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# Transnational Corporations and the Right to Food

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## **I. Introduction**

It is both ironic and tragic that eighty percent of the world's hungry are food producers.<sup>2</sup> Fifty percent of these are small-hold farmers, twenty percent are farm workers, and ten percent are pastoralists and fishermen. The other twenty percent of the world's hungry are made up of the urban poor, who are acutely affected by rising food prices. In this context, the Transnational Corporations ("TNCs") that operate in the food sector are crucially important in the struggle against hunger. Not only is there a grave power imbalance between TNCs and the small-hold farmers and farm workers who supply them, but these TNCs also directly employ approximately 700 million wage workers,<sup>3</sup> some of whom are among those who have the least access to adequate food.

Because of these facts, the United Nations Special Rapporteur on the Right to Food has organized a multi-stakeholder conference to take place in Berlin in June 2009 that will examine the impact that TNCs in the food production and distribution system can have on the realization of the right to food. In preparation for this conference, this paper examines market power—the ability to set prices of goods and services—and the effects of concentration (a function of the number of firms operating within the market) among TNCs at five levels along the global food supply chain, and explains how the actions of these corporations affect the realization of the right to food, mostly for small-hold farmers and farm workers. It then identifies current solutions that exist for individuals whose right to food has been affected by these actors, and the best practices in place among TNCs and other actors. It closes with recommendations for how governments and TNCs can ensure that the actions of food sector TNCs do not have a negative impact on the right to food for laborers and small-hold farmers.

Section II describes the right to food under international human rights law. Section III focuses on input providers, identifying three key farm inputs and the market forces at play in the interaction of suppliers of those inputs with small-hold farmers globally. Section IV looks at intermediaries in the supply chain, examining commodity traders and food processors. Sections V and VI focus on the actors that provide food directly to consumers: food retailers (particularly supermarkets) and food service providers (particularly fast food restaurants). Finally, section VII contains recommendations of practices that can be implemented at one or more levels of the food

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<sup>2</sup> BILL VORLEY, INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, SUSTAINING AGRICULTURE: POLICY, GOVERNANCE, AND THE FUTURE OF FAMILY-BASED FARMING 11 (2002).

<sup>3</sup> *Id.*

supply chain to ensure that the right to food is respected, protected and fulfilled. As these TNCs are all undeniably linked in the global food supply system, there are many problems and solutions that are shared across the different levels of production and distribution. Still, certain issues remain unique at each step in the chain, and each set of actors must play its unique part in helping to ensure that the right to food is realized across the globe.

## **II. The Right to Food Under International Human Rights Law**

The right to food which is grounded in international human rights law has been identified time and again in international documents as fundamental. It was first expressed in Article 25 of the Universal Declaration of Human Rights, which states that “everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food.”<sup>4</sup> The right to food was then codified in the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) which actually contains two related rights: the right to adequate food and the right to be free from hunger. The right to food is recognized as fundamental in both the ICESCR and the International Covenant on Civil and Political Rights (“ICCPR”).<sup>5</sup> According to the UN Committee on Economic, Social and Cultural Rights, fulfilling the right to food means that states have a responsibility to ensure “The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; [and] [t]he accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”<sup>6</sup> And yet millions of people around the world continue to go hungry.<sup>7</sup> As Professor Smita Narula has indicated, one key explanation for why violations of the right to food persist may be failures of a state-centric model of rights enforcement.<sup>8</sup> Narula highlights the increasingly salient impact TNCs have on global access to the right to food, and the need for obligations under international human rights law to be more clearly defined in order to hold these actors accountable.<sup>9</sup>

As noted above, it is often those who produce the world’s food, small-hold farmers and farm workers around the globe, who are least likely to have their own right to food realized. This

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<sup>4</sup> Universal Declaration of Human Rights, Art. 25, Dec. 10, 1948. *available at* <http://www.un.org/en/documents/udhr/index.shtml>.

<sup>5</sup> International Covenant on Economic, Social, and Cultural Rights art. 11, Jan. 3, 1976; International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966. *See*, Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT’L L. 691, 706 (2006) (The ICCPR implies a right to food as part of the right to life).

<sup>6</sup> *Id.* at 697.

<sup>7</sup> *See Id.*

<sup>8</sup> *Id.* at 694.

<sup>9</sup> *Id.*

is largely due to imbalances in the global food supply chain, whereby large TNCs have succeeded, through concentration, market capture,<sup>10</sup> and sheer size, in gaining the ability to alter the market price of their goods or services, or “market power.”<sup>11</sup> Within the food supply industry, there are high levels of both horizontal and vertical concentration. Horizontal concentration occurs when there are very few firms operating at one point in the supply chain while vertical concentration occurs when a few firms dominate more than one area on the supply chain.<sup>12</sup> Concentration allows some large firms to dictate what farmers produce and the value of that produce. As a result, the demands of TNCs may affect the right to food by pressuring certain countries or regions to produce food that does not meet their population’s needs, or by pushing farmers’ profits and farm-workers’ wages so low that they cannot feed themselves or their families.

The international human rights framework has been viewed by many as offering little in the way of methods for holding TNCs accountable when they adversely impact the realization of the right to food. What is more, at many levels of the supply chain, these corporations are largely free from public scrutiny. As they do not sell directly to consumers, they are less susceptible to consumer pressure. However, Narula and others have argued that there are ways that human rights law can be brought to bear on TNCs.<sup>13</sup>

A widely-used framework for discussing human rights obligations of states is the duty to respect, protect, and fulfill rights. In this context, this means that states must refrain from interfering with existing access to food (the respect prong), that they must make sure that others do not interfere with existing access to food (the protect prong), and that they must take affirmative steps to ensure access to adequate food for individuals and groups within their borders (the fulfill prong).<sup>14</sup> In applying this framework the Special Representative of the United Nations Secretary General on human rights and transnational corporations and other business enterprises, Professor John Ruggie, has argued that states should protect against human rights abuses by third parties including TNCs, that TNCs have a responsibility to respect human rights,

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<sup>10</sup> Market capture, or the capture rate, is the amount of goods or services in a certain market that are bought or sold by the same firm.

<sup>11</sup> SOPHIA MURPHY, HEINRICH BOLL FOUNDATION, CONCENTRATED MARKET POWER AND AGRICULTURE 15 (2006).

<sup>12</sup> *Id.* at 14.

<sup>13</sup> Narula, *supra* note 5.

<sup>14</sup> *Id.* at 701.

and that both state and corporate actors should work to provide remedies for human rights abuses.<sup>15</sup>

As articulated by Professor Ruggie:

The framework rests on three pillars: the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial. The three pillars are complementary in that each supports the others.<sup>16</sup>

Some specific mechanisms have been identified by which this framework might be implemented and the role of TNCs in the realization of the right to food might be addressed. Some of these mechanisms focus on government action, such as the strengthening and expansion of domestic and international laws related to trade and antitrust, or holding states responsible under international human rights law for failing to adequately police the harmful actions of corporations. Some of these mechanisms require action on the part of independent organizations (like certifying fair trade products), or consumer action (like choosing to buy fair trade certified products). But the most important actors in regulating the effect of TNCs on the right to food must be the TNCs themselves, recognizing their own interest in ensuring the realization of the right to food.

### **III. Input Providers**

#### **A. Introduction**

There is an increasing reliance on agricultural inputs to advance agricultural performance. Presently, the primary producers of these inputs are TNCs. Inputs are materials and infrastructure used on farms to facilitate crop production. Here the focus is on three key inputs that are at the core of modern farming: commercial seed, agrochemicals, and fertilizers. Use of these inputs can improve farmers' yields and can increase their operations' profitability. In turn, improved yields can lead to greater availability of food and lower food prices. As most of the world's poor rely on farming for their livelihood,<sup>17</sup> making farming a more profitable enterprise can provide the means for some of the most disadvantaged people to purchase food. That said, the broader use and adoption of these inputs is not clearly a net positive. There can be serious environmental and health consequences to their use. Moreover, inputs can be quite expensive, sometimes harboring

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<sup>15</sup> See John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, delivered to the United Nations Human Rights Council*, U.N. DOC. A/HRC/11/13 (Apr. 22, 2009).

<sup>16</sup> *Id.* at 3.

<sup>17</sup> WORLD BANK, *WORLD DEVELOPMENT REPORT 2008: AGRICULTURE FOR DEVELOPMENT 1* (2009).

certain hidden costs, such that the profitability of their adoption and increased use by certain farmers may be questionable. Practices by TNCs can make farmers dependent on the use of certain inputs and poor information can lead farmers to use inputs at levels that undermine the profitability of their enterprise.

## B. Impact of Input Providers on the Right to Food

### 1. Commercial Seed<sup>18</sup>

Commercial seed impacts both the availability of food and the economics of food production. While most farmers still rely on seed gathered from previous harvests—particularly farmers in the developing world—commercial seed has a significant impact on the availability of food given its wide use in industrial agriculture production.<sup>19</sup> The use of commercial seed is motivated by many factors, including increased crop yields and production of a superior, more resilient and uniform crop. It is important to keep in mind however, that there are serious costs; both environmental and economic to using commercial seed. Below is a look at the potential benefits of commercial seed, the factors affecting its adoption and the possible adverse consequences of its use.

Commercial seed can increase yields, produce a higher quality product, and can be designed to be resistant to certain climate conditions and agrochemicals.<sup>20</sup> These benefits generally accrue from the development of improved plant varieties based on hybridization and transgenic seed (genetically modified, or GM seed).<sup>21</sup> For instance, half of the rice yield increase in China between 1975 and 1990 is attributed to the use of hybrid seed.<sup>22</sup> Furthermore, it is estimated that as much as fifty percent of the overall crop yield growth in the 1980s and 1990s was due to the use of improved plant varieties.<sup>23</sup> Beyond potential yield gains, impetus for the adoption of commercial seed can also be spurred by the specific demands of the output market. Large retailers generally have high standards for the quality and uniformity of agricultural products.<sup>24</sup> The use of commercial seed is often necessary in order to meet those standards and

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<sup>18</sup> The term “commercial seed” is used here generally and means all seed that is purchased from a seed producer as opposed to seed gathered by farmers for their own use.

<sup>19</sup> See MURPHY, *supra* note 11, at 10.

<sup>20</sup> See *id.* at 6. The term “agrochemicals” is used throughout to mean pesticides, herbicides, insecticides, and fungicides. It is *not* used here to include synthetic fertilizers or other growth agents.

<sup>21</sup> Hybrid plant varieties may or may not be genetically modified. Hybrids can be produced by natural means; for instance, through processes of cross-pollination.

<sup>22</sup> WORLD BANK, *supra* note 17, at 52. (citing Huang et al., *Technological Change: Rediscovering the Engine of Productivity Growth in China's Rural Economy*, 49 J. Dev. Econ, 337 (1996)).

<sup>23</sup> *Id.* at 159-60.

<sup>24</sup> Margaret Cowan, Transformation of Food Retail and Marginalization of Small Farmers 13 (2008).



thus be able to access more lucrative markets.<sup>25</sup> Field conditions may also motivate the use of commercial seed. For instance, there are genetic modifications that can produce a crop more able to withstand drought conditions and others that can create a plant which is resistant to certain herbicides.<sup>26</sup>

Many farmers in the developing world do not use commercial seed nor do they have access to it.<sup>27</sup> This may in part be explained by factors affecting supply and demand, but may also be due to high levels of concentration in the global seed market. These low use and adoption rates may be problematic given the benefits to using commercial seed enumerated above.

The limited use of commercial seed in the developing world may be due to both limited supply and limited demand. By contrast, in East Asia and the Pacific, improved varieties of cereals are used in eighty-five percent of the land dedicated to cereal cultivation, while in Sub-Saharan Africa use is at only twenty-four percent.<sup>28</sup> While it can be argued that weak demand in the developing world is due to the practice of harvesting instead of purchasing seeds,<sup>29</sup> it is not just demand that affects usage. Constraints on supply play a role as well. The lack of intellectual property rights enforcement,<sup>30</sup> coupled with the very fact that smallholder agriculture does not supply high volume output markets,<sup>31</sup> curbs the incentives of large commercial seed companies to invest in penetrating certain underserved markets.<sup>32</sup> But the interplay of supply and demand does not provide a full picture of why farmers in the developing world have limited access to and under utilize commercial seed. Rather, one must consider the continuing rise of concentration in the global commercial seed market, which may be further limiting access to new seed technologies.

The existence of horizontal concentration in the global commercial seed market is well established. Based on 2006 revenues, the top ten seed companies control fifty-seven percent of the market, with Monsanto occupying a dominate position at the top taking in twenty percent of total world-wide commercial seed revenue.<sup>33</sup> Looking just at the proprietary seed market, those

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<sup>25</sup> *Id.*

<sup>26</sup> MURPHY, *supra* note 11, at 6.

<sup>27</sup> *Id.* at 10.

<sup>28</sup> WORLD BANK, *supra* note 17, at 52.

<sup>29</sup> MURPHY, *supra* note 11, at 10.

<sup>30</sup> Intellectual property laws can also have an adverse effect if enforced. These impacts will be discussed briefly below.

<sup>31</sup> Here a “smallholder” means a farmer that operates on a small-scale, which is generally characterized by low input usage and a small plot of land under cultivation. It is often contrasted to commercial or industrial agriculture.

<sup>32</sup> *See* WORLD BANK, *supra* note 17, at 150.

<sup>33</sup> ETC GROUP, THE WORLD’S TOP TEN SEED COMPANIES 1 (2007), available at [http://www.etcgroup.org/upload/publication/pdf\\_file/656](http://www.etcgroup.org/upload/publication/pdf_file/656).

seeds which would be subject to intellectual property restrictions, the top ten companies account for sixty-six percent of sales.<sup>34</sup> Moreover, concentration within the seed market has not only been increasing but is accelerating. In 2004, the top ten seed companies' share of the global market was forty-nine percent, while in 1996 it was at thirty-seven percent with Monsanto not even appearing on the list.<sup>35</sup>

Levels of concentration are even more startling when the scope is narrowed slightly. In 2005 Monsanto controlled forty-one percent of the global corn/maize seed market and twenty-five percent of the global soybean seed market. Looking only at GM crops, in 2008 Monsanto GM seed was used in sixty-six percent of the total acreage planted with GM crops worldwide.<sup>36</sup>

One result of consolidation in the seed market could actually be a decrease in research and development ("R&D"). According to researchers at the United States Department of Agriculture ("USDA"), as concentration amongst corn, soybean, and cotton seed producers increased in the late 1990s, private research decreased.<sup>37</sup> Econometric modeling revealed that there was a "simultaneous self-reinforcing relationship."<sup>38</sup> A similar trend is becoming apparent in the pharmaceutical industry, where R&D productivity has decreased by sixty percent in the last ten years in the face of increased concentration.<sup>39</sup> Reduction in R&D caused by horizontal consolidation in the global commercial seed market will create ossification; making it less likely that seed companies will be able to meet new needs, such as those created by changes in the climate. This will in turn impact access to and use of commercial seed. Moreover, in so far as developments in seed technology can benefit farmers and increase access to food, this movement away from R&D is troubling.

While commercial seed does carry the promise of increased yields, crop uniformity and resistance to pests and climate conditions, these benefits come at a significant cost to the farmer

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<sup>34</sup> *Id.* at 2.

<sup>35</sup> *Id.* at 1.

<sup>36</sup> This is actually down from eighty-eight percent in 2004. ETC GROUP, OLIGOPOLY, INC. 3 (2005), available at [http://www.etcgroup.org/upload/publication/pdf\\_file/44](http://www.etcgroup.org/upload/publication/pdf_file/44). The above figure is based on data from the ISAAA and Monsanto which shows a total of 410 million trait acres worldwide and 271.5 million trait acres of Monsanto product in 2008. ISAAA Brief 39–2008 – Executive Summary, <http://www.isaaa.org/RESOURCES/PUBLICATIONS/BRIEFS/39/executivesummary/default.html>; Monsanto, Monsanto Biotechnology Trait Acreage: Fiscal Years 1996-2008 [www.monsanto.com/pdf/investors/2008/q4\\_biotech\\_acres.pdf](http://www.monsanto.com/pdf/investors/2008/q4_biotech_acres.pdf). "Trait acres," is a measurement that reflects the fact that one GM crop can contain multiple licensed genetic modifications. One acre planted with a crop that contains two GM traits would be counted as two trait acres.

<sup>37</sup> Jorge Fernandez-Cornejo & David Schimmelpfennig, *Have Seed Industry Changes Affected Research Effort?*, Amber Waves, Feb. 2004, at 19, [http://www.ers.usda.gov/amberwaves/february04/pdf/features\\_seedindustry.pdf](http://www.ers.usda.gov/amberwaves/february04/pdf/features_seedindustry.pdf).

<sup>38</sup> *Id.*

<sup>39</sup> Cather Arnst, *Drug Mergers: Killers for Research*. Business Week, Mar. 9, 2009, [http://www.businessweek.com/technology/content/mar2009/tc2009039\\_020072.htm?campaign\\_id=rss\\_daily](http://www.businessweek.com/technology/content/mar2009/tc2009039_020072.htm?campaign_id=rss_daily).

along with harmful impacts on the environment. Commercial seed can be expensive and, by design, can foster a dependency on its use. Once farmers begin using commercial seed, a self-perpetuating demand structure can develop. Hybrid and GM seed need to be replaced regularly, meaning the seed from these crops often cannot be reused.<sup>40</sup> In some cases it can be illegal or impossible to harvest seed from hybrid or GM crops. Intellectual property law can be used to prohibit farmers from harvesting seed produced by a crop that contains a patented trait.<sup>41</sup> And in order to avoid costly enforcement of their patented technologies, many large seed producers are looking to make it impossible to harvest seed by using “terminator technology,” which makes the seed produced by GM crops sterile,<sup>42</sup> and second generation seeds unusable. An inability to harvest seed from past crops could have a particularly deleterious effect on small-hold farmers, as it would breed a dependency on large seed producers. Given smallholders’ poor access to credit,<sup>43</sup> one bad year could render farmers unable to purchase seed for a subsequent season’s planting, potentially bringing their farming operation to a halt. Dependency is also promoted through a system where GM seed is sold in a “technology package,” which provides patented farming techniques that require a royalty payment for their use.<sup>44</sup>

There are also serious environmental concerns associated with the use of commercial seed; chief among them is a loss of biodiversity. More farmers buying seed from increasingly fewer seed producers means fewer plant varieties are cultivated.<sup>45</sup> The decline in crop diversity is startling. Just fifty years ago more than 30,000 types of rice were grown in India; now only ten varieties account for seventy-five percent of rice production.<sup>46</sup> It is estimated that nine crops make up three quarters of all plants consumed by humans.<sup>47</sup> The United Nations Convention on Biological Diversity (“CBD”) describes biodiversity as essential to “ensure the production of food, fibre, fuel, fodder...maintain other ecosystem services, allow adaptation to changing conditions - including climate change, and sustain rural peoples’ livelihoods.”<sup>48</sup> Thus, the greater

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<sup>40</sup> See WORLD BANK, *supra* note 17, at 150.

<sup>41</sup> See generally Donald L. Barlett & James B. Steele, “Monsanto’s Harvest of Fear.” *Vanity Fair*, May 2008, available at <http://www.vanityfair.com/politics/features/2008/05/monsanto200805?currentPage=1>.

<sup>42</sup> See generally Hope Shand & Pat Mooney, *Terminator Seeds Threaten an End to Farming*, *Earth Island Journal*, Fall 1998, available at [http://www.thirdworldtraveler.com/Transnational\\_corps/TerminatorSeeds\\_Monsanto.html](http://www.thirdworldtraveler.com/Transnational_corps/TerminatorSeeds_Monsanto.html).

<sup>43</sup> WORLD BANK, *supra* note 17, at 143.

<sup>44</sup> MURPHY, *supra* note 11, at 10.

<sup>45</sup> See Wolfgang Sachs & Tilman Santarius, *Slow Trade – Sound Farming* 37 (2007).

<sup>46</sup> DEPARTMENT FOR INTERNATIONAL DEVELOPMENT [DFID], *GROWTH AND POVERTY REDUCTION: THE ROLE OF AGRICULTURE* 24 (2005).

<sup>47</sup> Sachs & Santarius, *supra* note 45.

<sup>48</sup> United Nations Convention on Biological Diversity, *Why Is It Important?*, <http://www.cbd.int/agro/Importance.shtml> (last visited Apr. 28, 2009).

use of commercial seed can spur increased losses in biodiversity with serious consequences to the health of the planet.

The way in which large commercial seed producers operate limits the supply of seed in developing countries depriving certain farmers of an important tool in improving their production. Moreover, the way in which commercial seed is developed and sold can harm small-hold farmers financially and degrade the environment.

## 2. Agrochemicals

As with commercial seeds, agrochemical use is controversial and improving access to agrochemicals is not an unqualified good. Farmers may be able to increase yields and control costs by applying agrochemicals, but harms to the environment and human health—particularly the health of farm workers—caused by agrochemical use may be quite acute and it is not clear whether these costs are outweighed by the benefits. That said, for those farmers who do wish to have greater access to the agrochemical market, there are significant concerns involving market concentration and the availability of objective information on agrochemical use. High concentration can harm farmers by inflating prices and decreasing the diversity of products on the market, while the unavailability of good information can lead to the overuse—and improper use—of chemicals that harm humans and the environment.

The existence of horizontal concentration in the global agrochemical market is well established. Currently the top six agrochemical producers control roughly three quarters of the market.<sup>49</sup> Concentration tends to inflate prices and decrease the diversity of products on the market. However, specific effects of this concentration are difficult to measure as there is an acute lack of public data on the agrochemical market.<sup>50</sup> However, this concentration may diminish as generics gain strength; a trend which is only expected to continue as the patents on many agrochemical products are set to expire. In fact, it is estimated that within five years eighty percent of crop-protection chemicals will not be patented.<sup>51</sup> But local and small-scale production of agrochemicals comes with its own costs. In Pakistan, for instance, local agrochemical dealers are more willing than multinationals to provide their product on credit but charge exorbitant

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<sup>49</sup> IBISWORLD, GLOBAL FERTILIZERS AND AGRICULTURAL CHEMICALS MANUFACTURING 10 (2009). The top six producers are BASF, Bayer, Dow, DuPont, Monsanto, and Syngenta. *Id.*

<sup>50</sup> Jorge Fernandez-Cornejo & Richard E. Just, *Researchability of Modern Agricultural Input Markets and Growing Concentration*, 89 Am. J. Agric. Econ. 1269 (2007).

<sup>51</sup> *Id.* at 16.

annual interest rates as high as thirty or forty percent.<sup>52</sup> Furthermore, local dealers aim for a higher profit margin, often supplying substandard pesticides.<sup>53</sup> Multinationals, on the other hand, are less willing to extend credit and are said to invest in training programs to build capacity amongst farmers and dealers.<sup>54</sup>

Also significant is the alarming degree of vertical concentration that results from convergence with the seed market. In 2004, four of the top ten seed producers were also amongst the top ten agrochemical producers.<sup>55</sup> Most dramatically, Syngenta was the second largest agrochemical manufacturer and the third largest seed producer.<sup>56</sup> Many of these manufactures look to capitalize on prefabricated synergizes between their GM seed and pesticides. Monsanto, for instance, markets many of its seeds as “Roundup Ready,” meaning the plant will be resistant to its Roundup herbicide.<sup>57</sup> This creates a greater dependency on a single product, and therefore a single manufacturer, making the farmer extremely vulnerable to any changes in pricing.

Access to information on proper agrochemical use is also an important issue. Case studies in both South Africa and Guatemala show that farmers get much of their information on proper agrochemical use from the companies that sell the product.<sup>58</sup> The fact that such a self-interested party is helping to direct agrochemical application may be contributing to its overuse.<sup>59</sup> In a study of agrochemical use amongst farmers in Costa Rica, for example, potato farmers who used the agrochemical label as a primary source of information about the agrochemical, used a significant amount more of the agrochemical than those who did not.<sup>60</sup> This can also be seen in the overuse of agrochemicals amongst farmers supplying the wholesale-supermarket channel in Guatemala.<sup>61</sup> The same overuse is not seen in the practice of farmers supplying traditional

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<sup>52</sup> Aijaz Ali Khooharo et al., *An Empirical Analysis of Pesticide Marketing in Pakistan*, 46 *Pakistan Economic & Social Review*, Summer 2008, at 72.

<sup>53</sup> *Id.* at 70.

<sup>54</sup> *Id.*

<sup>55</sup> ETC GROUP (2007), *supra* note 33, at 6. Based on 2004 revenue.

<sup>56</sup> *Id.*

<sup>57</sup> Monsanto: Our Products – Seeds & Traits, [http://www.monsanto.com/products/seeds\\_traits.asp](http://www.monsanto.com/products/seeds_traits.asp) (last visited Mar. 6, 2009) (clicking on any of the seed types on the left provides information on the genetically fabricated properties).

<sup>58</sup> Hanna-Andrea Rother et al., *Pesticide Use Among Emerging Farmers in South Africa: Contributing Factors and Stakeholder Perspectives*, 25 *Development Southern Africa* 399, 413-14 (2008); Ricardo Hernández et al., *Supermarkets, Wholesalers and Tomato Growers in Guatemala*, 36 *Agricultural Economics* 281, 286 (2007).

<sup>59</sup> Hernández et al., *supra*. note 58.

<sup>60</sup> Ryan E. Galt, *Toward an Integrated Understanding of Pesticide Use Intensity in Costa Rican Vegetable Farming*, 36 *Human Ecology* 655, 669 (2008). While taking agriculture classes decreases pesticide use amongst potato farmers, squash farmers who have taken classes use more pesticides. Despite this, the author concludes that the squash market may be *sui generis* and recommends education to encourage the reduction of pesticide use.

<sup>61</sup> Hernández et al., *supra* note 58, 284-85.

markets, such as small local produce vendors.<sup>62</sup> While the overuse may in part be explained by greater access to credit and the buyers' more stringent quality standards, reports in the field indicate that agrochemical companies recommend the purchase and use of agrochemicals that are not necessary, or at least not necessary in the quantity recommended.<sup>63</sup>

In addition to the costs incurred by overuse, use of agrochemicals even in appropriate quantities can have serious health and environmental repercussions. A 2009 European Commission ("E.C.") review of agrochemicals that were on the market as of 1993 revealed that of the 1,000 substances analyzed seventy were deemed to pose an unacceptable risk to human health and the environment.<sup>64</sup> Those seventy substances were subsequently removed from the market.<sup>65</sup> Agrochemicals may also contaminate ground water, which in turn can cause contamination of drinking water.<sup>66</sup> Farm laborers in particular face a high risk of exposure to dangerous levels of agrochemicals. For instance, in 2007 California's Department of Pesticide Regulation reported just under 1,000 cases of pesticide poisoning.<sup>67</sup> And this number may be low given that often those who are exposed are migrant laborers that may fear reporting incidents to a government agency if they are undocumented or may be unable to do so due to language barriers.<sup>68</sup>

### 3. Fertilizers

When utilized, fertilizers can dramatically increase a farmer's yields. Higher fertilizer use in the developing world is responsible for at least a twenty percent increase in agriculture in the last three decades.<sup>69</sup> To take one example, in the first year that a government subsidy in Malawi reduced the price of fertilizer by seventy-six percent, maize production jumped by 125 percent.<sup>70</sup> In just two years, Malawi went from a food importing country—dependent on foreign food aid—to a country that not only exports food but donates food to its neighbors.<sup>71</sup> Fertilizer adoption in

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<sup>62</sup> *Id.* Interestingly, these traditional-channel farmers actually earn more per hectare because of their lower input costs. *Id.* While they may earn less per hectare, the wholesale supermarket-channel farmers are said to prefer supplying this market because of its stability and low transaction costs. *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Press Release, European Commission, Commission Completes Pesticide Review Programme – an Important Step to Ensure the Protection of Health and Environment (Mar. 12, 2009) (on file with author).

<sup>65</sup> *Id.*

<sup>66</sup> NATIONAL PESTICIDE INFORMATION NETWORK, PESTICIDES IN DRINKING WATER (2000), available at <http://npic.orst.edu/factsheets/drinkingwater.pdf>.

<sup>67</sup> Reed Fujii, *Pesticide Poisonings Rise in Latest Report: Incidents Gre in S.J., California in 2007, State Says*, McClatchy, Mar 28, 2009.

<sup>68</sup> *Id.*

<sup>69</sup> WORLD BANK, *supra* note 17, at 51, (citations omitted).

<sup>70</sup> Lameck Masina, *Malawi: Fertilizer Success Stuns Western Donors*, African Business, May 2008, at 67.

<sup>71</sup> *Id.*

the developing world has surged. Developing countries used just ten percent of the fertilizer sold globally in the 1960s; in 2008 their share increased to sixty percent.<sup>72</sup> Asia has led this growth, with Sub-Saharan Africa still lagging far behind using just thirteen kilograms of fertilizer per hectare of arable land compared to Latin America and the Caribbean, which use eighty-one kilograms per hectare, or East Asia and the Pacific, which use 190 kilograms per hectare.<sup>73</sup> While there is little evidence of direct actions by multinational fertilizer companies which limit supply in developing countries, there is room for greater investment in these underserved markets in order to increase availability and stimulate demand.

Inability to access fertilizers and information regarding their proper use can result in loss of production and revenues. Smallholders in the developing world face a number of obstacles to gaining access to fertilizers. Logistical constraints can be particularly onerous. For instance, a study of Kenyan fertilizer use showed a negative correlation between the distance to a fertilizer market and fertilizer adoption.<sup>74</sup> The further one has to travel to get the fertilizer, the less likely s/he is to use it.<sup>75</sup> This is compounded by a lack of access to transportation where ownership of transportation has a “positive and significant effect on [fertilizer] adoption” as in Kenya.<sup>76</sup> Proper application of fertilizers is also important, given that using too much can quickly make the farming operation unprofitable. A separate report on fertilizer use in Kenya found that it would be unprofitable for the average farmer sampled in the study to use fertilizer as recommended by the Minister of Agriculture because the amount recommended was improper.<sup>77</sup> Were the proper amount of fertilizer to be used, the average farmer could expect a net increase in earnings equivalent to about one month’s worth of agricultural wages.<sup>78</sup> Thus, even when farmers are able to gain access to fertilizers, there is a lack of information on their proper use which can severely depreciate their value to farmers.

### C. Potential Solutions and Best Practices

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<sup>72</sup> WORLD BANK, *supra* note 17, at 51.

<sup>73</sup> *Id.* at 52.

<sup>74</sup> Arega D. Alene et al., *Smallholder Market Participation Under Transactions Costs: Maize Supply and Fertilizer Demand in Kenya*, 33 *Food Policy* 318, 327 (2007).

<sup>75</sup> *Id.* at 327.

<sup>76</sup> *Id.*

<sup>77</sup> Esther Duflo et al., *How High Are Rates of Return to Fertilizer? Evidence from Field Experiments in Kenya*, 98 *American Economic Review* 482, 487 (2008).

<sup>78</sup> *Id.*

There is much that companies, states, and non-governmental organizations (“NGOs”) can do in order to ameliorate many of the harms explicated above. What follows is a look at some of the measures that are currently being used.

1. The Duty to Protect: What States Can Do

- a) Build Infrastructure

An investment in infrastructure can greatly improve agricultural output. In many African countries a lack of access to infrastructure has been cited as the single greatest impediment to agricultural growth.<sup>79</sup> In India, on the other hand, it is estimated that investments in rural roads accounted for roughly twenty-five percent of the increase in agricultural output in the 1970s.<sup>80</sup> Looking at inputs specifically, a World Bank report found that investments in infrastructure can lower fertilizer prices and increase farmers’ share of the price paid for the crop when it leaves the farm.<sup>81</sup> Infrastructure investment is a key solution available to states, corporations, NGOs, and public private-partnerships.

- b) Technology and Guidance on Sound Farming Practices

There is a marked need for further research into sound farming practices and for providing farmers with greater information on the best farming methods. A study of investments in 700 R&D projects in the developing world revealed an average internal rate of return of forty-three percent,<sup>82</sup> which indicates that R&D is an extremely efficient investment bringing about a great deal of growth. Presently, there are groups engaged in research and in disseminating information on sound farming practices. The Consultative Group on International Agricultural Research (“CGIAR”), for instance, conducts extensive research on sustainable farming and new plant varieties and claims that without its research, global food production would be four to five percent lower.<sup>83</sup> CGIAR operates with the support of state governments, NGOs, and private businesses around the world.<sup>84</sup> Another organization is the Food & Fertilizer Technology Center for the Asian and Pacific Region (“FFTC”), which provides small-scale farmers with information on sound farming practices through regional field surveys, seminars and workshops, training

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<sup>79</sup> Michael Warner et al., *FAO, Market-Oriented Agricultural Infrastructure: Appraisal of Public-Private Partnerships* xvii (2008).

<sup>80</sup> WORLD BANK, *supra* note 17, at 150 (citations omitted).

<sup>81</sup> MICHAEL MORRIS ET AL., WORLD BANK, *FERTILIZER USE IN AFRICAN AGRICULTURE: LESSONS LEARNED AND GOOD PRACTICE GUIDELINES* 10 (2007). Infrastructure investment has a particularly significant impact on fertilizer prices given that it is used in high volumes and much of its final price is attributable to transportation costs. *Id.* at 28.

<sup>82</sup> WORLD BANK, *supra* note 17, at 165.

<sup>83</sup> CGIAR: Who We Are, <http://www.cgiar.org/who/index.html> (last visited Apr. 28, 2009).

<sup>84</sup> *Id.*



courses, and publications.<sup>85</sup> These and other such organizations play an important role in improving the efficiency and sustainability of smallholder agriculture.

c) Subsidies

As illustrated by the Malawi example cited above—wherein a government subsidy reducing fertilizer prices was followed by a 125 percent growth in maize output<sup>86</sup>—subsidization can have an enormous impact. Subsidies are generally controversial in the face of calls by developed countries to liberalize markets. But even the World Bank, an international financial institution often opposed to government subsidies, recognizes the benefits of targeted input subsidies to overcome market failures for smallholder farmers.<sup>87</sup> While the World Bank cautions that subsidies can be extremely expensive, easily misappropriated, and can increase disparities,<sup>88</sup> it offers a list of ways in which a fertilizer subsidy would promote economic efficiency.<sup>89</sup> It notes the potential for a subsidy to (1) create economies of scale which can push down prices, (2) motivate adoption amongst farmers unaware of the benefits of fertilizer use, (3) allow farmers to bypass imperfect credit or insurance markets that may have presented a barrier to purchasing fertilizers, (4) overcome taxes and output price controls that are making the fertilizer economically unviable, and (5) produce positive environmental externalities.<sup>90</sup> The United Nations Food and Agriculture Organization (“FAO”) also recommends certain subsidies, noting their ability to attract private investors.<sup>91</sup> Insofar as there are imperfections within input markets that suppress demand and constrain supply, subsidies can play an important role in improving access.

d) Promote and Support Alternative Farming Practices

Farmers may not always need to use agrochemicals to achieve high yields and an economically sustainable agricultural operation. Organic farming can be quite profitable and efficient whereas, in some cases, agrochemical use can actually hamper yields. In fact, a recent study found that pesticides and other contaminants actually reduced legume plant yields by one third.<sup>92</sup> A report released by the FAO found that, “Organic production systems can make

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<sup>85</sup> Food & Fertilizer Technology Center, About Us, <http://www.agnet.org/about/> (last visited Apr. 28, 2009).

<sup>86</sup> Lameck Masina, *Malawi: Fertilizer Success Stuns Western Donors*, African Business, May 2008, at 67.

<sup>87</sup> WORLD BANK, *supra* note 15, at 138, 149, 151.

<sup>88</sup> *Id.* at 151.

<sup>89</sup> *Id.* at 152.

<sup>90</sup> *Id.*

<sup>91</sup> FAO, *Market-Oriented Agricultural Infrastructure: Appraisal of Public-Private Partnerships* xviii (2008).

<sup>92</sup> Jennifer E. Fox et al. *Pesticides Reduce Symbiotic Efficiency of Nitrogen-Fixing Rhizobia and Host Plants*, 104 Proceedings Nat'l Acad. Sci. U.S. 10282, 10284 (2007).

important contributions to food supply stability and farmer livelihoods by establishing soil fertility, providing diversity and, therefore, resilience to food production systems in light of the many uncertainties of climate change.”<sup>93</sup> Organic farming practices could be particularly beneficial in developing countries where labor is cheap and input prices are high.<sup>94</sup> But in order to fully take advantage of the benefits of farming organically, such as the price-premium for organic goods, farmers would need access to certain markets as well as capacity building investments.<sup>95</sup>

e) Promote and Support Buying Cooperatives

Smallholder farmers that form cooperatives can create the economies of scale necessary to bring down the cost of certain inputs. For instance in 1999, as a consequence of purchasing in small quantities, farmers in Uganda were paying \$600 per metric ton of urea when the price was just \$100 in global markets.<sup>96</sup> After combining their orders with large Kenyan importers, the price of urea for farmers in Uganda decreased by more than \$300<sup>97</sup> This indicates that promoting buyer cooperatives may enhance protection of the right to food.

f) Develop and Enhance Anti-Trust Legislation

TNC market power achieved through vertical and horizontal concentration negatively impacts the right to food. States can curb this impact through anti-trust legislation aimed at eliminating or reducing this concentration. Anti-trust legislation is discussed in greater detail below.

2. The Duty to Respect: What Transnational Corporations Can Do

a) Develop Energy Efficient Farming Techniques that do not Adversely Impact the Right to Food

TNCs should invest in R&D projects aimed at developing energy efficient farming techniques with minimal adverse impacts on the realization of the right to food. One energy efficient technique promoted by Monsanto is ‘no-till farming.’<sup>98</sup> This is a farming practice made possible by Monsanto’s Roundup Ready seed where farmers do not need to till a field after

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<sup>93</sup> Food and Agriculture Org. of the United Nations [FAO], *Organic Agriculture and Environmental Stability of the Food Supply*, at ¶ 57, FAO Doc. OFS/2007/3 (May 3, 2007) available at <ftp://ftp.fao.org/paia/organicag/ofs/OFS-2007-3-rev.pdf>.

<sup>94</sup> FAO, *Issues Paper: Organic Agriculture and Food Availability*, at ¶ 48, FAO Doc. OFS/2007/1 (May 3, 2007) available at <ftp://ftp.fao.org/paia/organicag/ofs/OFS-2007-1.pdf>.

<sup>95</sup> *Id.*

<sup>96</sup> MORRIS, *supra* note 81 at 57.

<sup>97</sup> *Id.*

<sup>98</sup> Monsanto, Biotech Soybeans Spur No-Till Farming in U.S. and Environmental Benefits, [http://www.monsanto.com/responsibility/sustainable-ag/notill\\_farming.asp](http://www.monsanto.com/responsibility/sustainable-ag/notill_farming.asp) (last visited Apr. 21, 2004).

harvest to prepare the land for a new planting—a common method of weed control. Instead, a farmer who has used Roundup Ready seed can simply spray the fields with Roundup to control weeds without risk of harming the crops. Removing the need to till reduces tractor usage and thus energy consumption, which amounts to a reduction in emissions. In addition, “[c]urtailing tillage produces many [other] environmental and economic benefits – from reducing soil and wind erosion and generating healthier soil to reducing fuel and equipment costs, lowering the runoff of chemicals into streams and reducing carbon dioxide releases into the atmosphere.”<sup>99</sup> However, Monsanto has failed to address the many serious issues raised above concerning commercial seed and agrochemical use. Moving forward these adverse impacts ought to be considered alongside the development of these techniques.

b) Respect Biodiversity

By partnering with NGOs, states, and other businesses TNCs can positively impact biodiversity. For instance, business participation in CGIAR serves to support one of the organizations main priorities: Sustaining agriculture biodiversity. “A critical task for 11 of the CGIAR Centers is to maintain international genebanks, which preserve and make readily available the plant genetic resources that form the basis of food security worldwide.”<sup>100</sup> The results of this initiative to date include the maintenance “of over 650,000 samples of crop, forage and agroforestry genetic resources in the public domain”.<sup>101</sup>

c) Provide Adequate Information and Training to Avoid Overuse

As discussed above, there is a need for providing farmers with adequate information on and training in the best farming methods, and businesses as well as states have a role to play in disseminating this knowledge. Private businesses are in fact instrumental in supporting CGIAR’s operations and priorities.<sup>102</sup>

#### **IV. Commodity Traders and Food Processors**

A. Introduction

Commodity traders are transnational agribusiness corporations that purchase commodities, such as wheat, soy, coffee, cocoa, and sugar, from farmers. The commodity traders

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<sup>99</sup> *Id.*

<sup>100</sup> *See generally*, CGIAR: Who We Are, *supra* note 83.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

then sell the commodities to food processors or directly to retailers.<sup>103</sup> Examples of major commodity traders include Cargill, Archer Daniels Midland (“ADM”), Bunge, and ConAgra.<sup>104</sup> In response to a number of changes in the commodities market over the past 30 years, including the development of new technologies, the globalization and liberalization of markets, and the increased concentration among retailers and food processors, commodity traders have attempted to expand their operations in a number of ways.<sup>105</sup> The effort to expand has caused commodity traders to grow and merge with other traders, leading to an increased concentration of market power among a few commodity traders.<sup>106</sup>

Food processors are food and beverage companies that transform raw output from farms into retail-ready product. Processing adds significant retail value to products through branding. Describing the development of modern food processors Lyson and Raymer have said, “the emerging global system of production and consumption is part and parcel of the industrialization of the food system that developed in the US in the early part of the 20th century. The progenitors of today’s large, multinational food giants were the small canning and packing companies that formed throughout the US after 1900.”<sup>107</sup> In many cases, concentration among food processors today is the result of mergers and acquisitions in the 1970s and 1980s of former canning and packing companies.<sup>108</sup> Globally, the top five food processors are, as of 2003, Nestlé S.A., Kraft Foods, Inc., Unilever plc, PepsiCo Inc., and Archer Daniels Midland Co.<sup>109</sup>

This section will examine the impact of commodity trader and food processor market power on the right to food, or the “right to adequate food” and “the right to be free from hunger.”<sup>110</sup> It is divided into three sections. First, it will examine the negative effect of commodity trader and food processor concentration on worldwide hunger, focusing on how commodity trader and food processor market power hinders farmers’ right to food by preventing farmers and farm laborers from receiving adequate compensation. Then, it will present some

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<sup>103</sup> The commodity traders sometimes perform primary processing and marketing of the commodities before trading them. Additionally, some of the largest commodity traders are also involved in food manufacturing. Examples of this are Cargill and Smithfield Foods.

<sup>104</sup> WILLIAM D. HEFFERNAN, *THE INFLUENCE OF THE BIG THREE – ADM, CARGILL, AND ConAgra* 4 (1999).

<sup>105</sup> DEMOCRATIC STAFF OF THE COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY, UNITED STATES SENATE, TOM HARKIN, IOWA, RANKING DEMOCRATIC MEMBER, *ECONOMIC CONCENTRATION AND STRUCTURAL CHANGE IN THE FOOD AND AGRICULTURE SECTOR: TRENDS, CONSEQUENCES AND POLICY OPTIONS* 1 (2004).

<sup>106</sup> THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (HEREINAFTER “FAO”), *THE STATE OF AGRICULTURAL COMMODITY MARKETS* 6 (2004), available at <ftp://ftp.fao.org/docrep/fao/007/y5419e/y5419e00.pdf> (last visited March 1, 2009).

<sup>107</sup> Thomas Lyson & Annalisa Raymer, 17 *AGRIC. & HUM. VALUES* 199, 200 (2000).

<sup>108</sup> *Id.* at 200-01.

<sup>109</sup> The Action Group on Erosion, Technology, and Concentration, *Communique: Oligopoly, Inc.* 10 (2003).

<sup>110</sup> Narula, *supra* note 5, at 12

present solutions and best practices used by commodity traders and food processors to protect farmers' right to food.

## B. Impact of Commodity Traders and Food Processors on the Right to Food

### 1. Concentration Among Commodity Traders and Food Processors

Commodity traders and food processors have developed market power through both horizontal concentration and vertical concentration. Horizontal concentration is well established. For example, Cargill, which is both a commodity trader and food processor, controls approximately forty-five percent of the global grain trade, and ADM controls approximately thirty percent.<sup>111</sup> When combined, Cargill, ADM, Barry Callebaut, and Hostra also control approximately forty percent of global cocoa grinding.<sup>112</sup>

Vertical concentration is also reflected within most supply chains, either through one firm's presence throughout the chain or through alliances between major firms. Cargill, for instance, is the largest grain trader in the world, lends money to wheat farmers, owns and runs a vast grain transportation and storage business, and also has a joint venture with Monsanto to provide grain seeds.<sup>113</sup> The banana supply chain is another example of vertical concentration among commodity traders. Dole and Chiquita, which together control roughly fifty percent of the world banana trade, have begun to partner with select retailers in the United States and the United Kingdom in order to strengthen their distribution network.<sup>114</sup>

Commodity traders and food processors may also exert their market power nationally. Suppliers are generally limited to marketing their goods locally, and are unable to seek out traders outside of their national market. Therefore, commodity traders that have horizontal or vertical concentration within a national market may exert significant force within that country. For instance, Cargill, ADM, Bunge/Ceval Alimentos, Dreyfus/Coinbra, and Avipal/Granoleo, have a sixty percent market share of the Brazilian soybean crushing industry. Cargill, ADM, and Bunge also control eighty percent of the European soybean crushing market, and roughly sixty percent of the European feed market.<sup>115</sup> Cargill, ADM, and Bunge thus wield significant market

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<sup>111</sup> BILL VORLEY, UK FOOD GROUP, FOOD, INC.: CORPORATE CONCENTRATION FROM FARM TO CONSUMER 39 (2003).

<sup>112</sup> SONIA MURPHY, INSTITUTE FOR AGRICULTURE AND TRADE POLICY, MANAGING THE INVISIBLE HAND: MARKETS, FARMERS, AND INTERNATIONAL TRADE 23 (2002).

<sup>113</sup> MURPHY (2006), *supra* note 11, at 14-15.

<sup>114</sup> UNCTAD, BANANA: MARKETING CHAIN, <http://r0.unctad.org/infocomm/anglais/banana/chain.htm> (last visited March 1, 2009).

<sup>115</sup> VORLEY (2003), *supra* note 111, at 44.

power over Brazilian soybean suppliers, especially if those suppliers wish to supply soy to Europe.

As noted above, over eighty percent of the world's hungry are small, rural, farmers from the developing world.<sup>116</sup> This group includes both a substantial proportion of women, small-hold farmers, and farm workers who work for larger scale farms, sometimes as migrant workers in the United States and the United Kingdom.<sup>117</sup> Bill Vorley defines these farmers as part of "Rural World 3."<sup>118</sup> They combine commodity and subsistence production, and are disconnected from participating more effectively in the formal economy due to a number of factors, including lack of education, training, and resources.<sup>119</sup> Rural World 3 farmers share few similarities with large, corporate farmers. In fact, policies which may be beneficial for large corporate farmers may have no impact or even negatively impact Rural World 3 farmers.

## 2. Impact of Commodity Trader and Food Processor Concentration

Commodity trader concentration adversely affects the right to food by preventing Rural World 3 farmers from receiving sufficient compensation. Commodity traders have used their market power to transfer wealth from farmers to traders.<sup>120</sup> As commodity trader concentration increases, farmers' share of the retail food dollar has correspondingly decreased. For example, farmers' share of the food retail dollar of cereal was sixteen percent in 1970, but only five percent in 2000.<sup>121</sup> Farmers' share of the retail food dollar of pork was fifty-one percent in 1970 and thirty percent in 2000.<sup>122</sup> The increased market power of commodity traders is not the only reason for this decline, which may also be partially explained by technological developments, liberalization of markets, and increased market power for actors in other parts of the supply chain. Still, commodity trader market power is a factor, as the traders are able to use their size and influence to set prices.<sup>123</sup> In any market where a few commodity traders control substantial market share a bottleneck effect is created. For example, in the Brazilian soybean market there are roughly 200,000 farmers attempting to sell to five main commodity traders.<sup>124</sup> In this type of

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<sup>116</sup> VORLEY (2002), *supra* note 2, at 11.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> MURPHY (2006), *supra* note 11, at 23.

<sup>121</sup> INSTITUTE FOR AGRICULTURE AND TRADE POLICY, A FAIR FARM BILL FOR COMPETITIVE MARKETS 5 (2007).

<sup>122</sup> *Id.*

<sup>123</sup> LIZ DODD & SAMUEL ASFAHA, TRADCRAFT AND THE SOUTH CENTRE, REBALANCING THE SUPPLY CHAIN: BUYER POWER, COMMODITIES, AND COMPETITION POLICY 22 (2008).

<sup>124</sup> VORLEY (2003), *supra* note 111, at 42.

situation farmers have only a few buyer options while the buyers have hundreds of thousands of farmers to purchase from, forcing the farmers to compete against one another. Farmers would receive more income if the markets were competitive.<sup>125</sup>

The absence of a competitive market has a negative impact on Rural World 3 farmers' right to food as it results in lower prices for produce. This is the case whether the farmer sells directly to the commodity trader or through a middleman because when the commodity trader pays less to the middleman that price decrease is passed along to the most vulnerable actor in the chain, the farmer. For farmers who can barely make sufficient money to feed themselves and their families — a substantial proportion of Rural World 3 farmers— this loss of profit may be the difference between adequate and inadequate food.<sup>126</sup> It also may force the farmers to attempt to increase their production in an effort to make more money. Although this decision makes perfect sense for each farmer individually, it leads to regional or even global oversupply of that commodity, which in turn drives down the price, creating a cycle that is difficult to escape and that adversely affects access to food. Finally, farm laborers are also affected by falling prices. These workers range from permanent employees of large scale commercial farms to the children and/or spouses of small scale farmers. When the commodity traders decrease the price paid to farmers or middlemen, the price decrease is then passed along to the laborers in the form of decreased wages, hindering the laborers' ability to purchase adequate food.<sup>127</sup>

The cocoa market in Cote d'Ivoire illustrates the exercise of market power by commodity traders following trader concentration. After the liberalization of the Cote d'Ivoire market, ADM, Cargill, and Barry Callebaut quickly came to dominate the Ivorian cocoa industry.<sup>128</sup> While ADM, Cargill, and Barry Callebaut do not own plantations and do not directly employ child workers,<sup>129</sup> their role as purchasers from middlemen who bought the cocoa from small-hold farmers led to a decrease in prices and a subsequent increase in child slavery and forced labor in Cote d'Ivoire. Farmers who were no longer able to make sufficient income and feed their own families turned to using forced or slave labor in order to turn a profit. The government states that

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<sup>125</sup> MICHAEL D. WILCOX AND PHILIP C. ABBOT, MARKET POWER AND STRUCTURAL ADJUSTMENT: THE CASE OF WEST AFRICAN COCOA MARKET LIBERALIZATION 19-20 (2004) (Econometric study of the exertion of market power in West Africa).

<sup>126</sup> RUTH MAYNE, OXFAM INTERNATIONAL, CAUSING HUNGER: AN OVERVIEW OF THE FOOD CRISIS IN AFRICA 3 (2006) (describing how small improvements in earnings in rural Africa can have a major impact on reducing hunger).

<sup>127</sup> MURPHY (2006), *supra* note 11, at 25.

<sup>128</sup> *Id.* at 6, see also ACTIONAID INTERNATIONAL, POWER HUNGRY: SIX REASONS TO REGULATE GLOBAL FOOD CORPORATIONS 20 (2005).

<sup>129</sup> Christian Parenti, *Chocolate's bittersweet economy: Seven years after the industry agreed to abolish child labor, little progress has been made*, *Fortune*, Feb. 4, 2008, at 1.

the only way to prevent these problems is for the big commodity traders to pay higher prices to the middlemen.<sup>130</sup>

Like commodity traders, food processors use their buyer power to drive down prices and cut their costs, thus adversely affecting the right to food. The Brazil dairy-processing sector is a case in point. In 1996, two transnational food and beverage giants, Nestlé and Parmalat, shared fifty-three percent of the Brazilian dairy processing market.<sup>131</sup> This market concentration was in large part attributable to a series of rapid acquisitions—at least twenty-four Brazilian processing companies were acquired by Nestlé from 1988 to 1997.<sup>132</sup> Before this period of concentration, Brazilian dairy processing was dominated by cooperatives, which did not survive once faced with competition from TNCs like Nestlé and Parmalat.<sup>133</sup> Ultimately, many co-operatives sold their facilities to TNCs.<sup>134</sup>

Facing pressure from retailers for low prices, processors tried to cut their own costs by requiring that processing tasks like milk cooling be done on-farm by producers.<sup>135</sup> The cost of the necessary refrigeration units forced many small-hold farms to increase production.<sup>136</sup> In turn, as author Elizabeth Farina explains, “in order to take full advantage of [refrigeration] technology, the producer is stimulated to undertake a second milking, followed by mechanical milking, and improvements in genetics...[T]he farmer has to invest in herd and milking equipment, and the technological upgrade requires a managerial upgrade.”<sup>137</sup>

The complexity of these changes presented obvious challenges for rural small-scale milk producers. As a result of Nestlé passing milk cooling off on producers in order to keep its own costs low, between 1997 and 2000 it lost seventy-five percent of its Brazilian milk suppliers—approximately 26,000 farmers who went out of business because there was no market for their milk.<sup>138</sup>

The problems identified above are compounded when commodity traders and food processors use their market power to pursue unfair trading practices. Examples of unfair

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<sup>130</sup> VORLEY (2003), *supra* note 111, at 50.

<sup>131</sup> ELIZABETH M.M.Q. FARINA, *THE LATIN AMERICAN PERSPECTIVE ON THE IMPACTS OF THE GLOBAL FOOD ECONOMY: THE CASE OF BRAZIL 7* (2003).

<sup>132</sup> *Id.* (citing M.S. Jank, E.M.M.Q. Farina and V. Galan, *O agribusiness do leite no Brasil* (1999)).

<sup>133</sup> FARINA *supra* note 131, at 7-8.

<sup>134</sup> *Id.* at 8.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 9.

<sup>137</sup> *Id.* at 9-10.

<sup>138</sup> *Id.*



practices include delaying payment for produce, lowering prices at the last minute or buying less than the amount agreed upon depending on market conditions, non-transparent weighing and grading of produce, and threatening to remove and actually removing farmers from supply lists without good reason.<sup>139</sup> For example, in a highly concentrated tobacco market in Brazil, traders entirely determine the grade of the leaf without granting the farmer any input or right to appeal. The grade in turn generates the price. With the concentration among traders, farmers are unable to sell elsewhere. Therefore despite the farmers' suspicions that traders consistently and deliberately classify the leaves at lower grades to generate additional profit, the farmers are left totally without recourse.<sup>140</sup> Commodity traders can also negatively impact the right to food by loaning Rural World 3 farmers money and then either paying farmers less than the value of the loan or placing restrictions on the activities of the farmers until the loan is paid off.<sup>141</sup> In addition, high interest rate loans can trap farmers in debt. For instance, cocoa farmers in Cote d'Ivoire say that loans from Cargill have had this effect, forcing the farmers to take their children out of school to work in the farm in order to make enough to pay back the loans.<sup>142</sup> Finally, concentration can lead to outright illegal practices, as corporations abuse their market power to increase their profits. In 1996, ADM and other commodity traders participated in an international cartel designed to inflate the price of an agricultural input, lysine.<sup>143</sup> Before the cartel was broken up by the United States Department of Justice ("DOJ") the price inflation cost farmers tens or millions of dollars.<sup>144</sup> As this was an agricultural input purchased by farmers, the price increase hindered farmers' ability to make a subsistence income, which in turn affected their access to adequate food.

For a number of years industry analysts believed that charging higher prices for commodities would address the issues above.<sup>145</sup> Unfortunately, the recent spike in commodity prices has not led to a corresponding increase in the wealth of Rural World 3 farmers. The great majority of the benefits of higher prices are reported to have gone to commercialized farmers and

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<sup>139</sup> ACTIONAID (2005), *supra* note 128, at 28.

<sup>140</sup> CAMPAIGN FOR TOBACCO FREE KIDS, GOLDEN LEAF, BARREN HARVEST: THE COSTS OF TOBACCO FARMING 13-14 (2001).

<sup>141</sup> ACTIONAID (2005), *supra* note 128, at 26.

<sup>142</sup> Parenti, *supra* note 129, at 7.

<sup>143</sup> Douglas Ross, *Antitrust Enforcement and Agriculture* 6 (2002).

<sup>144</sup> *Id.*

<sup>145</sup> ANNE LAURE CONSTANTIN, INSTITUTE FOR AGRICULTURE AND TRADE POLICY, TURNING HIGH PRICES INTO AN OPPORTUNITY: WHAT IS NEEDED? 3 (2008).

agribusiness corporations.<sup>146</sup> Commodity trader and food processor concentration is clearly not the sole reason for this phenomenon.<sup>147</sup> Nonetheless, vertical and horizontal concentration among commodity traders and food processors has likely exacerbated the issue, by preventing profits from the higher retail costs of commodities from reaching poorer farmers. Alarming, commodity traders had, before the market truly crashed in 2009, made record profits off of the increase in the price of commodities.<sup>148</sup> The market power of the traders, combined with small-hold farmers' lack of access to price and market developments, has allowed them to continue to hold the price paid to farmers low and to pocket the higher retail value.<sup>149</sup> Commodity traders may also leverage small-hold farmers into accepting the risk that stems from volatile shifts in the market, making it far more difficult for small-hold farmers to benefit.<sup>150</sup>

Yet another impact of commodity trader and food processor concentration is their increased influence on legislatures and governments. Market concentration gives the traders and processors wealth and unity in order to influence favorable political outcomes. In the United States, commodity traders and food processors have played a large role in government regulation of agriculture.<sup>151</sup> For instance commodity traders, along with other agricultural corporations, successfully lobbied for farm bills encouraging farmers to over-produce feed crops.<sup>152</sup> This in turn drove down the price of the crops globally, again hindering farmers' ability to receive adequate compensation.<sup>153</sup>

### C. Potential Solutions and Best Practices

#### 1. The Duty to Protect: What States Can Do

The size and position of commodity traders and food processors within the supply chain makes it difficult to pressure them to change their behavior. There are few producers or producer cooperatives of sufficient size to place pressure on commodity traders or food processors.

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<sup>146</sup> OXFAM, DOUBLE-EDGED PRICES: LESSONS FROM THE FOOD PRICE CRISIS: 10 ACTIONS DEVELOPING COUNTRIES SHOULD TAKE 9 (2008).

<sup>147</sup> There are a number of possible explanations. First, most rural workers are actually net food sellers, meaning that unless the sale price of their crop rises more drastically than the price of the food generally, the farmers are slipping farther into poverty. *Id.* at 9-10. Since the price of almost all food has increased the farmers have been unable to benefit. Also, a lack of infrastructure and capacity prevents Rural World 3 farmers from increasing their output to respond to higher prices, thus disadvantaging them in comparison to larger farmers.

<sup>148</sup> OXFAM (2008), *supra* note 146, at 10.

<sup>149</sup> CONSTANTIN, *supra* note 145, at 13. This same concept applies to farm workers who sell to middlemen and to day laborers for the same reasons quoted above.

<sup>150</sup> ACTIONAID (2005), *supra* note 128, at 26.

<sup>151</sup> MUPRHY (2006), *supra* note 11, at 18.

<sup>152</sup> INSTITUTE FOR AGRICULTURE AND TRADE POLICY, A FAIR FARM BILL FOR COMPETITIVE MARKETS 6 (2007).

<sup>153</sup> *Id.*

Moreover, commodity traders do not generally sell directly to the general public in the way that retailers or even food processors do, meaning that the impact of public opinion on commodity traders is extremely low. The only two non-state actors who presently appear to have the ability to apply significant pressure on commodity traders to change practices are large food processors, such as Nestlé and Unilever, and, increasingly, retailers, such as Walmart and Carrefour. Food processors, which are known to the public through their branded products, are susceptible to pressure from consumers to change their practices.<sup>154</sup>

Nonetheless, there are a few mechanisms presently available to combat the increasing market power of the large commodity traders and food processors. This section describes the most significant mechanisms and assesses their effectiveness.

a) Home State Competition Law

One possible solution is for the home state of the commodity traders or food processors to use anti-trust laws to combat their market power. For the purposes of this Section home state shall refer to the state where the traders and processors are incorporated. Home states can exercise their duty to protect the right to food by using anti-trust laws to limit concentration, thereby decreasing market power and increasing the price received by farmers. Such a recommendation would generally be addressed to the governments of the United States and the European Union as this is where nearly all of the powerful commodity traders and food processors are incorporated and where an anti-trust lawsuit would likely need to be brought.<sup>155</sup>

There are three main provisions of E.U. competition law: (1) prohibitions against certain actions taken on the basis of collusion between firms; (2) prohibitions against similar actions undertaken by a single firm in a dominant market position; and (3) prohibitions against mergers which would lead to a single firm occupying a dominant market condition.<sup>156</sup> For all of the prohibitions the reference is always to the regional consumption market rather than the global market. There have been a few examples where the E.C. imposed fines on actors outside the

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<sup>154</sup> SARAH ROBERTS, SUPPLY CHAIN SPECIFIC? UNDERSTANDING THE PATCHY SUCCESS OF ETHICAL SOURCING INITIATIVES, 44 J. BUS. & ETHICS 159, 163 (2003).

<sup>155</sup> Although developing countries have developed a wide array of competition law, this assumes the general practice that the developing country is unable to extend its competition law to corporations outside of its jurisdiction. Also, within the United States a private party may bring an anti-trust action under the Sherman Act and under state consumer protection laws. DEMOCRATIC STAFF OF THE COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY UNITED STATES SENATE, *supra* note 105, at 24. This ability, however, might only prove useful for harms suffered within the United States.

<sup>156</sup> PETER GIBBON, THE COMMODITY QUESTION: NEW THINKING ON OLD PROBLEMS 22 (2005). The main actions prohibited against in sections 1 and 2 are “fixing purchasing prices, fixing physical quotas for specific suppliers, fixing price disparities between different supply markets and fixing trading conditions including payment and credit terms.” *Id.*

region for price fixing arrangements, but only where the arrangement was implemented in the region and where the primary effect occurred in the region.<sup>157</sup> To be liable for an abuse of dominance a firm must have a forty-fifty percent market share.<sup>158</sup>

Within U.S. anti-trust law there are also three general types of violations: (1) conspiracies to suppress competition; (2) predatory or exclusionary conduct to acquire or hold onto a monopoly; and (3) mergers that appear likely to significantly lessen competition in a market.<sup>159</sup> High concentration on its own is not a violation of U.S. anti-trust law.<sup>160</sup> U.S. competition law is broader than in the European Union in that it also allows consideration of the level of competition in relation to issues of consumer interest and wider welfare outcomes.<sup>161</sup> This doctrine, however, is usually used to allow actions that would otherwise possibly be anti-competitive, rather than in the other direction.<sup>162</sup>

Gibbon, Dodd and Asfaha suggest that as presently construed competition law is not particularly helpful for farmers and laborers squeezed by the market power of commodity traders and food processors.<sup>163</sup> Competition authorities usually focus on seller rather than buyer power, meaning that if consumers are receiving low prices then the authorities are unlikely to act.<sup>164</sup> This problem is compounded by the reluctance of U.S. and E.U. authorities to examine the impact of U.S. and E.U. companies on foreign sellers.<sup>165</sup> Mergers of commodity traders and food processors can sometimes be prevented or at least require divestiture, but this will only serve to somewhat limit additional consolidation in already consolidated markets.<sup>166</sup> Even where illegal trading practices exist the law will not always provide a clear remedy. First, hard evidence of illegal practices is difficult to prove.<sup>167</sup> Second, competition law is enforced by the national governments of the United States and the European Union, with the most common penalty for illegal actions being a fine paid to the government in question.<sup>168</sup> Poor farmers' and laborers'

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<sup>157</sup> DODD & ASFAHA, *supra* note 123, at 22.

<sup>158</sup> CASSEY LEE, MODEL COMPETITION LAWS: THE WORLD BANK-OECD AND UNCTAD APPROACHES COMPARED 12 (2004).

<sup>159</sup> Ross, *supra* note 143, at 2.

<sup>160</sup> *Id.* at 3.

<sup>161</sup> GIBBON, *supra* note 156, at 22.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*; see also DODD AND ASFAHA, *supra* note 123, at 18.

<sup>164</sup> DODD AND ASFAHA, *supra* note 123, at 18.

<sup>165</sup> *Id.* at 20 (competition authorities do not take enforcement actions when national buyers exert anticompetitive practices against foreign sellers).

<sup>166</sup> Ross, *supra* note 143, at 17-18 (describing the divestitures required for the Cargill/Continental merger).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

right to food may still benefit if the firms are deterred by government action from anti-competitive behavior, but it is not clear that they benefit significantly.

One possible area for improvement within the present competition laws would be to place pressure upon the U. S. DOJ and the USDA to bring cases under the consumer interest and wider welfare provision. The USDA also has the authority under the Packers and Stockyards Program to promulgate rules to prevent unfair, unjustly discriminatory, or unduly preferential practices in certain agricultural industries.<sup>169</sup> If the USDA were to use this authority more forcefully, unfair practices by commodity traders and food processors could possibly be curtailed.

b) Host State Competition Law

Host states, meaning states where production is taking place, may also effectively curb commodity trader and food processor market power—and the ensuing adverse impacts—through the development of competition laws. Over the last thirty years a significant number of developing countries have implemented competition laws.<sup>170</sup> As of 2006, however, a number of countries still lacked competition policy.<sup>171</sup> Competition laws among these countries vary, and therefore it is hard to reach any general conclusions.<sup>172</sup> (See, however, a discussion of South African competition law below).

Still, Dodd and Asfaha present a few issues that generally act to limit the ability of host state competition law to protect the right to food from commodity trader and food processor concentration. Although theoretically some host states could extend jurisdiction to enforce competition law against U.S. or E.U. companies, host states face practical difficulties in doing so.<sup>173</sup> First, it is difficult and expensive for host states to investigate and prosecute the corporations.<sup>174</sup> Secondly, even if the host state is able to successfully bring an action it may be difficult for smaller host states to enforce rulings in their favor against wealthy and global commodity traders and food processors.<sup>175</sup> Additionally, because host states are often attempting to attract the investment and capital of the commodity traders and food processors, they may be loath to investigate these companies out of fear that the investigation will result in a loss of

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<sup>169</sup> DEMOCRATIC STAFF OF THE COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY UNITED STATES SENATE, *supra* note 105, at 19.

<sup>170</sup> LEE, *supra* note 158, at 1.

<sup>171</sup> DODD AND ASFAHA, *supra* note 123, at 14.

<sup>172</sup> The competition policy of developing countries has been influenced by the U.S., the E.U., Germany, Japan, South Korea, UNCTAD, and the World Bank-OECD. *Id.*

<sup>173</sup> *Id.* at 20.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

investment and capital.<sup>176</sup> Even the affected farmers are often scared to bring complaints to the state, worried that other competitors might boycott and delist them.<sup>177</sup>

#### (1) South African Competition Law

South African competition law provides an example of steps that both home and host states can take toward protecting the right to food from commodity trader and food processor concentration. The law, which was “developed through a three-year consultation process with industry trade unions,”<sup>178</sup> is not simply aimed at consumer protection, but rather allows for and sometimes mandates a more holistic approach. While its main goal is to “promote and maintain competition,”<sup>179</sup> it additionally seeks to ensure “social and economic welfare”, “opportunities to participate in world markets”, equitable opportunities for small and medium-sized enterprises to participate in the economy, and increased “ownership stakes of historically disadvantaged persons”.<sup>180</sup> Under the South African law, injured parties submit their complaints for investigation to the Competition Commission.<sup>181</sup> If the Commission then fails to refer the matter to an independent Competition Tribunal, the injured party may bring an action to the Tribunal, and can possibly receive costs and damages.<sup>182</sup> Additionally, the possibility of corporate leniency is provided in exchange for admitting the wrong and providing evidence against other firms.<sup>183</sup>

The competition law’s potential to protect farmers’ right to food from commodity trader and food processor concentration is demonstrated in a case before the Commission.<sup>184</sup> As of April, 2008, South African authorities were in the process of prosecuting seven dairy processors for a variety of offenses, “including abuse of their dominant position with suppliers and colluding to fix purchase prices.”<sup>185</sup> One processor applied for leniency, and at this writing was scheduled to provide evidence against the others.<sup>186</sup> If the Competition Commission finds the dairy processors guilty it plans to fine them ten percent of their turnover.<sup>187</sup> Suits such as this

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<sup>176</sup> *Id.*, at 21.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 26.

<sup>179</sup> OECD, COMPETITION LAW AND POLICY IN SOUTH AFRICA 17 (2003).

<sup>180</sup> *Id.* at 18.

<sup>181</sup> *Id.* at 40.

<sup>182</sup> *Id.* at 45.

<sup>183</sup> DODD AND ASFAHA, *supra* note 123, at 25.

<sup>184</sup> Sapa, *Date set for dairy price-fixing hearing*, THE CITIZEN, Nov. 17, 2008.

<sup>185</sup> DODD AND ASFAHA, *supra* note 123, at 24.

<sup>186</sup> *Id.* at 25.

<sup>187</sup> *Clover to spill beans on price-fixing cartel*, BUSINESS REPORT, Jan. 25, 2007.

may deter commodity traders and food processors from engaging in anti-competitive behavior, enabling farmers to earn more income and thereby protecting their right to food.

c) Promote and Support Farmer Cooperatives

States should seek to increase the market power of farmers through encouraging farmer cooperatives. Farmer cooperatives potentially increase the bargaining power of farmers by giving farmers more consistent crops and allowing them to potentially avoid selling to private traders.<sup>188</sup> This in turn may result in higher compensation for the farmers, hopefully enough to procure adequate food. For instance, potato growers in Thailand were able to organize into a Potato Growers Cooperative and diversify their potato production, avoiding over-reliance on one buyer.<sup>189</sup> By signing contracts with multiple partners the Potato Growers Cooperative was able to make significant profits.<sup>190</sup>

Nonetheless, there are substantial obstacles for farmer cooperatives or partnerships in successfully countering the market power of commodity traders and food processors. In order for a farmer cooperative to be truly effective it would need to be extremely large and likely geographically diverse, or would need to have partnerships with farmer cooperatives in other nations.<sup>191</sup> Such a configuration, however, is not easy to achieve as it requires complex coordination between rural farmers from different cultures.

One alternative taken by some farmer cooperatives is to establish working relationships with particular commodity traders and food processors.<sup>192</sup> Although these cooperatives have slightly more bargaining power, they are still limited by the commodity traders' and food processors' ability to play the cooperative against cooperatives in other countries. There are also concerns that the largest of these cooperatives are in essence becoming private organizations, requiring each farmer to pay in order to join the cooperative and failing to protect any farmer from problems with his or her individual crop.<sup>193</sup> At this point the cooperative loses its ability to protect farmers' right to food, as it no longer leads to greater compensation.

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<sup>188</sup> MURPHY (2002), *supra* note 112, at 43.

<sup>189</sup> VORLEY (2003), *supra* note 111, at 72.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> HEFFERNAN, *supra* note 104, at 7 (1999).

<sup>193</sup> MURPHY (2002), *supra* note 112, at 45.

#### d) Public Procurement

A lack of industry-wide uniformity and transparency around Corporate Social Responsibility (“CSR”)<sup>194</sup> initiatives often results in companies not being rewarded by the market for pursuing such activities, and in companies not being sanctioned for negatively affecting human rights, such as the right to food.<sup>195</sup> It is incorrect to assume the market will balance this out, or that uncoordinated voluntary initiatives will ultimately result in satisfactory progress in CSR.<sup>196</sup> One way states have begun to encourage uniform standards and transparency in corporate operations is to incorporate social responsibility criteria into their public procurement decisions.<sup>197</sup>

Public procurement, or government purchasing, comprises sixteen percent of the E.U. GDP and as such offers a promising means of influencing corporate contractors.<sup>198</sup> The E.C.—the executive branch of the European Union<sup>199</sup>—is developing a Guide to Social Consideration in Public Procurement for E.U. member state use.<sup>200</sup> The potential impact on the food sector is significant: the E.C.’s General Budget for 2008 allocated forty percent, or EUR 54.61 billion, for agriculture.<sup>201</sup>

The E.C. Guide will be based on revisions to the 2004 E.U. Public Procurement Directives, which included social and environmental factors for governments to consider in granting contracts.<sup>202</sup> The Directives “specifically mention in their recitals and provisions the possibilities for adopting social considerations in technical specifications, selection and award criteria, and contract performance clauses.”<sup>203</sup> According to some commentators, however, implementation via clauses inserted into public contracts is the only legal means of incorporating human rights criteria into procurement practices.<sup>204</sup>

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<sup>194</sup> Corporate Social Responsibility here is defined to mean any voluntary action by a corporation that has a social, rather than strictly economic, objective.

<sup>195</sup> INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (FIDH), CONTRIBUTION TO THE EU MULTI-STAKEHOLDER FORUM ON CSR 1 (FEBRUARY 10, 2009).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 2.

<sup>198</sup> [http://europa.eu/institutions/inst/comm/index\\_en.htm](http://europa.eu/institutions/inst/comm/index_en.htm)

<sup>199</sup> *Id.*

<sup>200</sup> EUROPEAN COMMISSION, MEMO/09/109 Brussels (Mar. 16, 2009).

<sup>201</sup> EUROPEAN COMMISSION, General Budget for the European Union for the Financial Year 2008: The Figures, 5.

<sup>202</sup> EUROPEAN COMMISSION, EC 2004/18 (2004).

<sup>203</sup> PROPOSED ELEMENTS FOR TAKING ACCOUNT OF THE SOCIAL CONSIDERATIONS IN PUBLIC PROCUREMENT 15 (Jul. 21, 2008) (discussing Directive EC 2004/18).

<sup>204</sup> EUROPEAN COALITION FOR CORPORATE JUSTICE, LINKING CSR TO PUBLIC PROCUREMENT IN THE EU 2, 4 (2007).



The benefits of socially oriented public procurement include improved market competition, creation of a market for socially responsible goods and services, and creation of a model system for ensuring social responsibility that can also be implemented by the private sector.<sup>205</sup> Some NGO statements received during the Guide’s comment period specifically cite the right to food as a human right that should be included.<sup>206</sup> The Northern Alliance for Sustainability (“ANPED”) recommends that this be accomplished by giving preference to contractors who pledge to honor the International Labour Organization (“ILO”) Core Labour Standards and the rights recognized in the Universal Declaration of Human Rights, and by conducting human rights impact assessments and using this information to guide procurement decisions.<sup>207</sup> ANPED also recommends that the E.C. Guide encourage use of Fair Trade Criteria and Fair Trade Procurement Initiatives.<sup>208</sup>

Recognizing E.U. public procurement as a best practice must be qualified by the following critiques. First, E.U. procurement policy is based on economic objectives.<sup>209</sup> Social and environmental objectives are currently enforced under other laws, and are therefore de-prioritized in procurement decisions.<sup>210</sup> Second, despite the benefit this refocusing on fairness in buying might have on developing country farmers’ right to food, E.U. policy in general does not seem to be oriented around recognizing and alleviating the impacts of market concentration on the right to food.<sup>211</sup> Lastly, in the U.K., socially responsible procurement practices in the food sector have been criticized for prohibiting contracts with local producers, inhibiting the local food movement.<sup>212</sup>

## 2. The Duty to Respect: What Transnational Corporations Can Do

### a) Multi-Stakeholder Initiatives

Multi-stakeholder initiatives (“MSIs”)—wherein “NGOs, multilateral and other organizations encourage companies to participate in schemes that set social and environmental

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<sup>205</sup> PROPOSED ELEMENTS FOR TAKING ACCOUNT OF THE SOCIAL CONSIDERATIONS IN PUBLIC PROCUREMENT, *supra* note 203, at 12-13.

<sup>206</sup> NORTHERN ALLIANCE FOR SUSTAINABILITY, CONTRIBUTION TO THE GUIDE ON SOCIAL CONSIDERATIONS IN PUBLIC PROCUREMENT 1.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 2.

<sup>209</sup> MARTIN TRYBUS, SOCIAL CLAUSES IN EU PUBLIC PROCUREMENT 1 (2008).

<sup>210</sup> *Id.*

<sup>211</sup> The EU’s rural development policies in terms of food security recognize that “badly functioning markets” are a cause of global hunger, but otherwise addressing market concentration is not mentioned among the food security measures the EU undertakes. [http://ec.europa.eu/development/policies/9interventionareas/ruraldev/food\\_intro\\_en.cfm](http://ec.europa.eu/development/policies/9interventionareas/ruraldev/food_intro_en.cfm), accessed Apr. 25, 2009

<sup>212</sup> KEVIN MORGAN & ADRIAN MORLEY, RELOCALISING THE FOOD CHAIN: THE ROLE OF CREATIVE PUBLIC PROCUREMENT 25-27 (2002).

standards, monitor compliance, promote social and environmental reporting, and encourage stakeholder dialogue and ‘social learning,’”—have become a primary strategy for encouraging corporate respect for human rights.<sup>213</sup> Peter Utting<sup>214</sup> suggests that the rise of MSIs is in part a reaction to the deficiencies of corporate self-regulation.<sup>215</sup>

A more elaborate definition of MSIs describes three methods of “intervention,” or partnership between TNCs, NGOs, and local government and organizations in host states that primarily serve to improve the conditions for farmers and agricultural laborers but also, importantly, benefit the TNCs.<sup>216</sup> These interventions include: (1) creating inclusive business models;<sup>217</sup> (2) building human and physical capital;<sup>218</sup> and (3) improving institutions and policies and the overall enabling environment.<sup>219</sup>

TNCs that become involved in MSIs are those that tend to prioritize brand reputation, as well as those suffering reputational damage due to consumer or media focus on corporate actions that appear to harm human rights.<sup>220</sup> Four major groups, whose opinion of the corporations’ reputations translates into degrees of success relative to the stakeholder group, are “authorizers,” such as shareholders, directorial boards, government and regulatory agencies, “business partners,” “customer groups,” and “external influencers” such as interest groups and journalists.<sup>221</sup>

Ethical Sourcing Initiatives (“ESIs”), or corporate purchasing policies with a social responsibility dimension, are one strategy well-suited to the MSI model, particularly in terms of building brand confidence and reputation.<sup>222</sup> The importance of reputation to various members of the supply network and the power of various members are key determinants of the successful implementation of ESIs.<sup>223</sup> For example, reputation is often very important to consumers

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<sup>213</sup> PETER UTTING, REGULATING BUSINESS VIA MULTSTAKEHOLDER INITIATIVES 61 (2001).

<sup>214</sup> Peter Utting is a Staff Member of the United Nations Research Institute for Social Development.

<sup>215</sup> UTTING, *supra* note 213, at 67-71.

<sup>216</sup> MARC PFITZER & RAMYA KRISHNASWAMY, THE ROLE OF THE FOOD AND BEVERAGE SECTOR IN EXPANDING ECONOMIC OPPORTUNITY 13 (2007).

<sup>217</sup> Educating small business owners in order to increase their business savvy, establishing more dependable cash flows, assisting producers in understanding and implementing standards for crop quality and labor. PFITZER & KRISHNASWAMY, *supra* note 216, at 4.

<sup>218</sup> Educating farmers about cutting edge crops, technology, and operations strategies. PFITZER & KRISHNASWAMY, *supra* note 216, at 4.

<sup>219</sup> Focusing on “addressing low awareness of economic opportunities, dearth of supporting institutions, deficiency of infrastructure, and needs for knowledge and standards.” PFITZER & KRISHNASWAMY, *supra* note 216, at 4.

<sup>220</sup> UTTING, *supra* note 213, at 82.

<sup>221</sup> SARAH ROBERTS, SUPPLY CHAIN SPECIFIC? UNDERSTANDING THE PATCHY SUCCESS OF ETHICAL SOURCING INITIATIVES, 44 J. BUS. & ETHICS 159, 161-63 (2003).

<sup>222</sup> *Id.* at 159.

<sup>223</sup> *See generally id.*

making choices between brands.<sup>224</sup> This makes reputation a priority for food processors.<sup>225</sup> However, reputation can be much less of a priority for commodity traders that do not sell directly to the public.<sup>226</sup>

One such example is the Chiquita Company's partnership with the Rainforest Alliance. Responding to damage to its reputation, new Chiquita leadership prioritized CSR and took four significant steps toward creating an ethical sourcing program.<sup>227</sup> These included: (1) partnering with a non-profit, the Rainforest Alliance, which enjoyed good press, was connected to existing frameworks for implementation, and was able to reach out to other stakeholders; (2) using an external standard to measure progress, specifically the SA8000 social accountability standard for labor rights, and hiring an external firm to do the auditing; (3) formally expanding Chiquita's Code of Conduct to include social responsibilities; and (4) working on a collaborative agreement with two large coalitions of unions.<sup>228</sup>

Chiquita's MSI strategy, particularly its partnership with the Rainforest Alliance and its use of the SA8000, had a positive effect on producers' right to food. Auditing on a Guatemala farm site revealed that workers classed as temporary, who were receiving no benefits and a lower compensation rate, actually qualified for full-time status as a result of the fact that they were actually working a permanent schedule.<sup>229</sup> Also, by prioritizing worker health and workplace safety, Chiquita reduced accident rates in the production process.<sup>230</sup>

Other corporations are also engaging in MSIs, undertaking projects to build up rural economies using the "intervention" strategies listed above.<sup>231</sup> In doing so, corporations are using socially responsible practices to stabilize their supply chains and increase their ability to market and brand based on differentiated products. In Pakistan's Punjab province, for example, Nestlé is operating a "gender support program" that trains women entrepreneurs to provide livestock healthcare and management services with the long-term goal of raising milk production standards.<sup>232</sup> The project, a partnership with the United Nations Development Programme,

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<sup>224</sup> *Id.* at 168.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> MARCO WERRE, IMPLEMENTING CORPORATE RESPONSIBILITY – THE CHIQUITA CASE, 44 J. BUS. & ETHICS 247, 249-258 (2003).

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 258.

<sup>230</sup> *Id.*

<sup>231</sup> PFITZER & KRISHNASWAMY, *supra* note 216, at 20-37.

<sup>232</sup> *Id.* at 23-24.

benefits Nestlé in that it provides a higher quality milk supply and generates significant goodwill in the community, and benefits producers by creating jobs.<sup>233</sup> Within approximately the first year of the program, 800 women had been trained and the average family income had increased by US \$42 per month.<sup>234</sup> Though it did not directly address buyer power or supply chain consolidation, this MSI did target wages in producer communities, and illustrates a way for TNCs to respect the right to food.

The U.K. based Ethical Trading Initiative (“ETI”) has also had success in the food sector. ETI facilitates collaboration between trade unions, NGOs, and corporations, with two goals: (1) defining and promoting best practices in corporate codes on minimum labor standards; and (2) promoting corporate adoption and implementation of the ETI Base Code on minimum labor standards.<sup>235</sup> The ETI Base Code is based on the ILO Conventions.<sup>236</sup> The Base Code mandates that living wages be paid, specifically that “wages should always be enough to meet basic needs,” making it particularly relevant to the right to food discussion.<sup>237</sup>

Rather than certifying companies for compliance with the Base Code or providing accreditation to auditors, ETI focuses on promoting knowledge development and experience sharing between stakeholders.<sup>238</sup> One example is the Ethical Tea Partnership (“ETP”), which builds on the ETI Base Code using a standard of labor practices based on the Base Code for independent monitoring of its members’ estates.<sup>239</sup> According to the ETP website “The Ethical Tea Partnership aims to ensure that, as a minimum, producers conform with all requirements of the ETP Standard which encompasses the Ethical Trading Initiative Base Code, ILO core Conventions, local laws and collective bargaining agreements.”<sup>240</sup>

An additional example related to MSIs is the Common Code for the Coffee Community Association (“4C”). This Germany-based MSI, with the support of food and beverage giants including Nestlé and Kraft Foods,<sup>241</sup> works to develop “a code of conduct for the sustainable

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> Ethical Trading Initiative, <http://www.ethicaltrade.org/Z/abteti/index.shtml>, accessed April 28, 2009.

<sup>236</sup> Ethical Trading Initiative, <http://www.ethicaltrade.org/Z/ethtrd/aboutet/standards.shtml>, accessed April 28, 2009.

<sup>237</sup> Ethical Trading Initiative, The Base Code, Sec. 5.1, [http://www.ethicaltrade.org/Z/lib/base/code\\_en.shtml](http://www.ethicaltrade.org/Z/lib/base/code_en.shtml), accessed April 28, 2009.

<sup>238</sup> *Id.*

<sup>239</sup> Ethical Trading Initiative, [http://www.ethicalteapartnership.org/pages.asp?page\\_id=42&parent\\_id=23](http://www.ethicalteapartnership.org/pages.asp?page_id=42&parent_id=23), accessed April 28, 2009.

<sup>240</sup> Ethical Tea Partnership Monitoring Process: A Briefing Document for Producers (August 2007), available at [www.ethicalteapartnership.org/document\\_library/30134614\\_ProducerBriefingLeaflet.Oct\\_07.pdf](http://www.ethicalteapartnership.org/document_library/30134614_ProducerBriefingLeaflet.Oct_07.pdf), accessed April 28, 2009

<sup>241</sup> According to Lang, these two TNCs comprised 80% of global coffee production at the end of 2002. BARBARA LANG, EXPERIENCES WITH VOLUNTARY STANDARDS INITIATIVES AND RELATED MULTI-STAKEHOLDER DIALOGUES 6 (2006).

production, post-harvest processing and trading of [pre-roast] coffee.”<sup>242</sup> The 4C MSI is led by a three-party steering committee made up of corporations, NGOs and trade unions, and coffee producers, each having an equal vote in decision-making.<sup>243</sup> As may be evident in the list of 4C corporate members—which includes Finlays, Melitta, Sara Lee International, and as mentioned above, Nestlé and Kraft Foods<sup>244</sup>—the MSI is aimed at the mainstream coffee market.<sup>245</sup> This approach is different from the Fair Trade strategy, for example, which is primarily directed at high-end markets.<sup>246</sup>

However, these initiatives may have adverse consequences. For instance, the MSI or “intervention” relationship that may often be motivated by reputational concerns implicates another dimension of corporate social responsibility decisions: sustainability. In addition, as discussed above under the section on input providers, although traditional farming practices may not produce uniform product on a scale large enough to be beneficial to TNCs that prioritize brand consistency, there are still important cultural and environmental benefits to preserving local diversity in agriculture. These concerns should be a part of the discourse on developing rural economies and respecting the right to food. Also the reputational concerns that fuel ESIs and MSIs in general may be lacking in food and beverage companies wherein a key stakeholder, the commodity trader, is not typically subject to public scrutiny and therefore not under pressure to participate in MSIs or implement ESIs.<sup>247</sup> As of 2003, major confectionary companies had not committed themselves to ESIs, arguably for this reason.<sup>248</sup> Moreover, assessing the effects of the Chiquita-Rainforest Alliance MSI, one research study noted “an imbalance [in corporations preferring to focus on improving worker welfare and safety rather than labor rights like collective bargaining] has served to strain relations between the NGO and various stakeholders, notably certain trade union organizations, which in turn has undermined the global legitimacy of the scheme.”<sup>249</sup> Thus, while commodity traders and food processors are in a position to develop

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<sup>242</sup> *Id.* at 6.

<sup>243</sup> *Id.* at 7.

<sup>244</sup> LIST OF MEMBERS OF THE COMMON CODE FOR THE COFFEE COMMUNITY ASSOCIATION (4C) (March 27, 2009), available at <http://www.4c-coffeeassociation.org/en/partners.htm>, accessed on April 28, 2009.

<sup>245</sup> COMMON CODE FOR THE COFFEE INDUSTRY, COFFEE TRADE & INDUSTRY AND THE 4C ASSOCIATION 2, available at <http://www.4c-coffeeassociation.org/en/association.htm>, accessed April 28, 2009.

<sup>246</sup> LANG, *supra* note 241, at 7.

<sup>247</sup> ROBERTS, *supra* note 221, at 168.

<sup>248</sup> *Id.*

<sup>249</sup> UTTING, *supra* note 213, at 86 (citing J. Bendell, Growing Pain: A Case Study of a Business-NGO Alliance to Improve the Social and Environmental Impacts of Banana Production (2001)).

initiatives that respect the right to food, these MSIs must be carefully designed to ensure sustainability, diversity of production, and respect for the rights of farmers and laborers.

## **V. Retailers**

### **A. Introduction**

As globalized trade has expanded and refrigeration and preservation methods have expanded, globalized food retailers have thrived. Large retail chains, with their low prices and wide selection of products, are quickly replacing small local retail outlets as the primary source of consumer products in many parts of the world. As these chains grow, they often merge with, acquire or force out smaller retailers. Horizontal concentration of retailers leads to strong demands for uniformly lower prices, which is thought in turn to drive vertical integration throughout supply chains.<sup>250</sup> This broad concentration gives global retailers great buyer power, and also results in a loss of product information and differentiation. This section will cover three main problems associated with retailers with respect to the right to food.

First, it will examine the effects of retailer buyer power on prices paid to producers. As global retailers expand and buyer competition decreases, producers are given fewer and fewer available options for sale of their goods, allowing retailers to extract goods at high volume for very low prices.

Second, it will examine how retailers use buyer power to impose rigorous product standards (e.g. packaging, freshness, and shape) on producers and to force producers to absorb the cost of marketing promotions. Supermarkets often impose rigid quality standards on produce. These standards make production more difficult, require the use of large amounts of pesticides and other chemical inputs, and lead to vast amounts of waste that can be very costly to producers. Producers are also expected to respond to and comply with periodic temporary changes in order size and price associated with the promotional activities of supermarkets, in which prices are temporarily slashed to draw in more retail customers. Producers are often forced to fully absorb the cost of these promotional events.

Third, it will examine the failure of the conventional supermarket model to effectively communicate the true social cost of products to consumers. The proliferation of global retailers has led to the alienation of the average consumer from the source of his/her food. As consumers' knowledge about their food declines, consumers' ability to make ethical purchases is greatly

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<sup>250</sup> DODD AND ASABA, *supra* note 123, at 9.

diminished. If hidden costs, such as costs to the environment and to human health, were revealed to consumers, consumers may make different purchasing choices. This change in consumer demands could provide important incentives for retailers to practice socially responsible trade.

#### B. Impact of Retailers on the Right to Food

Large multiple “supermarket” chains are on the rise, and many retailers are moving from single-country chains to globalized operations. For example, as of 2008, U.S.-based Wal-Mart reported its operation of 3,141 retail outlets in Puerto Rico and twelve countries outside the United States.<sup>251</sup> Tesco, which is based in the United Kingdom, also operates retail outlets in twelve international markets.<sup>252</sup>

The United Kingdom Department for Environment, Food and Rural Affairs (“Defra”) in part attributes the success of the supermarket to urbanization, rising incomes, mass manufacturing technology, the development of popular grocery brands, the pursuit of economies of scale, the convenience of one-stop grocery shopping, rising incomes, wider car ownership, and wider ownership of refrigerator freezers.<sup>253</sup>

Not only are supermarket chains expanding rapidly, but most of the growth is experienced by only a handful of chains. In 2000, it was estimated that only five supermarket chains accounted for over forty percent of food retail sales in the United States,<sup>254</sup> and in 2005 it was estimated that only four supermarket chains accounted for over two-thirds of food retail sales in the United Kingdom.<sup>255</sup>

In addition to retailers expanding such that a large portion of retail market share is held by only a few companies, retailers’ demand for large amounts of undifferentiated goods also encourages and facilitates vertical concentration in the food industry.<sup>256</sup> The result is that the relatively few, very powerful produce buyers are able to extract lower prices and better terms for themselves at the expense of small-scale producers.<sup>257</sup> At one time, producers were able to establish long-term relationships with purchases based on familiarity and trust. This is rapidly

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<sup>251</sup> Wal-Mart, *2008 Annual Report* (2008), <http://walmartstores.com/download/2713.pdf>, at 12; 15.

<sup>252</sup> Tesco PLC, *Annual Report and Summary Financial Statement 2008* (2008), [http://www.tescoreports.com/downloads/tesco\\_report\\_final.pdf](http://www.tescoreports.com/downloads/tesco_report_final.pdf), at 3.

<sup>253</sup> DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS, ECONOMIC NOTE ON UK GROCERY RETAILING (2006), <https://statistics.defra.gov.uk/esg/reports/Groceries%20paper%20May%202006.pdf>, at 5.

<sup>254</sup> Mary Hendrickson, et al., *Consolidation in Food Retailing and Dairy: Implications for Farmers and Consumers in a Global Food System*, 103 *Brit. Food J.* 715, 716 (2001).

<sup>255</sup> Oli Brown, *Supermarket Buying Power, Global Commodity Chains and Smallholder Farmers in the Developing World* (2005), [http://hdr.undp.org/docs/publications/background\\_papers/2005/HDR2005\\_Brown\\_Oli\\_4.pdf](http://hdr.undp.org/docs/publications/background_papers/2005/HDR2005_Brown_Oli_4.pdf).

<sup>256</sup> DODD & ASFAHA, *supra* note 123, at 9.

<sup>257</sup> *Id.* at 12.

changing; today, purchasers often select their suppliers based on online reverse auctions in which suppliers are forced to bid against one another for the lowest price.<sup>258</sup> These online auctions are blind, such that suppliers do not know which, if any, rivals are bidding against them.<sup>259</sup>

Enormous buyer power is complemented by oversupply, which occurs when agricultural supply exceeds demand.<sup>260</sup> Because many agricultural producers have no alternative livelihood, many compensate by producing more when prices drop. This increases oversupply, thereby exacerbating the problem.<sup>261</sup>

Retailers use buyer power not only to extract lower prices and better terms out of producers, but also to force producers to absorb the costs of complying with quality standards. Supermarkets have an obligation to ensure that marketed products meet government regulatory requirements. For example, since 1990, retailers in the United Kingdom have been required to exercise “due diligence” in the manufacture, transportation, storage and preparation of food.<sup>262</sup> In order to demonstrate compliance, many retailers have begun tracing products from the fields to the market. Instead of absorbing the cost of these tracing schemes themselves or passing the cost on to consumers, retailers often require producers to cover costs associated with “traceability.”<sup>263</sup> Defra notes that traceability requirements increase the “regulatory burden” on suppliers, but that compliance is nonetheless “critical.”<sup>264</sup>

In addition to passing on government regulatory requirements to producers, retailers impose their own rigorous uniformity and cosmetic standards on producers, driven by consumers’ preferences for produce that appears uniform and aesthetically pleasing. Products that do not meet industry standards are sold at a loss or simply wasted.<sup>265</sup> This includes produce that is the wrong shape, size, and/or color, as well as fruits and vegetables with minor skin blemishes.<sup>266</sup> In an attempt to meet these strict standards, many producers use large, possibly excessive, amounts of pesticides, which results in pesticides making their way into purchasers’

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<sup>258</sup> Steven Mathieson, *Tesco's Retail Exchange reaps rewards*, *Computing*, Nov. 17, 2000, <http://www.computing.co.uk/computing/news/2068039/tesco-retail-exchange-reaps-rewards>

<sup>259</sup> VORLEY (2003), *supra* note 111, at 24.

<sup>260</sup> *Id.* at 10.

<sup>261</sup> DODD & ASFAHA, *supra* note 123, at 10.

<sup>262</sup> Brown, *supra* note 255, at 5.

<sup>263</sup> *Id.*

<sup>264</sup> DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS, *supra* note 253, at 19.

<sup>265</sup> Friends of the Earth, *Consultation Response: Competition Commission: Provisional decision on remedies relating to supply chain practices* (2002), [http://www.competition-commission.org.uk/inquiries/ref2006/grocery/pdf/responses\\_remedies\\_third\\_parties\\_fote\\_supply\\_chain\\_practices.pdf](http://www.competition-commission.org.uk/inquiries/ref2006/grocery/pdf/responses_remedies_third_parties_fote_supply_chain_practices.pdf), at 1.

<sup>266</sup> *Id.*



food and water.<sup>267</sup> Pesticide use can also be extremely dangerous and damaging to the environment in areas where produce is grown.

Retailers further use buyer power to force producers to periodically participate in and absorb the cost of marketing promotions. During marketing promotions, retailers sometimes slash prices for consumers, then pass the lower prices right on to producers. In the words of one farmer, “The marketing organisation did a buy one get one free... But as far as I can make out, that’s not the supermarket buying all the fruit and saying buy one get one free, rather we are giving two pounds of apples away for the price of one pound. It doesn’t affect the supermarket, it affects us; so that hurts.”<sup>268</sup>

Despite being forced to absorb enormous costs associated with quality standards and marketing promotions, producers often refuse to make official complaints regarding unfair buyer practices for fear of being delisted or boycotted by purchasers.<sup>269</sup>

When consumers select products to purchase in supermarkets, they do so based on an integration and interpretation of the information that is actually available to them at that time.<sup>270</sup> In a supermarket, there is often very little information made available to consumers regarding product origin. However, products traded and marketed under the conventional agribusiness model often carry hidden costs for the environment, for human health and nutrition, and for producers and other agricultural workers.<sup>271</sup> These hidden costs represent an information deficit faced by consumers making purchase choices in retail outlets. If hidden costs were revealed to consumers, consumers may make different purchasing choices based in part on their valuation of these costs, which in turn could provide important incentives for retailers to practice socially responsible trade.

## C. Potential Solutions and Best Practices

### 1. The Duty to Protect: What States Can Do

#### a) Implement Government Imposed Codes of Practice

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<sup>267</sup> Friends of the Earth, *Super markets or corporate bullies?* (2003), [http://www.foe.co.uk/resource/briefings/super\\_markets\\_corporate\\_bullies.pdf](http://www.foe.co.uk/resource/briefings/super_markets_corporate_bullies.pdf), at 5.

<sup>268</sup> Rachel Duffy, et al., *Methodology for quantitative comparison of UK multiple retailers* (2002), [http://www.racetothetop.org/documents/reports/Wye\\_RTTT\\_Final\\_Report.pdf](http://www.racetothetop.org/documents/reports/Wye_RTTT_Final_Report.pdf), at 82.

<sup>269</sup> DODD & ASFAHA, *supra* note 123, at 21.

<sup>270</sup> Alexandru M. Degeratu, et al., *Consumer Choice Behavior in Online and Traditional Supermarkets: The Effects of Brand Name, Price, and other Search Attributes*, 17 Int’l J. Res. Marketing 55 (2000).

<sup>271</sup> Olivier De Schutter, *Background Document for the Report of the Special Rapporteur on the Right to Food on his Mission to the World Trade Organization, delivered to the Human Rights Council*, background to U. N. Doc A/HRC/10/005/Add.2 (Mar. 2009)

Government imposed codes of practice have the potential to greatly influence corporate actors. One promising example of such a code is the U.K. Competition Commission's Groceries Supply Code of Practice ("GSCOP").

In 1998, the U.K. Office of Fair Trading launched an investigation into supermarkets.<sup>272</sup> The results of the inquiry were forwarded to the Competition Commission, an independent public regulatory body which investigates and reports on issues relating to competition. In 2000, the Commission published a report on the results which revealed, among other things, that the Commission had identified fifty-two specific practices of concern engaged in by retailers, as reported by suppliers.<sup>273</sup> In response, the Competition Commission negotiated a voluntary code of practice to be entered into by the U.K.'s four largest supermarket chains.<sup>274</sup> The Supermarkets Code of Practice ("SCOP"), introduced in March 2002, aims to rein in some of the most problematic buying practices exercised by these supermarket chains.<sup>275</sup> The SCOP contains a formal complaint mechanism for suppliers who work with U.K. retailers.<sup>276</sup> However, it is severely flawed in at least two ways. First, it is worded vaguely, giving supermarkets with vast legal resources a great advantage over suppliers. Second, cases of SCOP violations must be brought by suppliers, who are afraid to do so for fear of being boycotted and/or forced out of business.<sup>277</sup> Observers have commented that these weaknesses are the result of retailers' lobbying efforts, and that they effectively render the SCOP useless.<sup>278</sup>

Realizing that the SCOP was flawed, the Competition Commission recommended the establishment of a Groceries Supply Code of Practice ("GSCOP"), based closely on the SCOP but with several improvements.<sup>279</sup> The Competition Commission also recommended the establishment of an independent groceries supply ombudsman, who would receive confidential complaints from suppliers, gather information about corporate buying practices, arbitrate

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<sup>272</sup> VORLEY, *supra* note 111, at 35.

<sup>273</sup> Competition Commission, *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom* (2000), [http://www.competition-commission.org.uk/rep\\_pub/reports/2000/fulltext/446a11.3.pdf](http://www.competition-commission.org.uk/rep_pub/reports/2000/fulltext/446a11.3.pdf), at 235-236.

<sup>274</sup> Judith Whateley, *Supermarket Practices: The need for EU wide action*, [http://www.agribusinessaccountability.org/pdfs/305\\_Concerns-about-supermarket-practices.pdf](http://www.agribusinessaccountability.org/pdfs/305_Concerns-about-supermarket-practices.pdf), at 4.

<sup>275</sup> ActionAid, *supra* note 128, at 62.

<sup>276</sup> ActionAid, *supra* note 128, at 62.

<sup>277</sup> *Id.*

<sup>278</sup> ActionAid, *ActionAid's analysis of the Competition Commission's Provisional Findings*, [http://www.actionaid.org.uk/wps/content\\_document.asp?doc\\_id=1466](http://www.actionaid.org.uk/wps/content_document.asp?doc_id=1466), at 2.

<sup>279</sup> Competition Commission, *Provisional decision on remedies relating to supply chain practices* (2006), [http://www.competition-commission.org.uk/Inquiries/ref2006/grocery/pdf/decision\\_remedies\\_supply\\_chain.pdf](http://www.competition-commission.org.uk/Inquiries/ref2006/grocery/pdf/decision_remedies_supply_chain.pdf), at 12.

disputes arising under the GSCOP and issue reports on retailers' compliance with the GSCOP.<sup>280</sup> The ombudsman would also have the power to prosecute retailers for breaches of the GSCOP.<sup>281</sup>

In February 2009, the Competition Commission published a draft GSCOP.<sup>282</sup> The GSCOP is broader in scope than the SCOP, applying to all corporate retailers with an annual U.K. retail groceries turnover of £1 billion or more.<sup>283</sup> The GSCOP will require retailers to: make certain improvements to their internal processes in relation to dealing with suppliers; improve their arrangements for keeping records of contracts with suppliers; automatically provide suppliers information on contractual terms and rights; and appoint an in-house GSCOP compliance officer.<sup>284</sup> The Competition Commission will take into consideration representations it has received in response to the released draft, and is expected to impose an order bringing the GSCOP into force later in 2009.<sup>285</sup>

b) Establish, Expand and Support Effective Grievance Mechanisms

Governments should establish, expand, and support the establishment of supplier grievance mechanisms at the local level. This would include the adoption of local labor laws, which are often mirrored in corporate codes of practice.<sup>286</sup> In addition, governments should establish regional and national institutions and organizations for receipt of formal complaints. Among the many national institutions and organizations available to suppliers are the National Human Rights Commission of India; the National Commission on Human Rights of Kenya; the Human Rights Commission of New Zealand; the Arbitration Council of Cambodia; the Commission for Conciliation, Mediation and Arbitration of South Africa; and the Advisory, Conciliation and Arbitration Service of the United Kingdom.<sup>287</sup> Among the regional organizations are the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development and the Inter-American Development Bank.<sup>288</sup> While formal mechanisms currently exist for the receipt of complaints from aggrieved producers, as

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<sup>280</sup> Friends of the Earth, *supra* note 265, at 2-3.

<sup>281</sup> DODD & ASFAHA, *supra* note 123, at 26.

<sup>282</sup> Pinsent Masons, *Update April 2009* (2009), <http://www.pinsentmasons.com/PDF/Competition-OFTAnnualPlan-April09.pdf>, at 1.

<sup>283</sup> Competition Commission, *supra* note 278, at 16.

<sup>284</sup> *Id.* at 2.

<sup>285</sup> Pinsent Masons, *supra* note 282, at 1-2.

<sup>286</sup> Centre for Research on Multinational Corporations, *Considering Complaint Mechanisms* (2003), [http://somo.nl/publications-en/Publication\\_350/at\\_download/fullfile](http://somo.nl/publications-en/Publication_350/at_download/fullfile), at 5.

<sup>287</sup> Caroline Rees, et al., *Mapping Grievance Mechanisms in the Business and Human Rights Arena*, Corp. Soc. Resp. Initiative Rep. No. 28 (Harvard Kennedy Sch.), 2008, at 50-63.

<sup>288</sup> *Id.* at 71-89.

noted above, producers often refuse to make official complaints regarding unfair buyer practices for fear of being delisted or boycotted by purchasers.<sup>289</sup> The filing of a complaint can put workers at risk of being reassigned, fired, intimidated, or even physically assaulted.<sup>290</sup> Governments should support initiatives to improve these mechanisms so that they can serve the purpose they were established to fulfill.

## 2. The Duty to Respect: What Transnational Corporations Can Do

### a) Develop Corporate Social Responsibility Codes

There are typically two kinds of private CSR standards that are adopted by corporate actors in furtherance of their social responsibility goals: private company standards, which are set and monitored by individual firms, and private collective standards, which involve actors from beyond a single company.<sup>291</sup>

One type of private collective standard is the industry collective standard, which is typically developed by multiple corporate actors in a single industry.<sup>292</sup> The Euro-Retailer Produce Working Group Good Agricultural Practices (“EUREPGAP”) protocol, for instance, in 2004 was a private industry collective standard applicable only to fresh fruit and flowers and aimed primarily to improve the environmental sustainability of farming and the quality and safety of the food produced.<sup>293</sup> It additionally dealt with worker health, safety and welfare.<sup>294</sup> Among other things, it provided guidelines for handling pesticides so that produce would be safe and workers not harmed.<sup>295</sup> EUREPGAP’s focus on food hygiene and safety facilitated corporate actors’ goals of maintaining brand reputation and consumer confidence.<sup>296</sup> Benefits to workers’ health that resulted from EUREPGAP’s food safety and hygiene requirements represents one situation in which corporate interests align with supplier interests; however, these interests often do not align. For example, good agricultural practices outlined in industry collective standards may actually decrease farm level diversity.<sup>297</sup> A reduction in biodiversity can threaten agriculture

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<sup>289</sup> DODD & ASFAHA, *supra* note 123, at 21.

<sup>290</sup> *Id.*

<sup>291</sup> Anne Tallontire, *CSR and Regulation: towards a framework for understanding private standards initiatives in the agri-food chain* *CSR and Regulation*, 28 *Third World Q.* 775, 777 (2007).

<sup>292</sup> *Id.*

<sup>293</sup> Charles Mather, *Codes of Conduct, retailer buying practices and farm labour in South Africa’s wine and fruit export chains*, 26 *Int’l Dev. Planning Rev* 477, 485-487 (2004).

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> Linda Fulponi, , *Private voluntary standards in the food system: The perspective of major food retailers in OECD countries*, 31 *Food Pol’y* 1, 6 (2006).

<sup>297</sup> MARY HENDRICKSON, ET AL., *THE GLOBAL FOOD SYSTEM AND NODES OF POWER* at 11.

and food security by decreasing producers' ability to develop improved crops.<sup>298</sup> Additionally, stringent industry collective standards may lead to the exclusion of diversified smallholders from market participation.<sup>299</sup> Indeed, EUREPGAP was often criticized for favoring large-scale producers at the expense of hundreds of thousands of smallholders.<sup>300</sup> In 2007, EUREPGAP was expanded and re-branded as GLOBALGAP.

Not all private collective standards are industry specific; another category of private collective standards are MSIs, sometimes also known as private standards initiatives.<sup>301</sup> In contrast to industry collective standards, MSIs are generally developed by corporate actors from multiple industries in collaboration with other organizations.<sup>302</sup> The advantage of these initiatives is that they provide a vehicle for much-needed collaboration between supermarkets, NGOs and trade unions.<sup>303</sup> Cooperation among businesses, governments and NGOs is critical to any attempt to tackle systemic problems.<sup>304</sup> MSIs aim to examine, address and halt the negative impacts of widespread buying practices.<sup>305</sup> These initiatives establish codes of conduct attempting to ensure, among other things, that workplaces are safe, children are not employed, working hours are not excessive, and living wages are paid.

Perhaps the most well known MSI, the ETI, discussed above, seems to have enjoyed substantial, though not unlimited, success. The ETI, founded in 1998, comprises several corporate retailers who have committed to working toward a code of conduct intended to set forth the rights that workers should expect to enjoy.<sup>306</sup> According to ETI spokeswoman Julie Hawkins, "Real change can be achieved only if [corporate actors] start putting ethical trade at the heart of their activities."<sup>307</sup> Compliance with ETI is assessed by auditors,<sup>308</sup> for which, as noted below, the ETI has been widely criticized. Furthermore, the tendency of private standards initiatives to focus on supplier compliance fails to address some other problems. For example, a 2006 study commissioned by the ETI revealed that ETI monitoring had failed to ensure that workers were paid a living wage and that female employees were offered training and promotion

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<sup>298</sup> Smita Narula, *supra* note 5, at 23.

<sup>299</sup> MARY HENDRICKSON, ET AL., *supra* note 297, at 11.

<sup>300</sup> VORLEY (2003), *supra* note 111, at 71.

<sup>301</sup> Tallontire, *supra* note 291, at 3.

<sup>302</sup> *Id.*

<sup>303</sup> VORLEY (2003), *supra* note 111, at 37.

<sup>304</sup> Tesco PLC, *supra* note 252, at 16.

<sup>305</sup> ActionAid, *supra* note 128, at 61.

<sup>306</sup> *Id.*

<sup>307</sup> Emma Clarke, *Chain Reaction*, Financial Management, Apr. 2007, at 10.

<sup>308</sup> *Id.*

opportunities.<sup>309</sup> Additionally, there is much evidence that ETI's use of auditors, resulting from its focus on code compliance, may have prompted some audited factory managers to falsify records and coach workers on what to say to inspectors.<sup>310</sup>

MSIs often have formal complaint mechanisms to allow small-scale producers to report code violations committed by corporate actors. These mechanisms vary in efficacy, and many are deeply flawed. For example, according to the Amsterdam-based Centre for Research on Multinational Corporations ("SOMO"), much ambiguity exists with regard to producers' role in ETI's formal complaint process, which could lead to cases being brought forward without producers' consent.<sup>311</sup> This is an issue of great concern for producers who face the possibility of stigma and/or punishment when they file reports.<sup>312</sup>

#### b) Marketing Ethical Alternatives

TNCs should support responsible ethical alternative schemes. Organic products represent an alternative to the unsustainable practices of conventional agriculture. In the words of Robert Shapiro, former CEO of Monsanto, feeding the world sustainably "is out of the question with current agricultural practice... Loss of topsoil, of salinity of soil as a result of irrigation, and ultimate reliance on petrochemicals ... are, obviously, not renewable. That clearly isn't sustainable."<sup>313</sup> Organic agriculture eliminates reliance on expensive synthetic pesticides while maintaining high crop yields.<sup>314</sup> Organic agriculture also slows the loss of valuable topsoil to erosion and continually increases soil fertility without chemical inputs.<sup>315</sup> In addition to the significant positive environmental effects associated with organic agriculture, retailers can earn higher margins by marketing and selling ethical alternatives.<sup>316</sup>

Fairtrade is an ethical certification and labeling scheme standardized and managed by the not-for-profit organization Fairtrade Labelling Organizations International, or FLO.<sup>317</sup> Fairtrade requires the industry to pay producers a Fairtrade defined minimum price for products which

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<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> Centre for Research on Multinational Corporations, *supra* note 286, at 12.

<sup>312</sup> DODD & ASFAHA, *supra* note 123, at 21.

<sup>313</sup> Christos Vasilikiotis, *Can Organic Farming Feed the World?* (2000), <http://www.cnr.berkeley.edu/~christos/articles/CV-Organic%20Farming.pdf>, at 1.

<sup>314</sup> *Id.* at 4.

<sup>315</sup> *Id.* at 4-5.

<sup>316</sup> VORLEY, *supra* note 111, at 37.

<sup>317</sup> Fairtrade Labelling Organizations International, *Introducing Fairtrade* (2006), [http://www.fairtrade.net/uploads/media/Explan\\_Doc\\_Introducing\\_Fairtrade.pdf](http://www.fairtrade.net/uploads/media/Explan_Doc_Introducing_Fairtrade.pdf), at 2.

covers all costs.<sup>318</sup> In addition to this minimum cost-covering price, producers receive a “Fairtrade Premium,” extra money that can be used by farmers or workers on whatever they believe will improve their livelihood.<sup>319</sup> Fairtrade also attempts to foster entrepreneurship and economic growth through improved financial support and networking for producers; it requires buyers to give producers advances, or pre-financing, on up to sixty percent of order value upon request.<sup>320</sup>

Supermarkets increasingly support organic food and the fair trade market.<sup>321</sup> While the market potential of ethical certification schemes, such as Fairtrade, has been highly debated, studies show that there exists a widespread willingness to pay premium prices for goods where consumers are convinced of a product’s ethical credentials.<sup>322</sup> In one study, based on an anonymous mail survey of approximately 6,000 individuals,<sup>323</sup> it was determined that more than forty percent of U.K. consumers would pay a retail premium of eleven percent or more for ethically produced fruits and vegetables.<sup>324</sup> The study acknowledges that many consumers who express some interest in ethical product premiums remain reluctant to switch from familiar brands to unfamiliar ethical products for a host of reasons, including perceived risk and brand image.<sup>325</sup> Nevertheless, according to at least one report, organic and Fairtrade products have recently begun to attract consumers not strongly committed to ethical buying.<sup>326</sup>

Despite obvious labor and environmental advantages, however, organic and Fairtrade products are not without drawbacks. Organic production was once dominated by small-scale producers. Recently, however, big producers have moved into this area, such that it is no longer a refuge for smallholder farmers.<sup>327</sup> Also, for various reasons, producers are often unable to join certification schemes; becoming Fairtrade certified, for example, costs money.<sup>328</sup> For those who are not able to become certified, there are reports that the expansion of ethical alternatives may

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<sup>318</sup> *Id.* at 3.

<sup>319</sup> Fairtrade Labelling Organizations International, *Why Fairtrade?* (2006), [http://www.fairtrade.net/uploads/media/Explan\\_Doc\\_Why\\_Fairtrade\\_\\_2\\_.pdf](http://www.fairtrade.net/uploads/media/Explan_Doc_Why_Fairtrade__2_.pdf), at 3-4.

<sup>320</sup> *Id.* at 4.

<sup>321</sup> DEPARTMENT FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS, *supra* note 253, at 20.

<sup>322</sup> Peter J. McGoldrick & Oliver M. Freestone, *Ethical product premiums: antecedents and extent of consumers’ willingness to pay*, 18 *Int’l Rev. Retail Distribution Consumer Res.* 185, 197 (2008).

<sup>323</sup> *Id.* at 191.

<sup>324</sup> *Id.* at 188.

<sup>325</sup> *Id.* at 197.

<sup>326</sup> Mintel, *Attitudes towards ethical foods - UK* (February 2004).

<sup>327</sup> VORLEY, *supra* note 111, at 36.

<sup>328</sup> Fairtrade Labelling Organizations International, *Introducing Fairtrade*, *supra* note 317, at 7.

actually have negative impacts.<sup>329</sup> In addition, ethical trade schemes reportedly fail at targeting particular disadvantaged groups of producers, such as women.<sup>330</sup>

## **VI. Fast Food Restaurants and Other Food Service Providers**

### **A. Introduction**

Food service providers are increasingly important actors in the global food supply chain. Longer working hours and increased numbers of women working outside of the home in the United States and other developed countries has led to increased reliance on prepared food, which in turn leads to food service providers purchasing an ever increasing proportion of farm production.<sup>331</sup> The share of produce sold to consumers in America through food service outlets went from 34.7 percent to fifty percent in the ten years between 1987 and 1997.<sup>332</sup> “McDonald’s is now the largest purchaser of agricultural commodities in France,”<sup>333</sup> and many American farmers of certain crops, such as tomatoes, cite food service providers as their primary buyers.<sup>334</sup> This portion of the paper will focus on fast food providers, as these corporations exert the most buyer power and are the most globalized of actors in the food service industry.<sup>335</sup>

According to author Eric Schlosser, “The centralized purchasing decisions of the large [fast food] chains and their demand for standardized products have given a handful of corporations an unprecedented degree of power over the [American] food system.”<sup>336</sup> Big global chains like McDonalds and Yum Brands exert tremendous buyer power because of their sheer size.<sup>337</sup> In addition, food service providers are increasingly joining in purchasing cooperatives in order to augment their buyer power relative to growers and suppliers.<sup>338</sup>

While the food service industry remains highly fragmented, there is a trend towards concentration in the industry. One important example of this is Yum Brands, which controls Taco Bell, Kentucky Fried Chicken, and Pizza Hut, as well as several other smaller fast food

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<sup>329</sup> Stefano Ponte, *Standards as a Trade Passport: How Labels, Certifications and Quality Conventions Affect Development Prospects*, <http://www.diis.dk/graphics/Subweb/SAFE/ponte.pdf>, at 5.

<sup>330</sup> *Id.*

<sup>331</sup> PHIL KAUFMAN ET AL, U. S. DEP’T OF AGRIC., UNDERSTANDING THE DYNAMICS OF PRODUCE MARKETS: CONSUMPTION AND CONSOLIDATION GROW 9 (2000).

<sup>332</sup> *Id.*

<sup>333</sup> ERIC SCHLOSSER, FAST FOOD NATION 244 (2002).

<sup>334</sup> OXFAM AMERICA, LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE 29 (2004).

<sup>335</sup> SCHLOSSER, *supra* note 333, at 5.

<sup>336</sup> *Id.*

<sup>337</sup> DODD & ASFAHA, *supra* note 123; Ben Rooney, *Finding Shelter Under the Golden Arches*, CNNMONEY.COM, Dec. 3 2007 (“[W]hen it comes to negotiating prices with their suppliers, McDonald’s has more leverage simply because its contracts are so big.”).

<sup>338</sup> OXFAM AMERICA, *supra* note 334, at 26; Steve Coomes, *Is Little Caesars Truly Rising Again?*, PIZZAMARKETPLACE.COM, July 17, 2005.



chains.<sup>339</sup> Also, despite the continued overall fragmentation of the food service industry, one effect of the enormous purchasing power of large fast food chains has been to encourage consolidation among suppliers like food processors and wholesalers.<sup>340</sup> As discussed above, concentration depresses the prices paid to farmers, and ultimately the wages paid to farm workers, so that these farm workers no longer have the money necessary to provide adequate food for themselves and their families.<sup>341</sup> Meatpackers, who are drawn from the same pool of migrant workers that provide labor on American farms, have also been the victims of greatly reduced wages as a result of fast food chain-encouraged consolidation.<sup>342</sup> As Sophia Murphy, a Senior Advisor at the Institute for Agriculture and Food Policy, illustrates:

Poultry in the United States has long been produced in so-called captive supply chains. Ninety percent of U.S. chicken is produced in a vertically integrated chain, where a firm contracts with a poultry grower and provides everything—chicks, feed, veterinary services, vaccines—and buys the chickens (those that make the grade, at least) at the end.<sup>343</sup>

Much of this section will focus on the United States, as this is the country where fast food chains are the most entrenched and have had the most influence. However, fast food companies are increasingly expanding their operations across the globe. McDonalds, for example, now earns a full fifty percent of its income outside of the United States.<sup>344</sup> As fast food companies expand into new nations, they use suppliers in the countries they operate in. But rather than simply buying from local farms, fast food chains conform local farms to meet their standards, importing the sort of production methods used on American farms (with their low wages, monocultures, and tendencies to drive small-hold farmers out of business), and bringing with them American food processors.<sup>345</sup> Thus many of the impacts, problems, and solutions described in the coming section are or may soon be applicable across the globe, wherever a McDonalds or a Kentucky Fried Chicken can be found.

## B. Impact of Food Service Providers on the Right to Food

### 1. Impact on Fast Food Workers

Most of this paper has focused on actors in the food supply chain and their impact on small-hold farmers and farm workers. Problems specific to the fast food industry also merit

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<sup>339</sup> OXFAM AMERICA, *supra* note 334, at 26.

<sup>340</sup> SCHLOSSER, *supra* note 333, at 116-17, 136-144. *See also* DODD & ASFAHA, *supra* note 123, at 9 (explaining how retailer buyer power encourages processor and supplier consolidation).

<sup>341</sup> SCHLOSSER, *supra* note 333, at 116-17, 136-144.

<sup>342</sup> *Id.* at 160-62.

<sup>343</sup> MURPHY (2006), *supra* note 11, at 15.

<sup>344</sup> Rooney, *supra* note 337.

<sup>345</sup> SCHLOSSER, *supra* note 333, at 230-31.

consideration, in particular the impact of these problems on laborers directly employed by fast food companies.

Fast food workers are the largest group of minimum wage workers in the United States.<sup>346</sup> The franchise system employed by many chain restaurants operates to depress wages; with rents, franchise fees, and supply costs controlled by the parent company, lowering wages is often a franchisee's only option to reduce costs.<sup>347</sup> Because work in fast food restaurants is highly standardized and low-skilled, workers are viewed as interchangeable, and turnover is high.<sup>348</sup> Many fast food restaurant employees are teenagers. Numerous studies have found that spending long hours working fast food jobs harms American teenagers' prospects for educational and financial success.<sup>349</sup> Both the age of the employees and the high employee turnover rate renders these workers extremely vulnerable and makes it very difficult for them to organize or exercise political muscle.

On top of these structural impediments, the fast food industry has actively lobbied politicians to block worker safety, food safety, and improved minimum wage laws.<sup>350</sup> According to Schlosser, "About 60 large food service companies... have backed congressional legislation that would essentially eliminate the federal minimum wage by allowing states to disregard it."<sup>351</sup> Fast food chains also tend to fight against unionization of their employees, sending teams of executives to fight pro-union movements all around the world, and employing such tactics as shutting down franchises where workers attempt to unionize and reopening in a nearby location with new employees.<sup>352</sup>

In summary, fast food workers are among the most powerless groups of laborers in America today.<sup>353</sup> Because of their poverty and lack of political clout, they lack access to basic rights or a living wage that is essential to accessing adequate food. And for those who are employed by fast food companies as teenagers, this disempowerment may continue throughout their adult lives.<sup>354</sup>

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<sup>346</sup> *Id.* at 6.

<sup>347</sup> *Id.* at 78.

<sup>348</sup> *Id.* at 70.

<sup>349</sup> See Charles Hirschman & Irina Voloshin, *The Structure of Teenage Employment: Social Background and the Jobs Held by High School Seniors*, 25 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 189, 192 (2007).

<sup>350</sup> SCHLOSSER, *supra* note 333, at 8.

<sup>351</sup> *Id.* at 73.

<sup>352</sup> *Id.* at 75-78.

<sup>353</sup> *Id.*

<sup>354</sup> Hirschman & Voloshin, *supra* note 349, at 192.

## 2. Impact on Farm Workers

The only laborers in the United States who earn a lower wage than fast food workers are the migrant farm workers who help to supply the fast food restaurants.<sup>355</sup> Farm workers are possibly the poorest group of laborers in America, with a median salary of only \$7500/year in 2008,<sup>356</sup> and with three-fifths of farm workers in that year earning less than \$10,000.<sup>357</sup> Eighty-one percent of farm workers are foreign-born, and about fifty-two percent are undocumented.<sup>358</sup> Similar statistics persist in the meatpacking industry.<sup>359</sup> As a result, farm and slaughterhouse workers who sustain the fast food industry lack political power and the ability to defend their rights.<sup>360</sup> They also lack access to government benefits that are intended to form a safety-net for low wage workers.<sup>361</sup>

Increasing price pressure from large scale buyers, including fast food brands as well as supermarket chains, has meant that real wages paid to farm workers have decreased thirty percent since 1980.<sup>362</sup> Much like fast food franchisees, the farmers who provide fast food companies with their produce are under such pressure from higher up the supply chain that they view wages and worker benefits as the only areas in which they can cut costs and improve profit margins.<sup>363</sup> According to Charles Porter, a reporter for *The Packer*—a weekly newspaper covering issues related to fresh produce—Burger King and other large fast food chains manipulate pricing schemes to take advantage of supplier desperation and to pit suppliers and commodity traders against one another:

How can a company force its suppliers to lower the price, especially with fuel costs exploding and other expenses rising? Well, you take advantage of the desperate nature of your tomato suppliers...Without you, some of them may be out of business...Suppliers you treated so well over the years that they never demanded any written agreements or contracts. You pit this loyal group against a new crop of repackers that want a small piece of the action. Several repackers who gave you their heart and soul for a decade or more have been replaced.<sup>364</sup>

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<sup>355</sup> *Id.* at 6.

<sup>356</sup> OXFAM AMERICA, *supra* note 334, at 2.

<sup>357</sup> Desiree Evans, *Bearing the Fruits of Their Labors*, FACING SOUTH, Dec. 5, 2008, <http://www.southernstudies.org/2008/12/bearing-the-fruits-of-their-labor.html>.

<sup>358</sup> OXFAM AMERICA, *supra* note 334, at 8.

<sup>359</sup> SCHLOSSER, *supra* note 333, at 160.

<sup>360</sup> *Id.* at 266.

<sup>361</sup> OXFAM AMERICA, *supra* note 334, at 15.

<sup>362</sup> *Id.* at 2.

<sup>363</sup> *Id.* at 36.

<sup>364</sup> Charles Porter, *Big Fast-Food Contracts Breaking Tomato Repackers*, THE PACKER, May 16, 2005.

Porter goes on to note the inevitability of these price reductions eventually being passed on to farm workers in the form of lower wages.<sup>365</sup>

As with their own direct employees, fast food companies have in some instances been extremely hostile to farm workers' attempts to organize or obtain fair labor standards. Burger King has actively denied some of the worst violations of workers' rights committed by its suppliers,<sup>366</sup> and has reportedly hired private security agents to infiltrate and spy on workers' rights groups.<sup>367</sup> Even when appearing to respond to pressure from workers, fast food companies have in some cases refused to work directly with workers' groups and have attempted to develop their own, weaker, set of labor standards that fail to meet worker demands.<sup>368</sup>

In sum, fast food companies exert tremendous buyer power enabling them to obtain very cheap inputs of vegetables and meats. Growers and processors in turn pass on these cost cuts to workers in the form of extremely low wages, minimum to nonexistent employment benefits, and often deplorable working conditions. These market pressures of the fast food industry collectively deprive workers of a standard of living necessary to realize the right to adequate food.

### C. Potential Solutions and Best Practices

#### 1. The Duty to Protect: What States Can Do

##### a) Enhance Legal Protection of Farm Workers

For the most part farm laborers remain deprived of remedies for persistent violations of their rights. Farm workers are excluded from many American labor laws, including the National Labor Relations Act and key provisions of the Fair Labor Standards Act,<sup>369</sup> and are under-protected by federal agencies like the Occupational Safety and Health Administration, the Environmental Protection Agency, and the Department of Labor.<sup>370</sup>

While there are certain laws aimed specifically at protecting farm workers, such as the Farm Labor Contractor Registration Act,<sup>371</sup> because of their impoverished and marginalized status, farm workers face great difficulties in attempting to obtain legal enforcement of even the

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<sup>365</sup> *Id.*

<sup>366</sup> *Ending Abuses and Improving Working Conditions for Tomato Workers: Hearing Before the S. Comm. on Health, Education, Labor, and Pensions*, 110th Cong. (2008) (Testimony of Eric Schlosser).

<sup>367</sup> Eric Schlosser, Op-Ed., *Burger With a Side of Spies*, N.Y. TIMES, May 7, 2008.

<sup>368</sup> Kris Hundley, *Fast Food Fight*, ST. PETERSBURG TIMES, Mar. 5, 2006.

<sup>369</sup> OXFAM AMERICA, *supra* note 334, at 38-40.

<sup>370</sup> *Id.* at 40-41, 47-49.

<sup>371</sup> 7 U.S.C. 52.

few statutes that are meant to protect them.<sup>372</sup> These difficulties are compounded by the prevalence of undocumented workers in the farm labor force. These workers cannot be represented by federally-funded legal services programs<sup>373</sup> or by government agencies.<sup>374</sup> Thus, while farm workers have obtained certain concessions as a result of exerting direct pressure on large buyers, they remain for the most part deprived of the rights and remedies enjoyed by other laborers in the United States.

## 2. The Duty to Respect: What Transnational Corporations Can Do

### a) Engage in tripartite bargaining

One strategy for farm worker groups that has seen great success in recent years is to target large scale buyers rather than producers, and to encourage tri-partite bargaining amongst fast food chains, growers, and farm workers.<sup>375</sup> This strategy gains part of its effectiveness from the fact that buyers like fast food companies and food retailers are very much in the public eye, and have brands that can suffer from negative publicity. Targeting of buyers was initiated in the late 1970s with the Farm Labor Organizing Coalition's boycott of Campbell's Soup,<sup>376</sup> and has been echoed by the Coalition of Immokalee Workers ("CIW") in its calls for fast food companies to pay slightly more money for tomatoes, money that would be passed directly on to workers.<sup>377</sup> This campaign has succeeded in convincing Taco Bell, Burger King, McDonald's, and Subway to pay a penny more per pound of tomatoes, increasing tomato picker earnings by about seventy-five percent.<sup>378</sup>

### b) Proactively Enforce Labor Standards

CIW pressure has also encouraged Taco Bell (and its parent company Yum Brands) and Burger King to institute stronger enforcement and monitoring of labor standards, including enforceable corporate codes of conduct.<sup>379</sup>

### c) Encourage Unionization and Establish Dialogue with Workers

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<sup>372</sup> OXFAM AMERICA, *supra* note 334, at 49.

<sup>373</sup> *Id.* at 49.

<sup>374</sup> *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002) (Holding that the National Labor Relations Board had no power to award backpay to illegally terminated undocumented workers).

<sup>375</sup> OXFAM AMERICA, *supra* note 334, at 9.

<sup>376</sup> *Id.* at 8-9.

<sup>377</sup> *Id.* at 27.

<sup>378</sup> Hundley, *supra* note 368; Press Release, Coalition of Immokalee Workers, Burger King Corp. and Coalition of Immokalee Workers to Work Together (May 23, 2008), [http://www.ciw-online.org/BK\\_CIW\\_joint\\_release.html](http://www.ciw-online.org/BK_CIW_joint_release.html); Evans, *supra* note 357.

<sup>379</sup> Coalition of Immokalee Workers, *Victory at Taco Bell*, CIW-ONLINE, Mar. 8, 2005, <http://www.ciw-online.org/agreementanalysis.html>; Press Release, Coalition of Immokalee Workers, *supra* note 378.

Both fast food employees and farm workers have sought to remedy inequities caused by fast food companies' buyer power by unionizing. Unfortunately, unionization efforts by fast food employees to effect some sort of change in their position vis-à-vis their employers have been almost universally unsuccessful. As noted above, fast food companies have responded by employing tactics such as closing down franchises where unionization seemed likely and reopening new ones nearby with a different crew.<sup>380</sup> Unionization of farm workers has, by contrast, led to several historic victories, most notably those of the United Farm Workers under Cesar Chavez.<sup>381</sup> The temporary nature of farm jobs, the tenuous legal position of many workers, and severe opposition from producers and buyers, however, makes organizing increasingly difficult.

d) Establish Corporate Codes of Conduct Enforced by an Independent Monitoring Body

Companies can seek to establish corporate codes of conduct enforced by an independent monitoring organization, in collaboration with and with input from farm workers.<sup>382</sup> These codes of conduct, as implemented in the United States tomato growing industry, provide a complaint mechanism whereby individual tomato pickers can report instances of grower abuse, including wage violations that may affect the right to food. The CIW and the fast food company in question then work together to investigate the complaint, which can result in revocation of a grower's approved status, or referral to a state enforcement agency.<sup>383</sup>

## VII. Recommendations

Working within the respect, protect, and remedy framework proposed by Professor Ruggie, there are many steps that states and TNCs can take to ensure that small-hold farmers and farm workers have access to the right to food. While some of these steps are eluded to at various other points in the paper, here the paper collects and elaborates upon recommendations for TNCs and for states.

### A. The Duty to Respect: What Transnational Corporations Can Do

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<sup>380</sup> See SCHLOSSER, *supra* note 333, at 75-78.

<sup>381</sup> OXFAM AMERICA, *supra* note 334, at 9. The UFW was a groundbreaking organization in the 1960s that introduced a new type of labor movement, combining elements of civil rights and union organizing to orchestrate widespread strikes in concert with nationwide boycotts.

<sup>382</sup> Coalition of Immokalee Workers, *Victory at Taco Bell*, CIW-ONLINE, Mar. 8, 2005, <http://www.ciw-online.org/agreementanalysis.html>; Press Release, Coalition of Immokalee Workers, *supra* note 378.

<sup>383</sup> Coalition of Immokalee Workers, *Victory at Taco Bell*, *supra* note 379.

## 1. Corporate Social Responsibility

### a) Corporate Codes of Conduct

The first step for corporate actors committed to improving smallholders' quality of life is to publicly recognize their role and commit to clearly outlined objectives by adopting codes of CSR. Despite the importance of CSR, it remains the case that these codes have not yet been adopted in most parts of the world by the vast majority of corporate actors.<sup>384</sup>

A number of corporate actors in the global food supply chain are not in the public eye and therefore receive little public pressure to implement voluntary CSR codes. Still, such codes remain valuable to these actors because they generate positive reputational gains and indicate a readiness for coming into compliance with impending regulations. CSR codes can help to improve reputation and build brand confidence, thereby bolstering financial success.<sup>385</sup>

For corporate actors in the global food supply industry who already have voluntary CSR codes, a number of problems with the codes remain. For example, corporations that have adopted CSR codes are often accused of developing codes that are very limited in scope, then using the positive publicity associated with CSR to mask corporate practices not regulated by such codes.<sup>386</sup> CSR codes are also criticized for ignoring the priorities of marginalized groups disproportionately affected by corporate practices,<sup>387</sup> and for being self-regulating so that compliance cannot be assured.<sup>388</sup> If some of these problems were addressed, the codes would potentially make a much greater impact.

Ideally, corporate actors would both implement private CSR codes and participate in multi-stakeholder initiatives. The adoption of MSIs has the potential to eliminate widespread confusion experienced by suppliers, workers and governments attempting to learn divergent codes and to comply with varying standards and monitoring requirements.<sup>389</sup> However, MSIs' current focus on compliance largely ignores many problems faced by small-scale producers,<sup>390</sup> and places enforcement power in the hands of auditors who are not equipped to properly evaluate

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<sup>384</sup> Peter Newell & Jędrzej George Frynas, *Beyond CSR? Business, poverty and social justice: an introduction*, 28 *Third World Q.* 669, 679 (2007).

<sup>385</sup> Roberts, *supra* note 221, at 159-160.

<sup>386</sup> Christian Aid, *Behind the Mask: The Real Face of Corporate Social Responsibility* (2004), <http://www.globalpolicy.org/socecon/tncs/2004/0121mask.pdf>, at 2.

<sup>387</sup> Newell & Frynas, *supra* note 384, at 676.

<sup>388</sup> Narula, *supra* note 5, at 48.

<sup>389</sup> Ethical Trading Action Group, *Transparency and Disclosure: New Regulatory Tools to Challenge Sweatshop Abuses* (2003), <http://en.maquilasolidarity.org/sites/maquilasolidarity.org/files/ETAGTransparencyandDisclosure.pdf>, at 12.

<sup>390</sup> Emma Clarke, *supra* note 301, at 10.

the managers they are reviewing.<sup>391</sup> To resolve this, MSIs must begin to move away from the tendency to solely focus on code “compliance” through audits.

There are a number of items that should be included in every code of conduct. First and most importantly, codes must allow small-hold farmers to receive locally appropriate living wages.<sup>392</sup> This can be done by establishing a locale specific definition of living wage, then aiming directly for that target, or by working to increase wages in stages. If using the first approach, the definition of “living wage” should be based on a standard methodology, for example being able to afford a standard local market basket of goods at specified intervals.<sup>393</sup> CSR code adherents would then require that smallholder wages meet the established living wage benchmark. Under the second approach, corporate actors in the global food chain could follow the much-praised strategy for raising wages adopted by the garment industry’s Joint Initiative on Corporate Accountability and Workers Rights (“JO-IN project”). The JO-IN project avoided definitively settling the issue of how to define living wages by focusing instead on how to improve workers’ wages in stages over time.<sup>394</sup> JO-IN’s approach begins with an assessment of current wage levels.<sup>395</sup> It then focuses on strategies for improving the wage, for example by increasing prices paid for products or improving productivity.<sup>396</sup> Improvements in wage are then observed and charted as it progresses up a “wage ladder” from legal minimum up to various “living wage” standards defined by trade unions.<sup>397</sup>

Corporate codes of social responsibility must also address corporate actors’ lending practices to farmers. These loans may be necessary, and the provision of this service is generally beneficial to the smallholder community, but only to the extent that interest rates are not so high as to drive farmers further into debt.<sup>398</sup> Corporate codes should therefore contain a requirement that corporate actors charge fair interest on loans to farmers.

In implementing and enforcing their codes, corporate actors should be aware that their own procurement practices are often at the root of suppliers’ violations of the code. For example,

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<sup>391</sup> *Id.*

<sup>392</sup> *See, e.g.,* ACTIONAID, *supra* note 128, at 73;

<sup>393</sup> Erin Dirnbach, *Weaving a Stronger Fabric: Organizing a Global Sweat-Free Apparel Production Agreement*, 11 WorkingUSA 237.

<sup>394</sup> Maquila Solidarity Network, *Who’s Got the Universal Code?* (2008), [en.maquilasolidarity.org/sites/maquilasolidarity.org/files/MSN-CodesMemo23-ENG.pdf](http://en.maquilasolidarity.org/sites/maquilasolidarity.org/files/MSN-CodesMemo23-ENG.pdf), at 11.

<sup>395</sup> *Id.*

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> Parenti, *supra* note 129, at 3.



rush orders, retail marketing promotions and demands to cut costs may leave suppliers with little choice but to violate labor standards outlined in the CSR code.<sup>399</sup> If CSR codes are to be effective, corporate actors must commit to avoiding these practices whenever possible.<sup>400</sup>

Corporate actors must adopt CSR codes and should also join MSIs. Corporate actors, trade unions and NGOs must work together to explore ways in which initiative codes of conduct can be altered to incorporate strict guidelines governing retailer buyer practices.

#### b) Multi-stakeholder Initiatives

Two specific recommendations have been offered with respect to MSIs and how TNCs can respect the right to food. First, Peter Utting recommends that MSIs institutionalize complaint-based mechanisms, in forms such as “judicial and parliamentary procedures, global collective agreements between TNCs and trade unions, and NGO watchdog bodies that attempt to ‘name and shame’ companies in relation to specific abuses.”<sup>401</sup>

Second, the ETI Smallholder Partnership Project, which closely relates to the right to food in that it focuses on the afflicted population, contains several recommendations that should be followed. Through the Smallholder Project, ETI has researched and compiled an initial report on what various stakeholders, including smallholders, purchasers (food and beverage companies), and retailers can do to successfully implement the ETI Base Code.<sup>402</sup> ETI recommendations for purchasers include an initial resources assessment, improving communication with smallholder producers, and creating an action plan for compliance.<sup>403</sup>

#### 2. Exercising Market Power to Demand Higher Payments to Farmers and Farm Workers

Food retailers, fast food companies, and other restaurants should work to ensure that the produce and meats they purchase are grown, picked, slaughtered, and processed by workers whose right to food is respected. They should use their market power to dictate practices that ensure the fulfillment of the right to food for all. TNCs have the power to demand higher wages and safer working conditions for meat-packing and farm workers, as well as higher prices paid to small-hold farmers and poultry growers. Such increases would result in very small increases in

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<sup>399</sup> Clarke, *supra* note 301, at 10.

<sup>400</sup> *Id.*

<sup>401</sup> UTTING, *supra* note 213, at 63-64.

<sup>402</sup> See generally ETI REPORTS 2005, ETI SMALLHOLDER GUIDELINES, available at <http://www.ethicaltrade.org/Z/lib/2005/09/smhlldr-gls/index.shtml>.

<sup>403</sup> *Id.* at 29-32.

retail or fast food menu prices, but very large gains in consumer goodwill<sup>404</sup> and greater protection of the right to food for farm workers and meatpackers. The viability of this solution has been demonstrated by the Coalition of Immokalee Workers who successfully campaigned to convince fast food companies to pay more for tomatoes, and to demand and ensure that the money be passed on to workers in the form of higher wages, as described above<sup>405</sup>

### 3. Negotiating with Farmers and Laborers

Retailers and fast food companies should also engage with workers and growers in tripartite bargaining to create fair labor standards and implementation plans that truly reflect workers' needs.<sup>406</sup> This strategy helps to mobilize the market power of large buyers to lobby for protection of the right to food for small-hold farmers and farm laborers, as described above. Oxfam America recognizes such tripartite bargaining structures as crucial to ensuring that premiums in pricing are passed on to farm workers.<sup>407</sup> In addition, this type of bargaining can be instrumental in setting up enforceable CSR codes that are both written and monitored with farmer and worker input, like those negotiated by the CIW with fast food companies as described above.

### 4. Working with Smallholders to Develop Outgrower Schemes

Corporate actors should explore the possibility of instituting outgrower schemes for procurement of purchased goods. While there has been little substantive reporting on the long-term effects of contract agriculture on productivity, food prices, food security and the environment<sup>408</sup> available data reflects substantial positive results, including higher cash incomes for participating smallholders, higher employment rates, and the introduction of technologies that can be transferred within communities to other crops.<sup>409</sup> Where outgrower schemes exist or are in development, corporate actors must ensure that outgrower contracts are fairly honored and enforced, both by instituting internal contract review systems and by working to improve smallholders' access to contract review. In addition, in developing these schemes, corporate

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<sup>404</sup> SCHLOSSER, *supra* note 333, at 268.

<sup>405</sup> Coalition of Immokalee Workers, About CIW, <http://www.ciw-online.org/about.html> (last visited May 19, 2009). However, it should be noted that a major part of the CIW's success came from its ability to mobilize support from student groups, churches, and community and labor organizations, creating a credible threat of severe consequences with consumers if the fast food companies did not institute these practices. TNCs are unlikely to use their market power to demand greater protection for the right to food unless consumers first exert their own power on TNCs

<sup>406</sup> See Hundley, *supra* note 368.

<sup>407</sup> OXFAM AMERICA, *supra* note 334, at 59.

<sup>408</sup> Dave Weatherspoon, et al., *Linking Globalization, Economic Growth and Poverty: Impacts of Agribusiness Strategies on Sub-Saharan Africa*, 83 Am. J. Agric. Econ. 722, 725 (2001).

<sup>409</sup> *Id.* at 724.

actors should work to minimize incentives for smallholders to move production away from local foods and limit smallholders dependency on corporate actors where possible.<sup>410</sup>

## B. The Duty to Protect: What States Can Do

### 1. Competition and Antitrust Law

States should strengthen both national and international competition law to make it more effective in protecting the right to food from adverse actions by TNCs. Asfa and Dodd suggest a number of steps that both home and host states could take to more effectively protect farmers through national competition law.<sup>411</sup> By protecting the income of farmers and farm laborers these steps will also protect the right to food, ensuring that the farmers and laborers can afford to feed themselves and their families. First, home and host states should ensure that their competition policy addresses the public interest and buyer power, rather than focusing solely on seller power. Competition authorities should investigate and prosecute TNCs that exert anti-competitive behavior against farmers, even where the anti-competitive behavior leads to lower prices for consumers.<sup>412</sup> In the absence of governmental regulation, farmers believe that not only are their profits lower, but their ability to determine their agricultural activity is limited.<sup>413</sup> In proving the abuse of buyer power, competition authorities should be aware of both horizontal and vertical concentration. In addition, they should not set the quota for dominant buyer market power too high, as it is easier for a firm to exert buyer power at lower levels of market share than a seller.<sup>414</sup> Home states should ensure that their jurisdiction extends to anti-competitive actions taken by national TNCs against foreign sellers, while host states should ensure that their jurisdiction extends to opportunistic behavior by foreign buyers against national sellers.<sup>415</sup> Without extended jurisdiction TNCs are free to practice anti-competitive behavior, cutting into farmers' income. Host states should also consider developing regional responses if they are concerned about being vulnerable as a small economy.<sup>416</sup>

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<sup>410</sup> Where outgrower schemes exist, they are often criticized for creating incentives for smallholders to move production away from local foods toward export-oriented crops and for trapping smallholders in dependent relationships with corporate actors. *Id.*

<sup>411</sup> DODD AND ASFAHA, *supra* note 123, at 18.

<sup>412</sup> *Id.* (explaining that if consumers are protected or getting low prices that regulators are unlikely to act).

<sup>413</sup> *Id.*

<sup>414</sup> *Id.*, at 19.

<sup>415</sup> *Id.*, at 20.

<sup>416</sup> *Id.*, at 28.

a) National Competition and Antitrust Law

Governments can use South Africa's competition laws as an example of national legislation that effectively protects the right to food.<sup>417</sup> Like South Africa, governments should provide for the possibility of private suits, ensuring that the government cannot end an investigation for political reasons.<sup>418</sup> In addition, so as to ensure that farmers are not kept from bringing suits due to prohibitive legal costs courts should be empowered to award attorney's fees and damages.<sup>419</sup> Moreover, authorities should ensure that farmers who wish to bring private suits are sufficiently protected against retributive action.<sup>420</sup> As suggested by ActionAid, one way to ensure against retribution is to allow civil society actors to bring claims on behalf of those who have suffered direct harm.<sup>421</sup>

At the national level, as Gibbons recommends, governments can also act to focus on opportunistic behavior by TNCs.<sup>422</sup> For example, Gibbons encourages governments to require greater transparency in areas where there is concern over unfair business practices.<sup>423</sup> This then could be accompanied by laws banning the unfair practices, thereby hopefully preventing some of the worst abuses of market power. Overall, national authorities should be stringent in following through on investigating and prosecuting TNCs that engage in anti-competitive behavior.

b) International Competition and Antitrust Law

In addition to strengthening national competition law, states should work together to create an international competition law capable of policing agricultural buyer power and protecting farmers' right to food. Murphy argues that competition law needs to be international in order to respond to trade liberalization and the globalization of agricultural markets.<sup>424</sup> Dodd and Asfaha also suggest that an international competition policy is necessary to comprehensively address the impact of TNC buyer power.<sup>425</sup> A previous consideration of international competition regulation at the World Trade Organization ("WTO") was opposed by many civil

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<sup>417</sup> A more detailed description of South Africa's competition policy is given in Section 3, under Best Practices.

<sup>418</sup> OECD, COMPETITION LAW AND POLICY IN SOUTH AFRICA, *supra* note 179, at 17 (describing private suits under South African competition law).

<sup>419</sup> DEMOCRATIC STAFF OF THE COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY UNITED STATES SENATE, *supra* note 105, at 24.

<sup>420</sup> DODD AND ASFAHA, *supra* note 123, at 28.

<sup>421</sup> ACTIONAID, *supra* note 128, at 45.

<sup>422</sup> GIBBON, *supra* note 156, at 170 (2004).

<sup>423</sup> *Id.*

<sup>424</sup> MURPHY (2006), *supra* note 11, at 33.

<sup>425</sup> DODD AND ASFAHA, *supra* note 123, at 29.

society organizations and developing countries after the United States and the European Union pushed the agenda towards advancing the interests of global firms.<sup>426</sup> According to Vorley and Murphy, an international body independent from the WTO should be considered in order to manage anti-competitive behavior.<sup>427</sup> Wherever the authority is located it will be important for there to be sufficient representation of developing countries and relevant civil society organizations.<sup>428</sup> Murphy recognizes the difficulty of steps in this direction but nonetheless sees its importance and recommends discussions begin at the United Nations Conference on Trade and Development (“UNCTAD”).<sup>429</sup> This way, given the lack of binding rules, the discussion would likely be less confrontational than if it were at the WTO. To be effective in protecting the right to food international competition law should contain many of the same features recommended above for national competition laws: a focus on buyer power and anti-competitive behavior exercised against suppliers; a metric that accurately accounts for TNC market power; and mechanisms to ensure that prosecutions are not prevented for political reasons.

## 2. Transparency and Mandatory Reporting

Transparency is an essential component of a competitive marketplace.<sup>430</sup> Increased transparency is critical to the design of more effective remedies to TNC abuse of market power.<sup>431</sup> Sonia Murphy of the Institute for Agriculture and Trade Policy recommends steps that states should take to increase transparency around agribusiness concentration.<sup>432</sup> Already existing WTO rules require governments to complete questionnaires about state trading enterprises in their nation.<sup>433</sup> According to Murphy, states should also be required to complete the questionnaires for any companies, including any joint ventures or subsidiaries of the company, which control a certain percentage of the import or export market.<sup>434</sup> Murphy suggests that this information should either be collected directly by, or passed along to, the Food and Agriculture Organization of the United Nations or UNCTAD, which should then create a publicly available database with comprehensive information on the major private actors in

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<sup>426</sup> *Id.*

<sup>427</sup> VORLEY (2003), *supra* note 111, at 76; MURPHY (2006), *supra* note 11, at 34.

<sup>428</sup> VORLEY (2003), *supra* note 111, at 76.

<sup>429</sup> MURPHY (2006), *supra* note 11, at 34.

<sup>430</sup> DEMOCRATIC STAFF OF THE COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY UNITED STATES SENATE, *supra* note 105, at 22.

<sup>431</sup> MURPHY (2002), *supra* note 112, at 50.

<sup>432</sup> MURPHY (2006), *supra* note 11, at 36.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

agribusiness.<sup>435</sup> The information could be used by farmers and NGOs, or even states, to prevent the most restrictive international business practices.<sup>436</sup>

Second, Murphy recommends that governments provide market prices to producers.<sup>437</sup> For farmers to receive adequate compensation it is extremely useful for farmers to know the prevailing market price of their crop. For example, placing a telephone in a rural village in Bangladesh enabled farmers there to call the nearest market town and determine crop prices thus strengthening their bargaining position.<sup>438</sup> Improving farmers' bargaining positions will help farmers receive adequate compensation. This in turn helps protect the farmers' right to food by ensuring the farmers have sufficient income to feed themselves and their families. Governments should therefore work to ensure that farmers have this information.<sup>439</sup>

### 3. Government Imposed Codes of Practice

States must develop and implement legally enforceable codes of practice to govern TNCs in the global food production chain. These systems must be accompanied by investigation and enforcement structures that allow aggrieved producers to file confidential complaints against violators.

In the United Kingdom, the GSCOP must be implemented and the proposed groceries supply ombudsman post outlined by the Competition Commission should be established. The proposed groceries supply ombudsman will receive confidential complaints from suppliers, gather information about corporate buying practices, arbitrate disputes arising under the GSCOP, and issue reports on retailers' compliance with the GSCOP.<sup>440</sup> The ombudsman will also have the power to prosecute retailers for breaches of the GSCOP.<sup>441</sup> Without the establishment of this proposed investigation and enforcement structure, the GSCOP will potentially be no more effective than the SCOP. Suppliers must have the ability to file complaints against retailers without being forced to reveal their identities and risk being delisted or blacklisted as a result.<sup>442</sup>

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<sup>435</sup> *Id.*

<sup>436</sup> DUNCAN GREEN, OXFAM, CONSPIRACY OF SILENCE: OLD AND NEW DIRECTIONS ON COMMODITIES 44 (2005).

<sup>437</sup> MURPHY (2006), *supra* note 11, at 37.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> Friends of the Earth, *supra* note 265, at 2-3.

<sup>441</sup> DODD & ASFAHA, *supra* note 123, at 26.

<sup>442</sup> DODD & ASFAHA, *supra* note 123, at 21.

#### 4. National or Community Supply Reserves

The volatility of agricultural markets is a major barrier to adequate compensation for smallholder farmers. Agribusiness TNCs may welcome price volatility as they are capable of using their market knowledge to capture the profit resulting from the instability.<sup>443</sup> Conversely, developing countries, and farmers in those countries, can be extremely vulnerable to market failures or fluctuations, which adversely affect farmers' compensation.<sup>444</sup> States should consider one of two main options for how to decrease volatility. First, at the national level, states should study in detail the example of the Canadian Wheat Board ("CWB"). The CWB is a marketing body that collects all national production of wheat and then acts as a middlemen between farmers and TNCs.<sup>445</sup> The CWB essentially functions as a cross between a farmer cooperative and a national supply reserve, and is able to greatly decrease the farmers' risk of market price volatility by paying farmers a pro rata rate of the yearly profits of the CWB, ensuring that farmers are not exposed to daily or even monthly price fluctuations.<sup>446</sup> As Murphy has explained, the CWB works in part because it is wealthy and well administered, meaning there is a detailed structure in place to prevent corruption and to guarantee that the CWB continues to work in furtherance of its public mandate.<sup>447</sup> For a similar institution to function in other countries, the state would need to make an initial sizable investment and to continuously expend resources to certify that the institution is not benefiting private individuals at the expense of farmers.<sup>448</sup>

At the international level, states should also consider the possibility of resurrecting International Commodity Agreements ("ICAs"). ICAs enable producer states to potentially effectively stabilize prices by managing global oversupply.<sup>449</sup> A number of issues arise in creating ICAs—such as a lack of coordination among producer states, a lack of export monopolies, and an inhospitable political climate.<sup>450</sup> In addition, there are substantive critiques of ICAs.<sup>451</sup> Koning, Calo, and Jongeneel suggest, however, that these concerns are likely

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<sup>443</sup> VORLEY (2003), *supra* note 111, at 21.

<sup>444</sup> CONSTANTIN, *supra* note 145, at 11-13.

<sup>445</sup> MURPHY (2002), *supra* note 112, at 46.

<sup>446</sup> *Id.* at 46. Farmers are paid a percentage of the price at delivery of their product to the CWB based on an estimate of expected yearly price, with the balance then paid at the year's end. *Id.*

<sup>447</sup> *Id.*

<sup>448</sup> *Id.* at 47.

<sup>449</sup> NIEK KONING, MURIEL CALO, AND ROEL JONGENEEL, UR NORTH-SOUTH CENTRE, FAIR TRADE IN TROPICAL CROPS IS POSSIBLE 9 (2004).

<sup>450</sup> VORLEY (2003), *supra* note 111, at 75-76. It is also worth noting that there are potential

<sup>451</sup> *Id.* at 75. ICAs have been criticized for artificially boosting prices, thereby storing worse problems for the future, for transferring wealth and resources to the most powerful farmers, and for corruption. *Id.*

overblown.<sup>452</sup> They argue that certain mechanisms are necessary for price-supporting arrangements to be successful.<sup>453</sup> Such arrangements should have “supply management, fair and transparent mechanisms that allow shifts of production from higher-cost to lower-cost countries, resistance to usurpation of benefits by interests for which they are not intended, and independence from financial support from importing countries.”<sup>454</sup> Koning, Calo, and Jongeneel provide a detailed example of how a robust and transparent version of such an arrangement could work in practice, which involves the establishment of a common fund by developing countries that maintains prices within an established price band through a quota system.<sup>455</sup> They also suggest that an appropriate first step in overcoming political resistance to new ICAs is to have developing countries invite civil society and willing governments in developed countries to start a coalition aimed at fostering support for ICAs and modifying international laws where necessary to assure that the ICAs would be legal.<sup>456</sup>

## 5. Public Procurement

The European Commission, Member States of the European Union, NGOs, and legal commentators should continue to probe the legality of using social welfare criteria in public contract selections,<sup>457</sup> as opposed to strictly economic criteria, and should continue seeking a case study in the food sector. As the European Coalition for Corporate Justice (“ECCJ”) points out, the fact that the E.C. and the governments of Member States serve as both regulating authorities and participants in the public contracts market offers an opportunity for both to create model policies for the private sector to follow.<sup>458</sup> ECCJ recommends this be accomplished via leading by example and following through with requiring that the recommended socially responsible criteria be fulfilled by contractors in practice, or by adopting mandatory social clauses in the contracts.<sup>459</sup>

A caveat to this recommendation is that the overall goals of public procurement are to ensure fair competition for companies seeking public contracts and to strengthen the Internal

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<sup>452</sup> KONING ET AL, *supra* note 449, at 9.

<sup>453</sup> *Id.* at 14.

<sup>454</sup> *Id.*

<sup>455</sup> *Id.*

<sup>456</sup> *Id.* at 17. There are concerns that ICAs might violate GATT and WTO rules, so for any potential ICA this would need to be considered. *Id.* at 22 (discussing possible concerns with GATT and WTO rules and possible loopholes allowing commodity supply management programs).

<sup>457</sup> EUROPEAN COALITION FOR CORPORATE JUSTICE, *supra* note 204, at 5.

<sup>458</sup> *Id.*

<sup>459</sup> *Id.*



Market of the European Union. Where social objectives conflict with these goals, it is possible they will lose.<sup>460</sup>

## 6. Reinforce Farm Worker Protections

### a) All Nations

More than 40 countries around the world have ratified ILO Convention number 129, which requires ratifying states to establish and maintain a system of labor inspection in agriculture.<sup>461</sup> The ILO believes that inspections are crucial to ensuring that labor standards are applied equally to all employers and workers,<sup>462</sup> and can guard against the harms associated with occupational accidents and illnesses, absenteeism, abuse of workers and labor conflict.<sup>463</sup> In the agricultural context, inspections can be important to making sure that small-hold farmers and farm workers can maintain the standard of living necessary to access adequate food. Thus, those nations that have not ratified Convention 129 should do so, and all nations should strive to comply with ILO core labor standards and to create fully-funded and well functioning systems of labor inspection in agriculture.

### b) United States

The U.S. government, as the home of many of the world's major fast food companies, as well as many major food processors, should curb fast food companies' and food processors' efforts to interfere with unionization campaigns. Organized labor is often the only option for low-wage, often undocumented workers to gain bargaining power.<sup>464</sup> In order to achieve this fair labor laws that currently exclude farm workers, such as the National Labor Relations Act and the Fair Labor Standards Act, must be amended to give the same protections to farm workers that are granted to all American laborers. The U.S. government should also enforce the ILO's core labor standards<sup>465</sup> and grant legal standing to undocumented workers who challenge violations of fair labor practices.<sup>466</sup>

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<sup>460</sup> *Id.* at 8.

<sup>461</sup> International Labour Organization, Labour Inspection, [http://www.ilo.org/global/What\\_we\\_do/InternationalLabourStandards/Subjects/Labourinspection/lang--en/index.htm#P14\\_3360](http://www.ilo.org/global/What_we_do/InternationalLabourStandards/Subjects/Labourinspection/lang--en/index.htm#P14_3360) (last visited May 19, 2009).

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> SCHLOSSER, *supra* note 333 at 266.

<sup>465</sup> OXFAM AMERICA, *supra* note 334 at 58, 60; *See*

[http://www.ilo.org/global/What\\_we\\_do/InternationalLabourStandards/Introduction/lang--en/index.htm](http://www.ilo.org/global/What_we_do/InternationalLabourStandards/Introduction/lang--en/index.htm).

<sup>466</sup> OXFAM AMERICA, *supra* note 334 at 61.

## 7. Access International Judicial Mechanisms to Defend the Right to Food

Regarding the potential to litigate the right to food in regional human rights tribunals, Christian Courtis notes that economic, social and cultural rights, including the right to food, are not justiciable before the Inter-American Court of Human Rights and the European Court of Human Rights. Courtis does however suggest that “duties stemming from a particular human right usually overlap with duties stemming from other rights, so that protecting the first may also protect the second.”<sup>467</sup> He therefore argues that the right to food may be litigated through its nexus with civil and political rights such as the right to non-discrimination. Alternatively, cases may be argued on the basis of the right to life.<sup>468</sup>

The case studies and examples used by Courtis do not touch on the basic question of holding a third state liable for a violation of the right to food. Nonetheless, his argument reflects an interesting conceptual framework for litigating the components of the right to food. States should examine the extent to which this can be transplanted to hold third states accountable, and apply this framework to litigate violations of the right to food.

## VIII. Conclusion

As has been illustrated by the various sections of this paper, TNCs acting at all levels of the global food supply chain have a powerful influence on the realization of the right to food. Much of this paper has covered the negative effects that corporate concentration and buyer and seller power have on small-hold farmers and farm workers and their rights to adequate food. This paper has also attempted to identify ways in which TNCs can begin to have powerful *positive* effects on the achievement of the right to food for those who supply and sustain them. With strong efforts by governments, consumers, workers, and most importantly TNCs themselves, those who feed the rest of the world can also feed their own families, and the world can move closer to the ICESCR’s twin goals of efficient food production and equitable food distribution.

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<sup>467</sup> Christian Courtis, “The Right to Food as a Justiciable Rights: Challenges and Strategies,” MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 317, 328 (2007).

<sup>468</sup> *Id.* at 329.