale for maintaining market access barriers but it suggests that market access (as well as subsidy) concessions, as they have been implemented thus far, do not promote agricultural sector development conducive to enhanced self-sufficiency or food

[807] De Schutter, *International Trade in Agriculture and the Right to Food* (n 766) 25. See also: FAO, 'Import Surges: What are they and how can they be identified?' (n 801) 1 ; FAO, 'Import Surges: Import surges: What is their frequency and which are the countries and commodities most affected?' (n 806) 1
[808] De Schutter, *International Trade in Agriculture and the Right to Food* (n 766) 25; FAO, 'Import Surges: What is their frequency and which are the countries and commodities most affected?' (n 806) 2-3
[809] Ramesh Chand, 'International Trade, Food Security, and the Response to the WTO in South Asian Countries' in Basudeb Guha-Khasnobis, Shabd S. Acharya, and Benjamin Davis (eds) *Food Security; Indicators, Measurement, and the Impact of Trade Openness* (UNU-WIDER Studies in Development Economics, Oxford University Press 2007) 264, 275
[810] ibid 264
[811] ibid
[812] ibid 274

security in some countries.[813] If developing countries continue to face barriers accessing valuable markets while experiencing import surges that damage local production, they may benefit from maintaining the right to invoke special measures to shield their industries and producers.

Another way to improve the competitiveness of domestic products in developing country markets when import surges threaten to undermine production is through technology and capacity assistance from the developed countries. As noted, although this is an objective of the *Doha Ministerial Declaration* and the *Bali Ministerial Decision*, it has not been consistently realized.[814] Many developing countries do not possess the capabilities to conduct and interpret trade surveillance that would enable them identify import surges.[815] The ability to predict and identify them is imperative, as it is only with this information that countries can effectively respond by invoking the safeguard measures permitted under the Agreement on Agriculture and other WTO agreements.

In recent years, particularly since the food crisis of 2008, there has been a trend toward greater investment in agriculture in developing countries in the form of land leases.[816] Though the WTO rules do not in themselves create such opportunities or new agreements, they have perhaps contributed to the intended effect of stimulating investment.[817] The question is whether the investment trends occurring post-food crisis translate into improved production, and if so, for whose benefit. Investors may possess farm and production technologies that enable them to generate higher yielding crops, yet if crops are grown for

[813] In the same book, authors find that the implantation of the WTO agreements have had no significant impact on food security policies in countries in the Southern African Development Community (SADC). Hodge and Charman (n 793) 246; Samuel K Gayi, 'Does the WTO Agreement on Agriculture Endanger Food Security in Sub-Saharan Africa?' in Basudeb Guha-Khasnobis, Shabd S. Acharya, and Benjamin Davis (eds) *Food Security; Indicators, Measurement, and the Impact of Trade Openness* (UNU-WIDER Studies in Development Economics, Oxford University Press 2007) 316
[814] Hodge and Charman (n 793) 258
[815] FAO, *Agricultural Import Surges in Developing Countries - Analytical Framework and Insights from Case Studies* (n 803) 125
[816] UNHRC, 'Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge' (n 781) paras 2, 11
[817] WTO, 'Agriculture Agreement: Explanation, Market Access' (n 751)

export to the home country's market or for non-food purposes (such as for biofuels) the improvement in production capacity may not enhance the availability of food in host country.[818] In some cases, land purchased or leased is not used, but rather held as a medium or long-term financial investment, incentivized by speculation that the land will increase in value over time.[819] Individuals that have historically used public land without legal title to it may no longer have access and may even be forcibly evicted.[820] Investment of this kind can actually reduce production in this way, even if the subsistence farming or grazing that historically took place on that same land generated minimal food. Market restrictions designed to protect local production in the face of competitive imports might help to ensure that food that is produced within a country benefits local producers and consumers.

5.2.2.3 To Ensure Food Quality, Safety, and Acceptability

Maintaining regulatory autonomy over domestic health and safety standards can prevent the importation of food and agricultural products that are viewed as unhealthy, unsafe, or in someway disadvantageous to the population of the importing country. Members' ability to control the importation of products deemed unhealthy and unacceptable by civil society is curbed by the market access concessions they agree to under the Agreement on Agriculture. The extent to which they preserve the right to regulate imports was tested in *EC — Measures Concerning Meat and Meat Products (Hormones)*.[821] Recall that in this case the United States challenged the European Community's ban on beef treated with hormones for its inconsistency with obligations under GATT, the Agreement on Technical Barriers to Trade and the Agreement on Sanitary and Phytosanitary Measures (the initial request for consultations also suggested

[818] UNHRC 'Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge' (n 781) para 13
[819] ibid para 12
[820] ibid para 23
[821] WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) – Report of the Panel* (18 August 1997) WT/DS26/R/USA

inconsistencies with Article 4 of the Agreement on Agriculture).[822] The ban came in response to public outcry and boycott of such products within Europe.[823] The European Community argued, *inter alia*, that the ban was not in violation of key GATT provisions because hormone-treated beef is not 'like' other products (GATT Article III:4 prohibits discrimination of like products).[824] Moreover, the European Community claimed that if it was found to be incompatible with its GATT obligations, it was justified under GATT XX(b).[825] It also argued that its measures complied with the requirements of the criteria for exceptions allowed under the Agreement on Sanitary and Phytosanitary Measures, such as the performance of a risk assessment.[826] It recalled that the agreement "recognize[s] a Member's right to establish the level of protection which the Member determined to be appropriate," even if this is a higher level of protection than recommended by the Codex Alimentarius.[827]

The case called into question key concepts that would set the stage for future challenges within the WTO system, such as allocation of the burden of proof, the meaning of 'risk assessment', and the standard of review used by the panel and Appellate Bodies. The United States claimed that the burden of proof rests with the Member defending the measure, in this case the European Community, to demonstrate that there is a risk to human health or life associated with the consumption of hormone-treated beef in order for the measure to comply with its sanitary obligations.[828] The European Community claimed that, on the contrary, the United States must prove that such products are safe.[829] The panel agreed with the United States on this matter, finding that while the burden of proof is initially placed on the complainant to establish the basis of a challenge, it shifts to the respondent once the complainant has made a *prima facie* basis

[822] ibid [3.1]
[823] ibid [2.26]
[824] ibid [3.4]
[825] ibid [3.4]
[826] ibid [3.6]
[827] ibid. The Codex Alimentarius is an international food standards code developed by the FAO and the WHO, and used by the WTO to encourage harmonized international food standards.
[828] ibid [8.48]
[829] ibid [8.50]

for the claim.[830] The panel based its findings on provisions in the Agreement on Sanitary and Phytosanitary Measures that are expressed using the language, '*Members shall ensure* […].'[831] The Appellate Body ultimately reversed the panel's findings in this regard – an important precedent for future cases involving similar material facts and developing countries; the burden of proving risks to human health or life through scientific assessment would be especially difficult under capacity constraints that many developing countries face.[832] Moreover, the Appellate Body found that the panel's differentiation between risk assessment and risk management – the former entailing only the analysis of empirical evidence, whereas the latter relates to policy and 'social value judgments' – unnecessarily reduces the scope of the term 'risk assessment.'[833] One might infer from the Appellate Body's clarification on this point, that a risk assessment that includes consideration of how a population perceives the safety of a product for consumption might be accepted in the future.

While the panel affirmed that States have sovereign authority over the level of sanitary protection they afford to food products, it also stressed that Members have agreed to undertake such sovereign acts in accordance with the Agreement on Sanitary and Phytosanitary Measures.[834] Their authority to govern their internal food system is therefore curtailed by their membership in the WTO. The European Community argued that deference is to be given to countries to decide appropriate standards of protection, even if they are higher than the levels suggested by international bodies (such as the Codex Alimentarius), while the United States argued upon appeal that the standard of review is to be

[830] ibid [8.51]
[831] ibid [8.52]
[832] WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) - Report of the Appellate Body* (16 January 1998) WT/DS26/AB/R, WT/DS48/AB/R [9]. It should perhaps be noted that the doctrine of *stare decisis* is not formally embedded in the WTO system.
[833] WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) – Report of the Panel* (n 821)[8.94]; WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) - Report of the Appellate Body* (n 832) [181]
[834] WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) – Report of the Panel* (n 821) [8.164]

determined by the panel.[835] Instead of deferring to the European Community's assessment, the panel conducted a *de novo* review of the available scientific research and determined that the European Community's ban constituted arbitrary and unjustifiable treatment of hormone-treated beef form the United States, however the Appellate Body found that the panel had erred in this matter; the applicable standard is neither a *de novo* review nor is it total deference to the State, but an objective assessment of facts.[836]

The Appellate Body reaffirmed the 'important right' of members to determine their own levels of protection, and stressed that this is indeed a right and not an exception to the rules, but noted that there are limitations to the right.[837] The Appellate Body recognized that aspects of the precautionary principle are reflected in Article 5.7 of the Agreement on Sanitary and Phytosanitary Measures, but that it does not ultimately override the requirement to base measures that are otherwise inconsistent with obligations on scientific evidence.[838] While the Appellate Body reversed some of the panel's findings, it concluded that the ban was inconsistent with the European Community's obligations.[839] The WTO does not refuse Members the right to undertake measures deemed important for the protection of human health, even if the measures are found to contravene its WTO obligations. However, it effectively limits the measures, including legislative, that a State may chose from in order to ensure that food is safe and acceptable to its population. Furthermore, the threat of countervailing or retaliatory measures permitted under the WTO also reduces the range of policy options a Member might chose undertake.[840] Developing countries that specialize in few products and have few trading partners may find themselves particularly vulnerable to such pressures.

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[835] ibid [3.6]; WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) - Report of the Appellate Body* (n 882) [13]-[14], [42]
[836] WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) - Report of the Appellate Body* (n 832) [117]
[837] ibid [72]-[73]
[838] ibid [124]-[125]
[839] ibid [253(l)]
[840] De Schutter, *International Trade in Agriculture and the Right to Food* (n 766) 39; De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 750) 3

5.2.2.4 Other Considerations with Respect to Regulatory Autonomy

The concept of food sovereignty also provides rationale for maintaining market barriers. Although this concept is not fully integrated into the right to food legal framework, it has been interpreted as significant to its enjoyment.[841] Former Special Rapporteurs have noted that food sovereignty represents an alternative to trade liberalization, conducive to the realization of the right to food.[842] According to proponents of food sovereignty, it "challenges the current model of agricultural trade, which they see as cultivating an export-oriented, industrial agriculture that is displacing peasant and family agriculture."[843] As such, it can be contrasted with rules that require States to dismantle their measures that are intended to control certain imports or otherwise protect local production. Still, food sovereignty is not inherently opposed to trade; instead it recognizes that "a corollary right of importing countries to impose protective tariffs to protect themselves against dumping of any subsidized exports" might mitigate some of the negative effects.[844] The basic tenet of food sovereignty is that individuals and communities should have control over food policy, and the current trade regime diminishes the agency of States, as well as communities, to dictate food and agricultural policy.[845]

Member States that wish to impose restrictions on imports beyond those permitted by the WTO must ensure they conform to the criteria outlined in exceptions clauses; a State cannot simply decide to ban imports of a particular item in order to shield the producers of a similar product, or protect the health of its population, without meeting the requirements established by the international regime. With respect to the issues of technology transfer and food safety, proponents of the food sovereignty approach to trade assert that States

[841] See Section 4. 3.2
[842] UNCHR, 'Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2003/25' (9 February 2004) E/CN.4/2004/10 paras 33-34
[843] ibid para 24
[844] ibid para 29
[845] ibid para 27, 29

have the right to "refuse technologies considered inappropriate, on the basis of the precautionary principle."[846] This is primarily aimed at the right to refuse the imposition of intellectual property rights regimes, genetically modified organisms, and other farming input technologies, though it could also relate to imported foods among other things. As was demonstrated in the *EC-Measures affecting the importation of beef and beef products (Hormones)*, the recognized right of member States to implement measures aimed at protecting their populations are of limited use, and even reference to established principles like the precautionary principle does not justify the use of measures that are inconsistent with WTO rules if the justification itself is not fully integrated into the WTO regime.[847]

Although it is still somewhat unclear how self-sufficiency relates to the right to food, the movement away from a reliance on imports toward greater self-sufficiency – or at the very least, the option to do so, is central to the concept of food sovereignty.[848] Self-sufficiency is a politicized term, which evokes memory of Stalinist and Cold War era communist agricultural policies, and as such its relationship to human rights, or to the improvement of hunger is contested. Its relationship to the world trade regime, on the other hand, is clear; measures aimed at self-sufficiency are entirely rejected as appropriate responses to hunger. When debating former Director-General Lamy, former Special Rapporteur De Schutter expressed that he does not advocate self-sufficiency in food production as the antidote to hunger, nor does he necessarily propose a food sovereignty approach; instead he clarifies that he advocates for States to retain the freedom to choose their food policies.[849] Lamy repeated De

[846] ibid para 32
[847] WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) – Report of the Panel* (n 821); WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) - Report of the Appellate Body* (n 832)
[848] La Via Campesina, 'Peoples' Food Sovereignty - WTO Out Of Agriculture' (2 September 2003) <http://viacampesina.org/en/index.php/main-issues-mainmenu-27/food-sovereignty-and-trade-mainmenu-38/396-peoples-food-sovereignty-wto-out-of-agriculture> accessed 16 February 2016; UNCHR, 'Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2003/25' (n 842) paras 25, 28
[849] WTO, 'Table ronde, La libéralisation du commerce et l'OMC: aide ou entrave au droit à l'alimentation?' (n 762). "Je ne parle pas d'autosuffisance. Le mot n'est pas dans mon rapport. […] Je ne

Schutter's position on the matter, stating that he hoped that those who read the research of the former Special Rapporteur do not interpret it as advocating measures aimed at establishing self-sufficiency.[850] Self-sufficiency, and more broadly, control over agricultural and food policies (i.e. food sovereignty) can be eroded by market access norms. The displacement of local production by food imports encourages dependency on international markets to meet the food and nutrition needs of populations.[851]

In addition to the impact on the livelihood of food producers, the problem with dependency is that it leaves net food importing States vulnerable to the price shocks on international market.[852] This can increase the country's overall food import bill, and for those individual consumers on the cusp of poverty, price shocks can push food items out of reach, as was the case in the food crisis of 2008.[853] The reduction of market barriers has not proven entirely beneficial for producers of exports either; research illustrates that liberalization under the WTO does not encourage a transition to high-value crops from staple crops.[854] Overall, the export-orientation of agriculture, which seeks to take advantage of greater market access, has not proven particularly beneficial for food security in developing countries:

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parle donc pas d'autosuffisance ni de souveraineté alimentaire. Il faut que chaque pays ait la possibilité de faire des choix sans qu'ils soient dictés par le système du commerce international."

[850] ibid. "D'abord pour être complet, vous me dites que vous ne parlez pas et que vous ne prônez pas l'autosuffisance alimentaire, j'en prends acte et j'espère que tous ceux qui interprètent vos recommandations dans ce sens recevront le même démenti que celui qu'on vient de recevoir."

[851] ibid; UNCHR, 'Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2003/25' (n 842) para 15; UNHRC, 'Mission to the World Trade Organization' (n 750) paras 22, 24

[852] UNHRC, 'Mission to the World Trade Organization' (n 750) paras 21-24; De Schutter, *International Trade in Agriculture and the Right to Food* (n 766) 24; De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 750) 13

[853] However, it should be noted that there is debate over how exactly the Agreement on Agriculture contributes to price volatility. For example, De Schutter notes that "[i]n the early stages of the Doha Round, WTO members had attempted to quantify the AoA's general impact on food prices in order to determine what if any assistance should be provided to food importers. After the WTO turned to the World Bank and IMF for outside expert opinions, the World Bank argued it was impossible to precisely quantify the impacts of the AoA reform on food prices separated from the effects of other macroeconomic variables." De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 750) 15

[854] UNGA, 'Preliminary report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler' (n 750) para 74

> The switch to export crops has […] shifted government attention away from small-scale farm agriculture focused on food security. In Uganda, for example, the shift away from local food crops meant that people had *less* to eat. […] In Brazil, the switch towards export-orientated agriculture has meant that Brazil is now a major food exporter among the world's top 10 economies. Yet 32 million Brazilians still suffer from terrible poverty and malnutrition.[855]

It is for these reasons that food sovereignty advocates, and those that interpret food sovereignty as intertwined with the right to food, may defend the ability of Member States to maintain regulatory autonomy over market access measures.

5.3 Market Access Provisions under the Agreement on Agriculture

This section analyses WTO member States' market access commitments through a look at the plain language text of the agreement, in light of its object and purpose, and informed by the interpretations and elaborations by the panels and Appellate Body where available. Article 4 deals explicitly with market access concessions. It is divided into two parts, with important qualifiers spelled out in footnote 1 to Article 4.2 as well as in Article 5, and Annex 5. Article 4.1 points to Member's Schedules as the source of market access concessions. Article 4.2 states that "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties" (footnote omitted) with some exemptions listed in Article 5 and Annex 5. The text of these provisions offers little information and simply points to Member's individual scheduled commitments. As such, the following section considers how they have been interpreted in disputes before the panels and the Appellate Body in order to understand how they affect State's ability to regulate imports and producer's ability to access markets.

[855] ibid para 75

5.3.1 Primary Source of the Obligation to Reduce Barriers to Market Access

The WTO panel in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* understood Article 4.1 to be, essentially, a procedural provision, merely indicating, "where market access commitments can be found."[856] However, on appeal, the Appellate Body viewed the same provision as imposing substantive obligations on Members.[857] It explained that "Article 4.1 acknowledges […] new bindings and reductions of tariffs as well as other market access commitments […] were made as a result of the Uruguay Round negotiations."[858] Article 4.1 is therefore a source of obligation regarding States' tariffication and tariff reduction commitments, although the content of those obligations is specified in Member's Schedules, which form an integral part of the WTO agreement. Developed country Members committed to reduce their tariffs (after tariffication) by an average of 36 per cent, with a minimum 15 per cent reduction on each listed product over a period of six years (1995 – 2000).[859] Developing country Members were obligated to reduce tariffs by an average of 24 per cent, with a 10 per cent minimum reduction on each listed product over a period of ten years (1995 – 2004).[860] Least developed countries made no obligations in this regard.[861]

Overall, these are not very ambitions reduction commitments and offer little in the way of actual increases to market accessibility. This may be particularly true for developing country producers who, without access to the other necessary inputs, will not enjoy a great deal more access based on these provisions alone. Members are required to maintain 'current' or 'minimum

[856] WTO, *EC: Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador – Report of the Panel* (22 May 1997) WT/DS27/R/ECU, WT/DS27/R/GTM. WT/DS27/R/HND, WT/DS27/R/MEX, WT/DS27/R/USA [7.124]
[857] WTO, *EC: Regime for the Importation, Sale and Distribution of Bananas – Report of the Appellate Body* (9 September 1997) WT/DS27/AB/R [156]
[858] ibid
[859] WTO, 'Understanding the WTO: The Agreements, Agriculture: fairer markets for farmers' (n 764)
[860] ibid
[861] ibid. "These figures do not actually appear in the Agriculture Agreement. Participants used them to prepare their schedules — i.e. lists of commitments. It is the commitments listed in the schedules that are legally binding."

access' opportunities for the entry of products into their territory, as identified in their Schedules.[862] Although the agreement entered into force in 1995, the access levels refer to those during the base period of 1986-88.[863] If a large discrepancy existed between the access levels at the time that the agreement entered into force and the base period for a certain product (that is, if the access levels in 1995 amounted to less than 5 per cent of consumption of that product in the importing territory during the base period) that importing Member was obligated to ensure minimum access opportunities of at least 3 per cent of base-period consumption.[864] Developed countries had to increase that opportunity to 5 per cent in 2000, and developing countries were given until 2004.[865] The guaranteed opportunities or 'levels' are typically achieved through the use of tariff quotas, which are calculated in relation to the 'normal' duties applied to products in excess of the quota.[866]

5.3.2 Conversion of Barriers into Tariffs and the Prohibition of Non-Tariff Barriers

Article 4.2 proscribes the use of measures that "have been required to be converted into ordinary customs duties" in Article 4.1.[867] This article is the basis of the obligation to convert all non-tariff measures into tariffs.[868] Though not an exhaustive list, Footnote 1 to Article 4.2 lists the kinds of measures for which tariffication must be undertaken:[869]

> These measures include quantitative import restrictions, variable import levies, minimum import prices discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs

[862] WTO, 'Agriculture Agreement: Explanation, Market Access' (n 751)
[863] ibid
[864] ibid
[865] ibid
[866] ibid
[867] Agreement on Agriculture (n 794) art 4.2
[868] Desta (n 748) 69
[869] Asserting that this list is non-exhaustive, see: WTO, *Chile: Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Report of the Appellate Body* (n 753) [209]

> duties, whether or not the measures are maintained under country specific derogations from the provisions of GATT 1947 […].[870]

In *Chile – Price Band System*, the Appellate Body interpreted Article 4.2 using the ordinary meaning of the terms of the provision and noted the use of the present perfect tense.[871] It argued that this formulation is different than other provisions in the agreements, which are formulated using the present tense.[872] The significance of this difference, the Appellate Body clarified, is that the obligation set forth in Article 4.2 pertains not only to measures that *have been* converted, but measures that *ought to have been* converted, but have not actually been converted. In other words, if a Member has failed to convert a measure that it was obligated to convert, it is not absolved from the subsequent obligations involving those measures. The present perfect tense references the date 'from which' and 'by which' Members were obligated to convert the measures covered by Article 4.2.[873] It is essentially an obligation to cease the activity and to simultaneously prohibit it from the date of the Agreement on Agriculture's entry into force.[874] Article 4.2 applies to state-trading enterprises as well, which has been argued to represent the greatest progress in terms of market access disciplines in the WTO.[875]

5.3.3 Special Safeguard Measures

Article 5 contains rules on Special Safeguard Measures, which are essentially permissions to apply additional tariffs on imports. Members have recourse to apply Special Safeguard Measures in the event of certain volume- or price-based triggers that can come in the form of import surges of a particular product

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[870] Agreement on Agriculture (n 794) art 4.2 (footnote 1)
[871] WTO, *Chile: Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Report of the Appellate Body* (n 753) [205]-[209]
[872] ibid; WTO, *WTO Analytical Index* (n 753) 331
[873] WTO, *Chile: Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Report of the Appellate Body* (n 753) [206]. The Appellate Body reasoned, that "giving meaning and effect to the use of the present perfect tense in the phrase 'have been required' does not suggest that the scope of the phrase 'any measures of the kind which have been required to be converted into ordinary customs duties' must be limited only to those measures which were actually converted, or were requested to be converted."
[874] ibid [212]
[875] WTO, *WTO Analytical Index* (n 753) 335

or unexpected price drops.[876] Special Safeguard Measures are essentially emergency measures and can only be undertaken on a temporary basis; those undertaken in response to volume-based triggers are permitted only on the shipment in question and those undertaken in response to price-based triggers may be applied until the end of the year.[877] Members must signify their intent to use the measures by marking the relevant products with 'SSG' in their Schedule.[878] Furthermore, safeguards cannot be applied to imports that are already under a tariff quota. Special Safeguard Measures theoretically enable the importing country to respond to import surges that threaten local production.

It is important to note that the safeguard measures do not apply to price increases.[879] There was a downward trend in the price of agricultural products in the years immediately following implementation of the Agreement on Agriculture; however, many countries are experiencing price increases post-2008 food crisis, for which there is no effective response under Article 5.[880] The fact that countries need to pre-determine which products to mark as 'SSG' is a further limitation of the usefulness of this flexibility, as States may not know in advance which imports have the potential to increase in volume or price drops.

5.3.4 Special Treatment

Annex 5 outlines the Special Treatment permissions in regard to the obligations set forth in Article 4.2. Annex 5, Section A essentially allows Members to maintain barriers and refrain from subsequent tariff reduction commitments with respect to primary agricultural products and related "worked and/or prepared products."[881] This special treatment is permitted in accordance with

[876] WTO, 'Agriculture Agreement: Explanation, Market Access' (n 751)
[877] ibid
[878] ibid
[879] De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 750) 12
[880] ibid
[881] Agreement on Agriculture (n 794) annex 5.1

specific criteria, summarized as follows: the products exempt from tariffication and reduction commitments amounted to under 3 per cent of domestic consumption during the base period (1986-1988); export subsidies have not been applied to the 'designated products' (produced domestically); 'production-restricting' measures are applied (to domestically-produced products); the products for which special treatment might be applied are marked with 'ST-Annex 5' in the Member's Schedule.[882] The permission to implement special treatment for such products reflects their importance as non-trade concerns, most notably, food security.[883] Section B similarly exempts "primary agricultural product[s] that [are] the predominant staple in the traditional diet of a developing country Member" from the commitments of Article 4.2.[884] The remainder of Annex 5 provides a framework for calculating tariff equivalents for border measures that are permitted under the Annex, but which are otherwise prohibited by Article 4.

5.4.2.5 Issues Arising from Tariffication

Reduction commitments are based on overall tariff levels, not on a product-by-product basis. Because of this, countries may maintain higher tariffs on some products of particular importance (for example, if the country produces similar products), while making greater reductions on other products that are less important to compensate. The ability to choose which products to make the greatest reductions on enables States to protect and promote domestic production of sensitive crops, including culturally important foods. However, it has led to the problem of 'tariff peaks;' that is, unusually high tariffs amongst the trend of low tariffs.[885] Tariff peaks used in high-value markets that are placed on products that developing countries also produce suppresses the ability of those developing country products to compete. During the Uruguay Round of negotiations developed countries actually made smaller reduction

[882] ibid annex 5.1(a)-(e)
[883] ibid annex 5.1(d)
[884] ibid annex 5.7
[885] WTO, 'Glossary' (2016) < https://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm> accessed 16 February 2016

commitments "on products which are mainly exported by developing countries (37 %), than on imports from all countries (40 %)."[886] In general, "tariffs on tropical products remain higher and more complex than those on temperate zone products."[887] This is especially problematic for those countries that specialize in few crops, on the basis of the assumption that they possess a comparative advantage. Here, flexibilities that could theoretically enhance agricultural production and development in developing countries have actually served to prevent them from enjoying the supposed benefits of trade liberalization in agricultural products. Tariff peaks are argued to constitute "the most notable limitations of the resulting market access disciplines in the [Agreement on Agriculture]."[888]

In addition to tariff peaks, there is the problem of 'tariff escalation.' Tariff escalation occurs when countries retain higher tariffs on the importation of processed products than on raw materials.[889] This hampers the transition within developing countries from the production of primary agricultural products into higher value-added products.[890] Since an underlying assumption is that export revenue will allow investment into, and development of, other industries, these flexibilities also undermine the expected long-term gains of market access concessions. This perpetuates the cycle of producing low priced products, limits the ability of producers to reinvest in production, and also disincentives investment in agriculture.[891]

Another problem is that countries have engaged in 'dirty tariffication.' Dirty tariffication refers to a practice whereby countries inflated their tariffs during the base period or overestimated the tariff equivalent of their non-tariff barriers, resulting in a base rate that is artificially high, and from which reduction

[886] WTO, 'Understanding the WTO: Developing Countries, Some Issues Raised' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/dev4_e.htm> accessed 16 February 2016
[887] De Schutter, *International Trade in Agriculture and the Right to Food* (n 766) 13
[888] Desta (n 748) 62
[889] WTO, 'Glossary' (n 885)
[890] De Schutter, *International Trade in Agriculture and the Right to Food* (n 766) 17
[891] Gray (n 796) 12

commitments were then undertaken.[892] Members were not provided a standard formula to use when they undertook tariffication, and if their calculations were unchallenged at the time of calculation, they became binding.[893] Developed countries have been most frequently accused of dirty tariffication.[894] These practices do not represent 'norms' of the agreement on agriculture, but they are implicitly permitted through loopholes in the existing regime. The result is an unfair trade system, which goes against the stated aim of the regime, and which may not serve to further the right to food in the ways outlined in Section 5.2.1.

5.4 Are the Elements of a Conflict of Norms Present Between the Right to Food and Market Access Provisions?

Multiple definitions of norm conflict were outlined in Chapter 3, some that recognize incompatibilities between mutually exclusive obligations only and others that include the possibility of conflict with permissive norms. This section considers how a conflict between the right to food and the Agreement on Agriculture's market access norms might be identified or ruled out according to prominent theories. This entails identifying sets of facts to which the relevant rules of both regimes apply – that is, determining same subject-matter - and overlaying these facts with theories presented by authors.[895] There must also be actual States with obligations under both regimes (*ratione personae*) that could hypothetically encounter the conflicts in order for the exercise of determining the compatibility of the rules to be a worthwhile endeavor; this is easily satisfied given that the majority of WTO Members are also parties to the ICESCR.

[892] Desta (n 748) 75
[893] FAO, 'The implications of the Uruguay Round Agreement on Agriculture for developing countries' <http://www.fao.org/docrep/004/w7814e/w7814e06.htm> accessed 16 February 2016
[894] Gray (n 796) 17
[895] E.W. Vierdag, 'The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties' (1998) 59 British Yearbook of International Law 75

Broken down into the 'deontic operator' and the 'descriptive proposition,' the norms in question can be understood from the perspective of a single country.[896] According to Article 4, a Member State is:

> Obligated to convert non-tariff border measures into tariffs
>
> Prohibited from the use of non-tariff border measures (unless otherwise specified)
>
> Prohibited from the adoption of new, and the use of old, measures that restrict or prevent the importation of products (unless otherwise specified)
>
> Obligated to have reduced its tariffs by 24 per cent by 2000
>
> Obligated to ensure minimum access to its market

This is obviously a simplified interpretation of Article 4. The use of 'prohibitions' here is derived from the agreement's use of the phrase 'shall not.'[897]

At the same time, the ICESCR places obligations on States. The right to food obligations that appear to have the most overlap with WTO member State's market access obligations are those that require State parties to improve methods of production and distribution of food, and to ensure an equitable distribution of world food supplies in relation to need. The three levels of obligations identified by the Committee – to respect, protect, and fulfill – might apply to each of these as well in a scenario before the Committee itself, or before a court that adopts this obligational structure. Therefore, States must refrain from negatively impacting methods of production and distribution (which corresponds to issues of availability and access), and this includes an obligation to ensure that third parties do not infringe upon current levels either.[898] They must seek to fulfill this right by either facilitating greater access

[896] Erich Vranes 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17 The European Journal of International Law 395, 408
[897] Agreement on Agriculture (n 794) art 4.2
[898] CESCR, General Comment 12, Right to adequate food (1999) UN Doc. E/C.12/1999/5 para 15

through improved production and distribution, or by directly providing for those who cannot purchase or grow the food they require.[899] The elements of acceptability, safety and participation are also highly relevant, though may not necessarily be accepted as legal obligations in a given forum.

5.4.1 The Same Subject-Matter Criterion

The remarks by the panel in *Indonesia - Certain Measures Affecting the Automobile Industy* suggest that right to food and market access provisions would not be observed by the WTO dispute settlement mechanism as having the same-subject matter.[900] The panel found that despite overlap between subsidy provisions of the GATT and the Agreement on Subsidies and Countervailing Measures, they do not possess the same subject-matter, and therefore cannot conflict.[901] This is despite Indonesia's argument that one of the obligations limits the expression of the other (a permissive norm, which granted it special rights based on its developing country status). The panel reasoned that the provisions have different coverage and types of obligations.[902] The WTO dispute settlement mechanism would be the most likely forum to hear a dispute involving arguments over the relationship between WTO and human rights obligations - for example, if a Member attempted to justify a breach of a market access-related obligation based on its interference with right to food obligations – and the panel's reasoning provides some indication of how it might be received within the context of a dispute. According to some authors, the determination of same subject-matter is not a precondition necessary to unlock the conflict rules outlined in the Vienna Convention.[903] Regardless, there are points of clear overlap between the agreements, which indicate that the same subject-matter provision of the Vienna Convention might

[899] ibid
[900] WTO, *Indonesia: Certain Measures Affecting the Automobile Industry – Report of the Panel* (2 July 1998) WT/DS54/R WT/DS55/R WT/DS59/R WT/DS64/R
[901] ibid [14.36]; See discussion in Section 3.6.4
[902] ibid
[903] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) A/CN.4/L.682 para 21

be satisfied according to broader interpretations, if they were to be acknowledged by a court.[904]

The ILC suggests that the sameness criterion leads to the siloing of international legal rules, which does little to prevent or alleviate norm conflicts, and may instead perpetuate the fragmentation of international law:

> If conflict were to exist only between rules that deal with the "same" subject-matter, then the way a treaty is applied would become crucially dependent on how it would classify under some (presumably) pre-existing classification scheme of different subjects. But there are no such classification schemes. Everything would be in fact dependent on argumentative success in pigeon-holing legal instruments as having to do with "trade", instead of […] "human rights law" […]. If there are no definite rules on such classification, and any classification relates to the interest from which the instrument is described, then it might be possible to avoid the appearance of conflict by what seems like a wholly arbitrary choice between what interests are relevant and what are not[.][905]

While the trade regime and the human rights regime may operate according to different ethos, the interests of rights-holders has some relevance to the WTO regime, including its market access provisions. There is agreement between former Director-General Lamy and former Special Rapporteur De Schutter that the right to food is a human right and, along with the more frequently cited concept of food security, its realization is a worthwhile policy objective.[906]

Former Director-General Lamy posits that the rules of both regimes are based on the 'same values' such as 'individual freedom,' 'non-discrimination,' and 'welfare.'[907] He also affirms that "trade is a means to an end; and the end is raising the standards and conditions of living of all. The objective of sustainable development features prominently as one of the objectives of the

[904] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 30
[905] ILC (n 903) para 22
[906] WTO, 'Table ronde, La libéralisation du commerce et l'OMC: aide ou entrave au droit à l'alimentation?' (n 762)
[907] Lamy, 'Towards Shared Responsibility and Greater Coherence: Human Rights, Trade and Macroeconomic Policy' (n 767)

WTO."[908] The WTO agreement, to which the Agreement on Agriculture is annexed, states that "trade and economic endeavor[s] should be conducted with a view to raising standards of living."[909] This shares similarities with Article 11.1, which recognizes the "right of everyone to an adequate standard of living" and the "continuous improvement of living conditions."[910] The WTO agreement advocates the "optimal use of the world's resources in accordance with the objective of sustainable development."[911] Article 11.2 stresses the importance of improving production, conservation and distribution "to achieve the most efficient development and utilization of natural resources."[912] The Agreement on Agriculture states that reform of agricultural trade is a key objective of the agreement, and it specifically lists that parties are to regard the needs of developing countries, food security and the environment.[913] Similarly under Article 11.2(a) State parties are to take measures to reform agrarian systems, whereas Article 11.2(b) stresses that programs must "take 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."[914] Indeed, authors have noted many other points of intersection, including shared terms such as food security and non-discrimination, even though they may be conceptualized differently by each regime.[915]

In the simplest terms, Article 11 and the market access provisions both relate to food. This is also what Haugen notes in his study on the relationship between TRIPS and the ICESCR:

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[908] ibid
[909] Marrakesh Agreement Establishing the World Trade Organization (adopted April 15, 1994, entered into force 1 January 1995) 1867 UNTS 154 (WTO Agreement) preamble
[910] ICESCR (n 778) art 11.1
[911] WTO Agreement (n 909) preamble
[912] ICESCR (n 778) art 11.2(a)
[913] Agreement on Agriculture (n 794) preamble
[914] ICESCR (n 778) art 11.2(a)-(b)
[915] Christine Breining-Kaufmann, 'The Legal Matrix of Human Rights and Trade Law: State Obligations versus Private Rights and Obligations' in Thomas Cottier, Joost Pauwelyn, and Elisabeth Bürgi (eds) *Human Rights and International Trade* (Oxford University Press 2005) 103-104; UNCHR, 'Analytical study of the High Commissioner for Human Rights on the fundamental principle of non-discrimination in the context of globalization, Report of the High Commissioner' (15 January 2004) E/CN.4/2004/40 paras 16-24; Ernst-Ulrich Petersmann, 'The WTO Constitution and Human Rights' (2000) 3 Journal of International Economic Law 19

> While there are obvious differences between the subject matter in the human rights system (human beings) and the patent and plant variety protection system (protectable inventions or plant varieties), the rights recognized in the two systems both relate to physical food or improved food.[916]

ICESCR Article 11.2(a) and Agriculture Agreement Articles 4 and 5 relate to the distribution of food, as well as its availability and accessibility more generally. The agriculture agreement's market access provisions regulate measures that limit or prevent distribution through international markets. Again similar to Haugen's finding, the agreements regulate the subject-matter in different ways. A key difference is that ICESCR Article 11 is concerned with the equitable distribution of food for individuals, who are the objects of the treaty.[917] ICESCR is of a constitutional character and the relationships it governs are between States and individuals. Articles 4 and 5 of the agriculture agreement are concerned with the distribution of food (or agriculture products) in a way that is fair, but in this context fairness refers to competition between States.[918] It grants relational rights and obligations between Member States only.

Concern expressed by WTO Members over the impact of market access concessions on food security further supports the idea that the provisions address the same issues. In a proposal to the WTO Committee on Agriculture, Members argue that further negotiations pursuant to Article 20 should be undertaken with consideration for Members obligations under ICESCR Article 11.[919] Mauritius claims that food security can be best achieved through, *inter alia*, the encouragement of domestic production including through the "exclusion of certain products from [market access] reduction commitments."[920] Negotiations throughout the Doha Development Round also acknowledge that

[916] Hans Morten Haugen, *The Right To Food and the TRIPS Agreement* (Martinus Nijhoff Publishers, 2007) 345
[917] ICESCR (n 778) art 11.2(b)
[918] Agreement on Agriculture (n 794) preamble
[919] World Trade Organization Committee on Agriculture 'Note on Non-trade Concerns' (n 797) paras 14-15
[920] WTO, 'WTO Negotiations on Agriculture, Negotiating Proposal Submitted by Mauritius' (28 December 2000) G/AG/NG/W/96, 3

food security, among other non-trade concerns, should be given 'special attention' in future market access negotiations.[921]

5.4.2 Choice of Definitions; beginning with narrow definitions and the test of joint compliance

The definition of norm conflict used by an interpreter has bearing on the determination of conflict or compatibility. The test of joint compliance, "which prevails in legal theory, asks whether it is possible for the addressee of two norms to comply with the second norm, after having complied with the first one."[922] Given that the ICESCR was signed in 1966 by many States that are also party to the Agreement on Agriculture, which was signed in 1994, the right to food norms are the 'first' norms. Assuming that States would not enter into the latter agreement if they already had programmes in place that were incompatible, the agreements are unlikely to pose a problem according to this test.

In other areas of WTO law, however, this does raise some interesting questions at first glance. For example, the source of many of the WTO obligations is in fact GATT. GATT 1994 Article 1 "consist[s] of: the provisions in the General Agreement on Tariffs and Trade, dated 30 October 1947."[923] Here some of the problems noted by scholars on the difficulty of determining *lex prior* and *lex posterior* appear.[924] Although GATT 1947 existed before the ICESCR, most States did not have obligations under it until 1 January 1995, well after the ICESCR came into effect. It is likely to be the legal distinction of the GATT 1994 from the previous GATT 1947 as indicated in the Marrakesh Agreement that settles the issue of which came first for the majority of Members.[925] Moreover, the Agreement on Agriculture is among the recently created

[921] WTO, 'The Doha Round Texts and Related Documents' (2009) 81 <https://www.wto.org/english/res_e/booksp_e/doha_round_texts_e.pdf> accessed 16 February 2016
[922] Vranes (n 896) 413
[923] WTO Agreement (n 909) annex 1A ('GATT 1994')
[924] See Chapter 3 Sections 3.7.2 and 3.7.3
[925] WTO Agreement (n 909) art 2.4

agreements that are not a part of the original GATT, but annexed to its later version.

The agriculture agreement does not require Members to breach their obligations; and Members are able to comply with all obligations, provided they work within the parameters of the second norms, that is, the market access rules. In this way, market access provisions serve to limit the policy options and other measures available to States to combat hunger and malnutrition. This may pose some problems for the rights-holder who desires a particular measure to secure their rights, but it does not constitute a conflict according to the narrow definitions explored in Chapter 3. Therefore the option to prioritize right to food obligations over the market access obligations does not arise through the application of conflict avoidance or resolution techniques.

5.4.3 Broadening the Scope of Definitions and the Test of Violation

Broadening the scope of incompatibilities that are recognized by norm conflict theories begins with shifting from a focus on the ability of States to comply with the norms in question to one centered on breaches. Still, looking at the norms in question there are none that have directly conflicting instructions that would require a State to breach its obligations under the other regime; that is, there are no contrarily regulated norms.[926] As Marceau argues, "one would have to be able to demonstrate that compliance with the WTO *necessitates* violation of a human rights treaty" to determine that the relationship constitutes a conflict of norms.[927] For the purpose of maintaining coherence in international law, this is a desirable outcome. However, as Pauwelyn has argued, this approach risks confusing the approach of how to solve a conflict with not recognizing that one is present.[928]

[926] Vranes (n 896) 409
[927] Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 European Journal of International Law 753, 792
[928] Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press 2003) 176

Although it is clear that the agriculture agreement does not *necessarily* require States to breach their right to food obligations, might it *possibly* require them to do so?[929] Vranes' understanding of conflict includes permissive norms and he also considers how the 'jural opposites' posed in relation to the same deontic operator provide insight into the compatibility of two norms.[930] The jural opposite of a prohibition is a positive permission, and the opposite of an obligation is a 'non-command' or a negative permission.[931] Jural opposites expressed explicitly or implicitly in two provisions can lead to the conclusion that an action is '*contradictorily* regulated.'[932] The question then becomes whether the obligations set out in the ICESCR Articles 2 and 11 can be understood as permissions; if a State is obligated to take measures toward achieving the right to food, is it also *permitted* to take measures? It might similarly be asked whether Article 2 can be read as encompassing norms of competence, however, such norms have been historically excluded from norm conflict theory.[933] Within the obligations imposed on States under the ICESCR, there appear to be implicit permissions – the permission to implement any appropriate measures.[934] If included in this is the permission to deny entry to certain products or volumes of products, and the same State is obligated to ensure a minimum access to products (or it is prohibited from denying entry of products) the measure in question is contradictorily regulated.

For Vranes, this still may not translate into a genuine conflict of norms, as several weaknesses appear. First, identifying the obligations in the Covenant as permissions is limited by the fact that they are not explicit permissions to take or refrain from taking any particular actions or measures. Rather, they are broad and vague since they flow from the obligations to take all appropriate measures. If negative or positive permissions of this scope are implied by the

[929] Vranes (n 896) 418. See also: Hans Kelsen, *General Theory of Norms* (Michael Hartney (tr) Oxford University Press 1991) 123
[930] Vranes (n 896) 408, 410
[931] ibid 408
[932] ibid 410
[933] Vranes (n 896) 398
[934] ICESCR (n 778) art 2

provision of a treaty, it could therefore present endless compatibility issues in international law. When the presumption against conflict in international law is factored in, the argument is even further weakened: if a country signed on to the agriculture agreement, it did not intend to contravene its current obligations and it also agreed to limit its policy options. Moreover, the very act of submitting to its obligations might be understood as an example of an appropriate measure, in accordance with its right to food-related obligations, especially since there are overlapping objectives.

The second weakness is that the conflict disappears when the norms are read in reverse. In the absence of a prohibition on the importation of certain products, it is essentially permitted under the ICESCR.[935] Likewise, there is an obligation to ensure a level of market access under Article 4, which the ICESCR does not explicitly prohibit. Therefore, if there is a conflict, it is only unilateral and only recognized by some authors. The third problem with this approach is that Vranes' theory is specifically intended for compatibility assessments involving relational norms, or norms that exist vis-à-vis other States.[936] The 'rights-holders' of the Covenant are individuals. If the WTO recognizes the obligations under the Covenant as the *rights* of its Members, his approach, and perhaps a number of other norm conflict theories, would be more appropriate. The Appellate Body recognized the right of Members to impose domestic measures that impede imports of unsafe products and that "this is an autonomous right and *not* an exception."[937] However, it also stated that this right is recognized only to the extent that it complies with its obligations under the WTO agreements.[938]

[935] Vranes (n 896) 408
[936] ibid 407
[937] WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) - Report of the Appellate Body* (n 832) [172]
[938] ibid [173]

5.4.4 Subjectivity and 'Appropriate' Measures

Assuming that the obligations of States to take appropriate measures toward the realization of the right to food include the permission to take a particular measure, there is still the problem of how to establish that the measure, taken in contravention of market access obligations, is appropriate for the realization of the right to food. Although the WTO permits Members to pursue certain non-trade objectives, this does not extend to any and all measures; if a Member were to use its right to food obligations to justify a measure in contravention of its market access provisions, it would need to demonstrate that the measure is the most appropriate one to achieve the stated objectives. This is because the exceptions or flexibilities currently permitted to Members to pursue non-trade objectives (for example Article 5, Annex 5 of GATT Article XX) must be undertaken with adherence to specified criteria, such as being the most appropriate or least trade-restrictive measure. Attaching a requirement that progress toward the intended objective is demonstrable in some way, for example using indicators proposed by the Office of the High Commissioner for Human Rights, could bring the idea of using human rights obligations as justifiable limitations on market access obligations into greater harmony the WTO rules already in place, such as GATT XX.[939] However, since establishing causality between market access concessions and right to food violations is difficult to do, a State taking trade-limiting measures alone is not guaranteed to progress the realization of the right to food.[940] It would therefore need to discern the particular impact a trade-restricting measure is having on, for example, its ability to respect, protect or fulfill some aspect of the right.

The difficulty in pursing market access-limiting measures within the parameters of the current exceptions permitted for non-trade concerns is exemplified in

[939] For example, OHCHR, 'Human Rights Indicators, a Guide to Measurement and Implementation' (2012) HR/PUB/12/5
[940] Alverez (n 749) 13; Downes (n 749) 634; See also, Bezuneh and Yiheyis (n 749) 69

Peru – Additional Duty on Imports of Certain Agricultural Products.[941] Peru implemented, what was found to be, a variable import levy in attempt to reduce the effects of price volatility, which is incompatible with its market access obligations.[942] The levy was argued to facilitate the economic accessibility of food for consumers and protect domestic production (and thereby producers' livelihood) by setting base and ceiling limitations on tariffs.[943] Although the measure undertaken by Peru was not couched in human rights language, it shares commonalities with the right to food in international law. The preamble of Peru's Supreme Decree No. 115-2001-EF lists the objectives of the price range system as follows:

> Whereas national agricultural production is being adversely affected by distortions reflected in uncertainty and instability of domestic prices and national production and due, in particular, to the agricultural policies implemented by the main food producing and exporting countries;
>
> Whereas the Price Range System is a stabilization and protection mechanism that makes it possible to neutralize the fluctuations of international prices and limit the negative effects of the fall in those prices;
>
> Whereas the System in question constitutes an appropriate means of improving the levels of competitiveness of domestic producers, by giving the market clear signals with regard to trends in prices, thereby allowing economic agents to operate efficiently and productively […][944]

The Price Range System "is intended to stabilize the costs of importing the products included in the System by ensuring effective prices both for the producer, by means of a floor price, and for the consumer, through a ceiling price […]."[945] It is clear from this statement from the Ministry of the Economy and Finance cited by the panel report that this policy relates to aspects of the right to food elaborated in General Comment 12, such as the adoption of

[941] WTO, *Peru: Additional Duty on Imports of Certain Agricultural Products – Report of the Panel* (27 November 2014) WT/DS457/R
[942] ibid [8.1(b)], [8.1(d)]
[943] ibid [7.119]
[944] ibid [7.118]
[945] ibid [7.119]

'appropriate economic policies.'[946] The General Comment requires that particular attention be given to the economic accessibility of food for vulnerable populations, which in this context could refer to both poor consumers and producers in Peru.[947]

The objective of a variable import levy - to protect producers and consumers among other things, and whether it was genuinely aimed at fulfilling aspects of the right to food or not - was of no consequence to its legality under Article 4.2. The panel referred to *Chile – Price Band System*, wherein the Appellate Body found variable levies incompatible with a Chile's market access obligations based on their variability coupled with "additional features that undermine the object and purpose of Article 4, [including] a lack of transparency and a lack of predictability in the level of duties that will result from such measures."[948] A major concern presented to the panel was that this would lead to price distortions on the domestic market.[949] Notably however, Peru's import levy system was transparent, made widely available through online publishing, and despite varying the amount of the levy, did not actually exceed the country's bound tariff levels (in fact, it consistently remained well under the bound tariff levels).[950] The compatibility of the measure with Peru's market access obligations turned less on whether the measures were transparent or other factors, and more on whether they varied (which a measure aimed at addressing the effects of volatility might need to do in order to be effective).[951] In this case, the measure deemed appropriate to achieve key aspects of the right to food by Peru was found incompatible with its market access concessions.[952] Although Peru did not invoke its human rights obligations under the ICESCR (or under its constitution) and therefore the panel did not consider whether there was a technical norm conflict.

[946] General Comment 12 (n 898) para 4
[947] ibid para 13
[948] WTO, *Peru: Additional Duty on Imports of Certain Agricultural Products – Report of the Panel* (n 941) [7.289]
[949] ibid [7.193]
[950] ibid [7.213]-[7.239]
[951] ibid [7.330]
[952] ibid [8.1(d)]

Another example of access-limiting measures aimed at achieving aspects of the right to food that have been challenged under the WTO rules are those relating to the safety and acceptability of imported food. The obligation to ensure access to imported products that are considered unsafe (though without scientific evidence that can prove their potential harmfulness), provides additional insight into how obligations under Article 4 can conflict with food safety and participation requirements of the right to food.[953] Market access rules apply to genetically modified foods and hormonally enhanced foods, which could potentially be argued to promote the objectives of the Covenant, as they demonstrate 'efficient' use of resources and improvement. However, when these products enter a market wherein a population considers them unacceptable, the guaranteed access requirements under the WTO contravene the Committee's assertion that foods must be acceptable to a population. It also impinges on the food sovereignty of States, even if the right to refuse technologies, as envisioned by the former Special Rapporteur Ziegler, has not been integrated into the WTO regime.[954] Within the WTO system, it has clearly proven difficult for States to justify limitations on market access for products that are unacceptable to a population.[955]

5.4.5 Exemptions and Permissions

At first glance, the permissions and exceptions granted to all members under Article 5 and Annex 5 as well as those available exclusively to developing countries appear not only technically compatible with the right to food, but supportive of it. However, research by the FAO calls into question the usefulness of these permissions and exemptions in achieving human rights objectives in developing countries.[956] Among other 'special and differential

[953] General Comment 12 (n 898)
[954] UNCHR, 'Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2003/25' (n 842) para 32
[955] WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) – Report of the Panel* (n 821) [124]-[125]
[956] FAO, 'Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries, Country Case Studies' (Volume II, 2004) <http://www.fao.org/docrep/003/x8731e/x8731e00.htm#TopOfPage> accessed 16 February 2016

treatment' permitted to developing countries (such as, *inter alia*, waivers, the generalized system of preferences), they were permitted high bound tariff levels ('ceiling levels'), less stringent tariff reductions, and longer implementation periods.[957] Least developed countries had no tariffication or reduction obligations.[958] In theory, high bound tariff rates offer some flexibility in that countries can resort to a higher than normal rates when necessary.

5.4.5.1 A Closer Look at the Exemptions and Flexibilities for Developing Countries in regard to Market Access Commitments

Case studies conducted by the FAO that look at the food security options available to developing countries as a result of WTO negotiations illustrates that the flexibilities offered have not been sufficient, and in some cases they have compounded the negative effects of market openness.[959] It found that the differences between the bound tariff rates and applied tariff rates in 1999 were significant (with most countries applying rates well below the bound rates), indicating that the developing countries studied were not taking advantage of the flexibility.[960] The FAO found that because all of the countries in the study undertook trade reforms before the Uruguay Round, as many were obligated to undergo tariffication pursuant to structural adjustment programmes and loan conditionalities, they could not actually resort to higher rates permitted by the WTO.[961] Furthermore, for countries with large numbers of impoverished people, applying higher tariff rates on imported products may not be feasible, as

[957] For a concise overview, see: WTO, 'Understanding the WTO: The Agreements, Agriculture: fairer markets for farmers' (n 764)
[958] ibid
[959] FAO, 'Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries, Country Case Studies' (n 956). "In the ten years up to 1994, the trend in the value of food imports was downward for only three of the 14 countries [studied] (Bangladesh, Egypt and India). Measured against these declining trends, their 1995-98 food import bills were between 56 and 216 per cent higher, obviously a negative experience. […] [D]uring the 10-year period 1985-94, […] food imports were outpacing agricultural exports in 12 of the 14 countries (the exceptions being India and Jamaica). Two types of experience could be noted from the standpoint of the past trend. First, both India and Jamaica witnessed a change of direction of the ratio after 1994 - from a negative value to a sharply positive one, obviously a negative outcome. Second, Bangladesh and Senegal, with the sharpest increases relative to 1990-94, saw their situation worsen significantly also relative to the trend."
[960] ibid
[961] ibid

it leads to price increases on its domestic market and impacts the economic accessibility of (imported) food for those living in poverty.[962]

Allowing countries to set ceiling levels instead of tariffication is presumed to offer some advantages to developing countries: because tariffication requires replacing a non-tariff barrier with a tariff equivalent, if the tariff equivalent is calculated to be low (in some cases, it may even be negative), it offers very little protection as a tariff equivalent.[963] However, the FAO determined that "tariffs were often the primary, if not the only, trade instrument open to these countries for stabilizing domestic markets and safeguarding farmers' interests" in the event of price swings and import surges.[964] This suggests that the ability to avoid tariffication offered no real benefit to least developed countries because they had already tariffied their products or they lack the capacity and resources to utilize non-tariff measures permitted to them.[965] Because all of the developing countries in the FAO study had undergone tariffication prior to the Uruguay Round, the non-tariff safety measures that they were permitted to keep under the agriculture agreement are unavailable to them.

5.4.5.2 The Limitations of the Special Safeguard Measures

Article 5 permits all Members to apply additional tariffs to the products listed in its schedule in situations of significant price drops or import surges (according to specified criteria). In theory, this allows States to retain more regulatory autonomy as regards food security within their territory and as such it may be argued to promote the right to food. Special safeguards are only applicable to barriers that have been tariffed pursuant to Article 4.1, registered at the time the agreement came into effect, and where the products concerned were designated with a "SSG" in a schedule.[966] Because many developing countries transitioned their non-tariff barriers into tariffs in accordance structural adjustment

[962] ibid
[963] ibid
[964] ibid
[965] ibid
[966] Agreement on Agriculture (n 794) art 5.1

programmes, their products were not registered during the Uruguay Round negotiations.[967] In fact, only three countries in the FAO study were able to use agricultural safeguards for a limited number of products.[968] The special safeguards are perceived as 'unfair' by developing countries that undertook tariffication for which "no credit was given" in the WTO system.[969] Furthermore, developing countries "tend not to use the additional flexibility that these higher tariffs allow, either to maintain lower food prices for consumers or due to regional agreements reached with adjacent countries."[970] Instead, it is actually developed countries that take most advantage of these exceptions and flexibilities (which could have the effect of stifling access into their markets for developing country products).[971] In addition to the problems of implementing safeguards in practice, their formulation does not adequately address the real life problems encountered by developing countries today because special safeguards are intended to address temporary price drops and import surges, it is ineffective at combatting price increases over time.[972]

5.4.5.3 The Limitations of the Special Treatment Provisions

Annex 5 permits staple crops in a given country 'special treatment.' Members are able to apply tariff-rate quotas for products they designated as important for development and food security during the negotiations. Tariff rate quotas allow Members to apply one (lower) rate of tariffs to a certain amount of imports, and any imports above that level are subject to a higher tariff rate; "[t]he objective of TRQs is to provide a high level of protection to domestic producers but also a minimum level of access to foreign imports."[973] Few developing countries negotiated tariff rate quotas during the drafting process. In fact, least developed countries have the least number of products designated for the application of

[967] See for example: Downes (n 749) 639
[968] Botswana, Morocco and Thailand. See: FAO, 'Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries, Country Case Studies' (n 956)
[969] ibid
[970] Downes (n 749) 685
[971] ibid
[972] De Schutter, 'The World Trade Organization and the Post-Global Food Crisis Agenda' (n 750) 12
[973] ibid 11

tariff rate quotas due to the capacity and resources requirements involved in their calculation and application.[974] Even if developing countries use future negotiations to secure the use of tariff rate quotas on more items, "[i]n practice this may prove difficult since TRQ administration is very complex and can be very costly for some low income developing countries. In addition opening a TRQ may require food insecure countries to make additional concessions."[975] De Schutter argues that the Doha Round negotiations have focused more on further tariff rate quota disciplines and not on how to better facilitate their use by developing countries.[976]

5.4.6 GATT XX AS AN ENTRY POINT FOR THE RIGHT TO FOOD

GATT XX presents another option through which Members may be justified in taking measures to protect the health and lives of individuals within its territory, which otherwise contradict their obligations under the WTO.[977] GATT Article XX is widely considered the most likely entry point for non-trade concerns such as the right to food into the WTO regime.[978] In his report to the UN General Assembly, then Secretary-General wrote:

> [T]he exceptions referred to [in Article XX] call to mind the protection of the right to life, the right to a clean environment, the right to food and to health, the right to self determination over the use of natural resources, the right to development and freedom from slavery to mention a few.[979]

However, the scope and application of Article XX limited and its application is conditional upon the fulfillment of specific criteria. Furthermore, Article XX may only be invoked after a violation of another provision has been established.

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[974] ibid 11-12
[975] ibid 12
[976] ibid
[977] GATT 1994 (n 760) art XX
[978] Lorand Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction The Case of Trade Measures for the Protection of Human Rights' (2002) 36 Journal of World Trade 353, 353
[979] ibid

A Member may defend the use of a measure that is inconsistent with its WTO obligations using Article XX, provided that the measure falls under one of the listed categories, which include measures:

> Necessary to protect public morals;
> Necessary to protect human, animal or plant life or health; […]
> Relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;[…]
> Essential to the acquisition or distribution of products in general or local short supply […][980]

Once a measure has been provisionally justified under one of the listed categories, the State implementing the measure must then prove that it adheres to the requirements of the chapeau of the article.[981] Most notably, it must not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail."[982] The measure must be necessary; necessity requires an assessment of "all the relevant factors, particularly the extent of the contribution to the achievement of a measure's objective and its trade restrictiveness."[983] The measure should be the least trade restrictive option available, and a complainant must prove that there are other possible, less trade restrictive, measures available to achieve the same objectives.[984] *In United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* the Appellate Body established that the requirement to use the least trade distorting measure as opposed to other 'reasonably available' options must be considered in light of the States' resource and capacity constraints:

> An alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure

[980] GATT 1994 (n 760) art XX (a)-(j)
[981] WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R [156] – [157]
[982] GATT 1994 (n 760) art XX
[983] WTO, *Brazil: Measures Affecting Imports of Retreaded Tyres – Report of the Appellate Body* (12 March 2007) WT/DS332/AB/R [156]
[984] ibid

> imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.[985]

The realistic approach dictated by the Appellate Body lowers the threshold for meeting the requirements of the chapeau for developing countries, but it does not guarantee the ability of States to respect, protect and fulfill the right to food as deemed necessary by affected individuals or groups within that society. The most appropriate measure under the ICESCR may not be the measure that is also the least trade restrictive among the reasonably available options, in which case a State choses which measure to take based on the possibility that it will be accepted as a justification under Article XX or other exemptions.

It is notable that non-trade concerns – whether they directly overlap with human rights contained in the international bill of rights or not – must infiltrate the WTO system as a defense, rather than legitimate ends in themselves. The Appellate Body has been careful to note that the rights of Members to implement measures that are necessary to fulfill the objectives set out in Article XX must be balanced with the rights of other Members under the WTO agreement.[986] Maintaining the equilibrium necessarily entails curbing the States regulatory autonomy, so that measures aimed at, *inter alia*, right to food objectives must adhere to conceptions of what is necessary and justifiable according to WTO panels and Appellate Body. Yet there is a lack of clarity on whether the scope of Article XX allows sufficient room for human rights-related concerns into the international trade regime, and more specifically, whether it can be invoked in regard to a breach of the Agreement on Agriculture (or other non-GATT WTO agreement) at all.

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[985] WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services - Report of the Appellate Body* (7 April 2005) WT/DS285/AB [308]. See also: WTO, *Brazil: Measures Affecting Imports of Retreaded Tyres – Report of the Appellate Body* (n 983) [156]; WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products - Report of the Appellate Body* (22 May 2014) WT/DS400/AB/R; WT/DS401/AB/R [5.276]

[986] WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (n 981) [156], [157], [159]

The Agreement on Agriculture explicitly lists the exceptions permitted under GATT that are applicable; Article XX is not included in this list. Scholars are divided on the matter and recent jurisprudence provides no definitive answers to this question. Delving into drafting documents to determine the meaning and scope envisioned by the drafters proves inadequate as well considering that the text of GATT 1994 is taken directly from GATT 1947, at which time the annexed agreements did not exist (and also considering that GATT 1947 was never intended to be a long-term agreement or the basis of further negotiations). Authors Feld and Switzer argue that the Appellate Body's insistence that the multiple WTO agreements should be read harmoniously might suggest that Article XX is broadly applicable across agreements under the WTO, but they ultimately argue this cannot be the case because Article XX refers clearly to 'this' agreement (meaning GATT).[987] There were no changes made to the language of GATT 1947 when it was transposed into the WTO agreement. In fact, they find that to allow the application of Article XX to non-GATT WTO agreements would "do needless violence to the delicate balance between trade facilitation and regulatory autonomy to which WTO members agreed."[988]

Similarly, Coppens points to the Appellate Body's statements in in *China — Raw Materials* to support the idea that Article XX cannot be invoked outside of the GATT framework unless the non-GATT agreement specifically states that it can be invoked.[989] Coppens interprets the Appellate Body's decisions to indicate that Article XX may be used as a defense only where there is a 'textual hook' stating its applicability to the agreement.[990] The panel in the same case was even more clear on the matter: it stated that it would reject the use of GATT XX in regard to an agreement which did not contain such a hook,

[987] Danielle Spiegel Feld and Stephanie Switzer, 'Whither Article XX? Regulatory Autonomy Under Non-GATT Agreements After China—Raw Materials' (2012) 38 The Yale Journal of International Law Online 20
[988] ibid 18
[989] Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures* (Cambridge University Press 2014) 193; WTO, *China: Measures Related to the Exportation of Various raw Materials - Report of the Appellate Body* (30 January 2012) WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R [303]-[306]
[990] ibid 193

however the Appellate Body did not respond to or elaborate on this specific statement and has generally avoided determining the scope of its applicability.[991]

Unless it can be found that Article XX is applicable as a defense against breaches of agreements other than GATT generally, it is perhaps unhelpful to argue in favour of its usefulness as a defense for breaches of the agriculture disciplines. Even less likely is the possibility of Article XX(b) to be used to effect change in another country by, either refusing to import products that are produced under conditions that involve human rights violations (for example forced evictions), or by refusing to import products from countries that commit or condone human rights violations in some way.[992] If this were possible, it would open the door to multiple options for Members to apply pressure to promote adherence to the right to food in other States. The Appellate Body has stated that measures that may be justified under Article XX cannot be used to coerce other Members into adhering to the policy objectives of the implementing Member.[993]

A more recent case explores the use of Article XX as a defense for measures that encompass human rights considerations, and that are incompatible with GATT. It suggests that even if Article XX is found to be applicable to the Agreement on Agriculture, it might prove inadequate to justify human rights-related measures that are incompatible with market access or other agricultural trade obligations. In *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products* it was argued by Canada and Norway that the implementation of the European Union ban on seal products results in violations to the European Union's obligations under GATT

[991] ibid; WTO, *China: Measures Related to the Exportation of Various raw Materials – Report of the Panel* (5 July 2011) WT/DS394/R, WT/DS395/R, WT/DS398/R [7.153]
[992] Bartels (n 978) 357-376
[993] WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (n 981) [161]. The Appellate Body states: "Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO. Section 609, in its application, is, in effect, an economic embargo which requires all other exporting Members, if they wish to exercise their GATT rights, to adopted essentially the same policies […]."

(regarding non-discrimination and most favoured nation treatment), the Agreement on Technical Barriers to Trade, and Agreement on Agriculture (Article 4.2 regarding market access, however the invocation of this article was subject to a finding that the regime was in violation of GATT Article XI:1).[994] The ban involves regulations enacted by the European Parliament and European Commission, which prohibit the importation of seal products with exceptions for some products hunted by indigenous communities (most notably, Inuit) or through marine resource management measures.[995] The seal regime was argued to nullify and impair the expected benefits pursuant to GATT Article XXIII:1(b) for the complaining parties. The European Union invoked GATT XX, which permits exception related to the protection of 'public morals.'[996]

The Appellate Body found that the European Union's ban was provisionally justified under GATT XX.[997] However, it also determined that the exceptions for indigenous community hunts amount to discriminatory treatment and therefore needs to be changed to fully reflect its own object and purpose: to protect public morals in regard to animal welfare.[998] Essentially, it reasoned that if commercial hunts are detrimental to animal welfare, then the hunts performed by Inuit are as well. The European Union's legislation, which attempts to balance European 'public morals' regarding animal welfare on the one hand and Indigenous livelihoods in Canada and Greenland on the other, does not comply with WTO rules precisely because of a discrepancy intended to protect the livelihoods of indigenous peoples.

Although the Appellate Body acknowledged that indigenous rights and animal welfare can be encompassed by the general exceptions relating to 'public morals,' it declined the opportunity to assess the legitimacy of protecting indigenous rights in light of trade obligations – indeed, it declined the

[994] WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products - Report of the Appellate Body* (22 May 2014) WT/DS400/AB/R; WT/DS401/AB/R [1.5]
[995] ibid [1.2]
[996] ibid [5.291]-[5.292]
[997] ibid [5.290]
[998] ibid [5.338]-[5.339]

opportunity to even mention human rights and focused entirely on 'community interests' even though the issue of indigenous peoples' subsistence rights was explicitly raised.[999] The European Union had two choices following the decision: to either ban all seal products, whether hunted by indigenous peoples or not, and thus fail to take into account indigenous peoples' rights, or to remove the ban altogether. While the case may have been a victory for non-trade concerns in the WTO such as animal welfare, it did not advance the position of human rights as a counterbalance to trade rules. The failure to appreciate the nuanced application of the ban suggests that the WTO is unlikely to accept food and agriculture measures aimed at protecting aspects of the right to food domestically or in other countries if they discriminate between products based on concerns over the method of production and livelihoods of producers (even if they represent vulnerable groups).[1000]

In critiquing the ruling, a contributor to the International Centre on Sustainable Trade and Development notes how the Appellate Body rejected the European Union's argument that issues that may not be widely understood by the public can still underpin measures 'to protect public morals' within the scope of GATT XX when they aim to "honour[] broader public policy considerations, especially those deriving from international obligations."[1001]

Parties such as Canada shared Appellate Body's opinion, claiming that "the existence of international agreements that recognize, in general terms, the interests of indigenous people cannot be a determining factor in assessing whether the rationale for the regulatory distinction is justified."[1002] Minority rights were essentially excluded from the concept of 'public morality' in this way. The author further explains:

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[999] ibid [4.6] footnote 817; Marie Wilke 'The litmus test: Non-trade interests and WTO law after Seals' (September 2014) 8 Boires (International Centre for Trade and Sustainable Development) 9, 9 <http://www.ictsd.org/bridges-news/biores/news/the-litmus-test-non-trade-interests-and-wto-law-after-seals> accessed 20 March 2016

[1000] Wilke (n 999) 12

[1001] ibid 13

[1002] WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products - Report of the Appellate Body* (n 994) [2.4]

> As a consequence, no matter how carefully the issue may be looked at, it will be looked at through the lens of the public's moral, often the majority. And nothing could be more inappropriate than subjecting minority rights, especially those of historically disadvantaged groups, to the general public's morals. This is not only a point of semantics. It may have real effects, particularly where cases are tested for their trade restrictive effects under the GATT, because the standard will be assessed on the basis of the established public moral, and not on the basis of international standards.[1003]

In this case the Appellate Body missed an opportunity to create a more harmonious relationship between human rights, specifically indigenous rights, and trade rules and it did not ensure that States are permitted the necessary regulatory autonomy to protect nuanced domestic and extra-territorial human rights objectives. The European Union's ban did not attempt to override trade obligations by including the indigenous rights caveat; rather it attempted to balance them responsibly with their trade obligations and this was rejected.

5.6 Conclusion

The special rapporteurs as well as non-governmental and intergovernmental organizations have produced a large body of research on the real-life effects of market access concessions as well as other trade commitments aimed towards greater liberalization. The extent to which this reality is captured by the analysis of conflict of norms, however, is limited. This reduces the means by which a State party to both agreements might prioritize the right to food over trade norms in situations of incompatibility.

In the absence of the possibility of applying conflict resolutions techniques, it is worth considering how the current market access rules might be better shaped to promote the right to food. For example, if small-scale agricultural producers from developing countries are to benefit from the market access commitments in the WTO there must be improved public spending and investment into agriculture, access to technology, credit services, transportation, and

[1003] Wilke (n 999) 13

infrastructure so that items produced can be distributed in ways that benefit producers and consumers. Additionally, resources must contribute to the protection of so-called 'non-trade' concerns (including human rights, public health, environmental protection) to mitigate the negative effects of export-oriented agriculture on the present and future realization of the right to food.

Promoting the right to food within the parameters of the Agreement on Agriculture requires remedying some of the problems that currently exist in relation to the market access rules. For example developing countries could receive compensation for undergoing tariffication and reducing barriers prior to the WTO. The organization could also impose legal obligations with respect to the *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries*. It could pursue full liberalization, with greater attention to conceptions of fairness that extend beyond market norms and product competition. As Joseph points out, "trade is hardly free in the absence of free competition."[1004] At minimum, the WTO agreements should clearly recognize Members' rights to pursue a range of human rights measures and include right to food obligations as specific exemptions from the current disciplines. Currently, the shortcomings of market access rules do not appear to adhere to the objectives of the Agreement on Agriculture, or the right to food.

[1004] Joseph (n 773) 199

6. DOMESTIC AND EXPORT SUBSIDIES

6.1 INTRODUCTION TO SUBSIDIES IN THE WORLD TRADE REGIME

This chapter continues the assessment of compatibility between the right to food and the Agreement on Agriculture, turning now to the issues of domestic support and export subsidies. Although each kind of support could be examined on its own, domestic support and export subsidies disciplines appear successively in the same chapter for three main reasons. First, both kinds of measures are administered domestically; a domestic support measure "acquires an international dimension as soon as its adverse impact starts to be felt by other countries."[1005] Second, export subsidies are rarely employed without concomitant domestic supports.[1006] Third, export subsidies provisions within the WTO are less complex than other rules and do not necessarily require a separate, extensive discussion. Here, the main export subsidy provisions relate to aid, a topic that is also discussed in regard to domestic subsidies.

For the purpose of this chapter, 'domestic supports' and 'domestic subsidies' will be used interchangeably. The term 'domestic support' appeared for the first time in an international treaty under the Agreement on Agriculture.[1007] It is often considered synonymous with 'domestic subsidies' although this is not evident from the text of the agreement, which neither defines nor employs the term, domestic subsidy.[1008] While there is no concrete, observable difference between supports and subsidies in the agreement, the use of the former term ensures that the relevant provisions (Articles 1, 3, 6, and 7) are applicable to a range of government policies and measures that support agriculture production for domestic consumption, but may not technically fall under the definition of

[1005] Melaku Geboye Desta, *The Law of International Trade in Agricultural Products* (Kluwer Law International 2002) 313

[1006] Although the reverse is not necessarily true, domestic subsidies still effect competition with international products in a given domestic market and therefore both impact the competitiveness of products.

[1007] Desta (n 1005) 305, 306

[1008] ibid "[T]he concept of "domestic support" is in no significant way different from "domestic subsidies." In fact, the term 'domestic subsidy' does not appear anywhere in GATT/WTO texts except for in the 1955 interpretive understanding on the doctrine of reasonable expectations.

subsidy.[1009] Moreover, all domestic support measures considered by the adjudicatory bodies to date can also be regarded as subsidies.[1010] Salient features of subsidization include:

> A guaranteed level of income for producers;
>
> The use of government price-setting (higher prices than on the world market) or direct payments to producers ('budgetary transfers');
>
> They often result in over-production and surplus of agricultural products, and;
>
> They tend to lead to border measures and/or export subsidies (aimed at disposing of surplus product).[1011]

In essence, domestic support measures typically aim to protect producers, to encourage a the production of goods, or to promote the access to the goods by consumers, much in line with the plain language meaning of a subsidy.

The Agreement on Agriculture defines export subsidies simply as those "contingent upon export performance."[1012] Article 9.1 lists measures that fall under the category of export subsidy and to which reduction commitments have been undertaken.[1013] The enumeration sheds light on the meaning of the term, but it is not an exhaustive list of all measure that might be considered export subsidies; other unlisted measures may also be export subsidies, but fall outside of the scope of Article 9.1.[1014] A more satisfactory definition of export subsidies can be found in the Agreement on Subsidies and Countervailing Measures Article 1.1.[1015] It provides a lengthy definition that details export

[1009] ibid 385
[1010] ibid 385
[1011] ibid 310
[1012] Agreement on Agriculture (15 April 1994) 1867 UNTS 410 art 1(e)
[1013] ibid art 9.1
[1014] WTO, 'Agriculture: Explanation, Export competition/subsidies' <https://www.wto.org/english/tratop_e/agric_e/ag_intro04_export_e.htm> accessed 15 March 2016
[1015] Agreement on Subsidies and Countervailing Measures (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 14
Article 1.1 "For the purpose of this Agreement, a subsidy shall be deemed to exist if:
(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

subsidies as those in which "a benefit is thereby conferred" on the recipient.[1016] The panel and subsequently the Appellate Body have elaborated the term 'benefit' by explaining that an export subsidy for the purpose of the Agreement on Subsidies and Countervailing Measures "confer[s] a benefit […] if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market."[1017] Because all annexed agreements are a single undertaking, and all are assumed to be coherent, the definition of export subsidies in the subsidies agreement informs the meaning of the term under the agriculture agreement. Yet where discrepancies between the Agreement on Agriculture and another WTO agreement arise in regard to prohibitions on agriculture subsidies, the provisions of the former prevail "only to the extent that [it] contains an exception."[1018]

The Agreement on Agriculture operates as *lex specialis* in relation to the subsidies agreement in some circumstances, most notably in regard to overriding the clear prohibitions on agriculture subsidies in the Agreement on Subsidies and Countervailing Measures.[1019] However, it should be noted that

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(i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)1;
(iii) a government provides goods or services other than general infrastructure, or purchases goods;
(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and (b) a benefit is thereby conferred."

[1016] ibid art 1.1(b)

[1017] WTO, *Canada: Measures Affecting the Export of Civilian Aircraft – Report of the Appellate Body* (2 August 1999) WT/DS70/AB/R [149], [161]

[1018] Agreement on Agriculture (n 1012) art 21.1
Article 21.1 reads: "[The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement." See also: WTO, *United States: Subsidies on Upland Cotton – Report of the Appellate Body* (3 March 2005), WT/DS267/AB/R [530]-[533]; Agreement on Subsidies and Countervailing Measures (n 1015) art 3

[1019] WTO, *United States: Subsidies on Upland Cotton – Report of the Appellate Body* (n 1018) [532] "Article 21.1 could apply in the three situations described by the Panel, namely: …where, for example, the domestic support provisions of the Agreement on Agriculture would prevail in the event that an explicit carve-out or exemption from the disciplines in Article 3.1(b) of the SCM Agreement existed in the text of the Agreement on Agriculture. Another situation would be where it would be impossible for a Member to comply with its domestic support obligations under the Agreement on Agriculture and the Article 3.1(b) prohibition simultaneously. Another situation might be where there is an explicit authorization in the text

although the former exempts certain measures from prohibition under the latter, it does not shield them from challenge; such measures are still counterviable or actionable under the Agreement on Subsidies and Countervailing Measures. A common feature of subsidized products is that they appear on markets at artificially low prices. In the case of domestic subsidies, this distortion appears on a domestic market, and renders imported products less competitive. Export subsidies distort prices in international markets. In both cases, subsidies are disadvantageous to comparable unsubsidized products and their producers.

6.2 Agricultural Subsidies and the Right to Food

It is "in the field of subsidies" according to Desta, that "the standing ideological divergence over the role of the state in the economy reappears in its most refined and challenging form."[1020] The ideological divide over economic systems and the role of governments therein has also impressed upon the development of the right to food in international law. In fact, Desta's comment might equally be made in relation to the field of socio-economic rights considering the resistance to various formulations of the right to food during the drafting of the Universal Declaration of Human Rights and the Covenant, which conflate of the imposition of socio-economic rights obligations with 'an injunction' by the UN for member States to adopt communist regimes.[1021] Still today, State planning policies and other interventions are overwhelmingly perceived as distortionary; they are frequently contrasted with ideas of 'freedom' and the 'natural' market forces, whereas neoliberalism is presented as the solution.[1022] The prevailing opinion in international relations is that the right to food, often reduced to the concept of food security, is best achieved not through self-sufficiency as was espoused by the FAO at one time, but through

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of the Agreement on Agriculture that would authorize a measure that, in the absence of such an express authorization, would be prohibited by Article 3.1(b) of the SCM Agreement."

[1020] Desta (1005) 312

[1021] Philip Alston and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly 156, 181

[1022] Anne Orford, 'Food Security, Free Trade, and the Battle for the State' (2015) 11 Journal of International Law and International Relations 1, 17-19

the adoption of free market principles.[1023] Poverty alleviation through economic growth, structural adjustment, and increasing purchasing power in global market were touted as the correct approaches.[1024] With international financial institutions insisting on export-oriented agrarian reform as a condition for lending, some developing countries had little choice but to adhere to this version of development in attempt to improve welfare and meet other objectives related to socio-economic rights.[1025] The WTO has increased this pressure, and insists that food security is "to be achieved in principle not by retreating from the programme of trade liberalization in agriculture, but by supporting countries through the reform programme."[1026] Notwithstanding the rhetoric, developed countries continue to subsidize their agricultural industries over $300 billion USD annually.[1027]

Given the wide margin of discretion offered to States through Article 2 of the Covenant, and the assertion by the Committee that no particular political or economic system is required to ensure the fulfillment of the rights set out in the Covenant, neither economic ideology is necessarily the correct one.[1028] Stated in the simplest terms, the role of the State in socio-economic rights fulfillment is that of the duty-bearer, yet whether or not that means that the State should intervene in the economy to correct market failures, and to what extent, is a question that scholars and States continue to debate in relation to socio-economic rights obligations. Subsidies are one type of such interventions that a State might undertake to contribute to the objectives of right to food

[1023] ibid 6
[1024] ibid
[1025] ibid
[1026] ibid; UNHRC, 'Report of the Special Rapporteur on the right to food, Olivier De Schutter, Mission to the World Trade Organization' (4 February 2009) A/HRC/10/5/Add.2 para 14 ('Mission to the World Trade Organization'); WTO, 'Lamy on the rise in food prices: "Trade is part of the answer, not part of the problem"' (22 January 2011) <http://www.wto.org/english/news_e/sppl_e/sppl183_e.htm> accessed 20 March 2016; Orford (n 1018) 13
[1027] For example, the World Bank reports that OECD countries provided 336 billion USD in agricultural subsidies in 2010. World Bank, *2012 World Development Indicators* (International Bank for Reconstruction and Development/The World Bank 2012) 33. See also: OHCHR, 'Background Note: Analysis of the World Food Crisis by the U.N. Special Rapporteur on the Right to Food, Olivier De Shutter' (2 May 2008) 13 ('Background Note')
[1028] CESCR, General Comment 3, The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant) (14 December 1990) UN Doc. E/1991/23, para 3 ('General Comment 3')

domestically or abroad; however, once the State binds itself to the WTO's rules, the pool of possible support measures it can adopt to achieve its obligations is reduced. Questions over how the provision, re-allocation, or removal of subsidies relate to the right to food are explored in this section.

6.2.1 Rationale for the Provision of Support to Agriculture in Light of the Right to Food

Governments subsidize industries or producers in order to encourage industrial development and innovation, to redistribute wealth, to promote environmental conservation, and to accommodate the multifunctionality of industries (such as agriculture).[1029] This last point is most relevant to the right to food; it suggests that agriculture is more than the production of a commodity; it encompasses environmental, nutritional, labour, and other socio-economic considerations in the production and distribution of agricultural goods. More specifically, the three reasons most often cited by States at the WTO for providing agricultural subsidies are "to make sure that enough food is produced to meet the country's needs; to shield farmers from the effects of the weather and swings in world prices; [and] to preserve rural society."[1030]

6.2.1.1 To Improve Production in Relation to Need

The first reason, to encourage production in relation to need, is clearly encompassed by ICESCR Article 11.2(a), (b).[1031] When a subsidy supports production, particular levels of production, the production of certain types of food, or the cost of food to consumers, it can facilitate the availability and accessibility of food, including food that is culturally meaningful and nutritious, in conformity with key elements of the right advocated by the Committee.[1032] It

[1029] WTO, *World Trade Report 2006* (World Trade Organization 2006) 65
[1030] WTO, 'Understanding the WTO: The Agreements, Agriculture: fairer markets for farmers' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm3_e.htm> accessed 15 March 2016
[1031] International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1923 1976) UNTS 993 (ICESCR) art 11.2(a)
[1032] CESCR, General Comment 12, Right to adequate food (1999) UN Doc. E/C.12/1999/5 paras 11-13 ('General Comment 12')

might do this indirectly through maximizing the efficiency of agricultural production; subsidization can enable producers to acquire the necessary inputs such as fertilizers, pesticides, irrigation or other kinds of technology, and equipment, which in turn can help them to generate higher yields from important crops. But in addition to the productivity of the land, 'improving production' in this section includes meeting the variety of needs of individuals.

As highlighted by the events in 2008, trade liberalization leaves markets vulnerable to a multitude of external factors, particularly when countries are unable to use price stabilization policies or where they do not have sufficient stockholdings.[1033] The primary indication of the crisis was the sharp increase in the cost of foods; "overall, the price of food commodities on the international markets rose by 83%" in the three years leading up to it.[1034] The increases were not felt equally across the globe; in some areas the prices of staple goods is reported to have increased by as much as 200 per cent.[1035] For those living on the cusp of poverty or already struggling to meet their needs, the increases push nutritious foods out of reach.[1036] The ensuing 'food riots' that occurred across 40 countries, some of which experienced violence as a result and two of which required the use of armed forces to guard food stocks, drove 100 million *more* people into food insecurity.[1037] Food imports are expected to "more than double between 2000 and 2030 under a business-as-usual scenario" for net-food importing developing countries, many of which are in Africa, and countries'

[1033] The policy constraints faced by governments in response to the food crises is discussed further in Section 6.5.2. Factors include weather-related events, livestock feed shortages, weak US dollar, low food stocks (in relation to increased demand, which stems from the nutrition transition, urbanization, development and population growth), and demand for biofuels. Wayne Jones and Armelle Elasri, 'Rising food prices: causes, consequences and policy responses' in Baris Karapinar and Christian Häberli (eds) *Food Crises and the WTO; World Trade Forum* (Cambridge University Press 2010) 109-116; OHCHR, 'Background Note' (n 1027) 6-7. See also: United Nations High Level Task Force on the Global Food Crisis, Updated Framework for Comprehensive Action (United Nations 2010) < http://un-foodsecurity.org/sites/default/files/UCFA_English.pdf> accessed 30 March 2016

[1034] OHCHR, 'Background Note' (n 1027) 6

[1035] United Nations Environmental Programme, 'The Environmental Food Crisis – The Environment's Role in Averting Future Food Crises' (C Nellemann, M MacDevette, T Manders, B Eickhout, B Svihus, A.G. Prins, B.P. Kaltenborn eds, UNEP 2009) 6

[1036] ibid 7; Baris Karapinar, 'Introduction: Food crises and the WTO' in Baris Karapinar and Christian Häberli (eds) *Food Crises and the WTO; World Trade Forum* (Cambridge University Press 2010) 4-5

[1037] OHCHR, 'Background Note' (n 1027) 1, 7, 9

food bills will also increase, meaning that many may not be able to feed their populations.[1038]

Subsidies can be used to produce and conserve food through stockholding programmes for the purpose of domestic aid in times of crises, food shortages or to address chronic hunger. This corresponds to the obligation on States to fulfill the right to food in times of acute hunger or starvation.[1039] Governments might purchase foodstuffs from local producers at supported prices for stockholding programmes, a transaction which has the additional effect of ensuring the livelihood of producers and the continuation of local production.[1040] Consumer-focused redistribution programmes and others that aim to lower the cost of food (price supports) for consumers thereby support the economic accessibility of food and fall under the category of subsidies as well. Programmes that aim to transfer purchasing power to poor members of society can be a more efficient use of resources and produce better results at the household level than other policies; studies show that "[s]pending 'x' euros on food subsidies for low-income households increases the welfare of recipients less than a cash gift of the same amount."[1041]

Export subsidies can promote the provision of food aid outside of the subsidizing country as well. The danger is that subsidized food can offset local production and contribute to a cycle of dependency on subsidized imports and aid. Because food aid is more effective when purchased from the country or region in which the crisis is occurring, food aid delivered with the help of developed country export subsidies is not typically advocated.[1042] Subsidized

[1038] ibid 7
[1039] General Comment 12 (n 1032) paras 15, 36
[1040] WTO, Committee on Agriculture Special Session, 'G-33 Proposal on Some Elements of TN/AG/W/4/REV.4 For Early Agreement to Address Food Security Issues' (13 November 2012) JOB/AG/22 para 6(ii)
[1041] WTO, *World Trade Report 2006* (n 1029) 90
[1042] Food Assistance Convention (adopted 25 April 2012, entered into force 1 January 2013) I-50320 ('Food Assistance Convention'); Christian Häberli, 'Food Security and the WTO Rules' in Baris Karapinar and Christian Häberli (eds) *Food Crises and the WTO; World Trade Forum* (Cambridge University Press 2010) 306

aid is classified as an export subsidy if it disrupts commercial supplies.[1043] Still, the organization admits, "the proper distinction between bona fide food aid and subsidized in-kind food transfers for the purpose of surplus disposal has been a source of contention."[1044]

6.2.1.2 To Protect Producer Livelihood

The second reason cited by States relates to the protection of livelihoods. This is closely linked with ICESCR Article 11.1 in which individuals are guaranteed the right to an "adequate standard of living."[1045] Subsidies that supplement farm-income can help shield producers from the effects of price volatility when prices plummet, and price supports and controls can support consumers when prices rise. It should be noted that, because producers are of course consumers as well – indeed most are net consumers - the producer/consumer dichotomy is not entirely accurate, but is used here to differentiate between different types of subsidies and their relationship to specific aspects of the right to food.[1046] Perhaps counter-intuitively then, high food prices do not translate into higher incomes for most of the world's food producers who are small-scale or subsistence farmers, either because they still rely mostly in purchased food, do not have the resources to increase production to benefit form the increases, or they are landless workers with fixed (typically low) wages.[1047]

Low food prices can be a side effect of subsidization that is tied to production; overproduction decreases demand, which drives the price of an item down. However, since small-scale producers (particularly landless workers) are rarely the recipients of subsidies, they are not enjoying the benefit of supplemented income, but in order to compete with the cheaper products they must drop their prices too. Overproduction leading to price drops can also result from what is called, 'the cobweb effect,' which reflects the 'inherent volatility' of

[1043] WTO, *World Trade Report 2006* (n 1029) xxxiii
[1044] ibid
[1045] ICESCR (n 1031) art 11
[1046] Häberli (n 1042) 301
[1047] ibid

agricultural markets.[1048] The cobweb effect explains how producers select the type of crop to plant months in advance of harvest time, typically opting for crops that will receive the high prices.[1049] If all producers select the same or similar crops, there will be an overabundance of those crops on international markets, which in turn decreases the value.[1050] Speculation in international financial markets on primary commodities also plays an important role in price volatility. However, it is not the focus of this research except to the extent that subsidies might address the problems stemming from speculation: Effective subsidization might encourage the production of staple crops or crops necessary for the nutrition of the population rather than crops that are simply (expected to be) most profitable.

Another, perhaps less commonly understood, aspect of subsidization is the agriculture-energy nexus. Agricultural subsidies help to offset high oil prices, which are also volatile and influenced by availability, conflict, or the reduction or provision subsidies. Fossil fuels are important to agriculture not only for transportation but also for growing crops, as pesticides and fertilizers are produced from the byproduct of fossil fuel processing and are used to replace nitrogen in soil - an essential element of productive soil.[1051] When the cost of oil increases, the cost of agricultural production rises with it. High oil prices translate into a greater demand for biofuels as well, and when the demand for biofuels increases, productive land is diverted from food crops to biofuel crops (or else forested land is deforested for their production).[1052] In fact, fluctuations in the energy sector and an increased demand for biofuels are listed among the primary causes of the food crisis of 2008.[1053] For poor producers these fluctuations can diminish their production capacity by limiting the inputs they

[1048] Sarah Joseph, *Blame it on the WTO?* (Oxford University Press 2011) 196
[1049] ibid
[1050] ibid
[1051] OHCHR, 'Background Note' (n 1027) 9; UNHRC, 'Report of the Special Rapporteur on the right to food, Olivier De Schutter, Final report: The transformative potential of the right to food' (24 January 2014) A/HRC/25/57 para 11, 19 ('The transformative potential of the right to food')
[1052] ibid
[1053] OHCHR, 'Background Note' (n 1027) 9; Jones and Elasri (n 1033) 115

are able to afford and reducing their ability to transport goods in the absence of market stabilization interventions.

Some authors posit that a reduction in supports may spur the relocation of production from developed to developing countries, as the cost of land and production, including labour, is lower.[1054] In theory, this promotes investment, development and income generation in developing countries.[1055] Yet increasingly, relocation occurs in the form of large-scale land acquisitions in developing countries (where raw materials, cheap labour and lax environmental standards can be exploited).[1056] Large-scale land acquisitions may also involve the forced eviction of individuals from land that they have historically used.[1057] This transition can hardly be argued as a benefit of subsidy reduction or removal unless developing country producers have access to the inputs and resources necessary to strengthen their role in production chains, to transition from raw materials/primary goods to value-added products, and to protect the environment, especially soil integrity, in order to remain competitive.

6.2.1.3 To Preserve of Rural Society and the Environment

The issue of environmental preservation and the conservation of natural resources in rural areas are implicated in the last reason for providing domestic supports listed by States: to preserve rural society. Subsidies can be instrumental in encouraging environmental stewardship on or around productive land, enabling the use of more sustainable techniques and materials, and mitigating the 'negative environmental externalities' associated with unhindered production of environmentally damaging goods.[1058] Indeed the

[1054] Kym Anderson, 'Agriculture Trade Liberalisation and the Environment: A Global Perspective' in Kym Anderson and Tim Josling (eds) *The WTO and Agriculture* (Vol. 2, Edward Elgar Publishing 2005) 355
[1055] UNHRC, 'Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge' (28 December 2009) A/HRC/13/33/Add.2 para 13
[1056] ibid para 11
[1057] ibid para 24
[1058] WTO, *World Trade Report 2006* (n 1029) 98 "[T]here is a negative externality any time a producer or a consumer does not have to bear the full cost of his actions, so that he over-invests in the polluting activity or over-consumes relative to the socially optimal level. For example, a company whose

number of environment-focused agricultural subsidies notified to the WTO in accordance with the Agreement on Agriculture, has increased significantly from the late 1990s.[1059] Today, it is commonly acknowledged that "economic incentives […] must meet sustainable development objectives, defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their needs.'"[1060] Supports that incentivize the preservation of ecosystems and biodiversity in and around farmland, engage in farming techniques that maintain soil integrity, and use water and other resources more efficiently are in line with Committee's recommendation to ensure that food is produced in a way that is sustainable for present and future generations.[1061]

Relatedly, supports can mitigate the effects of undesirable climate or natural disasters, which are feared to be occurring with greater severity and frequency.[1062] Transitions to more sustainable practices are crucial to achieve this objective, as the intensification of agriculture and changing consumer demand (for example, for more meat) has had adverse effects on the environment and, if left unchanged, is expected to result in a loss of productivity.[1063] Furthermore, without these kinds of supports, agricultural work becomes less lucrative and more people leave rural areas for urban centres.

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production causes air pollution through gas emissions, but is not made to pay for this, will continue to produce as long as the incremental revenue the firm will earn from selling its product exceeds its incremental cost of production."

[1059] ibid

[1060] ibid

[1061] General Comment 12 (n 1032) para 7

[1062] UNEP (n 1035) 44

[1063] UNHRC, 'The transformative potential of the right to food' (n 1051) para 7, 9

6.2.1.4 To Encourage Development: R&D, Innovation, and New Industries

Certain kinds of supports help existing industries to remain competitive and assist emerging industries to enter international markets. Domestic supports can encourage research and development and incentivize innovation within and across industries in a country.[1064] Supports for emerging industries are justified by the 'infant industry argument:'

> [I]n the presence of more developed countries, less developed countries cannot develop new industries without state intervention. It has been argued that many of today's industrialized countries successfully applied infant industry promotion policies in early stages of their development."[1065]

Industries in developing countries can benefit from the same kinds of supports that industries in developed countries have historically enjoyed. Supports to this end are often linked to broader development policies.[1066]

Another argument that has been put forth with respect to the relationship between agricultural export subsidies and development is rooted in the theory of comparative advantage.[1067] The argument in relation to export subsidies and food security is that consumers can benefit from cheaper foreign-produced subsidized goods. Herrmann suggests that in these cases, the "import[] of subsidized goods essentially amounts to a transfer of income from the country that subsidizes the product to the country that imports the subsidized product."[1068] He continues, subsidized imports that "lead to a contraction of the agricultural sector, may allow for scarce resources to be employed in non-agricultural sectors and thus support a more rapid structural transformation of

[1064] WTO, *World Trade Report 2006* (n 1029) 66-88
[1065] ibid 66
[1066] ibid
[1067] UNHRC, 'Mission to the World Trade Organization' (n 1026) para 20
[1068] Michael Herrmann, 'Agricultural Support Measures in Developed Countries and Food Insecurity in Developing Countries' in Basudeb Guha-Khasnobis, Shabd S. Acharya, and Benjamin Davis (eds) *Food Security: Indicators, Measurement, and the Impact of Trade Openness* (UNU-WIDER Studies in Development Economics, Oxford University Press 2007) 220

an economy. Therefore they can be a good thing for developing countries."[1069] He suggests that agricultural export subsidies benefit not only consumers in the importing country, but also the country's overall development objectives if the theory of comparative advantage is adhered to and the benefits are transferred effectively. Conversely, a reduction in agricultural subsidies often leads to increases in world food prices, which makes some products inaccessible to individuals living in poverty and raises food bills for countries overall, particularly in net food importing countries.[1070] A further development consequence is that resources must then be directed to ensuring survival of people, and might be diverted from other development-related projects.

6.2.1.5 Political and Security Considerations

As previously noted, the insistence of States on maintaining subsides on key products can be influenced by lobby groups who are the recipient of such supports.[1071] The World Trade Report finds that politically motivated subsidization occurs when "subsidies that are provided to a specific industry are not intended to correct a market failure, but to improve the economic standing of the special interest group, who in turn will reward the incumbent."[1072] This kind of subsidization is more insidious from a trade liberalization perspective (and perhaps also from a right to food perspective because highly organized producers are able to lobby more effectively than large numbers of landless producers for much-needed resources).

Agricultural subsidies may also be a legitimate response to human and national security concerns. Increased dependency on imports can render a State vulnerable to external political pressures, and lead to a loss of political power. Former United States President Bush expressed this concern in 2001, stating:

[1069] ibid
[1070] OHCHR, 'Background Note' (n 1027) 13
[1071] David Orden, 'WTO Disciplines and the 2008 US Farm Bill' in Baris Karapinar and Christian Häberli (eds) *Food Crises and the WTO; World Trade Forum* (Cambridge University Press 2010) 231-2, 236. See also: Ronald Steenblik, *A Subsidy Primer* (International Institute for Sustainable Development n.d.) 17
[1072] WTO, *World Trade Report 2006* (n 1029) 64

> It's important for our nation to build - to grow foodstuffs, to feed our people. Can you imagine a country that was unable to grow enough food to feed the people? It would be a nation subject to international pressure. It would be a nation at risk. And so when we're talking about American agriculture, we're really talking about a national security issue.[1073]

Members have also argued the importance of subsidies to simply maintain the capacity to grow food so that security issues do not necessarily threaten food security.[1074] Specifically, countries like Norway and Japan have argued the need to maintain levels of production so that in the event of disruptions in production and distribution due to conflict or environmental disaster, food can be produced domestically.[1075] Production needs to be ongoing due to the fact that the knowledge of how to produce food needs to be maintained and also because the production of food is not instantaneous.[1076] If reliance on imports renders States vulnerable to international pressures, it is most important that net food importing developing countries are able to subsidize their industries to curb dependency on imports.

6.2.2 Rationale for Reducing or Ending Agricultural Subsidies in Light of the Right to Food

Reducing the use of agricultural subsidies is a central tenet of trade liberalization and has been among the key targets of multilateral trade negotiations since the inception of GATT. According to Anderson, the introduction of domestic subsidy disciplines under the Agreement on Agriculture were necessary because trade protectionism became "extremely distortionary by the 1980s […] and there was every indication that agricultural protection growth would continue to spread, cancer-like, unless explicitly

[1073] UNCHR, 'Report submitted by the Special Rapporteur on the right to food, Jean Ziegler, in accordance with Commission on Human Rights resolution 2003/25' (9 February 2004) E/CN.4/2004/10 para 16
[1074] WTO, *World Trade Report 2006* (n 1029) 104
[1075] ibid
[1076] ibid

checked."[1077] Export subsidies are particularly problematic and are often held 'primarily responsible' for distortions in international trade in agriculture.[1078]

6.2.2.1 To Improve Market Function: Making Markets 'Fairer'

From a trade liberalization perspective, the use of subsidies is 'unfair' because they interfere with the 'natural' comparative advantage of developing counties.[1079] Throughout the early decades of GATT, majority of subsidies were provided by developed countries to primary agricultural products, particularly cereals, dairy products, meat, sugar and vegetable oil/seeds, cotton, eggs, potatoes, and tobacco.[1080] In addition to tropical fruits, cacao, coffee beans, and other raw products, the abovementioned products also happen to be of great interest to developing countries (in terms of export potential).[1081] When these products are subsidized in developed countries, the developing countries that may have a comparative advantage are unable to realize potential gains therefrom. Today developed countries continue to be the heaviest users of subsidies, despite commitments to reduce them under the WTO.[1082] Former Special Rapporteur De Schutter finds that current conditions have "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 its sensitivity to weather-related events and the low elasticity of both supply and demand."[1083] For example, a number of African countries that were historically net food-exporting countries and became net food-importing countries in the 1980s still cannot realize their

[1077] Anderson (n 1054) 99
[1078] Desta (n 1005) 207; Olivier De Schutter, *International Trade in Agriculture and the Right to Food*, No. 46 Dialogue on Globalization (Friedrich-Ebert-Stiftung November 2009) 22; UNHRC, 'Mission to the World Trade Organization' (n 1026) para 22
[1079] Lorand Bartels, 'Trade and Human Rights' in Daniel Bethlehem, Isabelle Van Damme, Donald McRae, and Rodney Neufeld (eds) *The Oxford Handbook of International Trade Law* (Oxford University Press 2009) 574; Orford (n 1022) 17-19
[1080] Desta (n 1005) 307-308
[1081] ibid
[1082] At the end of the implementation period, in 2005, "[d]eveloped countries subsidies to their agricultural producers were estimated […] to amount to 350 billion USD a year. This in turn, according to UNDP estimates, represents a loss of 34 billion USD per year for developing countries […]." OHCHR, 'Background Note' (n 1027) 13. See also: World Bank (n 1027) 33
[1083] UNHRC, 'Mission to the World Trade Organization' (n 1026) para 21

comparative advantage because of the continued use of subsidies by developed countries combined with the lack of investment in agriculture (which is, in part dissuaded by developed country subsidies).[1084] It is presumed that decreasing developed country subsidies would be most advantageous to certain developing countries, namely the Cairns Group, as they possess "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."[1085]

Moreover, large-scale agricultural operations are commonly the recipients of subsidies, as opposed to small-scale producers.[1086] Large-scale farming operations that produce subsidized monoculture crops may contribute little to the nutrition of a population, as such crops are often used as ingredients in highly processed foods, as feed for cattle, or for biofuel – products primarily consumed by wealthy consumers.[1087] The former Special Rapporteur finds that "[t]he farming sector has become highly dependent on agricultural subsidies that have favoured the production of commodities for the livestock or food processing industry – corn, soybean and wheat, in particular – rather than food […]."[1088] With these considerations in mind, the provision of subsidies today do not appear to serve a redistributive function or to maximize benefits to rural society, as country justifications for their use would suggest.[1089]

Research conducted by Vandenhole illustrates the detrimental effect of subsidies provided by developed countries on developing country producers.[1090] He assesses how the European beet sugar subsidies regime promotes the overproduction of beet sugar, which is then exported to developing countries in

[1084] ibid
[1085] Cairns group includes: Argentina, Brazil, Chile, Colombia, Costa Rica, Indonesia, Malaysia, Philippines, South Africa, Thailand and Uruguay. OHCHR, 'Background Note' (n 1027) 13
[1086] UNHRC, 'The transformative potential of the right to food' (n 1051) para 32
[1087] ibid para 23, 33; UNHRC, 'Mission to the World Trade Organization' (n 1026) para 8
[1088] UNHRC, 'The transformative potential of the right to food' (1051) para 33
[1089] WTO, *World Trade Report 2006* (n 1029) 88-90, 105; WTO, 'Understanding the WTO: The Agreements, Agriculture: fairer markets for farmers' (n 1026)
[1090] Wouter Vandenhole, 'Third State Obligations under the ICESCR: A Case Study of EU Sugar Policy' (2007) 76 Nordic Journal of International Law

the Southern hemisphere at prices below the cost of production.[1091] The European Union is the second largest exporter of sugar despite the fact that it does not have a comparative advantage in its production.[1092] He argues that the importation of low priced sugar detrimentally impacts the potential for local producers in the importing countries to make a living off of cane sugar.[1093] This is especially unfair considering many of the importing developing countries possess a comparative advantage in cane sugar production.[1094] Vandenhole argues that this interferes with the enjoyment of the rights of producers and would-be producers in the importing countries.[1095] He further asserts that since States have obligations toward individuals outside of their borders, the European sugar exporting States are in violation of their extraterritorial human rights obligations.[1096]

Vandenhole notes that some positive reforms to Europe's Common Agricultural Policy have been put in place since 2006, after the European Community's sugar regime was successfully challenged by Brazil at the WTO in *European Communities — Export Subsidies on Sugar*.[1097] In this case, the panel found that the European Community had exceeded its export subsidy obligations, as determined by its Scheduled commitments and under *inter alia* Articles 3.3, 8, and 9.1 of the Agreement on Agriculture.[1098] However, according to Vandenhole, the reforms have done little to improve the human rights situation arising as a result of the sugar subsidy regime, as it remains highly distortive and damaging.[1099]

[1091] ibid 73
[1092] ibid 76
[1093] ibid 73, 100
[1094] ibid 80
[1095] ibid 92
[1096] ibid 91
[1097] ibid 76; WTO, *EC: Export Subsidies on Sugar – Report of the Panel* (15 October 2004) WT/DS266/R
[1098] WTO, *EC: Export Subsidies on Sugar – Report of the Panel* (n 1097) [7.340] [8.3]
[1099] Vandenhole (n 1090) 76

6.2.2.2 To Promote the Efficient Use of Resources in Relation to Need

The overproduction encouraged by subsidy regimes in developed countries also places and undue burden on the earth's resources for products that are not needed, do not reach those in need, or that are used to produce more expensive goods that remain inaccessible to many (such as feed that is grown for cattle).[1100] Subsidies can encourage unsustainable production techniques and practices by the recipient farmers; "for example, irrigation subsidies often encourage crops that are farmed intensively, which in turn leads to higher levels of fertilizer use than would occur otherwise" (because the soil is consistently depleted of the same nutrients).[1101] Moreover, nitrogen fertilizers contribute greenhouse gas emissions (methane and nitrous oxide).[1102] This type of farming requires more pesticides because one type of plant is concentrated in a relatively small area of land, which invites pests that have an affinity for the crop variety.[1103] In fact, studies have shown a "very high correlation between producer price incentives and the use of farm pesticides."[1104]

6.2.2.3 Capacity Needed for the Effective Use of Subsidies

For subsidy interventions to be effective, they require the collection of a significant amount of information about market functioning and failure, including extraneous factors that might effect production.[1105] Developing countries may not have the resources to conduct the research needed to make the most informed policy decisions regarding resource allocation in the form of subsidies. If resources are limited, subsidies might be offered on an *ad hoc* basis, in response to a particular market failure. Although these kinds of

[1100] "Over one third of the world's cereals are already being used as animal feed, and if current trends continue, this will rise to 50 per cent by 2050. Demand for meat diverts food away from poor people who are unable to afford anything but cereals." UNHRC, 'The transformative potential of the right to food' (n 1051) paras 8, 32
[1101] Steenblik (n 1071) 16
[1102] See also: UNHRC, 'Mission to the World Trade Organization' (n 1026) para 31
[1103] ibid
[1104] Anderson (n 1054) 361
[1105] WTO, *World Trade Report 2006* (n 1029) 76

'selected interventions' can enable States to respond to issues as they arise, it also means that governments essentially "pick the winners," which some argue increases the potential for "political capture and corruption."[1106] This is another way in which the provision of subsidies hinders the fair functioning of markets.

Although Members are permitted to maintain a level of support under the Agreement on Agriculture, FAO research shows that the majority of developing country Members do not come close to providing the permitted amount.[1107] They are frequently unable to do so because of loan conditionalities imposed on them by international financial institutions, or they may simply not have the resources to provide them. Although the subsidies extinguished in the 1980s were intended to be replaced by private investment, which can potentially create new kinds of resources for producers, this has not come to fruition in a way that benefits the most vulnerable small-scale producers; private investment that has occurred, "went to a narrow range of cash crops grown for export markets."[1108]

Resource and capacity constraints also prevent developing countries from challenging developed country supports within the WTO system. Comments made in a report for United States congress provides insight into how developing countries may have difficulty finding the resources needed to challenge developed country supports. The report also demonstrates how developed country awareness of these constraints emboldens them to continue the provision of subsidies that may or may not be permitted under the agreement. The report stated,

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[1106] ibid 75

[1107] FAO, 'Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries, Country Case Studies' (Volume II, 2004) <http://www.fao.org/docrep/003/x8731e/x8731e00.htm#TopOfPage> accessed 16 February 2016. See also: FAO, 'WTO Agreement on Agriculture: The Implementation Experience - Developing Country Case Studies' (Commodities and Trade Division, Food and Agriculture Organization of the United Nations 2003) <http://www.fao.org/docrep/005/y4632e/y4632e04.htm#bm04> accessed 20 March 20016. See also: Joseph (n 1048) 186

[1108] UNHRC, 'The transformative potential of the right to food' (1051) para 10

> [N]umerous new WTO challenges of U.S. farm support are unlikely. They contend that challenges require intense effort, the financial costs are high, and the broader geopolitical consequences may far outweigh any potential trade gains. Few developing countries have the needed resources for a challenge. In addition, there is the inherent risk that if a challenge fails, the effort could legitimize those very programmes targeted for discipline.[1109]

The practicality of challenging subsidies therefore bolsters arguments for further trade liberalization in this regard.

In general, the continued use of subsidies by developed countries undermines the supposed benefits of trade liberalization for many developing countries that are unable to provide the same supports – regardless of whether this inability is due to the formal rules of the WTO, resource constraints, or structural adjustment programmes. As one author notes, "[o]ne can hardly speak of free and fair trade and competition if markets are obtained not on the basis of commercial considerations such as price and quality of goods, but depending on the relative strength of the national treasuries."[1110]

6.2.2.4 FOOD AID

The relationship between subsidies and food aid was discussed under the rationale for maintaining subsidies as well. It was noted that subsidies can encourage the provision of domestic and international food aid, however this idea is problematized by the fact that there appears to be little relationship between its dispersion of aid and actual need. Häberli explains, "in parallel with the unprecedented price increases in 2007, food aid was reduced to its lowest level ever. This fact demonstrates the truly vicious face of an instrument used first and foremost for surplus dumping, rather than for the fight against hunger and starvation."[1111] In this way, export subsidies contribute to a cycle of

[1109] Joseph (n 1048) 189
[1110] Desta (n 1005) 312; OHCHR, 'Background Note' (n 1023) 13
[1111] Häberli (n 1042) 306

dependency on imports and aid in developing countries that might otherwise be capable of greater self-sufficiency.

In conclusion of section 6.2, the interactions between elements of the right to food and subsidies outlined here raise questions about whether it is the provision, reform, reduction or removal of agricultural subsidies in developed and developing countries that is most conducive to the realization of right to food. Ideas on how to best utilize State interventions in trade to reduce poverty have changed courses nearly every decade since the implementation of GATT. In the 1950s and 1960s there was widespread belief that import-substitution, through the use of subsidies for the production of similar domestic products, was crucial for the economic development of a country.[1112] In the 1970s, prominent economists accused this approach of leading to widespread market distortions that decreased overall social welfare.[1113] In the 1980s further research suggested that export-oriented markets with reduced State intervention were the best approach to encourage development.[1114] The argument that "government failures were more likely than market failures" prevailed and was espoused by key international financial institutions, the World Bank and the International Monetary Fund.[1115] Indeed some economic analyses posit that the liberalization project that took hold of agricultural trade in the 1980s and continued into the early 2000s "improved global economic welfare by US$233 billion per year."[1116] Those same studies suggest that developing countries experienced more economic gain than developed countries during this time.[1117] Anderson proposes that developing countries "would gain nearly twice as much

[1112] WTO, *World Trade Report 2006* (n 1029) 66; Kym Anderson, 'Agriculture Policies: Past, Present and Prospective under Doha' in Baris Karapinar and Christian Häberli (eds) *Food Crises and the WTO; World Trade Forum* (Cambridge University Press 2010) 169
[1113] WTO, *World Trade Report 2006* (n 1029) 66-67
[1114] ibid XX, 80
[1115] ibid 67
[1116] Anderson, 'Agriculture Policies: Past, Present and Prospective under Doha' (n 1112) 179
[1117] ibid

as high-income countries if all countries were to complete that reform process."[1118]

However, as noted in the previous chapter, economic modeling analyses do not adequately take into account the needs and living conditions of the most vulnerable individuals; from a human rights perspective, economic growth in terms of GDP is not the only measure of development and success, as it does not consider distribution. Analysis models employed by economists within the WTO demonstrate that:

> [S]o long as the market ensures that goods are priced at marginal cost and factors of production are paid their marginal products, then the ensuing outcome is considered pareto-efficient. One distribution of income is as good as another under a pareto-efficient outcome.[1119]

When such approaches underpin trade reform and the rules of the organization, socio-economic rights considerations are effectively sidelined.

Indeed, in the 1990s the empirical work that originally suggested reduced State intervention in the economy and the export-orientation of agriculture began to be questioned on methodological grounds of the research conducted, particularly as it related to the experiences of countries in East Asia, Latin America, and Africa.[1120] Today, the idea that governments are not the appropriate actors to direct the economic policies of the State, specifically interventions in times of market failure, creates a conceptual disconnect between economic theory on one hand and socio-economic rights on the other, according to which States have the primary duty to ensure economic rights are fulfilled. If the government is relegated to a limited role in the economy, its ability to ensure that economic activities are geared toward improving standards of living and the enjoyment of rights, particularly for the most vulnerable members of society, is constrained.

[1118] ibid
[1119] WTO, *World Trade Report 2006* (n 1029) 2006
[1120] ibid 67

6.3 Subsidy Provisions under the Agreement on Agriculture

Sections 6.3 and 6.4 of this chapter look at the provisions of the Agreement on Agriculture regarding domestic and export subsidies, respectively. In addition to a textual inquiry of the meaning of these provisions, decisions of the panels and Appellate Body are considered where relevant.

6.3.1 Source of Commitments on Subsidies

Article 3 of the Agreement relates to both domestic and export subsidies. Article 3.1 refers to Members' Schedules as an important source of obligations.[1121] The remainder of the Article stipulates that subsidies provided to producers in amounts greater than what is listed in their Schedules (and Article 6) are essentially prohibited. The nature of commitments to which Article 3 refers – that is, whether they can be understood as obligations, prohibitions, permissions, or exemptions – and what this means for their compatibility with States' right to food obligations is also relevant.

6.3.2 Domestic Supports Provisions

The Agreement on Agriculture Articles 6 and 7 constitute the basis of Members' obligations regarding domestic support measures. Article 6.1 sets out the basic legal obligation of Members:

> The domestic support reduction commitments of each Member contained in Part IV of its Schedule shall apply to all of its domestic support measures in favour of agricultural producers with the exception of domestic measures, which are not subject to reduction in terms of the criteria set out in this Article and in Annex 2 to this Agreement.[1122]

Members are therefore obligated not only to the rules outlined in text of the agreement, but they must also conform to the specific bindings set out in their

[1121] Agreement on Agriculture (n 1012) art 3
[1122] ibid art 6.1

Schedules.[1123] Though not obvious from the text of the Agreement on Agriculture, the measures outlined in Article 6 are commonly classified under a metaphorical coloured box scheme that depicts the level of market distortion and permissibility associated with them. Green box measures have no or limited trade effects and are permitted. Blue Box measures are minimally distorting and are permitted to the extent that they meet specified criteria. Amber box measures are the most trade distorting.[1124] Members therefore have reduction commitments in regard to amber box measures. There is no red box in relation to the Agriculture Agreement, though measures that do not fit into one of the aforementioned boxes are essentially prohibited. This figurative classification system is supported by the WTO, as evidenced by its appearance in the organization's analytical index and official documents. It is also widely used by governments, trade negotiators, and scholars.

6.3.2.1 Green Box and Other Measures Exempt from Commitments

The fundamental requirement for measures to exist in the Green Box is "that they have no, or at most minimal, trade-distorting effects on production."[1125] Currently, there are no limits on the amount of support provided through Green Box measures and all parties – developed and developing – are permitted to employ such measures. Article 6 of the agreement refers to Annex 2 as the source of criteria according to which supports might be exempt from reduction commitments.[1126] According to Annex 2, a Green Box support must be publicly funded through a government programme and "shall not have the effect of providing price support to producers."[1127] Currently, accepted polices under the Green Box are those aimed at providing: general services in accordance with

[1123] ibid art 3.1
[1124] WTO, 'Agriculture Negotiations: Background Factsheet, Domestic Support in Agriculture' (1 October 2002) <https://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm> accessed 16 February 2016
[1125] Agreement on Agriculture (n 1012) annex 2 art 1(b)
[1126] ibid art 6.1. See also: ibid art 1 "the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement"
[1127] ibid annex 2 art 1

certain policy-specific criteria,[1128] public stockholding for food security purposes, domestic food aid, payments to producers (provided they are publicly funded, generally available and decoupled from production), certain types of income insurance, relief to mitigate the effects of natural disasters, structural adjustment assistance, regional assistance, and support for environmental protection.[1129] A common feature of the criteria outlined for the provision of these supports is that, in order to be exempt from reduction commitments, the measure in question must be undertaken according to 'pre-determined' 'clearly defined,' or 'clearly designated' goals.[1130]

Green box measures are completely immune from both unilateral and multilateral challenge under the Agreement on Agriculture. This freedom, however, is not absolute in the broader context of the WTO, as measures that comply with the criteria set out in Annex 2 may still be unilaterally actionable under other agreements, such as the Agreement on Subsidies and Countervailing Measures, since the expiration of the Article 13 (the 'Peace Clause') of the Agreement on Agriculture.[1131] To clarify, while a measure might be permitted under the Green Box, if it has led to serious injury, prejudice, or the nullification or impairment of benefits expected under GATT, a Member can seek to implement countervailing measures.[1132]

[1128] ibid annex 2 art 2 (a)-(g). These include "programmes which provide services or benefits to agriculture or the rural community", such as those related to: research, pest and disease control, training services, advisory services, inspection services, marketing and promotion services, including market information, advice and promotion, and infrastructural services.
[1129] ibid annex 2 art 2 – art 13
[1130] ibid annex 2 arts 3, 4, 6, 8-13.
[1131] ibid art 13; Agreement on Subsidies and Countervailing Measures (n 1015); Dominic Coppens, *WTO Disciplines on Subsidies and Countervailing Measures* (Cambridge University Press 2014) 331
[1132] WTO, 'Subsidies and Countervailing Measures: Overview, Agreement on Subsidies and Countervailing Measures' <https://www.wto.org/english/tratop_e/scm_e/subs_e.htm#fntext2> accessed 16 March 2016. "Actionable subsidies are not prohibited. However, they are subject to challenge, either through multilateral dispute settlement or through countervailing action, in the event that they cause adverse effects to the interests of another Member. There are three types of adverse effects. First, there is **injury** to a domestic industry caused by subsidized imports in the territory of the complaining Member. This is the sole basis for countervailing action. Second, there is **serious prejudice**. Serious prejudice usually arises as a result of adverse effects (e.g., export displacement) in the market of the subsidizing Member or in a third country market. Thus, unlike injury, it can serve as the basis for a complaint related to harm to a Member's export interests. Finally, there is **nullification or impairment** of benefits accruing under the GATT 1994. Nullification or impairment arises most typically where the improved market access presumed to flow from a bound tariff reduction is undercut by subsidization" (bold text original).

Country positions on the future of the Green Box differ tremendously. On one hand, Members value the policy space provided by the Green Box to implement and maintain supports to vulnerable industries, producers, and regions.[1133] On the other hand, some argue that the Green Box has been exploited by Members that manipulate their supports only slightly so that they qualify under the Green Box, but which actually have trade distorting effects.[1134] This 'box shifting' offsets formal gains from market access and subsidy reduction commitments. Calculations by the OECD demonstrate that, through box shifting (and manipulation of the aggregate measures of support base period, which is discussed in section 6.3.3), some countries have actually increased their supports over the implementation period of the Agriculture Agreement.[1135] Indeed, while Blue Box measures have decreased by a significant amount, Green Box measures have increased by an even greater amount in the last decade.[1136] For some, box shifting signifies the success of the agreement because it means countries are modifying their measures, moving away from more distortionary practices and toward acceptable measures.[1137] Still others argue that the programmes under the Green Box have been modeled after developed country programmes and do not adequately capture the kinds of supports needed by developing countries, particularly as they progress.[1138]

So far Green Box measures have been described as *exemptions* (from the rules of the agreement), however, as international legal norms and for the purpose of this research they might more accurately represent permissions. The problem with labeling the Green Box programmes as permissions is that they are still

[1133] WTO, Committee on Agriculture Special Session, 'Informal Meeting of the Committee on Agriculture' (28 March 2013) JOB/AG/23 6. See also: International Food & Agricultural Trade Policy Council, 'Should the Green Box be modified?' (2007) < http://www.agritrade.org/Publications/DiscussionPapers/Green_Box.pdf> accessed 16 March 2016. See also: Coppens (n 1131) 317
[1134] International Food & Agricultural Trade Policy Council (n 1133) 5; Coppens (n 1131) 321-322
[1135] For example, European Union spending on Green Box subsidies increased from €9.2 billion in 1995 to €68 billion in 2010. Rashmi Banga, 'Do Green Box Subsidies Distort Agricultural Production and International Trade?' (2014) 114 Commonwealth Trade Hot Topics Issue 1, 2
[1136] Coppens (n 1131) 321
[1137] International Food & Agricultural Trade Policy Council (n 1133) 6
[1138] Olivier De Schutter, *The World Trade Organization and the Post-Global Food Crisis Agenda* (Activity Report 2011) 6. See also: Joseph (n 1048) 185

conditional on specific criteria and, more importantly, other Members may still make unilateral claims against them under other WTO Agreements if the measures are incompatible with their provisions.[1139] They are therefore permissions with limitations and risks attached to them.

SPECIAL AND DIFFERENTIAL TREATMENT, OUTSIDE OF THE GREEN BOX

In addition to the measures outlined in Annex 2, developing country Members and least developed country Members are offered more exemptions and favourable concessions through 'special and differential treatment' provisions.[1140] Article 6.2 explicitly exempts from reduction commitments agricultural investment and input subsidies that are "generally available to low-income or resource poor producers" in developing countries.[1141] However, the agreement does not provide insight into who might qualify as a resource-poor producer.[1142] It also exempts supports from reduction commitments that are provided to producers in developing countries that are aimed at encouraging agricultural "diversification from growing illicit narcotic crops."[1143] These measures are treated similar to Green Box measures, but they are not available to all countries. The implementation period was also more generous for developing Members, which had ten years to implement their commitments as opposed to six.[1144] Least-developed country Members are not obligated to undertake any reduction commitments.[1145]

[1139] Coppens (n 1131) 329-332
[1140] Agreement on Agriculture (n 1012) arts 6.2, 15
[1141] ibid art 6.2
[1142] FAO, 'WTO Agreement on Agriculture: The Implementation Experience - Developing Country Case Studies' (n 1107)
[1143] ibid
[1144] Agreement on Agriculture (n 1012) art 15
[1145] ibid

6.3.2.2 BLUE BOX

Blue box measures are those that would otherwise be subject to reduction commitments, but are permitted based on the condition that they involve production limitations. Essentially, it contains "amber box measures with conditions."[1146] Article 6.5 outlines the Blue Box measures as follows:

> Direct payments under production-limiting programmes shall not be subject to the commitment to reduce domestic support if:
>
> (i) such payments are based on fixed area and yields; or
> (ii) such payments are made on 85 per cent or less of the base level of production; or
> (iii) livestock payments are made on a fixed number of head[1147]

All States can employ such measures and there is no limit to spending on Blue Box subsides.[1148] Historically, developed countries have used them most heavily, and today they are only used by the European Union, Iceland, Norway, Japan, the Slovak Republic, and Slovenia.[1149]

Although the Blue Box was intended as a permanent fixture of the Agreement on Agriculture, there is disagreement about its future as well.[1150] Some countries want all the measures contained in this category moved to the amber box, since they are technically tied to production, which is otherwise prohibited under the agreement (although measures under the Blue Box only limit production).[1151] Other developed and developing countries have been reluctant to participate in ongoing negotiations without the guarantee that Blue Box (and Green Box) measures will remain permitted.[1152] They argue that the Blue Box

[1146] WTO, 'Agriculture Negotiations: Background Factsheet, Domestic Support in Agriculture' (n 1124)
[1147] Agreement on Agriculture (n 1012) art 6.5(a)(i)-(iii)
[1148] Coppens (1131) 316-317. See also: WTO, 'Agriculture Negotiations: Background Factsheet, Domestic Support in Agriculture' (n 1124)
[1149] ibid 317; WTO, 'Agricultural Negotiations: Backgrounder, Domestic Support: Amber, Blue and Green Boxes' <https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd13_boxes_e.htm> accessed 20 March 2016
[1150] WTO, 'Agriculture Negotiations: Background Factsheet, Domestic Support in Agriculture' (n 1124)
[1151] ibid; WTO, 'Agricultural negotiations: Backgrounder, The issues and where we are now' (1 December 2004) <https://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd00_contents_e.htm> accessed 20 March 2016
[1152] ibid

acts as a 'staging post,' a place where countries are able to adjust measures that are otherwise subject to reduction commitments, to reduce their trade impacts and conform to the criteria of the Blue Box.[1153] Presumably, developing countries would like the possibility of implementing such measures; as they develop, they attain greater resources that can then be used to subsidize programmes that fall under the Blue Box. If the Blue Box is abolished, developing countries will miss out on the opportunity to support their agriculture sectors in ways that developed countries have enjoyed throughout the existence of GATT and the WTO.

Blue box measures were immune from some forms of challenge under the Agreement on Subsidies and Countervailing Measures until the expiration of the Peace Clause.[1154] Today such measures are counterviable, although the expiry of the Peace Clause in 2004 has not led to a large influx of challenges pertaining to these measures.[1155] Another controversial aspect of Blue Box Measures is inconsistency with which some States have calculated and reported their various AMS calculations, which will be discussed in Section 6.3.3.[1156]

6.3.2.3 AMBER BOX

Amber box measures are those for which developed and developing countries were obligated to reduce their supports by 20 per cent and 13 per cent, over a period of six years or ten years, respectively.[1157] Least developed countries had no obligations in this regard.[1158] This box contains all domestic support measures that are not included in the Blue or Green Boxes. The only exception

[1153] ibid
[1154] Agreement on Agriculture (n 1012) art 13(b)(i) Unless, for example, "a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations"
[1155] Coppens (1131) 328 Some argue that domestic subsidies permitted under the Agreement on Agriculture are not challengeable under the Agreement on Subsidies and Countervailing duties even post-Peace Clause, because the former represents *lex specialis*. However, this is not a widely accepted view. The Agreement on Agriculture encompasses general provisions on subsidies, whereas the Agreement on Subsidies and Countervailing duties deals with 'specific subsidies.'
[1156] WTO, *World Trade Report 2006* (n 1029) 194
[1157] Agreement on Agriculture (n 1012) art 1(f), art 15.2
[1158] ibid art 15.2

to reduction commitments under the Amber Box is *de minimis* levels of support; support of up to 5 per cent of the production value of product-specific subsidies (for a particular product) is permitted, and up to 5 per cent of production value of non-product specific subsidies are permitted.[1159] Developing country Members are permitted to exempt 10 per cent of production value in the same categories.[1160] The amount that falls within the *de minimis* values are not subject to reduction commitments (that is, their Current Total AMS calculations).[1161] The implementation period has since passed and updated commitments negotiated pursuant to Article 20 have been slow to transpire.[1162] However, countries must still remain within their respective committed levels of support.

6.3.2.4 Aggregate Measures of Support; contradictions and complications

If a Member has not made reduction commitments, it is, by default, 'not permitted' to use any such supports that do not meet the criteria of the Green Box or other exemptions, during the implementation period or thereafter.[1163] Commitments appear in Part IV of Member's Schedules and were calculated in terms of Aggregate Measures of Support (AMS).[1164] First, a 'base level AMS' was calculated by individual States, which is the average "unit value for the basic agricultural product" provided by the Member between the base years 1986 and 1988.[1165] Calculations were made on a product-specific basis except for non-product specific support, which was calculated as one overall total.[1166] The product-specific and non-product specific amounts were totaled to create the 'Base Total AMS,' from which reduction commitments were made.[1167] To clarify, reduction commitments were made from the total amount, and not on a

[1159] ibid art 6.4(a)(i)-(ii)
[1160] ibid art 6.4(b)
[1161] ibid art. 6.4(a)
[1162] ibid art 20
[1163] ibid art 7.2 (a)-(b)
[1164] ibid art 1(h)(i)-(ii), Annex 3
[1165] ibid art 1(a)(i), Annex 3 arts 5, 9
[1166] ibid Annex 3 art 1
[1167] ibid art 1(h)

product-specific basis.[1168] Commitments are expressed in terms of 'Annual and Final Bound Commitment Levels' ('Final AMS') and included in Part IV of Members' Schedules.[1169] For each year during the implementation period, Members had to calculate their 'Current Total AMS,' which was the actual amount of supports provided during the year being reported.[1170] Therefore, throughout the implementation phase it was possible to ascertain whether a country met its obligations to reduce its domestic support in a given year by comparing the Current Total AMS amount with the commitment level in its Schedule for that same year.[1171] Countries that had no Base Total AMS during the base period because their supports fell entirely within exempted measures must not provide support above the relevant *de minimis* levels.[1172]

A closer look at the provisions relating to AMS calculations raises doubt about the consistency of their application between Members, particularly in the years immediately following implementation of the agreement. Three main issues with consistency in regard to AMS are discussed here. The first problem is that countries that had a Base Total AMS were committed to making reduction commitments only in the aggregate, not on a product-specific basis (even though the final Base Total AMS number included a calculation of product-specific supports). This functioned as a loophole through which Members with reduction commitments could actually increase the amount spent on specific products so long as their overall number (Current Total AMS) fell below their commitment level, whereas Members with no Base Total AMS (most likely, developing countries as only fourteen developing countries declared a Base

[1168] Panos Konandreas and George Mermigkas, *WTO Domestic Support Disciplines: Options for Alleviating Constraints to Stockholding in Developing Countries in the Follow-Up to Bali* (FAO Commodity ad Trade Policy Research Working Paper No. 45, Paper prepared for the FAO Expert Meeting on Stocks, Markets and Stability 30-31 January 2014) 6
[1169] Agreement on Agriculture (n 1012) art 1(h)(i), art 6.1
[1170] ibid art 1(h)(ii)
[1171] WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Appellate Body* (11 December 2000) WT/DS161/AB/R, WT/DS169/AB/R [115] "Current Total AMS which is calculated according to Annex 3, is compared to the commitment level for a given year that is already specified as a given, absolute, figure in the Member's Schedule." See also: WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Panel* (31 July 2000) WT/DS161/R, WT/DS169/R [809]
[1172] Agreement on Agriculture (n 1012) art 6.4. See also: WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Panel* (n 1171) [808]

Total AMS) did not have this option.[1173] Members that had no Base Total AMS from which to make reductions must still ensure that their supports do not exceed *de minimis* levels for product-specific and non-product-specific supports. The FAO, explains:

> Therefore, unlike Members that have an AMS entitlement which acts as a ceiling for their total distorting domestic support (whether product or non-product specific), those without an AMS have to face two separate checks in the WTO obligations. They are in breach of their commitment if any of their product-specific supports or the aggregate non-product specific support is in excess of *de minimis*.[1174]

This has become a problem for developing countries in regard to food security-related policies that involve supported or administered price systems (i.e. purchasing goods for stockholding at fixed prices) because administered prices are not included in the Green Box.[1175] Developing countries therefore have to keep the amount they spend within product-specific *de minimis* levels. An interim solution for this has been found through the Bali Ministerial Decision, which is discussed with regard to recent negotiations in Section 6.3.2.5.

Secondly, the agreement provides multiple methodologies to be used for the various AMS calculations, which led to inflated Base Total AMS numbers. Articles 1(a), 1(h), 6.1, and Annex 3 are each relevant and their instructions are not entirely consistent. Article 1(a) states that AMS calculations exclude measures listed in Annex 2 (i.e. exempted Green Box measures).[1176] Article 1(a)(i) states that Base Total AMS is "specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule," while Article 1(a)(ii) states that support provided for any year during implementation or after is to be calculated in accordance with the

[1173] Konandreas and Mermigkas (n 1168) 6
[1174] ibid
[1175] ibid. See also: WTO, 'Agriculture Negotiations: Fact Sheet, The Bali decision on stockholding for food security in developing countries' <https://www.wto.org/english/tratop_e/agric_e/factsheet_agng_e.htm> accessed 20 March 2016; WTO, *Public Stockholding for Food Security Purposes, Ministerial Decision of 7 December 2013* (11 December 2013) WT/MIN(13)/38 WT/L/913
[1176] Agreement on Agriculture (n 1012) art 1(a)

methodology of Annex 3 and must take into account the amounts listed in Member's Schedules.[1177]

Article 6.1 exempts Green Box measures and those measures "set out in this article" from the Total AMS and Annual and final bound commitment levels.[1178] The exempted measures listed in Article 6.2, to which Article 6.1 refers, include measures: To "encourage agricultural and rural development" that are "an integral part of the development programmes of developing countries;" generally available agriculture investment subsidies in developing countries; generally available agricultural input subsidies for "low-income or resource-poor producers" in developing countries, and; subsidies that "encourage diversification from growing illicit narcotic crops."[1179] Article 6.2 mentions only Current Total AMS calculations from which the abovementioned measures are exempt, and not the Base Level AMS or Annual and Final Bound Commitment Levels.[1180] Annex 3 states that AMS levels are to be calculated "subject to the provisions of Article 6."

There are two issues with these discrepancies. The first is that Blue Box payments were not exempt from Baste Total AMS calculations according to Article 1(a) but they are excluded from Total Aggregate Measurement of Support and Annual and Final Bound Commitment Level calculations according to Article 6.1. More to the point, this means that a country can exempt measures in its annual calculations of provided supports that were included in its base level calculations (from which reduction commitments were made) pursuant to Article 1. Desta argues that this "allow[s] countries to start from higher benchmarks […] thus helping Members to stay within the law

[1177] ibid art 1(h)(i)-(ii)
[1178] ibid art 6.1
[1179] ibid art 6.2
[1180] ibid

possibly even after granting subsidies higher than would otherwise be the case."[1181]

The second part of this problem is that once a Member calculated its Base Total AMS in accordance with Article 1 (and therefore included Blue Box payments), this number was entered into the Schedules, where it became binding on States. Recall that Article 1(a)(ii) refers to the base period set in "the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule." This location is the source of commitments from which compliance is assessed, while the methodology for calculating Current Total AMS is found in Annex 3 (which takes into account the "constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule.")[1182]

These issues were considered in *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*.[1183] In this case, the complainants alleged, *inter alia*, that Korea had exceeded its commitment levels under the Agreement on Agriculture and that it had left these amounts out of its Current Total AMS in contravention with Article 3, 6, and 7.[1184] It was argued that Korea "disregarded the prescriptions contained in Annex 3 of the Agreement regarding the manner of calculation of Current Total AMS for beef."[1185] In response, Korea argued that "compliance should be judged by reference to the commitment levels specified in Part IV of a Member's Schedule, rather than the general calculation methods set forth in Annex 3 of the Agreement on Agriculture."[1186] Korea referred to Article 1(a)ii in which it is stated that annual levels of support should be determined based on "the constituent data and methodology used in the tables of supporting material incorporated by

[1181] Desta (n 1005) 407
[1182] Agreement on Agriculture (n 1012) art 1(h)(ii), annex 3
[1183] WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef - Report of the Panel* (n 1171); WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen* Beef – Report of the Appellate Body (n 1171)
[1184] WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef - Report of the Panel* (n 1171) [357]-[358]
[1185] ibid [369]
[1186] ibid [402]

reference in Part IV of the Member's Schedule" in addition to Annex 3, and not exclusively on Annex 3 methodology; to do otherwise would be to negate Article 1(a)(ii).[1187] Essentially, Korea claimed that since Part IV of Member's schedules are listed as a source of methodology, it cannot be disregarded as a source of commitments, as Schedules are binding on the State and integral to the agreement.

The panel found that the approaches in Article 1(a)(ii) and Annex 3 are complementary.[1188] It ultimately decided that the methodology in Annex 3 is the authoritative source to be used to determine support levels and to assess whether these support levels are in compliance with a Member's obligations.[1189] It found:

> Where no support was included in the base period calculation for any given product, there is no constituent data or methodology in the tables of supporting material to a Member's Schedule to refer to. In these circumstances, the only means available for calculating such domestic support is that provided in Annex 3.[1190]

The panel stated that in order to determine Korea's compliance with its obligations, its Base Level AMS would have to be calculated using the methodology in Annex 3.[1191] The Appellate Body upheld the panel's finding regarding Annex 3 as the source of methodology to be used in this case.[1192] It added that while the agreement accords a 'higher priority' to Annex 3 than to "constituent data and methodology," constituent data and methodology in Member's Schedules should be taken in account (albeit with a lower priority); however, due to the absence of calculations in Korea's Schedule, compliance

[1187] ibid [402]-[403]
[1188] ibid [812]
[1189] ibid [814]
[1190] ibid [811]
[1191] ibid [815]
[1192] WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Appellate Body* (n 1171) [112]

had to be based on the methodology of Annex 3 alone.[1193] Importantly, it found that:

> [F]or purposes of determining whether a Member has exceeded its commitment levels, Base Total AMS, and the commitment levels resulting or derived therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned. As a result, Current Total AMS which is calculated according to Annex 3, is compared to the commitment level for a given year that is already specified as a given, absolute, figure in the Member's Schedule.[1194]

The significance of this is as follows: although Korea had excluded certain payments from its AMS calculations appearing in Part IV of its Schedule, because Part IV of the Schedule is the source of commitments, its Current Total AMS as calculated by Annex 3 methodology (and therefore including more items) is to be used to determine its compliance.

The final problem with respect to the AMS commitments to be discussed here is the fact that developed countries are able to maintain high levels of support and remain within their reduction commitments because they began from such high levels during the base period, whereas developing country Members that did not make significant reduction commitments - but only because they began from a place of very low levels of support – must not exceed relatively low levels of support. Furthermore, because reduction commitments appear in overall amounts (of product-specific and non product specific totals), countries can reduce supports on items that are of less interest to them and maintain high levels on other products, while still reducing the overall amount and adhering to their commitments. Developing countries with separate product specific and non-product specific *de minimis* constraints do not have this ability. Indeed, many have argued that the Agreement on Agriculture benefits developed countries most, and fails to address the needs and concerns of developing

[1193] ibid [112]-[114]
[1194] ibid [115]

countries, particularly as regards their food security and development concerns.[1195]

6.3.2.5 Proposed Amendments, Post-World Food Crisis

Various amendments to the Green Box have been suggested, ranging from proposals to expand the list of measures permitted, to capping the amount of money spent on such measures, to abolishing the category altogether.[1196] Some developing countries see the flexibilities, and in particular the increase in Green Box subsidies, as enabling practices that are, in fact, distortive.[1197] Other developing countries generally stress the need to include more measures in this category in order to permit them the flexibility needed to develop their agricultural sectors.[1198] Debate about domestic support commitments intensified throughout the Doha Development Round following a number of key events, most notably, the food crisis, an important 2011 study, as well as what might be termed, the India-United States impasse.[1199]

As the FAO notes, during the food crisis a number of important food exporting countries imposed restrictions and prohibitions on exports.[1200] The agriculture agreement restricts certain export practices (i.e. dumping), but it does not *require* Members to export food to countries experiencing shortages. Article 15 instructs Members instituting export prohibitions to "give due consideration to the effects of such prohibition or restriction on importing Members' food security" and to notify the Committee on Agriculture.[1201] Decreased food availability during the food crisis caused many developing countries to

[1195] Joseph (n 1048) 185; De Schutter, *The World Trade Organization and the Post-Global Food Crisis Agenda* (n 1138) 6
[1196] WTO, 'Agricultural Negotiations: Backgrounder, Domestic Support: Amber, Blue and Green Boxes' (n 1149). See also: Konandreas and Mermigkas (n 1168)
[1197] ibid; Coppens (n 1131) 323
[1198] ibid
[1199] See *infra* Section 6.3.2.5
[1200] Konandreas and Mermigkas (n 1168) 9-10
[1201] Agreement on Agriculture (n 1012) art 15 (a), (b)

reconsider their dependency on imports and trade as a reliable approach to national food security.[1202]

Additionally, a 2011 study by DTB Associates conducted for wheat producers in the United States was a motivating factor in a series of proposals by G-33 countries to the WTO Committee on Agriculture.[1203] The DTB study found that a number of WTO Members with developing economies were in breach of their domestic support obligations. It found 'major increases' in subsidies provided by India, Brazil, Turkey and Thailand.[1204] The United States initiated discussions in regard to these breaches and developing country Members retorted "that the AoA rules do not provide them with sufficient policy space to pursue essential public interventions in the food market which would ensure availability of food for their populations."[1205] Proposals in 2012 and again in 2013 from the group of G-33 countries sought to expand the Green Box to include:

> [P]olicies and services related to farmer settlement, land reform programmes, rural development and rural livelihood security in developing country Members, such as provision of infrastructural services, land rehabilitation, soil conservation and resource management, drought management and flood control, rural employment programmes, nutritional food security, issuance of property titles and settlement programmes, to promote rural development and poverty alleviation.[1206]

The countries argued that the increasing market price of food and farm inputs (particularly in the lead-up to the 2008 crisis) makes "the AMS limit […] more constraining now than it was when the Uruguay Round was concluded."[1207] Inflation has made it more difficult to meet commitments under the Agreement,

[1202] Konandreas and Mermigkas (n 1168) 9-10
[1203] ibid 8
[1204] ibid
[1205] ibid 10
[1206] WTO, Committee on Agriculture Special Session, 'G-33 Proposal on Some Elements of TN/AG/W/4/Rev.4 for Early Agreement to Address Food Security Issues' (n 1040) para 6(i)(h); WTO, Committee on Agriculture Special Session, 'G-33 Non Paper' (3 October 2013) JOB/AG/25
[1207] WTO, Committee on Agriculture Special Session, 'Informal Meeting of the Committee on Agriculture' (n 1133). See also: Coppens (n 1131) footnote 357

as they are expressed in monetary values. Members sought to define "excessive rates of inflation" a phrase used in Article 18.4 which encourages Members to "give due consideration to the influence of excessive rates of inflation on the ability of any Member to abide by its domestic support commitments."[1208]

The G-33 States found AMS calculations constraining especially in regard to programmes under which goods for stockpiling are acquired at administered prices. They wanted to ensure that they could purchase goods at subsidized prices from resource-poor and low-income farmers for the purpose of "fighting hunger and rural poverty."[1209] According to Annex 2 footnote 5, governmental stockholding programmes, through which goods "are acquired and released at administered prices " fall into the Green Box on the condition that the "difference between the acquisition price and the external reference price is accounted for in the AMS."[1210] The requirement that countries calculate the difference between the purchased price and the external reference price (market price) and include those in its annual amount to be reported reduces the amount that Members can spend on stockholding and other subsidies to which they have reduction commitments. Moreover, changing external reference prices make this amount difficult to calculate. The G-33 offered two possible formulae to replace external reference price calculations, to ensure that it was more flexible than a fixed external price.[1211] The proposal sought to fully exempt food purchased for stockholding purposes from AMS calculations because it also contributes to "the objective of supporting low-income or resource-poor producers."[1212]

A working paper by the FAO elucidates the intentions behind the proposals. It says that:

[1208] WTO, Committee on Agriculture Special Session, 'G-33 Non Paper' (n 1206)
[1209] WTO, Committee on Agriculture Special Session, 'G-33 Proposal on Some Elements of TN/AG/W/4/Rev.4 for Early Agreement to Address Food Security Issues' (n 1040) para 6(1)-(iii); WTO, Committee on Agriculture Special Session, 'G-33 Non Paper' (n 1206)
[1210] Agreement on Agriculture (n 1012) annex 2 footnote 5
[1211] WTO, 'Committee on Agriculture Special Session, 'G-33 Non Paper' (n 1206) paras 1, 2(a)-(b)
[1212] WTO, 'Committee on Agriculture Special Session, G-33 Proposal on Some Elements of TN/AG/W/4/Rev.4 for Early Agreement to Address Food Security Issues' (n 1040) para 6(ii); WTO, 'Committee on Agriculture Special Session, G-33 Non Paper' (n 1206) para ii

> [I]mplicit in the G33 argumentation was the fact that if developing countries were in danger of breaching their AoA commitments as developed countries claimed [in the DBT study], this was due to the systemic weaknesses of the AoA. Thus, these weaknesses had to be addressed in order for developing countries to be in a position to effectively pursue their food security and rural development objectives.[1213]

The question is whether these systemic weaknesses represent conflicting obligations (or rights, permissions, exemptions) for States vis-à-vis their right to food obligations under international law. The WTO Committee on Agriculture recognizes the G-33 dilemmas in its summary of the proposals, which are necessary to: "guarantee that the government would be able to buy when competing with private sector; stimulate production in order to guarantee adequate availability of food; ensure adequate remuneration for some segments of farmers; and/or shield farmers from effects of price volatility."[1214] It essentially reiterates the G-33 position that the proposed amendments would allow Members to provide subsidized food to consumers "with the objective of meeting food requirements of urban and rural poor in developing countries."[1215] The Committee on Agriculture found that the main limitation of AMS methodology was that it "does not adequately reflect the economic value of subsidies."[1216] It seemingly acknowledged the practical constraints of current rules, but did not relate this to the outside commitments of WTO Members, such as right to food obligations. But the argument by G-33 countries to expand the Green Box to include more food security measures and remove them from AMS calculations is essentially a demand for a right or a permission within the WTO regime to implement these measures. The adoption of these proposals would undoubtedly bring the Agreement on Agriculture commitments in greater harmony with the right to food, as many of the suggestions overlap with ICESCR Article 11 and General Comment 12.

[1213] Konandreas and Mermigkas (n 1168) 10
[1214] WTO, Committee on Agriculture Special Session, 'Informal Meeting of the Committee on Agriculture, Special Session' (n 1133) 2
[1215] WTO, Committee on Agriculture Special Session, 'G-33 Proposal on Some Elements of TN/AG/W/4/Rev.4 for Early Agreement to Address Food Security Issues' (n 1040) para 6(iii)
[1216] WTO, Committee on Agriculture Special Session, 'Informal Meeting of the Committee on Agriculture, Special Session' (n 1133) 2

THE INDIA-US IMPASSE AND THE ENSUING PEACE CLAUSE

The outcome of the debate and the G-33 proposals came, in the end, as a result of India's unwillingness to consent to further liberalization without securing its right to pursue food security measures, some of which were included in the G-33 proposal, and those required by the country's National Food Security Act (discussed below).[1217] The expected legal challenge to India's food security measures resulted in an impasse on the entry into force of the Trade Facilitation Agreement - the first new agreement reached under the auspices of the WTO since the conclusion of the Uruguay Round. The impasse was resolved in November 2014 when India and the United States reached a bilateral agreement that paved the way for a temporary solution in the form of a Peace Clause much like that contained in Article 13.[1218] The Peace Clause affirms that Members:

> [S]hall refrain from challenging developing country Member's compliance with Articles 6.3 and 7.2(b) with regard to its support for "traditional staple food crops in pursuance of public stockholding programmes for food security purposes […] that are consistent with the criteria of paragraph 3, footnote 5, and footnote 5&6 of Annex 2 to the AoA when the developing Member complies with the terms of this Decision.[1219]

Therefore, developing country Members that report a Current Total AMS that exceeds its commitment levels (or *de minimis* levels where a country does not have Total AMS commitments) cannot be challenged so long as the measures in place that lead to the excess amount adhere to the specified criteria. The Peace Clause was originally set to expire in four years, however India refused to move forward in negotiations without a guarantee that its food security measures would continue unchallenged after four years. As such it is an interim solution but will remain in place until a permanent solution can be

[1217] The National Food Security Act (entered into force 15 July 2013) Registered No. DL-(N)04/0007/2003-13; WTO, 'Agriculture Negotiations: Factsheet, The Bali decision on stockholding for food security in developing countries' (n 1175)
[1218] WTO, *Public Stockholding for Food Security Purposes, Ministerial Decision of 7 December 2013* (n 1175). See also: WTO, 'WTO: 2014 News Items, Azevêdo applauds India-US agreement on key Bali issues' (13 November 2014) <https://www.wto.org/english/news_e/news14_e/dgra_13nov14_e.htm> accessed 16 March 2016
[1219] ibid para 2

found.[1220] The General Council's adoption of the Peace Clause paved the way for the entry into force of the Trade Facilitation Agreement.

The provisions of India's National Food Security Act are worth considering as they contain extensive overlap with the right to food. In recalling that the scope of the topic of norm conflict covered by this research is restricted to situations of horizontal conflicts involving international norms, as opposed to vertical conflicts involving a domestic rule and an international rule, India's National Food Security Act complicates the distinction between horizontal and vertical conflict. The Act contains provisions setting out the entitlements of eligible individuals and households to receive foodstuffs (Article 3), with particular reference to pregnant and lactating women (Article 4), children (Article 5) and children suffering from malnutrition (Article 6).[1221] Under the Act, the central and state governments undertake reforms to the current distribution system (Article 12) and endeavor to empower women through enhancing their food security at the household level (Article 13) and to focus on the needs of vulnerable members of society (Article 30).[1222] The measures under India's National Food Security Bill on the distribution of subsidized food for two-thirds of its 1.52 billion people clearly relate to the distribution (and conservation) of food for vulnerable individuals represent an effort to fulfill the right to food for those unable to meet their needs.

In a report by India's Standing Committee on Food, Consumer Affairs and Public Distribution, adherence to right to food obligations (in domestic and international law) is explicitly listed as a motivation behind the legislation.[1223] It further asserts that the "legislation marks a paradigm shift in addressing the problem of food security – from the current welfare approach to a right based

[1220] ibid
[1221] The National Food Security Act (n 1217) arts 3, 4, 5, 6
[1222] ibid arts 12, 13, 30
[1223] Standing Committee on Food, Consumer Affairs and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution (Department of Food and Public Distribution), *The National Food Security Bill, 2011* (Presented to Hon'ble Speaker, Lok Sabha, Twenty Seventh Report, January 2013) <http://164.100.47.134/lsscommittee/Food,%20Consumer%20Affairs%20&%20Public%20Distribution/Final%20Report%20on%20NFSB.pdf> accessed 16 March 2016 para. 1.1

approach."[1224] The key point here is that Indian delegation to the WTO negotiation is clearly of the opinion that the country's food security measures, undertaken in accordance with domestic and international right to food obligations and food security objectives, are in conflict with WTO rules. Although the act is domestic legislation, it stems from, or at least adheres to, the India's obligations under the ICESCR. The act translates the obligations set forth under international human rights law, specifically Articles 2 and 11, into obligations under municipal law. It also represents an appropriate measure, specifically, legislation, through which the government acts on its right to food obligations under the ICESCR.

6.3.3 Export Subsidy Provisions

Article 8 prohibits the use of export subsidies that do not comply with the obligations set forth in the agreement and in Member's Schedules. [1225] Article 9 provides a list of export subsidy measures that are subject to reduction commitments.[1226] The measures subject to reduction requirements listed in Article 9.1 refer to:

> (a) the provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance;
>
> (b) the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products at a price lower than the comparable price charged for the like product to buyers in the domestic market;
>
> (c) payments on the export of an agricultural product that are financed by virtue of governmental action, whether or not a charge on the public account is involved […];

[1224] ibid para 1.5
[1225] Agreement on Agriculture (n 1012) art 8
[1226] ibid art 9

> (d) the provision of subsidies to reduce the costs of marketing exports of agricultural products (other than widely available export promotion and advisory services) […];
>
> (e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments;
>
> (f) subsidies on agricultural products contingent on their incorporation in exported products.

Developed country Members were required to reduce subsidized exports by 21 per cent of the volume of that product exported in the base period (1986-1988) and to reduce budgetary outlays for export subsidies by 36 per cent over the period of six years.[1227] Developing country Members were obligated to reduce their volume by 14 per cent and budgetary outlays by 24 per cent over a period of ten years.[1228] The fact that commitments are made on a product-specific basis is notably different from domestic support commitments, which permit States to calculate non-product specific subsidies at the aggregate level.[1229] In comparison to the complications of AMS calculations, these commitments are relatively straightforward and the methodology for calculating supports on a product-specific basis is more transparent. Developing countries are also permitted to make use of a special and differential treatment to provide subsidies for marketing and transportation of exported products.[1230]

The *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products* case provides the most insight into the meaning of these provisions, as evidenced by the WTO's repeated use of the case in its Analytical Index to elaborate Article 9(a)-(e).[1231] According to the Appellate

[1227] WTO, 'Agriculture Agreement: Explanation, Export competition/subsidies' (n 1014)
[1228] ibid; The FAO found that export subsidies are "generally not an issue" among developing countries, which do have the resources to provide export subsidies, or they have been phased out prior to the Uruguay Round, therefore the focus is on reducing developed country export subsidies. FAO, 'Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries, Country Case Studies' (n 1107) Part One, 2.3
[1229] Agreement on Agriculture (n 1012) annex 3, art 1
[1230] ibid art 9.4
[1231] WTO, *Canada: Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Report of the Appellate Body* (13 October 1999) WT/DS103/AB/R WT/DS113/AB/R

Body, mention of 'payments in kind' in Article 9.1(a), refers to "the transfer of economic resources, in a form other than money."[1232] In other words, a Member cannot escape its export subsidy obligations by providing an advantage other than money if a benefit to the recipient is still conferred. The case also clarifies the scope of the term 'payments' under Article 9.1(c), and determines that it refers not only to a financial transaction in which the government or government agency transfers financial or other resources; the transfer can be in the form of goods, services or revenue forgone (i.e. tax breaks or exemptions).[1233] Article 9.1(f) ensures that reduction commitments also encompass subsidized products that will be incorporated into other products domestically and will then be exported.[1234] The same case also sheds light on Article 9.1(b) when it considers what constitutes a government agency for the purpose of the provision of a subsidy. Because provincial marketing boards used across Canada are comprised primarily of dairy producers, Canada argued that they are not government agencies.[1235] However the Appellate Body found that they fall under the ambit of Article 9(b) based on the fact that "governments retain 'ultimate control'" over the marketing boards.[1236] The Appellate Body was concerned primarily with the source of power and authority over the boards, despite the fact that the boards "enjoy a degree of discretion."[1237]

6.3.3.1 Export Subsidies Disguised as Aid and the Nairobi Package

The Nairobi Package includes some developments in terms of imposing further constraints on export subsidies while also maintaining sufficient flexibility within the obligations to ensure food aid is available and dispersed based on need. The Ministerial Decision of December 2015 instructs developed country Members to "immediately eliminate their remaining scheduled export subsidy

[1232] ibid [87]
[1233] ibid [113]
[1234] These are sometimes referred to as 'upstream subsidies' Desta (n 1005) 230
[1235] WTO, *Canada: Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Report of the Appellate Body* (n 1231) [99]
[1236] ibid [100]
[1237] ibid [97]

entitlements as of the date of adoption of this Decision" and developing country Members "shall eliminate their export subsidy entitlements by the end of 2018."[1238] In an apparent continued effort to mitigate the negative effects of export subsides, the Decision states that Members using them "shall give due consideration to the effects of any such export subsidies on other Members."[1239]

A large section of the Ministerial Decision is dedicated to the provision of international food aid in which Members reaffirm their food aid responsibilities and the need "to take account of the interests of food aid recipients."[1240] While emphasis on the interests of the recipient country is in line with ICESCR Article 11, the Decision does not appear to signify substantive changes from the original food aid provisions of the Agreement on Agriculture; Members must 'take into account' local market conditions in recipient countries, and refrain from providing in-kind aid where it will cause adverse effects, however, there is no reference stronger disciplines, or to the Food Assistance Convention which imposes stricter responsibilities.[1241] Members are merely 'encouraged' to provide cash-based aid and to procure goods in the recipient countries or regions.[1242] However, even if aspects of the Food Assistance Convention are incorporated into the WTO's export subsidy rules, the Convention contains a conflict clause, which prioritizes the present and future WTO obligations over the provisions of the Convention. Article 3 stipulates:

> Nothing in this Convention shall derogate from any existing or future WTO obligations applicable between Parties. In case of conflict between such obligations and this Convention, the former shall prevail. Nothing in this Convention will prejudice the positions that a party may adopt in any negotiations.[1243]

[1238] WTO, *Export Competition, Ministerial Decision of 19 December 2015* (21 December 2015) WT/MIN(15)/45, WT/L/980 paras 6,7
[1239] ibid para 11
[1240] ibid para 22
[1241] ibid paras 24, 25
[1242] ibid para 26
[1243] ibid art 3

The international rules on food assistance are thereby constrained by the market norms imposed by the WTO.

In 2014, Joseph pointed to the fact that "U.S. legislation requires that 75 per cent of it its food aid to be procured from US markets, to be packed and processed in the US, and transported by US ships" suggests that the Nairobi package appears to have changed little in this regard.[1244] There is still room within obligations under the agreement for States to disguise profit-seeking activities as food aid. For example, Article 10.4(a) prohibits the provision of aid tied "directly or indirectly to commercial exports," however it does not prohibit aid tied to other kinds of transactions, outside the realm of agriculture.[1245] Other authors have similarly lamented the fact that the organization continues to dictate international aid policies when it is simply 'none of the WTO's business.'[1246] Despite the reaffirmation to provide genuine food aid and to consider the needs of importing countries, under the Agreement on Agriculture this remains "a matter of best endeavor."[1247]

6.4 Are the Elements of a Conflict of Norms Present Between the Right to Food and the Subsidies Provisions?

Given that the same subject-matter between the Agreement on Agriculture and the ICESCR was discussed in Chapter 5, a detailed discussion is not warranted here.[1248] However, there are a few additional points to be made in regard to the overlap between the specific subsidy provisions and the right to food. It is perhaps even more likely that the provisions of these two topics would constitute the same subject-matter from the perspective of an interpreter because producer supports, particularly to low-income producers or those living in underdeveloped regions can contribute to the enjoyment of their right to food

[1244] Joseph (n 1048) 194
[1245] Agreement on Agriculture (n 1012) art 10.4(a); M.G. Desta, 'Food Security and International Trade Law; An Appraisal of the World Trade Organization Approach' (2001) 35 Journal of World Trade 449, 462
[1246] Häberli (n 1042) 316
[1247] ibid
[1248] See Chapter 5, Section 5.4.1

by improving their livelihood, whereas price supports can improve economic accessibility of foods for consumers. Other examples include subsidies that encourage the production of crops that produce nutritionally dense foods that can support the nutrition of a population, as opposed to export-oriented cash crops. Supports that incentivize environmental stewardship are useful for ensuring the right to food can be achieved for future generations. Lastly, subsidies that enable countries to purchase foodstuffs for stockholding and distribution as aid are necessary to fulfill the right to food in times of chronic or acute hunger; the fact that the G-33 country proposals express concern over being able to perform some of these functions as needed while remaining compliant with the WTO subsidy disciplines highlight an important intersection between the relevant provisions.[1249] Furthermore, adherence to international and national human rights obligations is one of the reasons cited for India's National Food Security Act, which was feared to be inconsistent with the country's WTO obligations.[1250] As the ILC has pointed out, "[t]he criterion of 'same subject-matter' seems already fulfilled if […] as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party."[1251]

A simple breakdown of some of the basic norms of the Agreement on Agriculture demonstrate that Members are, *inter alia*:

> Prohibited from the use of domestic support that *exceeds* agreed upon AMS levels (Article 3.2, Article 7.2(b))
>
> Prohibited from the use of export subsidies that *exceed* scheduled commitments (Article 3.3, Article 8, Ministerial Decision of December 2015)

[1249] WTO, 'Committee on Agriculture Special Session, G-33 Non Paper' (n 1206) 9; WTO, 'Informal Meeting of the Committee on Agriculture, Special Session' (n 1133) 2
[1250] Standing Committee on Food, Consumer Affairs and Public Distribution, Ministry of Consumer Affairs, Food and Public Distribution (n 1223) para 1.1, 1.5. See also: Global Post, 'US opposition to the ambitious Indian Program a 'direct attach on the right to food' (3 December 2013) <http://www.globalpost.com/dispatches/globalpost-blogs/global-pulse/obama-administration-food-security-act > accessed 20 March 2016
[1251] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) A/CN.4/L.682 para 23

Obligated to reduce Amber Box subsidies at an aggregate level (by the number determined in its AMS calculation) (Article 6.1)

Obligated to reduce export subsidies according to its Schedule (Article 9.1)

Permitted to employ subsidies, if they meet the criteria of Article 6.2 and Annex 2 (Article 6.1, Article 6.2, Article 7.1, Annex 2)

Permitted to employ subsidies, *if* production is limited (Article 6.5)

Permitted to provide subsidies in excess of AMS commitments (provided they adhere to criteria of Annex 2 and the Ministerial Decision of 7 of December)

The provisions of ICESCR Article 11 that contain the most overlap with subsidy disciplines are those in which a State is: Obligated to respect the "the right of everyone to an adequate standard of living for himself and his family, including adequate food, […] and to the continuous improvement of living conditions" (Article 11.1); obligated to improve methods of the production and conservation of food (Article 11.2(a)), and; obligated to ensure an equitable distribution of world food supplies in relation to need (Article 11.2(b)). These obligations are to be undertaken with a view to "achiev[ing] the most efficient development and utilization of natural resources."[1252] States are also obligated to take "all appropriate means, including particularly the adoption of legislative measures" (Article 2).

The interaction of these norms does not pose any *prima facie* conflicts according to prevailing narrow definitions because there are no descriptive propositions common to both sets of rules, to which conflicting instructions might apply; the WTO norms do not impose obligations or prohibitions related to any listed measure that is also listed by the ICESCR.[1253] In fact, a number of measures that can be construed to support the realization of the right to food are explicitly permitted or exempt from reduction commitments under the WTO.

[1252] ICESCR (n 1031) art 11.2(b)
[1253] Erich Vranes 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17 The European Journal of International Law 395, 408

Likewise, the ICESCR does not obligate States to undertake any specific measures that are prohibited under the WTO, only those that are appropriate to objectives of the Covenant.[1254] The tests of joint compliance and of violation are presented next, as well as some thoughts on how the concepts of harmony, accumulation, and fragmentation in international law are relevant.

6.4.1 The Test of Joint Compliance

The text of ICESCR provides a wide enough margin of appreciation that a State can comply with the subsidy rules. Likewise, the provision of a subsidy, even one that does not fall under the Green Box, can be implemented at a cost that falls within the AMS limits. Because the State agreed to the terms of the agriculture agreement after the Covenant and it also has the option to implement various, perhaps equally beneficial, measures, the *test of joint compliance* is unlikely to be satisfied if its historical application is any indication. Recall that the panel adheres to a strict definition and applies the test in *European Communities — Regime for the Importation, Sale and Distribution of Bananas*.[1255] It finds that meaning of 'conflict' as set out in the General Interpretative Note pertains to: a situation where "obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and […] the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits."[1256]

One could expand on this test to include consideration of the norms from both directions, without regard to which rule was imposed first, or which measure was implemented first.[1257] This flexibility is fitting given the ongoing nature of the right to food obligations. States might pursue different kinds of measures at different points in time to respond to new or changing contexts, such as the

[1254] ICESCR (n 1031) art 2
[1255] WTO, *European Communities: Regime for the Importation, Sale and Distribution of Bananas – Report of the Panel* (22 May 1997) WT/DS27/R/GTM, WT/DS27/R/HND [7.159]. See also: WTO, Indonesia: *Certain Measures Affecting the Automobile Industry – Report of the Panel* (23 July 1998) WT/DS54/R, WT/ DS59/R, WT/DS64/R [footnote 649]
[1256] ibid
[1257] Vranes (n 1253) 413-414

food crisis. Because the right to food contains obligations of result and of conduct, a State may discontinue or modify an existing measure based on reassessment; all of these actions comply with the nature of obligations under international human rights law.[1258] Yet even this modification to the test, if it is not accompanied by clear acceptance of permissive norms, will not demonstrate that a conflict is present; that is, if a measure is appropriate for the fulfillment of a States' right to food obligations, and that same measure is prohibited under the Agreement on Agriculture, so long as the State does not actually implement that measure (because it is prohibited), it can comply with the WTO rules. It might also remain in compliance with its right to food obligations by choosing other measures. In essence, it is *possible* for States to comply with their obligations under both agreements.

Furthermore, a WTO panel or Appellate Body might clarify that Members are not prohibited *in concreto* from implementing any specific kind of subsidy; rather, they must only adhere to their reduction commitments or to the specific criteria of the Green Box or *de minimis* ceilings. It is also unlikely that the panel or the Appellate Body would find a conflict, as it would entail interpretation of the right to food in order to determine that the State is obligated to undertake the measure in question. Although the panels and Appellate body can – indeed, must – take into account external international rules such as right to food obligations, it may not apply those rules as facts when it would require an interpretation of them (or without a party invoking them).[1259]

[1258] Alston and Quinn (1021) 185; ILC, 2 Yearbook of the International Law Commission A/CN.4/SER.A/1977/Add.l (Part 2) (1977) 23 para. 14

[1259] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 31.3(a); Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press 2003) 269

6.4.2 TEST OF VIOLATION

The *test of violation* asks whether "compliance with, or the application of, one norm necessarily or potentially violates the other."[1260] This relates to what Pauwelyn calls "a conflict of applicable laws."[1261] That is, a situation wherein the "*exercise or implementation* of one norm" leads to a breach of another norm.[1262] The question is, do the subsidy provisions lead to a breach of States' right to food obligations after they have been exercised? As noted, the subsidy provisions do not expressly obligate States to refrain from undertaking any specific measure to which they have a simultaneous obligation to implement under the ICESCR (there are no identical descriptive propositions).[1263] Just as in Chapter 5, here again WTO obligations could potentially lead to a breach of right to food obligations if the obligation to take 'all appropriate' measures contains the permission to take any measure including a specific measure that is inconsistent with a State's subsidy obligations (and if it actually implements that measure). It must be considered that a State has the sovereign authority to undertake a desired measure to the extent that it has not committed itself to do otherwise through international rules that curb this freedom. In this case, the State has willingly committed to the Agreement on Agriculture in accordance with the principle of *pacta sunt servanda*, and therefore its freedom to undertake a conflicting measure (which is only one of innumerable possible and permitted measures) is undercut by its entry into the organization.

Further complicating analyses based on breach, is the fact that violations of the subsidy (and market access) provisions and the right to food obligations are not always clear. In regard to WTO law, former Special Rapporteur De Schutter states that because "violations are not self-evident but are determined by the Dispute Settlement Body (DSB) after a Member has initiated dispute

[1260] Vranes (n 1253) 415
[1261] Pauwelyn, *Conflict of Norms in Public International Law* (n 1259) 177-179
[1262] ibid
[1263] Vranes (n 1253) 408

proceedings […] states are less likely to initiate creative policies."[1264] This is what he refers to as the 'chilling effect' of the WTO rules on right to food-related measures.[1265] The potential for a State's right to food-related programme to be challenged within the WTO can dissuade States from implementing such programmes, even if they are not explicitly prohibited under the agriculture agreement. Member States:

> 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 strictly required by human rights treaties, nevertheless would contribute to the progressive realization of human rights.[1266]

The responsibility of WTO adjudicatory bodies to take into account outside law does not resolve the issue of the chilling effect because the problem is that it preempts the use of any measures that might be challenged. If the measure is precluded based on its incompatibility with the WTO rules, no rules are ultimately breached.

General Comment 12 outlines some of the ways in which violations occur, and the growing body of case law contributes to this understanding, yet uncertainties remain. Satisfying an obligation of conduct in regard to the right to food requires a State to take steps toward its progressive achievement, by improving the production and distribution of food through the efficient use of resources, and also to take into account the needs of food importing and exporting countries. The shared objectives of the Agreement on Agriculture as enumerated in its preamble, make it appear not only compatible in these regards, but also possibly constitutive of a measure through which a State can fulfill its right to food obligations of conduct pursuant to Article 2 and 11. Even in the presence of research indicating that WTO rules have failed to achieve some of the objectives set out in the covenant, "so long as the State has

[1264] De Schutter, *The World Trade Organization and the Post-Global Food Crisis Agenda* (n 1138) 3
[1265] ibid
[1266] De Schutter, *International Trade in Agriculture and the Right to Food* (n 1078) 39

not failed to achieve *in concreto* the result required by an international obligation," it does not amount to a breach of obligation.[1267] The fact that economic modeling demonstrates overall welfare gains stemming from trade liberalization, particularly in developing countries, can be used to demonstrate how compliance with the Agreement on Agriculture enhances the fulfillment of the Covenant's objectives (for example, to improve standards of living).[1268] Additionally, regional trade agreements signed by a State to further liberalize trade may represent efforts toward remedial action, if the loopholes in the world trade regime are assumed to be reason that the expected benefits have not accrued.

6.4.2.1 Does the Implementation of the World Trade Organization's Agriculture Rules Represent Retrogressive Measures?

The WTO criteria imposed on permitted programmes can constrain or limit their application, although they may not amount to a breach of right to food obligations *per se*. For example, according to G-33 States, the requirement that Current Total AMS calculations or annual *de minimis* calculations include the difference between the applied price and the external reference price of food purchased for food security programmes limits the resources that can be allocated to those programmes, but does not prohibit them altogether. However, the removal or reduction of subsidies or contributions to specific programmes might be viewed as retrogressive. A retrogressive measure must be "justified by reference to the totality of right in the Covenant and in the context of the full use of the maximum available resources."[1269] It might be argued that the expected benefits of the trade rules will promote the realization of other rights and therefore any slight regressions related to the right to food

[1267] ILC, 2 Yearbook of the International Law Commission (n 1258) paras 3-5, 14. See also discussion in Section 4.3.1.4
[1268] Anderson (n 1112) 179
[1269] Malcolm Langford and Jeff A. King, 'Committee on Economic, Social and Cultural Rights' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 501

are justified. Dowell-Jones argues that rollbacks in the area of subsidies are inevitable in the "post-Keynesian paradigm" wherein States cannot spend as much as they once did (though she did not say whether this is because of the limitations imposed by Bretton Woods institutions or the WTO).[1270]

In light of the obligation to take steps toward the progressive realization of rights, using the State's 'maximum available resources,' the AMS requirements might be understood as reducing the available resources for those programmes *if* 'available' relates to resource spending that will not be subject to challenge.[1271] Here again the issue of interpretation and indeterminacy arises; identifying what resources are available, and who is to determine their availability, are not clear from the Covenant, which makes norm conflict theories difficult to apply to this issue.

Notwithstanding the questions surrounding the notion of 'available resources,' it is proposed here that the chilling effect exemplifies the impairment of the *telos* of a norm, which represents a conflict only according to very broad definitions.[1272] According to Vranes, the function of norms – their *telos* – is fundamentally to 'regulate behavior.'[1273] He writes that, "if attaining this *telos* is impaired by a permission incompatible with an obligation or prohibition, […] one should recognize these norms as conflicting."[1274] Here the threat of challenge, and particularly unilateral challenge and the imposition of countervailing measures can potentially impair the *telos* of the right to food provisions. While this is unlikely to be accepted by the panels or Appellate Body, it nonetheless represents a problem for States in implementing the full spectrum of possible right to food measures. It also represents the kind of

[1270] ibid
[1271] De Schutter, *International Trade in Agriculture and the Right to Food* (n 1078) 39
[1272] Vranes (n 1253) 404-405
[1273] ibid 404
[1274] ibid 410

frustration that Jenks acknowledges to be equally difficult for States to navigate.[1275]

6.4.2.2 The Effect of the Peace Clause

There are still caveats to this determination, however, as the creation of the Peace Clause, which exempts certain food security measures from challenge, adds an additional layer of complexity to the assessment of conflict or compatibility; if the *telos* of a norm was impaired by the possibility of challenge, this incongruence is ameliorated by the introduction of the Peace Clause. This is true at least in the case of stockholding programmes that meet the criteria set out in Annex 2 and the Peace Clause. Although the norms in question remain the same (there was no change to the provisions of the agriculture agreement), the 'chilling effect' of the threat of challenge does not factor into the assessment as it did before. This ensures the technical compatibility of the subsidy rules with the right to food, but it does not encourage the development of an international agricultural trading system that enhances the realization of socio-economic rights. The norms expressing flexibilities in regard to matters related to the right to food are consistently presented as tangential to the objectives of the trade agreements. The new flexibilities that the Peace Clause engenders neither explicitly permit nor prohibit measures; instead they are simply exempt from challenge.[1276] The exemption may be conceived as contributing to the legal compatibility of the subsidy provisions and the right to food, yet absent a conflict clause giving primacy to human rights in the event of conflict, this temporary solution falls short of promoting coherence between the international regimes.[1277]

[1275] Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 British Yearbook of International Law 401, 426
[1276] WTO, *Public Stockholding for Food Security Purposes, Ministerial Decision of 7 December 2013* (n 1175)
[1277] De Shutter expresses concern over the fragmentation of international policy, see: UNHRC, 'Mission to the World Trade Organization' (n 1026) paras 33-36

6.4.3 Revisiting the Indeterminacy of the Right to Food; Human Rights as Counterweights to Trade Rules within the WTO Dispute Settlement Mechanism

Because there are competing conceptions of the scope and content of the right to food, determining compatibility depends, in part, on how an interpreter understands the entitlements and obligations related to the Covenant. If one adopts the elaborations put forth by the Committee for example, it therefore includes a broad range of entitlements and obligations on States towards its own citizens, to individuals in other jurisdictions, and to the international community. The larger scope means that there are also more possibilities for conflict. If one uses a conservative interpretation, the possibility of conflict is reduced simply by virtue of the fact that it contains fewer elements and therefore fewer points of intersection. Again it must be recalled that harmonious interpretations are encouraged in legal discourse, particularly that which expounds the dangers of fragmentation. Indeterminacy provides the interpreter some flexibility to reshape the scope of entitlements and obligations related to the right to food and other socio-economic rights so that they adhere to principles of the world trade regime.

6.4.3.1 Contemporaneous and Evolutionary Interpretations of the Right to Food and Related Concepts in the WTO

Determination of a conflict between ICESCR Article 2 and the Agreement on Agriculture subsidy provisions (and market access provisions) appears to hinge on what an 'appropriate' measure is. The problem is that the potential range of measures is so wide that the overall obligation is devoid of any clear content against which compatibility can be measured within the WTO regime. Furthermore, what is an appropriate measure to combat hunger and malnutrition is likely to change according to the conditions prevailing within a State at a given time. What was appropriate at the time of drafting the Covenant may no

longer be appropriate. For example, the challenges arising in the aftermath of the global food crisis may require different, perhaps more collective, efforts.

This is of particular significance in regard to food security as a concept noted in the preamble to the Agreement on Agriculture. If food security is understood within the WTO regime as ensuring that enough food is available within a State, then the responsibility of Members to 'take account' of it when interpreting the agreement is not sufficient to ensure that States can respect, protect and fulfill the right to food within and beyond their borders. Orden describes the evolution of the concept of food security and how it has been shaped by neoliberal discourse throughout its existence.[1278] She finds that in the 1980's institutions such as the World Bank resisted the idea that food sovereignty was encompassed by concept of food security, as it was originally proposed by the FAO; instead the World Bank (along with the IMF) promoted a version of food security that focused on purchasing power and economic development, including through globalized agricultural trade.[1279] Through the work of the FAO, the Committee on World Food Security, and others, its meaning has again broadened to include measures of food security at the household and individual level, though these organizations work from the assumption that globalized trade is the standard framework through which it can be achieved.[1280] Despite the evolution of the meaning of food security, the WTO system continues to prioritize national food security that can be achieved through a dependency on imports and with the limited regulatory autonomy for States.[1281] It is far removed from the broad array of entitlements envisioned by the Committee on Economic, Social and Cultural Rights and the present and former Special Rapporteurs on the Right to Food, according to whom food is a legal right, agriculture is a public good, and States have a central role in

[1278] Orford (n 1022) 6
[1279] ibid
[1280] See for example: FAO, *Rome Declaration on World Food Security and World Food Summit Plan of Action* (13 November 1996) paras 37, 39, 40(a), (c), (e), (f). See also: Kerstin Mechlem, 'Food Security and the Right to Food in the Discourse of the United Nations' (2004) 10 European Law Journal 631
[1281] Olivier De Schutter, 'WTO defending an outdated vision of food security' (16 December 2011) <http://www.srfood.org/en/wto-defending-an-outdated-vision-of-food-security> accessed 20 March 2016

ensuring the optimal functioning of agricultural systems. From the text of the instruments of the organization, it appears to accept important concepts related to the right to food, such as food security, but it does so using a particular and limited notion of what is encompassed by the term.

However, there are possibilities for a broader understanding of the right to food to enter the organization. The panel and Appellate Body frequently refer to general rules on treaty interpretation and specifically to the Vienna Convention. Article 31.3(c) of the Vienna Convention asserts that "relevant rules of international law applicable between parties" are to be taken into account in interpretation.[1282] These rules include the ICESCR Articles 2 and 11. However, Pauwelyn cautions that the adjudicatory bodies have rarely engaged Article 31.3(c) in comparison to the other rules of treaty interpretation and therefore they appear reluctant to seriously consider outside law like human rights agreements.[1283] The vague nature of States obligations under the Covenant further problematize this, as there is room for various interpretations of the right to food obligations held by States; he notes that, "interpretations held by only some of the parties to an international treaty may not be conclusive since the interest and intentions of other parties may have to be taken into consideration."[1284] Therefore the continuing disagreement over what exactly the right to food entails could foreseeably limit its advancement within the WTO regime through Article 31.3(c).

Furthermore, the elaboration of the right to food has taken place through the General Comment and it is unclear whether this constitutes an agreement between the parties on the meaning of Article 11. Although there have been efforts to place the Committee on legal par with other treaty bodies, its unique genesis could theoretically pose a problem for accepting the quasi-legal character of General Comment 12 as a subsequent agreement between the parties. Certainly the United States, which has been critical of the Committee,

[1282] Vienna Convention (n 1259) art 31.3(c)
[1283] Pauwelyn (n 1259) 269
[1284] ibid 257

is likely to reject the idea that interpretation put forward in General Comment 12 has any bearing on the trade-related rights and obligations of WTO Members.[1285] Without General Comment 12 the Covenant does not provide clear guidance on what the obligations entail, and Members might hold widely different interpretations. Indeed, some WTO Members are not even party to the ICESCR.

The right to food requires contemporaneous interpretation if it is to be effective at addressing present day challenges.[1286] An argument for the expansion of the concept of 'non-trade concerns' in the Agreement on Agriculture to include a wider range of right to food-based entitlements is complicated by the uncertainty of how dynamic or evolutionary interpretations would be accepted within the regime. Pauwelyn asserts that a WTO agreement would need to clearly express the intention of the parties to accept evolutionary and contemporaneous interpretations.[1287] While Agreement on Agriculture does not express this intention, the preamble text leaves the door open to the possibility. By Pauwelyn's own admission, the Appellate Body has accepted the evolving nature of terms such as 'exhaustible natural resources.'[1288] To assume otherwise - that the non-trade concerns mentioned in preamble of the agreement reflect static issues at the time of adoption of the agreement - would limit its usefulness.

These possibilities may prove more effective at advancing the right to food within the organization than GATT Article XX. The decision in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* illustrates the Appellate Body's refusal to accept human rights

[1285] Malcolm Langford and Jeff A. King, 'Committee on Economic, Social and Cultural Rights' in Malcolm Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2008) 480
[1286] For example, recall that ICESCR 11.2(b) originally reflected grain-exporting (developed) countries concerns over export profit potential. Philip Alston, 'International Law and the Human Right to Food' in Philip Alston and Katarina Tomaševski (eds.) *The Right to Food* (Martinus Nijhoff Publishers 1984) 43
[1287] Pauwelyn (n 1259) 265. See also: David Palmeter and Petros Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92 American Journal of International Law 398, 410
[1288] ibid 267; WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products – Report of the Appellate Body* (12 October 1998) WT/DS58/AB/R [128]-[129]

considerations as ancillary objectives of exempted measures.[1289] Moreover, the criteria according to which Article XX can be invoked places limitations on its usefulness; the threshold used to determine what is a 'necessary' measure according to Article XX is much higher than the idea of an 'appropriate measure' in the ICESCR. At least the burden of demonstrating the availability of other less trade-restrictive options lies with the complaining State, which relieves the State implementing the human rights measure of expending resources to prove why other measures are not available or reasonable. However, Article XX does not factor in the importance of public participation, the needs of vulnerable members of society, or overarching human rights principles. Nor does it facilitate nuanced measures that contain carve outs for certain groups based on their special needs.[1290]

6.4.3.2 Some Final Thoughts on the Concepts of Accumulation and Conflict

According to Pauwelyn, the relationship between norms of international law that pertain to the same issues can take two forms: they can conflict or accumulate.[1291] When the norms in question have overlapping subject-matter and do not truly conflict, they should therefore accumulate, or reinforce one another in some way. The analysis throughout Chapters 5 and 6 of this research demonstrates that the relationship between the norms in question is complex; and while not necessarily indicative of genuine norm conflict according to prevailing theories, it can impair the exercise of one or more of the norms in a given context.

[1289] See Chapter 5 Section 5.4.6; WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products - Report of the Appellate Body* (22 May 2014) WT/DS400/AB/R; WT/DS401/AB/R; Marie Wilke 'The litmus test: Non-trade interests and WTO law after Seals' (September 2014) 8 Boires (International Centre for Trade and Sustainable Development) 9, 13 <http://www.ictsd.org/bridges-news/biores/news/the-litmus-test-non-trade-interests-and-wto-law-after-seals> accessed 20 March 2016

[1290] ibid

[1291] Pauwelyn (n 1259) 161

Without determining a conflict, no rules are applied to give priority to one or another norm in a given context. According to Former Special Rapporteur De Schutter, this means that it is left:

> [T]o 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 and because human rights norms have the status of peremptory norms of international law […] human rights should prevail over any other international commitments.[1292]

De Schutter suggests that if genuine conflict exists, human rights obligations should prevail if a court hears the matter. Because the peremptory status of the right to food is not a widely accepted concept, it is not clear that the right to food would be afforded such priority.[1293] Marceau notes that "WTO provisions cannot be overruled by situations and considerations belonging to another subsystem,' such as those of human rights law."[1294]

More to the point, if a genuine conflict between the rules in question cannot be found, and they have overlapping subject-matter, it must be asked how the rules accumulate. Ensuring harmony in this regard seems to imply that States interpret their socio-economic rights obligations and the possible appropriate measures within the boundaries of the WTO framework. The appropriate measures to be undertaken are defined and limited by the WTO rules, either through the Green Box, Article XX, or other exemptions. Members ensure that their measures conform to free market principles and the tenets of neoliberal ideology embedded in the WTO regime. Accumulation, as a kind of harmonization, brings the vague content of socio-economic rights in line with

[1292] De Schutter, *International Trade in Agriculture and the Right to Food* (n 1078) 37-38
[1293] WTO, *European Communities: Measures Concerning Meat and Meat Products (Hormones) - Report of the Appellate Body* (16 January 1998) WT/DS26/AB/R, WT/DS48/AB/R
[1294] Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 European Journal of International Law 753, 767

trade rules and the limited understanding of non-trade concerns held within the regime.

The WTO regime operates under the pretense that market norms can achieve the objective of human rights norms. If it is to truly facilitate the enjoyment of the right to food, the concepts shared by both regimes such as non-discrimination, fairness, food security, and trade efficiency must include not only economic considerations but also the ability of agricultural trade to feed people with dignity, with particular concern for the most vulnerable people. Leaving the fulfillment of the right to food to the presumed effective functioning of the market will have a detrimental effect on the enjoyment of the right to food for vulnerable members of society. As Joseph argues, "food is a necessity of life, unlike most products and services. From a human rights point of view, those who are too poor to purchase food cannot be excluded from the food market in the same way that they can be excluded from the markets for cars or television sets."[1295]

6.4.2.3 ICESCR ARTICLE 4: LIMITATIONS ON THE RIGHT TO FOOD

If, *argruendo*, a clear conflict were determined between the Agriculture Agreement and the right to food from the perspective of a State, one would then need to examine whether the violation would be acceptable under ICESCR Article 4.[1296] If so, this poses new questions about how Article 4 may operate as a *de facto* conflict avoidance clause. ICESCR Article 4 explains that State parties 'may subject' the rights outlined in the Covenant "to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."[1297] Article 4 thereby permits limitations on the enjoyment of rights (and the fulfillment of obligations) according to the criteria listed.

[1295] Joseph (n 1048) 195
[1296] ICESCR (n 1031) art 4
[1297] ibid

With respect to the requirement that limitations on the rights in the Covenant are undertaken to promote the 'welfare' of a society, Saul *et al*. interpret this as encompassing concern for "national security, public order, public health or public morals."[1298] While the Committee has provided little guidance on the interpretation of this Article, it could also be understood as including the *economic* welfare of "the people as a whole."[1299] The expected benefits of membership in the WTO, if realized, can ultimately advance the enjoyment of the right to food and other socio-economic rights. The phrase "in a democratic society" might further justify limitations in situations where a democratically elected government enters into the WTO.[1300] The requirement that limitations on the rights in the Covenant must occur "as determined by law" is not difficult to satisfy, however no WTO Members have implemented a law explaining that limitations on the right to food may result from its obligations under WTO agreements. The requirement that the limitation must also maintain compatibility with the 'nature' of the rights means that it must not limit rights to the extent that a breach of their minimum core occurs.[1301] Alston and Quinn posit that this phrase might also mean that some rights may not be subject to limitations at all, due to the nature of their subject-matter; they present the right to be free from hunger as one such example.[1302] Limitations on the enjoyment of the right to food as a result of the Agriculture Agreement, whether the WTO agriculture rules conflict with the right to food or not, are unlikely to breach the minimum core of the right to food, as the WTO rules allow sufficient policy space for States to address acute circumstances. Minimal limitations on the broad spectrum of entitlements encompassed by the right to food might be reasonably justified by an argument that the WTO rules can ultimately achieve the objectives Covenant, provided they are demonstrated to be necessary, legitimate, and proportionate.

[1298] Ben Saul, David Kinley, and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights Commentary, Cases, and Materials* (Oxford University Press 2014) 250
[1299] ibid; Limburg Principles on the Implementation of the ICESCR (8 January 1987) E/CN/4/1987/17 para 52
[1300] ICESCR (n 1031) art 4
[1301] Saul (n 1298) 257
[1302] Alston and Quinn (n 1021) 201; Langford and King (n1267) 497

6.5 CONCLUSION

The perception of conflict between the trade and right to food provisions stems from the documented and perceived negative effects occurring, or worsening, alongside the implementation of the WTO rules. Just as in the examination of market access rules, the determination of compatibility according to prevailing norm conflict theories is more the consequence of the lack of clear content of the right to food than genuine compatibility between the norms. It is also the result of the limitations of the prevailing norm conflict theories. Most of the subsidy commitments relate simply to reductions and therefore do not necessarily *prevent* measures supportive of the right to food. An appropriate measure according to a State or a population, may not fit under the programmes that are exempted from commitments under, *inter alia*, the Green Box, but without explicit obligation or permission to undertake that particular measure it does not conflict with the WTO obligations. Therefore a State must alleviate the apparent incompatibility by finding another appropriate measure to achieve its desired objective – one that fits into the agriculture agreement's listed exemptions.

Without acknowledgement of the right to food in the WTO regime, it is unclear whether the right to food acts as a counterbalance to WTO obligations within the WTO regime. Although the panels and Appellate body have recognized that Member obligations must be understood within the broader context of other international law, the vagueness of the right to food may prevent the WTO adjudicative bodies from factoring it into a dispute when they must interpret its meaning.[1303] Even in the event that they do factor the right to food obligations

[1303] WTO rules are not to be read in 'clinical isolation' from external international law. WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Bod*y (29 April 1996) WT/DS2/AB/R [16]

into a dispute, if it implies differently from the WTO rules in question, it does not override States obligations within the regime.[1304]

Technical compatibility does not, however, indicate that States' WTO commitments are neutral in terms of their impact on the enjoyment of the right to food, especially for small-scale producers in developing countries, as research by Special Rapporteurs illustrates the potential harm to them.[1305] The gaps in the WTO rules allow developed country Members to continue to use high levels of support and the incomplete liberalization process allows for uneven distribution of subsidies between developed and developing countries. This is not to suggest that full liberalization is needed to enhance the congruency between WTO rules on agriculture and the right to food; rather, it is simply to assert that the loopholes in the existing rules hamper the expected benefits of agricultural trade disciplines for developing countries. From a trade liberalization perspective, committing to further reductions and tightening the rules on agriculture subsidies will facilitate the right to food, as former WTO Director-General Pascal Lamy has argued in the debate with former Special Rapporteur Olivier De Shutter.[1306] The Peace Clause represents one example of Members taking the needs of developing countries and food security into account, in accordance with the Preamble of the Agreement on Agriculture. However, subsidy reform aimed at providing more support to small-scale farmers and improving sustainable and efficient production could also prove useful. At a minimum, to ensure that international agricultural trade regime is harmonious with the right to food, food as an individual human right – and not merely food security - must be incorporated into the WTO, including into the agreements themselves.

[1304] Marceau (n 1294) 767. See also: WTO, *EC: Measures Concerning Meat and Meat Products (Hormones) - Report of the Appellate Body* (n 1293) [124]

[1305] For example, UNHRC, 'Mission to the World Trade Organization' (n 1026)

[1306] WTO, 'Table ronde, La libéralisation du commerce et l'OMC: aide ou entrave au droit à l'alimentation?' (transcript) (11 May 2009) <https://www.wto.org/english/forums_e/debates_e/debate14_e.htm> accessed 16 February 2016. "[L]e commerce international des denrées agricoles mieux régulé c'est possible et que ça peut apporter, à mon sens, une contribution décisive pour régler la faim dans le monde." [...] [L]'ouverture des échanges peut et doit, compte tenu de l'urgence du problème, aider à la mise en œuvre du droit à l'alimentation."

The fact that States decide to become members of the WTO, and the rules of the organization are not imposed on them without their consent, supports the idea that the rules under both regimes are compatible, especially if one adheres to the presumption against conflict in international law. If a State foresaw that the rules would require it to breach its obligations under the ICESCR, presumably it would not enter into the organization. Although the WTO norms are not particularly supportive of the right to food, it must be recalled that States are the drivers behind the organization and that it does not operate independently of them.

7. Conclusion

The research conducted by experts such as Special Rapporteurs on the right to food suggest a conflict between the right to food and WTO norms, particularly in terms of the enjoyment of the right by individual rights-holders. This research has drawn on norm conflict theories and the discourse on the fragmentation of international law to assess the compatibility of rules of both regimes. Despite these negative impacts on the right to food for rights holders, it has found that, according to the prevailing definitions of norm conflict in legal theory and practice, no conflict exists, except perhaps in circumstances wherein very particular interpretations of the obligations set forth in the ICESCR are adopted.

The nature of the relationship between human rights and international trade law has been of great interest to scholars since the Uruguay Round of negotiations. From the existing literature, this impact appears to be unidirectional, with world trade law impacting the enjoyment of human rights – either positively or negatively – while human rights have had little impact on WTO jurisprudence. Activists, experts, and scholars have argued that human rights ought to 'trump' trade rules in situations wherein the enjoyment of human rights is limited as a result of international trade rules. But even where multilateral trade rules might prevent or detract from the enjoyment of the right to food, the WTO has failed to take them into account in any meaningful way to date. Former General-Director Lamy welcomed informal discussions about the relationship between the right to food and agricultural trade rules, and there has been mention of food security with respect to particular programmes, such as stockholding, which could be affected by the Agreement on Agriculture as well as the Agreement on Subsidies and Countervailing Measures. Yet human rights considerations have not made their way into the rules of the regime in a way that would enable them to act as a considerable counterforce to trade rules.

Broader understandings of the right to food, and concepts that are gaining momentum in civil society, such as food sovereignty, are entirely missing from the WTO agreements. Indeed, individual and community control over food systems contradicts the *raison d'etre* of the organization itself; international trade liberalization seeks to replace local systems with global ones. Self-sufficiency in particular has been wholly rejected as an approach that could enhance the right to food.[1307] There are many benefits to be enjoyed from increased international trade, and indeed some have already manifested, but without the necessary supports in place for net food-importing developing countries, small-scale producers, and vulnerable consumers, they will not be realized equally.

7.1 Overview of chapters

In chapter two, the issue of the fragmentation in international law was explored. The fragmentation of international law forms the contextual backdrop against which the relationship between the WTO's rules on agricultural trade and the right to food are assessed. It was found that neither the WTO or international human rights law constitutes self-contained regimes as both arise within general international law, including the rules on treaty interpretation as outlined in the Vienna Convention on the Law of Treaties. Still, the WTO regime and international law are both relatively isolated regimes in international law. While the general international law rules on treaty interpretation suggest that the rules of the Agriculture Agreement should be interpreted in light of States' other international commitments, the adjudicatory bodies have not admitted human rights concerns within the regime.[1308]

Fragmentation is said to contribute to norm conflict in international law due to the increase in rule-specific regimes (even if not wholly independent), which

[1307] WTO, 'Table ronde, La libéralisation du commerce et l'OMC: aide ou entrave au droit à l'alimentation?' (transcript) (11 May 2009) <https://www.wto.org/english/forums_e/debates_e/debate14_e.htm> accessed 16 February 2016.
[1308] WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products - Report of the Appellate Body* (22 May 2014) WT/DS400/AB/R; WT/DS401/AB/R

demonstrate limited consideration of external international law. Human rights law is one such specialized regime. International human rights law employs specialized rules of interpretation, includes hierarchical norms (such as *jus cogens* and obligations *erga omnes*) in an otherwise non-hierarchical international system. While the 'humanitarian and civilizing' nature of the human rights suggests that this rule regime is indeed special, it is not clear that all rights occupy a superior position in the wider corpus of international law than, for example, WTO law.

Chapter three builds on the discussion about fragmentation, looking specifically at the problem of conflicts of norms in international law. It presents an overview of scholarship on the definitions and theories about what constitutes genuine norm conflicts and how they are or should be resolved in international law. This chapter highlights how narrow definitions are more commonly employed in dispute settlement proceedings. This tendency along with the strong presumption against conflict often allows an interpreter to avoid recognizing conflicts, and thereby neglects the opportunity to resolve what may be a real incompatibility from the perspective of the State. It hints at how conservative definitions are most detrimental to norms that are vague or of a relatively weak force in international law, such as the right to food. Furthermore, norm conflict resolution techniques such as those found in the Vienna Convention and *lex specialis* are not applied in situations where a conflict is not recognized. In any event, their application would not guarantee the priority of the right to food over other rules of international law.

In Chapter four the focus is on the right to food in international law. It attempts to clarify the legal nature of the right to food. It explores how the vagueness of this right renders it vulnerable to competing understandings. It ultimately adopts a relatively conservative conception of the right to food, which is informed by the elaborations put forth by the Committee on Economic, Social and Cultural Rights. The frequent use of the term 'food security' in international law and the WTO system instead of the right to food demonstrates

how various actors within international law can influence the development of this right and reduce its scope, at least in terms of the discourse that surrounds it. Food security is not related to any international legal norms and its development has been shaped by institutions and organizations such as the WTO, that promote a specific kind of economic development that is dependent on trade liberalization.

In chapter five and six the analysis of the relationship between the Agreement on Agriculture and the right to food under the ICESCR take place. Chapter five focuses on market access disciplines. It also discusses the possibility of Article XX as an entry point for consideration of the right to food. Chapter six looks at subsidy disciplines enshrined in the Agreement on Agriculture and also considers how provisions of the Agreement on Subsidies and Countervailing Measures relate agriculture supports. It explores recent debate within the organization over the level of regulatory autonomy granted to States to protect food security within their jurisdictions. The result of this debate, the adoption of the Peace Clause, is also explored in terms of its ability to promote congruence with States' right to food obligations.

7.2 FINDINGS

This research demonstrates that although there are clear incompatibilities between the right to food and the Agreement on Agriculture, the relationship between these two agreements do not constitute a genuine conflict of norms. Ultimately, the agriculture agreement rules are in tension with the right to food, and the relationship between the norms of both regimes falls somewhere between conflict and accumulation.[1309] This finding is based on a number of factors, but most notably, the shortcomings of prevailing norm conflict theories in terms of their scope and applicability and also the vague formulation of the

[1309] Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press 2003) 161

right to food in international law, which limits its enforceability within the WTO regime. Fundamentally, these are issues of interpretation.

Prevailing norm conflict theories operate to erase incompatibilities. Courts tend to apply narrow definitions in order to maintain the coherence of international law, to remain within the boundaries of its subject-matter jurisdiction, and also to avoid determining which norm prevails in a particular situation. While narrow definitions may be important to preventing further technical fragmentation in international law, they do not achieve harmony between the rules of relatively isolated sub-regimes. They also do not serve to promote human rights - and this is especially true for socio-economic rights - as norms of an elevated status vis-à-vis other specialized regimes in international law.

A number of conclusions about the nature of the WTO regime, which came to light throughout this research, will be discussed in relation to the second major finding, regarding the right to food. The WTO dispute settlement mechanism is widely regarded as an exemplary adjudicatory system in international law. It has proven effective at enforcing compliance with the rules of the organization and operates to strengthen the regime overall. Along with the detailed rules of the covered agreements, it represents the development of international law. The problem is that some other sub-regimes of international law have not progressed at the same rate - particularly, the socio-economic rights sub-regime. The ICESCR lacks widespread agreement about the scope and content of the rules contained therein, which means that there are still problems with the justiciability of socio-economic rights in international law. According to the rules of interpretation and the Appellate Body's own remarks, the WTO agreements must be interpreted in light of other rules of international law. However, absent clear direction about what States must do to fulfill their obligations under the Covenant, no judicial body outside of the human rights regime can effectively enforce these rules (notwithstanding jurisdictional issues, of course). The wide margin of discretion granted by the Covenants

ensures that the right to food yields to the more detailed and enforceable rules of the WTO.

At present, human rights including the right to food are not well integrated into the WTO regime. There are some permissions in place that provide policy space for States to fulfill their human rights commitments, yet these remain exceptions to the rules and the onus is on the State enacting a measure to prove it complies with WTO rules. The closest that genuine human rights concerns have made their way into the WTO regime is through Ministerial Declarations and Decisions, such as the Decision on *Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net Food-Importing Developing Countries* and the Peace Clause guaranteeing that specific national food security measures will go unchallenged until a permanent solution is found. The former has been implemented in a limited way; there are no binding commitments regarding food aid and there is nothing quantifiable that the Committee on Agriculture can use to determine compliance. The latter may be more effective to the desired ends but it is ultimately a small concession and fails to meet the majority the demands and proposals by G-33 States. It is ultimately found that these articles can serve a limited purpose toward the advancement of human rights concerns in the WTO. They are, however, insufficient to enable the full range of entitlements and obligations outlined in the ICESCR and by the Committee. They are even less likely to promote the right to food.

To the extent that the norms examined might be interpreted as harmonious, this can explained by the ability of socio-economic rights norms to fit the ideological framework of the multilateral trade system. The provisions of the right to food can be argued to work toward its objective using 'impeccable legal argument.'[1310] Concepts that are related to the right to food, such as food security, have no static meaning throughout history. As such, increased trade,

[1310] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue, Cambridge University Press 2005) 591

dependency on imports, and reduced local production in accordance with the theory of comparative advantage, might all be argued to be harmonious, perhaps even supportive of food security. By restricting the discussion to a limited understanding of food security, and avoiding legal entitlements or obligations to this end, the Agreement on Agriculture appears *prima facie* supportive of aspects of the right to food. Even if the right to food were to be further incorporated into the WTO regime, either through the exemptions permitted in the Green Box, GATT XX or otherwise, it is vulnerable to being shaped by WTO norms and its overarching ideology at the expense of other possible interpretations. The measures that a State might undertake in accordance with ICESCR Article 2 would be defined by what is acceptable within the WTO system.

The apparent incompatibility between the norms of the two regimes, identified by experts such as the former Special Rapporteurs seems to stem from a clash of values, particularly on the part of key actors within each of the regimes. There is a disconnect between the approach taken by the Special Rapporteurs, scholars and activists in their determination of incompatibility of international legal rules on one hand, and the practice of the WTO and norm conflict theory on the other. In spite of evidence that WTO rules negatively impact the enjoyment of the right to food, the relationship does not meet the criteria for conflict of norms. It is determined that much of the negative impact of WTO rules on aspects of the right to food stem from the shortcomings of the rules, which permit varying degrees of implementation around the world, rather than the overall object and purpose of the agreements. This means that individuals within developing countries could conceivably enjoy the benefits of trade liberalization if developed countries gave effect to the object and purpose of the agreements in their own policies. Amending the existing rules to allow developing countries more flexibility in order to facilitate the development of new and fragile industries while ensuring their right to implement programmes that combat hunger and malnutrition would enhance the harmony of the

agreement with the ICESCR. Perhaps most importantly, a new legally binding instrument that clarifies the scope and content of the right to food and details the range of entitlements suggested by the Committee in addition to food security considerations would strengthen its force.

Much of the debate about the fragmentation of international law is imbued with a fear over what it means for the 'system' of international law and the legitimacy of its norms. From the perspective of this author, the fact there are different legal approaches to addressing many of the challenges facing the world today – financial, energy, climate, and most relevant, food – is not, in itself, problematic. Key political and legal actors have always exercised a diversity of opinions on how to handle crisis and this can be useful. However, competing ideological perspectives are strengthened through their specialized rule regimes and the key actors and courts operating within each regime tend to prioritize its rules over other external rules. This is especially problematic for weaker norms like the right to food, which are of the utmost importance to the lives of the most vulnerable individuals but which do not exhibit the compliance pull of other kinds of international legal rules.

7.3 The Contribution of this Research

Woven throughout this work is the research of scholars and experts who have conducted similar studies on the topic of conflict of norms generally, or the relationship of the WTO rules and human rights. Few scholars that have written on the latter topic have applied norm conflict theories to their research, which points to the gap in the existing relevant literature that this research intends to fill.

Pauwelyn's work on the problem of conflict of norms in international law uses the example of the WTO law to illustrate how a relatively isolated regime in international law is still a part of the wider corpus of international law. He concludes that international law is essentially coherent while at the same time,

diverse. Pauwelyn's prolific collection of articles and books on the topic have contributed much to the theory of norm conflict in international law and holds a central place in the present research. Although this research agrees with much of Pauwelyn's conclusions, he does not explore the topic of conflict with human rights, which are arguably of a different nature due to the focus on individuals.

Vranes, whose work incorporates that of Pauwelyn – and indeed has been supported by Pauwelyn – expands his work and incorporates highly theoretical and analytical perspectives on the inadequacy of the available definitions of norm conflict. He also uses the WTO regime to illustrate compatibility with external international law, particularly international environmental law.

Research by authors that have made important strides in clarifying the scope and content of the right to food was consulted regularly throughout the writing of this dissertation. The interpretations and elaborations put forth by Alston, De Schutter, Saul, the Committee on Economic, Social and Cultural Rights have figured prominently in Chapter 4, 5, and 6. While their work informs the understanding of the right to food, it also points to the clarifying work that still needs to occur. This research responds to the need of a compatibility review of the right to food and the WTO rules highlighted by former Special Rapporteur Olivier De Shutter.[1311]

Lastly, this research attempts to overcome some of the obstacles that other work has encountered in trying to 'reconcile' the right to food and trade.[1312] It is argued here that perhaps the right to food should not be reconciled with the trade rules if this approach risks redefining human rights norms according to market norms. Ideally, food and agriculture would be treated differently than

[1311] Olivier De Schutter, *The World Trade Organization and the Post-Global Food Crisis Agenda* (Activity Report 2011)
[1312] Lily Endean Nierenberg, 'Reconciling the Right to Food and Trade Liberalization: Developing Country Opportunities' (2011) 20 Minnesota Journal of International Law 619; Christine Breining-Kaufmann, 'The Right to Food and Trade in Agriculture' in Trade' in Thomas Cottier, Joost Pauwelyn, Elisabeth Bürgi (eds.), *Human Rights and International Trade* (Oxford University Press 2005)

other products and they would be exempt from any disciplines that do not directly serve to benefit individuals. Moreover, without obligations on WTO Members to contribute to the development of industries in developing countries, to participate in technology transfers (that are acceptable to populations in the receiving country), and to support the proposals of the G-33 States, as well as legal commitments to distribute food aid in such as way as to preserve the production capacity of the recipient State, the trade regime cannot be reconciled with the right to food. If the apparent incompatibilities between the regimes stems from a clash of values, then reconciling the two areas of international law would require dramatic shifts in the core values of the WTO.

7.4 LIMITATIONS OF THE RESEARCH

A number of key WTO norms that discipline agricultural trade are found in instruments other than the Agreement on Agriculture and have not been thoroughly explored here. An exhaustive analysis of the relationship between the right to food and all of the WTO norms that are likely to have bearing on its enjoyment far exceeds the space of this work. Moreover, the WTO rules apply at the same time as various regional trade agreements, as well as other related rules of international law, such as those on investment. All of these interact and may limit (or, in some cases, promote) the right to food; it is therefore difficult to determine direct causality involving any particular set of norms. Additionally, without clear understanding of what constitutes a violation of right to food, such an analysis will always be limited in scope.

7.5 LOOKING FORWARD

The arguments put forward by the G-33 group over the past three years indicate a turning point in the negotiation dynamic of the WTO. Opponents of trade liberalization have long pointed to the structural imbalances within the organization, and how it impacts negotiations and ultimately influences the binding commitments. These imbalances have perpetuated an uneven playing

field upon which developing county Members have not been able to effectively secure rules and flexibilities that serve their best interests. The implementation of the Peace Clause represents only a small step in the direction of recognition of developing country concerns.

The entry into force of the OP-ICESCR presents an opportunity for the Committee to continue to elaborate and clarify the scope and content of the right to food and other socio-economic rights. As the entitlements, obligations, and the nature of violations and fulfillment of this norm is explained by the Committee, it will enable further analysis of the direct and indirect impacts of various international actions on the enjoyment of this rights.

It has been predicted that in the coming years there will be serious climactic events, environmental challenges to food production (soil degradation, desertification, freshwater availability, acidification), and lingering effects of financial crises. All these challenges will occur alongside population increases, which will exacerbate resource demand and require even more efficient and sustainable production. These issues highlight the need to ensure that human rights as well as environmental concerns are taken seriously within the WTO regime. Not only should trade rules permit Members the regulatory autonomy to address these challenges, but it should also encourage support for developing countries to address them and mitigate their effects. Although one might argue that the WTO rules do not exacerbate these challenges in any specific way, they also "did nothing to prevent the 2008 food crisis."[1313]

7.6 POTENTIAL FOR FUTURE RESAERCH

The challenges expected in the future, the acceptance of the terms of the Trade Facilitation Agreement, and the increased responsibilities of the Committee all represent potential to continue the exploration of this topic in the future. The need to improve respect for the right to food and other socio-economic rights

[1313] Christian Häberli, 'Food Security and the WTO Rules' in Baris Karapinar and Christian Häberli (eds) *Food Crises and the WTO; World Trade Forum* (Cambridge University Press 2010) 305

within trade agreements is perhaps even more pressing with regard to new and impending regional trade agreements which threaten to impose even stricter disciplines on States. The United Nations Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas has expressed great concern over the incompatibility between the new Trans-Pacific Partnership (TPP) and human rights, among other things, which presents a clear opportunity to continue this research in a new direction while utilizing the key findings. De Zayas argues that the TPP's "compatibility with international law should be challenged before the International Court of Justice."[1314] In general, the predictions that there will be more incidences of norm conflict in the future reinforce the need to continue to explore the topic of fragmentation in the hopes of better addressing incongruences in international law. This necessitates further agreement on what constitutes a conflict of norms in international law and more effective means of addressing them.

[1314] OHCHR, *Statement by the Independent Expert on the promotion of a democratic and equitable international order, Alfred de Zayas, on the upcoming signing the Trans-Pacific Partnership* < http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17005&LangID=E > accessed 1 May 2016

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