

## WHO'S MINDING THE FARM? TRADE LAW AND AGRICULTURAL EXPORTS

This panel was convened at 9:00 a.m., Thursday, March 28, 2019, by its moderator Jeannette M.E. Tramhel of the Organization of American States, who introduced the panelists: Marsha A. Echols of the Howard University School of Law, World Food Law Institute; Edwini Kessie of the World Trade Organization; Katrin Kuhlmann of New Markets Lab; and Sophia Murphy of the University of British Columbia.

### BACKGROUND

#### INTRODUCTORY REMARKS BY JEANNETTE M.E. TRAMHEL\*

This is a panel on agricultural trade; but it is not just a trade law panel. As has been clearly recognized in the 2030 Agenda for Sustainable Development,<sup>1</sup> the Sustainable Development Goals (SDGs) are “integrated and indivisible.”<sup>2</sup> Lawyers, too, are called upon to look at these complex issues through an integrated lens. Accordingly, although this panel will examine SDG #2 through the lens of trade, we will attempt to do so using an integrated and holistic perspective. After providing the contextual background, the panel will consider first, the role of export subsidies and the importance of their elimination and secondly, the broader implications of trade for food security and the actualization of SDG #2.

SDG #2 is zero hunger; the goal is “to end hunger, achieve food security and improved nutrition and promote sustainable agriculture.”<sup>3</sup> Food security is considered to be achieved “when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food which meets their dietary needs and food preferences for an active and healthy life.”<sup>4</sup> The four pillars of food security are availability, access, utilization, and stability.<sup>5</sup> The first pillar, availability, refers to the physical availability of food and is concerned with the supply of food through production, distribution, and exchange (i.e., trade)<sup>6</sup> but as we shall see, trade also affects aspects of the other three pillars.

An accepted definition of sustainable agriculture is

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<sup>1</sup> United Nations General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, UN Doc A/RES/70/1 (Sept. 25, 2015) (Agenda 2030).

<sup>2</sup> *Id.*, para. 18. The SDGs came into effect on January 1, 2016.

<sup>3</sup> *Id.* at 14, Goal 2.

<sup>4</sup> Food and Agriculture Organization of the United Nations (FAO), Rome Declaration on World Food Security and World Food Summit Plan of Action (Nov. 13, 1996). Although this widely accepted definition is attributed to the 1996 World Food Summit, the language in paragraph 1 of the Plan of Action refers to “physical and economic access.” The concept of “social access” appears to have been added in later documents.

<sup>5</sup> World Summit on Food Security, Declaration of the World Summit on Food Security, at n. 1, Nov. 16–18, WSFS 2009/2.

<sup>6</sup> FAO and European Union (EU), *An Introduction to the Basic Concepts of Food Security*, EC-FAO Food Security Programme, Rome (2008), available at <http://www.fao.org/docrep/013/al936e/al936e00.pdf>.

the management and conservation of the natural resource base, and the orientation of technological and institutional change in such a manner as to ensure the attainment and continued satisfaction of human needs for present and future generations. [It] conserves land, water, plant and animal genetic resources, is environmentally non-degrading, technically appropriate, economically viable and socially acceptable... [and] contribute[s] to all four pillars of food security.<sup>7</sup>

To put SDG #2 into perspective, a few statistics about aspects of the current global food system would be useful. We live in a world of incredible paradoxes. In the midst of abundance, hunger and malnutrition are still huge challenges: one out of every nine persons is undernourished and many are malnourished, while at the same time rates of obesity are climbing.<sup>8</sup> Coinciding with high levels of corporate concentration and market domination in large-scale, industrial agriculture,<sup>9</sup> smallholder agriculture remains the largest employer in the world, generating livelihoods for 40 percent, with an estimated 500 million smallholder farms that continue to support almost two billion people, supplying up to 80 percent of all food consumed in some developing countries.<sup>10</sup> The current global population of almost eight billion is projected to increase by approximately 30 percent to reach 9.8 billion by 2050.<sup>11</sup> This will require at least an equivalent increase in food production; in fact, it is estimated that annual production will have to increase by over 60 percent by 2050 to take into account not only growing populations, but also changes in dietary preferences associated with economic development and increasing rates of urbanization.<sup>12</sup> At the same time, roughly one-third of food produced for human consumption is lost or wasted.<sup>13</sup> This represents a huge misuse of resources, not only in the face of hunger, but also in relation to the mismanagement and overuse of scarce natural resources such as water, arable land, and non-renewables (required both to produce fertilizers, pesticides, and packaging, and as energy for production and transport) and unnecessary greenhouse gas emissions that contribute to climate change.

<sup>7</sup> Report of the FAO Council, 94th Sess., Rome, cited at page 12 in FAO, *Building a Common Vision for Sustainable Food and Agriculture: Principles and Approaches*, Rome (2014), available at <http://www.fao.org/3/a-i3940e.pdf> (Common Vision).

<sup>8</sup> FAO, et al., *The State of Food Security and Nutrition in the World: Building Climate Resilience for Food Security and Nutrition* (2018), available at <http://www.fao.org/3/I9553EN/i9553en.pdf> [hereinafter FAO 2018 Report]. The Prevalence of Undernutrition indicates that after a prolonged period of decline, the global rate has begun to rise again and in 2017 it was at 10.9% (821 million); the Food Insecurity Experience Scale also indicates increases in the severe category with the global rate in 2017 at 10.2%. Nearly half (45%) of deaths in children under five are due to malnutrition and one in five children suffer stunted growth. Yet at the same time, one of every eight adults is considered obese and the global rate for overweight children is 5.6%.

<sup>9</sup> For example, only four agribusiness companies account for up to 90% of global grain trade and the main six global companies involved in the proprietary seed industry are related to or owned by the largest agricultural corporations. It should be noted, however, that such information is difficult to verify given that some of these companies are privately-held or where information is proprietary. IPES-Food, *Too Big to Feed: Exploring the Impacts of Mega-mergers, Consolidation and Concentration of Power in the Agri-food Sector* (2017), available at [http://www.ipes-food.org/\\_img/upload/files/Concentration\\_FullReport.pdf](http://www.ipes-food.org/_img/upload/files/Concentration_FullReport.pdf).

<sup>10</sup> HLPE, *Investing in Smallholder Agriculture for Food Security. A Report by the High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security* (2013), available at [http://www.fao.org/fileadmin/user\\_upload/hlpe/hlpe\\_documents/HLPE\\_Reports/HLPE-Report-6\\_Investing\\_in\\_smallholder\\_agriculture.pdf](http://www.fao.org/fileadmin/user_upload/hlpe/hlpe_documents/HLPE_Reports/HLPE-Report-6_Investing_in_smallholder_agriculture.pdf).

<sup>11</sup> UN Department of Economic and Social Affairs, *World Population Prospects: The 2017 Revision* (2017), at <https://www.un.org/development/desa/publications/world-population-prospects-the-2017-revision.html>.

<sup>12</sup> FAO, *Common Vision*, *supra* note 7.

<sup>13</sup> FAO, *Global Food Losses and Food Waste: Extent, Causes and Prevention* (2011), available at <http://www.fao.org/docrep/014/mb060e/mb060e00.pdf>. This figure takes into account the food that is lost or wasted throughout the supply chain, from initial agricultural production down to final household consumption. While in mid- to high-income countries significant waste occurs at the consumption stage, in low-income countries more loss occurs during the early to mid-stages of the supply chain.

## QUESTION 1

### JEANNETTE TRAMHEL

Liberation of trade, despite particular challenges for agriculture, has been the objective for decades and continues to be the goal for most states. And yet, given the situation that has been outlined, many would say that our current global food system is “broken.” Is it broken and how did we arrive at the situation we face today?

### REMARKS BY SOPHIA MURPHY\*

The global food system is complex, and that complexity has contributed to a polarization of the debate on whether trade supports or undermines food security. Some consider that food is different from other goods, while others disagree. There is a lot of debate, too, on the type and extent of the exceptions that might be made because food is different. While the focus of agricultural trade law is primarily on agricultural commodities, food security is about more than food production alone. Food security is ultimately about consumers and their well-being, and it touches on livelihoods and income, on nutrition and risk management. These are very different areas and trade rules matter to all of them yet at times, the same words are used to talk about distinct parts of the food security landscape.

Within the context of the World Trade Organization (WTO) Agreement on Agriculture,<sup>14</sup> there exists a binary with two strongly opposed camps. One group is in favor of more free trade in order to improve the global food system. Those in the other group support reassertion of more sovereignty and national control over food systems. Both positions are argued from legitimate perspectives grounded in empirical evidence; both are also blind to certain complexities. While markets are indeed powerful, they exist within a regulatory framework that is shaped not only by economics, but also by politics, culture, and other societal values; the physical environment also circumscribes what can be grown and where. On the other hand, while the sovereignty arguments are important, they must take into account the terms on which a state wants to engage with others and the role of trade in the national economy. Food sovereignty is both subnational and supranational, and it raises a number of issues that transcend national boundaries and demand international agreement.

In many of the states with a high incidence of food insecurity, food imports have become an increasingly important element of national food supplies. International trade is a logical part of a risk management strategy—risk management being important for stability, the fourth pillar of food security. While the trade system should provide that stability, often it does not. We want a transparent, rules-based system, but also one that is adaptive, and adaptation is one area in which the WTO is struggling.

The politics of the WTO is such that states are divided in overly simplistic ways—as developed or developing, food importing or exporting, and yet the vast majority of states are both exporting and importing, and development is not a binary condition. States want trade to function; yet they have interests both in facilitating trade and supporting their own domestic production. Most states are not as invested in liberalization as much as they are invested in predicable and enforceable rules. Too frequently, the rhetoric around the WTO with regard to agriculture and food security does not match the national rhetoric, nor the objectives governments have for their agricultural sector.

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<sup>14</sup> WTO, Agreement on Agriculture, WTO Doc LT/UR/A-1A/2, 1867 UNTS 410.

There are very significant inequalities in the way that negotiations happen and those states that are in greatest need of the trading system are often the least powerful actors. For example, Canada is very much more dependent on trade than is the United States yet has relatively much less weight as a trader because its market is so much smaller. Moreover, global agricultural trade is highly concentrated. Trade in commodities is oligopolistic, so the distribution side of agricultural commodities displays significant market power while food producers are among the smallest, most disparate, and least powerful economic actors. Market power disparity undermines the economic assumptions that would otherwise apply.

#### **REMARKS BY KATRIN KUHLMANN\***

It is not that the global food system is broken but rather, that the responses are too narrow. The current system of global rules does not adequately address the challenges associated with food security. Conversations about agricultural law often focus only on one aspect of the system without considering how it functions as a whole. Domestic law, which is critical to building global food systems, is frequently overlooked in an international context, and legal disciplines tend to focus more on the rules themselves rather than their implementation. It is time to have a conversation about law, agricultural trade, and food security that takes into account shifting global dynamics, including the evolving role of states and the private sector in regulating global food trade.

#### **REMARKS BY MARSHA A. ECHOLS\*\***

The comments by the United Nations that accompany SDG #2 suggest that there needs to be a change in the food and agriculture system without explaining what that involves.<sup>15</sup> The SDG #2 targets, however, are indicative that the needed change is a broader and multidisciplinary approach. A change in the system will require not only actions by governments, but also by engaging the private sector, NGOs, and a range of stakeholders to collectively reevaluate the food we eat, how it is produced, and how it is traded. This will also require consideration of the right to food.

#### **REMARKS BY EDWINI KESSIE\*\*\***

The system certainly is not broken, but it can be improved. If one considers the global increase in population, the global food system has been able to adjust notwithstanding that increase. The issue is how to move food from surplus areas to deficit areas and how to encourage developing countries, particularly those that are resource poor, to increase and sustain agricultural production. We need a holistic approach in addressing these challenges.

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<sup>15</sup> “A profound change of the global food and agriculture system is needed if we are to nourish the 815 million people who are hungry today and the additional 2 billion people expected to be undernourished by 2050.” SDG #2 Zero Hunger, at <https://www.un.org/sustainabledevelopment/hunger>.

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## EXPORT SUBSIDIES AND AGRICULTURAL TRADE

### QUESTION 2

**JEANNETTE TRAMHEL**

One of the targets of SDG #2 is to “correct and prevent trade restrictions and distortions in world agricultural markets, including through the parallel elimination of all forms of export subsidies and all export measures with equivalent effect.”<sup>16</sup> Could you explain how export subsidies have been disruptive and why their elimination is so important?

**EDWINI KESSIE**

In 2015, at the conclusion of the Tenth Ministerial Conference under the current Doha Round of negotiations, a historic decision was reached in Nairobi where WTO member states committed themselves to removing and abolishing export subsidies.<sup>17</sup> The perception is that such subsidies distort trade and increase food insecurity. Rich states, because of their deeper pockets, are able to sell their subsidized products on the international market at low prices which compete unfairly within the domestic markets of other WTO members. These types of measures were seen as quite unfair and also represented misuse of public funds. Farmers have to be efficient, but this should not be dependent on the ability of governments to provide subsidies.

Of the sixteen states that had export subsidies, eight states have implemented the decision to eliminate them and have had their schedules certified (Australia, Norway, Israel, Switzerland, Colombia, Uruguay, the United States, and South Africa). Three others have notified their amended schedules but are yet to be certified (European Union, Mexico, and Canada). Five others are yet to complete their domestic procedures (Brazil, Iceland, Indonesia, Turkey, and Venezuela). Thus, all of these states have committed themselves to phase out export subsidies.

Decisions were also made to curtail other measures with equivalent effect. For example, export financing repayment terms should not exceed eighteen months and export credit guarantee and insurance programs should be financially self-sustaining and maintain risk-based premiums. International food aid should focus on the needs of the recipients and seek to avoid commercial displacement. Restrictions were also placed on selling food aid for cash so as not to disrupt the local market of the recipient state. Although the decisions were quite far-reaching, some WTO members, such as Canada, maintained that the package could have gone further.<sup>18</sup> While the final outcome regarding export competition is not perfect, most WTO members have identified domestic support and market access as priority areas in the negotiations.

### QUESTION 3

**JEANNETTE TRAMHEL**

Given that one of the outcomes of the Nairobi Package was the elimination of export subsidies, and that this is one of the targets of SDG #2, can that target be considered as having been achieved?

<sup>16</sup> Agenda 2030, *supra* note 1, at 16, Goal 2, Target 2.B.

<sup>17</sup> WTO, Nairobi Ministerial Declaration, WTO Doc. WT/MIN(15)/DEC (Dec. 19, 2015), at [https://www.wto.org/english/thewto\\_e/minist\\_e/mc10\\_e/mindecision\\_e.htm](https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm).

<sup>18</sup> For example, some considered that for export finance the length of repayment could have been shorter and that for export trading enterprises the restrictive language was not tight enough.

**EDWINI KESSIE**

It is unlikely for these types of measures to be reintroduced in the future. States party to the rules-based multilateral trading system respect their obligations. If states that had eliminated export subsidies were to reintroduce such measures, they would be acting inconsistently with their obligations under the WTO Agreement on Agriculture. However, some states are of the view that the Nairobi Package did not go far enough and that now the focus must be on improvements, particularly on measures that could potentially have an equivalent effect, such as the provision of international food aid.

**KATRIN KUHLMANN**

Export subsidies had been under discussion for a long time and needed to be addressed, so it is positive that they were included in the Nairobi package. The discussion is now beginning to shift in ways that require us to look at the human face of food security and understand how individuals are engaging with agriculture and law.

This can be illustrated by a case study undertaken in Kenya and India,<sup>19</sup> two states with rapidly growing markets, both of which have made agricultural development a priority and both of which have considered different forms and degrees of government support. In India, government support is widespread, and it is impossible to have a conversation with either a government official or a farmer without the question of government support arising. In Kenya, the situation is a bit different. Although the government has prioritized certain crops, particularly maize, challenges in the market prompted several questions. These include questions of where the government should focus, whether a more diverse view of the agricultural sector is required, whether food security can be achieved through other crops, and what this means in terms of government support and other policies more generally. When we conducted our study, Kenya was not producing enough maize to meet domestic demand, and Ethiopia had become an important trading partner, since it produces more maize than it consumes (teff being the preferred grain). Corridors can be a vehicle for moving food from surplus to deficit areas, yet examination of the trade corridor between these two states brought to light a host of legal and regulatory issues that impact the actual flow of goods, including issues at border crossings; application of non-tariff barriers (NTBs); trade facilitation; the interoperability of national legal systems; and the impact on trade when countries are party to different regional trade agreements.<sup>20</sup>

Export subsidies are explicitly referenced in SDG #2 in part because there is a clear legal pathway to address this issue. However, SDG #2 also references many additional issues, such as access to land, other inputs, financial services, and market opportunities. I would argue that SDG #2 calls for a systems approach to law and food security; this requires that we go beyond export subsidies to address other issues and distortions in the market as well.

<sup>19</sup> Katrin Kuhlmann, *The Human Face of Trade and Food Security: Lessons on the Enabling Environment from Kenya and India*, CTR. STRATEGIC & INT'L STUD. (Dec. 2017), available at [https://docs.wixstatic.com/ugd/095963\\_d0db766f66984c13a883db2f66cff84a.pdf](https://docs.wixstatic.com/ugd/095963_d0db766f66984c13a883db2f66cff84a.pdf).

<sup>20</sup> New Markets Lab and East Africa Trade and Investment Hub, *Study of the Kenya – Ethiopia Trade Corridor: A Pathway to Agricultural Development, Regional Economic Integration and Food Security* (2018).

**SOPHIA MURPHY**

It is also important to consider export subsidies within a historical context. Civil society and NGOs in the 1980s were focused on export subsidies and their impact made organizations such as Oxfam receptive to the idea of an Agreement on Agriculture. It may be difficult to recall the damage caused by export subsidies during that era as it no longer occurs; it was possible to secure governments' agreement to the Nairobi Package because export subsidies are not as important anymore among the instruments used by wealthy governments to support agriculture.

One of the criticisms from civil society all along has been to question why the focus at the WTO is only on public distortions when there are also private sector trade distortions, such as those that are the result of oligopolies. These distortions also disrupt markets and create shocks for domestic production in developing states. An example is the production of chicken meat. Large quantities are produced in rich states where consumers prefer primarily white meat; this creates a surplus of dark meat that enters global markets at cheap prices. As a consequence, local grain farmers in many other states that want to add value by feeding a domestic chicken industry are squeezed out by cheap imports. This reality is not due to government subsidies, but rather, an unplanned "subsidy" that is created by rich consumers seeking health, global companies determined to please them, and big markets for cheap meat in poorer countries that would otherwise be served by domestic producers.

What this illustrates is that there is still unfinished business in terms of reshaping the global food system. Governments need to consider the various sources for trade distortions, whether these are stockpiles of grain that are liquidated without thought for the market, export subsidies and deliberate government intervention, or simply the market power of agribusiness intermediaries that can be attributed to a history of market domination reinforced by commodity-market failures.

**QUESTION 4**

**JEANNETTE TRAMHEL**

In addition, at times the geopolitical reality seems to undermine the objectives of accomplishments such as those of the Nairobi Package. For example, U.S. soybean farmers now find the Chinese market partially closed in response to a decision by the current U.S. administration to levy tariffs on hundreds of billions of dollars of Chinese goods. In response, the U.S. administration is offering an additional twelve billion dollars in subsidy-like support to U.S. farmers. Such steps raise questions regarding compliance with the aforementioned trade agreements to eliminate subsidies that distort global agricultural markets. This is but one of many such trade disputes with enormous consequences for a variety of stakeholders. How do such disputes impact farmers in the developing world?

**MARSHA ECHOLS**

Disputes such as the one between the United States and China over soybeans concerns agricultural production by large producers. However, in the context of SDG #2 and food security, figures from the Food and Agriculture Organization (FAO) and UN indicate that food production is primarily in the hands of small farmers.<sup>21</sup> Therefore the bigger question is how to support their needs so they can continue to produce for most of the world. Seen in this way, the dispute between the

<sup>21</sup> SDG #2, *supra* note 15.

United States and China becomes a different issue; it is a trade issue and deliberations over the rules that exist over dispute settlement. These trade disputes are not about food security; they are about something else and do not serve well as the touchstone for global food security. Although farmers in the United States are suffering as a result of this dispute, it does not affect food security.

On the other hand, when we consider this in the context of the global food system, it does invite consideration of whether there is something that could be done to avoid the disruptions that are created for everyone else in the world as a result of a bilateral dispute between two large agricultural producers. The current rules do not address this issue; we have a system that is largely inadequate for addressing a large trade dispute between two states that affects many other states.

### **JEANNETTE TRAMHEL**

That suggestion of a bifurcated world when it comes to trade is also evidenced by a mapping of those states that export or import wheat, rice, maize, and soybeans, which as a group collectively represents about 80–90 percent of global production, trade, and consumption of these commodities; other states do not appear to participate significantly in this market.<sup>22</sup>

### **EDWINI KESSIE**

The trade dispute between the United States and China is complex. China believes the United States acted inconsistently with its WTO obligations by imposing tariffs unilaterally on its products prompting China to respond in kind. The Aggregate Market Support (AMS) of the United States aimed at limiting trade-distorting support under the WTO Agreement on Agriculture is US\$19.1 billion; therefore, depending on the calculations and the kind of support granted, the recent announcement of US\$12 billion in support payments to American producers could potentially result in the United States exceeding its WTO commitments. This does raise other issues and illustrates why the rules have to be improved. Currently, under the WTO rules, developed states have the flexibility to provide product-specific support and yet remain in conformity with the rules. By contrast, developing states can only provide what is called *de minimis* support. For most states, this is equivalent to 10 percent of the value of domestic production of the relevant product.

Developed states are concerned that whereas their support is decreasing, support offered by large developing states is increasing. When China acceded to the WTO, it was granted entitlement to provide *de minimis* support at the rate of 8.5 percent (rather than 10 percent for developing countries in general); however, 8.5 percent of Chinese domestic agriculture production is a significant amount that far exceeds the support provided either by the United States or the EU. Another example is India, which provides almost US\$30 billion in support under Article 6.2 of the Agreement on Agriculture. As illustrated in the recent case between China and the United States, the WTO rules on agriculture subsidies are quite robust.<sup>23</sup> But as the landscape has changed, new rules are needed and unfortunately, progress in the negotiations has been slow. All states have a stake in strengthening the rules-based multilateral trading system, rather than resorting to unilateralism, which will weaken the system and eventually compromise the food security of all states.

<sup>22</sup> Agricultural Market Information System (AMIS), *The AMIS Participating Countries Comprise the G20, Spain and Seven Additional Major Exporting or Importing States*, at <http://www.amis-outlook.org/amis-about/en>.

<sup>23</sup> WTO Panel Report, China, Domestic Support for Agricultural Producers, WTO Doc. WT/DS511/R (Feb. 28, 2019). The panel found that China had exceeded its *de minimis* level of support for the grains under consideration (wheat rice and corn).



**JEANNETTE M.E. TRAMHEL**

Given that the theme of this conference is law as an instrument, it is logical to consider how we can best work with and strengthen these existing instruments.

**MARSHA ECHOLS**

It is important to point out, however, that such support is being provided primarily to large producers and those involved in large-scale production of grains and soybeans. Yet as the statistics indicate, most food is produced by small farmers. In considering rules that address support of production at that level, we are neglecting the major producers of food around the world. The issue that needs to be addressed is how governments can support farmers that constitute small and micro business to provide food security for a local region or a country.

**IMPLICATIONS OF TRADE FOR SDG #2**

**QUESTION 5**

**JEANNETTE M.E. TRAMHEL**

This introduces the dilemma we face in considering the implications of trade for SDG #2. While some call for more liberalized trade as the way forward, others consider that it is the very trade system itself that has contributed to the problem. How can we make sense of these polarities?<sup>24</sup>

**SOPHIA MURPHY**

Arguments on both sides can be considered in relation to the four pillars of food security. For example, in terms of Pillar 1, availability: more trade enables imports, which increases supply but can adversely impact local production; Pillar 2, access: imports can reduce food prices, exports can create employment and spur economic growth, yet imports can also disrupt urban/rural linkages while exports can create local scarcity; Pillar 3, utilization and nutrition: imports can increase food choices, but this can be unevenly distributed; imports can lead to more choices of processed foods that save time but this also can lead to poor health outcomes.<sup>25</sup>

Providing stability, Pillar 4, is where the trade system has the most to offer but it is also the area of greatest vulnerability. Although a big market is more stable, a shock in that big market is also more devastating as was clearly evidenced during the international food crisis of 2007–2008 and the five or so years of price volatility that ensued. The question that needs to be addressed is how to establish sustained agricultural production in those states that have not achieved their agricultural potential. One of the reasons we have not yet done so is because of the trade system; this is not because free trade is inherently “bad” but because of the inequalities within that system and that undermine the domestic markets that would normally arise, but for practices such as, for example, surplus commodity dumping.

<sup>24</sup> FAO, *The State of Agricultural Commodity Markets, Trade and Food Security: Achieving a Better Balance Between National Priorities and the Collective Good*, at tbl. 4 (2015–16); *Main Components and Limitations of the Trade Narratives for Food Security*, at 21, available at <http://www.fao.org/3/a-i5090e.pdf>.

<sup>25</sup> For example, the North American Free Trade Agreement has significantly increased the availability of unhealthy foods in Mexico and that correlates with poor health outcomes.

**KATRIN KUHLMANN**

The system of rules intersects with the very different views on how food systems should be developed. If trade is to be used as a tool for development, we have to find a way to include different perspectives in negotiating the rules. The solutions need to be rules-based, but should be developed from the ground up. Lawyers excel at designing comprehensive systems of rules, but this tends to be a very top-down approach.

The issues around food security involve very real and pressing problems that are unlikely to be addressed only through big, top-down solutions. While we do need a multilateral rules-based system now more than ever, what is missing are connections between that system and daily realities in different parts of the world. We need to consider not only connectivity with rules at the domestic level but also the regional component. For example, in sub-Saharan Africa where the markets are inherently regional, it will be impossible to address food security only at the domestic or global level; it will have to be approached from a regional perspective as well.

**EDWINI KESSIE**

It is not surprising that someone from the WTO supports more free trade. Trade is very important, especially for those states that are not naturally endowed. It is widely recognized by states that a system that enables us to move food from areas efficient in production, such as Canada and Australia, to other areas, is a good system. The suggestion that trade leads to unhealthy food is not accurate; a system that is fair and responsive enables people in other parts of the world to have access to better quality foods at affordable prices. For example, compare the retail price of beef steak for a consumer in the United States or Canada with the much higher price paid by a consumer in Switzerland.

But, of course, the issue is how to ensure that the system is fair. Under WTO rules, the tariffs on agricultural products are much higher than those for industrial products. As many developing states have bound tariffs in excess of 100 percent, they do have the ability to protect their agricultural sector if necessary. Nontrade concerns of all WTO members are also taken into account in the development of the rules. There is also the perception that the current rules are biased in favor of certain developed states, as developing states are mostly limited to *de minimis* trade distorting support whereas there is no such restriction on developed states who can provide support exceeding their *de minimis* limits. Consequently, some members such as the EU, the United States, and Canada can concentrate support on a few products, which leads to greater distortions in world markets. There is also a systemic issue that needs to be addressed and that is the concept of self-designation whereby each state can itself determine whether or not it is “developing.” Some members believe that these provisions need to be tailored so that only least developing states and low income developing states would be given broader flexibility to protect their agriculture sector. More trade is important, but we need to ensure that the rules are responsive, fair, take into account the interests of developing states and reflect the realities on the ground.

**QUESTION 6****JEANNETTE M.E. TRAMHEL**

States have been encouraged “to develop stable and long-term national food security and nutrition strategies”<sup>26</sup> and to do so by means of an integrated approach. Rather than considering trade

<sup>26</sup> CFS, *Principles for Responsible Investment in Agriculture and Food Systems*, at prin. 35 (endorsed by the CFS at its 41st session on October 15, 2014), available at <http://www.fao.org/3/a-au866e.pdf>.

rules in isolation, are there other legal instruments with which trade should be integrated? How can trade fit, or fit better, within a national strategy for food security?

### **MARSHA ECHOLS**

We have to consider the many small and micro producers of food around the world and consider whether the WTO is equipped to do that or whether we need different rules. When considering the benefits that result from trade, one should also acknowledge the many businesses that have been bankrupted by trade competition. Consider the example of a local producer of sesame seeds who cannot compete with a large producer in Europe or North America who floods the market with a less expensive product. Although such trade may be considered as “fair,” it makes the local business non-competitive. Adoption of a more multidisciplinary approach to food security allows consideration of the fact that as a result of such trade, now there is less income production in that region; trade affects employment, incomes and the vibrancy of a local community. All of that has to be considered more carefully.

The focus of the World Food Law Institute is on small, local producers who make specialty foods or foods indigenous to a local community and with a view toward maintaining local production and local products. The objective is to ensure that even in the face of fair competition, they are not decimated.

Many have forgotten that food security is connected to national security, even though the WTO Agreement includes an article to that effect.<sup>27</sup> With that in mind, we need to find a way to achieve a balance between encouraging competitiveness and local production.

### **KATRIN KUHLMANN**

Our case study from Tanzania illustrates the impact of trade on domestic production and the connection between investment and trade rules under domestic, regional, and international law.<sup>28</sup> In 2008 a group of investors sought to develop Tanzania's domestic potato market through socially responsible investment that was cognizant of human rights, equitable land tenure, etc. Although approximately 150,000 small farmers (mostly women) produced potatoes, there was no commercial sector; potatoes were trucked in from South Africa. Interestingly, trade law was one of the first challenges to moving high-quality germ-plasm for seed potato production across the border from Kenya to Tanzania. Although there was a regional trade agreement that should have facilitated such trade, it had not been implemented. Thus, addressing trade rules was a prerequisite in order to facilitate social investment for sustainable development. A second issue concerned implementation of the WTO SPS Agreement.<sup>29</sup> Although it contains general requirements that states must follow, it does not provide specific guidance on how to implement the framework in practice.

This is but one of many such cases that should be documented and considered in the discussions that must take place on how the rules can be revised to reflect changing global realities and the needs of small domestic producers.

<sup>27</sup> WTO Agreement, Article XI excludes “export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the export contracting party.” Article XXI excludes actions considered necessary “for the protection of essential security interests” under the enumerated conditions.

<sup>28</sup> New Markets Lab, *TransFarm Africa Case Study*, at <https://www.newmarketslab.org/transfarm-africa>.

<sup>29</sup> WTO, Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Doc. LT/UR/A-1A/121867, UNTS 493 (SPS Agreement).

## QUESTION 7

**JEANNETTE M.E. TRAMHEL**

As illustrated by the previous example, other legal instruments—whether international or regional—also must be considered. Apart from the WTO Agreement on Agriculture, what other legal instruments could be considered as important in relation to trade in agriculture and the actualization of SDG #2?

**SOPHIA MURPHY**

Although it is hard to think of a legal instrument that does not affect agriculture, a critically important consideration is climate change and the Paris Agreement.<sup>30</sup> It recognizes the importance of agriculture—both as “cause” and “victim” of the problem—as well as a potential “answer” in terms of adaptation strategies and mitigation of greenhouse gas emissions. Yet, within the WTO there continues to be a certain blindness to the challenges of addressing climate change. For example, it is important to consider how food is produced, not only in relation to workers’ rights, but also in terms of water use, emissions, impacts on biological diversity, etc. How food is grown is no longer (only) a national matter; governments have undertaken international obligations that they also need to take into consideration. However, few national plans for climate change have yet begun to address the changes that will be required in the agricultural sector and in relation to agricultural imports and exports. These new realities could help to create space for discussions on how trade rules will have to be changed to protect climate change commitments. The WTO is a necessary part of that conversation.

**EDWINI KESSIE**

We do need a range of policies, both at domestic and regional levels. The reason some developing states may not be food secure is because of inappropriate policies that have been pursued by governments at both levels. There is a heavy responsibility on the part of governments to adopt the right policies, which requires consultations between them and all relevant stakeholders, including farmers and agribusinesses on various topics such as access to finance, as all of these impact food security. Trade and the WTO are only one aspect and a holistic approach is necessary for the actualization of SDG #2. Encouraging domestic, regional, and international collaboration, not only on trade but on a range of subjects, would certainly be beneficial.

**KATRIN KUHLMANN**

A number of legal instruments should be considered in relation to the actualization of SDG #2. This includes laws and regulations along agricultural value chains. In the Tanzanian seed potato case study, farmers were getting a fraction of potential yields because of lack of access to quality inputs as a direct result of challenges with agricultural and trade law. Another issue concerns the rules regarding standards at the production and storage stages—both cold chain storage and dry chain storage (which relate to pest management, quality, traceability, standards, and packaging)—and have a significant impact on access to markets. Other issues include commodity-specific regulations and trade facilitation. Although the WTO Trade Facilitation Agreement was a huge

<sup>30</sup> United Nations Framework Convention on Climate Change (UNFCCC), COP Decision 1/CP.21, Annex, UN Doc. FCCC/CP/2015/10/Add.1 (Paris Agreement).

breakthrough,<sup>31</sup> it needs to be linked more closely to agricultural trade; despite measures such as expedited release for perishable goods, there also should be a focus on building regulatory capacity to move agricultural goods across borders, as illustrated by the Tanzanian case. Another issue is the need to examine regulation of services, such as financial services, distribution, and retail services, along with rules on intellectual property and technology. While a comprehensive approach is required, we need to find ways to connect discussions on law to the realities on the ground rather than pursuing a more theoretical approach.

## MARSHA ECHOLS

Apart from the WTO Agreement on Agriculture but still within the framework of the WTO, an important consideration is the SPS Agreement. It contains a harmonization provision that refers to three multilateral organizations: one concerned with the development of international rules about food safety under the International Plant Protection Convention (IPPC),<sup>32</sup> the World Organization for Animal Health (OIE), and the Codex Alimentarius Commission.<sup>33</sup> These technical legal instruments can go beyond food safety. For example, the IPPC has a connection to food loss. If 50 per cent of the food produced is lost during transport, storage, packaging, then part of that loss is due to something within the food itself and that food loss (as distinct from food waste) has an impact on food security. Although the IPPC is concerned with food safety, it is an instrument that could also be useful in the actualization of SDG #2.

A second consideration is in relation to geographical indicators (GIs), which are addressed under the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).<sup>34</sup> GIs are focused on foods that are produced within a specific region or that use a specific or traditional process. For example, discussions are taking place in the EU over Camembert cheese and its method of production, area of production, and involved farming groups. GIs concern community rights, as opposed to individual rights as protected by privately owned trademarks. GIs may provide a way to shift the focus toward local products and local producers and that might encourage considerations that would support local communities and economies by focusing on what they have that is special and on the producers of those products.

## QUESTIONS FROM THE AUDIENCE

[Unintelligible] University of San Francisco, Quito, Ecuador. Given that Mr. Kessie has said that the rules should provide flexibility for developing states, how should the WTO rules provide for such flexibility in the face of climate change, especially in terms of adaptation to environmental disasters?

[Unidentified] Within the context of the call to develop national strategies for food security, SDG #2 refers to the fair and equitable sharing of benefits arising from the use of genetic resources. How would implementation of the Nagoya Protocol factor into the design of effective strategies toward the actualization of SDG #2?<sup>35</sup>

<sup>31</sup> WTO Ministerial Conference Agreement on Trade Facilitation, WTO Doc. WT/MIN(13)/36, WT/L/911 (Dec. 7, 2013).

<sup>32</sup> FAO (2011), *International Plant Protection Convention* (1997), available at [https://www.ippc.int/static/media/files/publications/en/2013/06/06/1329129099\\_ippc\\_2011-12-01\\_reformatted.pdf](https://www.ippc.int/static/media/files/publications/en/2013/06/06/1329129099_ippc_2011-12-01_reformatted.pdf).

<sup>33</sup> *Codex Alimentarius*, available at <http://www.fao.org/fao-who-codexalimentarius/en>.

<sup>34</sup> WTO, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 UNTS 299.

<sup>35</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, available at <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>

[Unintelligible] Murdock University, Australia. Many of these issues appear to be governance problems. It has been suggested that new technologies when applied to agriculture, such as block chain, can potentially improve the situation at the local level, particularly for small holders. Any comments as to feasibility?

Carlos Vejar, Holland & Knight, formerly with the Mexican government, involved with WTO trade negotiations. What is the definition of food security? In Mexico, the perspective is that it is necessary to be self-sufficient in food production to become a developed state. Is there a specific minimum standard required for each state?

## RESPONSES FROM PANEL

### SOPHIA MURPHY

New technology does offer exciting new possibilities, such as decentralization of energy grids and improved storage capacity. There are applications that change the cost-effectiveness of investment in rural economies. But this raises additional questions over who will control the technology, who will decide where it is implemented, whether it will be directed primarily to ports to serve exports or generate growth in the hinterland? Poverty in rural areas is not usually due to food deficits but rather because of lack of access to infrastructure of all kinds, both soft and hard, whereas in urban areas hunger is often directly related to lack of access to affordable food. Technological change does transform cost-efficiency and investment potential.

There are many definitions of food security. It can be considered in terms of purchasing power and what percentage of foreign exchange is used to purchase the food that is required. There is also a national element to how food security is understood, and governments often hold strong views as a result. For example, the Philippines considers that it should be rice self-sufficient, although the objective is a challenge given its growing conditions and the availability of inexpensive rice imports. Assessing when and where self-sufficiency is the right strategy is a subjective as well as an objective exercise.

### KATRIN KUHLMANN

What has been described as a problem of governance is really a matter of implementation of law, which is an issue in every state. There is no perfect system in which the law as it is written is the law as it is applied. Implementation of laws is an ongoing process and is one that should be more inclusive and better understood.

As to the Nagoya Protocol and other related instruments that have not been implemented fully, I believe there is a way to address this through domestic law.<sup>36</sup>

As to flexibility, in every case flexibility exists (within limits) for states to determine how the rules should apply to them. As illustrated in the Tanzanian case, although the SPS Agreement provides broad direction, it is up to the states themselves to decide how to implement it through domestic law. This is true with all international law (often referred to as “policy space”), and flexibility does exist within the law across disciplines, including for environmental issues.

Technology does offer solutions that will help to leapfrog some of the challenges with governance. But how law is designed and implemented remain very important, even as technological solutions are explored. We need more lawyers in agriculture and building this capacity will be increasingly important going forward.

<sup>36</sup> Due to time constraints, this was to be further discussed after the session.

**EDWINI KESSIE**

Under the existing rules, there are flexibilities for states pursuing environmental programs, regional disaster relief, and support to help farmers adapt to new technologies; these apply to all states. However, on the broader issue of the nexus between trade and climate change, WTO members have not yet fully addressed this issue. There are rules that are relevant, but they are quite dispersed. Therefore, at some point WTO member states may wish to hold a more fulsome discussion.

**MARSHA ECHOLS**

As to technology and local production, new technology will be useful to some extent. For example, block chain will aid in product traceability, safety, and quality, however, the problem is that it is very expensive to use. Nonetheless, it is important to keep new technologies in mind and their possible use in strengthening local production and to make it more acceptable at the international level.