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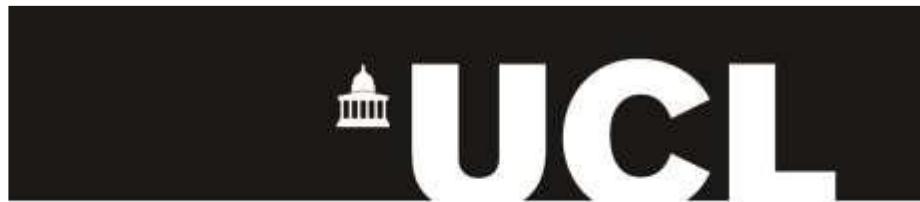
Hunger Games: Connecting the Right to Food and Competition Law

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Abstract:

This paper explores the interaction between the right to food and competition law. Although the actual or potential impact of human rights rhetoric informing and empowering competition law enforcement has not yet been examined in depth, we believe that the right to food may provide context and content to competition law and thereby guide its enforcement. We believe that an in-depth analysis of competition policy issues in the food sector may provide a blueprint for conceptualizing competition law not only as an instrument for achieving economic efficiency, innovation, and/or consumer welfare, but also as a sophisticated tool to ensure the fulfilment of the institutional conditions necessary for the realization of the aims of the right to food. Competition law may become an instrument to address the structural inequality that follows the development of a concentrated food system, characterized by the presence of global food value chains controlled by lead firms, which puts some economic actors, such as the farmers of the developing world, at a position of permanent disadvantage. It is our view that not only does the implementation of the right to food stand to benefit from the market-centered approach promoted by competition law, but also that competition law itself will become a more “holistic” and meaningful tool for social reform by taking into account values inherent in the right to food. We provide the grammar of a holistic competition policy in this crucial sector for national and global economies and we dissect the actual and potential impact of the right to food rhetoric on competition law enforcement.

Keywords: right to food, food value chains, competition law, economic concentration, IP rights, International Covenant on Economic, Social and Cultural Rights, right to health

JEL Codes: K21, L40, Q13

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Hunger Games: Connecting the Right to Food and Competition Law

*Ioannis Lianos and Amber Darr**

1. Introduction

The 'right to food' was first identified as an individual human right in Article 25 of the Universal Declaration of Human Rights 1948 where along with the right to health, it formed part of the widely envisaged 'right to a standard of living'.¹ In the decades that followed, the right to food came into sharp focus largely due to the "grave food crisis ... afflicting the peoples of ... developing countries".² The international community responded to this crisis by calling the World Food Conference 1974.³ Governments attending the Conference proclaimed that "every man, woman and child has the inalienable right to be free from hunger and malnutrition in order to develop their physical and mental faculties".⁴ To achieve this objective, the Conference issued the Universal Declaration on the Eradication of Hunger and Malnutrition which called for a globally coordinated, long-term policy for the development of rural areas and for staple food production.⁵

Despite the intention declared at the Conference that hunger, food insecurity and malnutrition would be eradicated within a decade, failures in policy-making and funding, amongst other reasons, did not allow this goal to be realised. By 1996, the Food and Agricultural Organisation ('FAO') recognised the need to accelerate progress in this regard and to this end, organised the World Food Summit ('WFS'). In the 'Rome Declaration on Food Security' issued at the WFS, states affirmed their "commitment to eradicating hunger in all countries, with an immediate

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¹ The Universal Declaration of Human Rights 1948, Article 25(1) states that (with emphasis added) "everyone has the *right to a standard of living* adequate for the health and well-being of himself and of his family, *including food*, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control". See United Nations, "Universal Declaration of Human Rights 1948", (*un.org*) <<https://www.un.org/en/universal-declaration-human-rights/index.html>>.

² The period from mid-1972 to mid-1975, which has since become known as the 'World Food Crisis' was characterised by the doubling or tripling of prices for internationally traded grain as well as hunger disasters in Africa and Asia that may have killed up to two million people, mainly in Bangladesh, Ethiopia and the West African Sahel. See C. Gerlach, "Famine Responses in the World Food Crisis 1972–5 and the World Food Conference of 1974", (2015) 22(6), *European Review of History: Revue Européenne d'Histoire*, 930.

³ *Ibid.* The World Food Conference organised by the UN in response to this crisis took place in Rome in November 1974. It was attended by 133 high-ranking country delegations, 18 UN organisations, 28 inter-governmental organisations, 161 NGOs, 69 multinational corporations and 400 journalists.

⁴ Report of the World Food Conference 1974 at page 2. https://digitallibrary.un.org/record/701143/files/E_CONF.65_20-EN.pdf (accessed 10 May 2019)

⁵ United Nations Human Rights, Universal Declaration on the Eradication of Hunger and Malnutrition 1974, (*ohchr.org*) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/EradicationOfHungerAndMalnutrition.aspx>.

view to reducing the number of undernourished people to half their present level by no later than 2015".⁶

During this period, the eradication of hunger and malnutrition, the quest for food sovereignty,⁷ and the fulfilment of the human right to food started forming an important component of the broader 'global justice' debate that was gaining momentum,⁸ partly as a reaction to the liberalisation of food commodities and exchange.⁹ Although the movement in favour of 'food sovereignty' assumed a life of its own and led to a number of other initiatives opposing industrial agriculture,¹⁰ the right to food ended up centre stage in the broader socio-economic development and rights discourse following the Declaration of the United Nations' ('UN') Millennium Development Goals ('MDGs') in 2000, which put emphasis on the eradication of poverty and hunger.¹¹

The MDGs represented one of two distinct paths being explored for global cooperation in the development sector. Endorsed by 189 governments and supported by the World Bank, the UN and all major donor governments, the MDGs proposed to improve the health, nutrition and well-being of approximately 1.2 billion humans who lived on less than the equivalent of a dollar a day through donor pledges, goals and benchmarks, multi-volume reports and sophisticated monitoring by UN agencies and other major donors.¹² The second path, somewhat less well articulated at the time, focused on human rights-based or 'rights-based' approaches to development cooperation, which rested upon internationally recognised human rights standards and principles, to which governments and donors are obliged to adhere.¹³

Although it was not evident initially, it progressively became clearer that there was an important link between the MDGs and the broader, more individual-centric, human rights discussions. A number of human rights and developmental agencies argued that, despite the conceptual differences between them, the MDGs and human rights approaches, promoted a

⁶ FAO, (4).

⁷ This quest for 'food sovereignty', was first articulated by Via Campesina, an international movement formed by organisations of small and middle-scale agricultural producers, agricultural workers, rural women and indigenous communities. The Via Campesina argued for the right of peoples and countries to shape their food systems, rather than this being left to multi-national corporations. See C. Barry and T. Pogge, *Global Institutions and Responsibilities: Achieving Global Justice*, (Blackwell, 2005), ; G. Brock, *Global Justice: A Cosmopolitan Account*, (Oxford University Press, 2009), ; T. Nagel, "The Problem of Global Justice", (2005) 33(2) *Philosophy and Public Affairs*, 113; T. Pogge, "Priorities of Global Justice", (2001) 32 (1/2) *Metaphilosophy*, 6; M. Risse, *On Global Justice* (Princeton University Press, 2012).

⁸ See C. Barry and T. Pogge, *Global Institutions and Responsibilities: Achieving Global Justice*, (Blackwell, 2005), ; G. Brock, *Global Justice: A Cosmopolitan Account*, (Oxford University Press, 2009), ; T. Nagel, "The Problem of Global Justice", (2005) 33(2) *Philosophy and Public Affairs*, 113; T. Pogge, "Priorities of Global Justice", (2001) 32 (1/2) *Metaphilosophy*, 6; M. Risse, *On Global Justice* (Princeton University Press, 2012).

⁹ P. Claeys, *Human Rights and the Food Sovereignty Movement – Reclaiming Control* (Routledge, 2015).

¹⁰ On 'food sovereignty', see P. McMichael, "Historicizing Food Sovereignty", (2014) 41 *The Journal of Peasant Studies*, 933; P McMichael, "Commentary: Food Regime for Thought", (2016) 43 *The Journal of Peasant Studies*, 648, which notes that food sovereignty "is about reorganising the international political economy, modelling the social struggle around democratic principles, gender equity, producer rights, ecological practices and rebalancing the urban/rural divide".

¹¹ United Nations Development Programme, "Millennial Development Goals", ([undp.org](https://www.undp.org/content/undp/en/home/sdgoverview/mdg_goals.html)) [>](https://www.undp.org/content/undp/en/home/sdgoverview/mdg_goals.html).

¹² P. Nelson, "Human Rights, the Millennium Development Goals and the Future of Development Cooperation", (2007) 35(12) *World Development*, 2041–2055.

¹³ *Ibid*, 2041.

consistent global set of humane policy initiatives. Oxfam, Action Aid, Christian Aid, Misereor and many UN agencies aligned themselves with rights-based approaches and considered the MDGs as a step toward the broader realisation of these rights.¹⁴ The UN-sponsored Millennium Development Campaign called the MDGs the link between human rights and “mainstream economic decisions-making processes” of international financial institutions,¹⁵ whilst Alston, Advisor to the High Commissioner on Human Rights, even as he highlighted the MDGs’ failures to emphasise their grounding in international human rights, emphasised the potential for harmonisation and coordination between the two approaches.¹⁶

The political momentum created by the WFS and the inclusion of the right to food in the MDGs led, in 2000, to the Commission on Human Rights appointing a Special Rapporteur on the Right to Food with the mandate to present recommendations on possible steps that may be taken to achieve the full realisation of this right. The work of the first Special Rapporteur, Professor de Schutter, was particularly wide-ranging in this regard. His office published a number of reports that explored and expanded upon different dimensions of the right to food.¹⁷ One of the most prominent (and at first sight, surprising) issues explored in the Special

¹⁴ *Ibid*, 2048.

¹⁵ S. Shetty, “Making Rights Real: The Challenge in Meeting the MDGs”, (2005) Public Presentation in London, <http://www.scielo.br/pdf/sur/v2n2/en_a01v2n2.pdf>.

¹⁶ P. Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals”, (2005) 27(3) *Human Rights Quarterly*, 755-829 and 1143.

¹⁷ See O. de Schutter, “Building Resilience: A Human Rights Framework for World Food and Nutrition Security”, (September 2008) Report of the Special Rapporteur on the Right to Food to the 9th session of the Human Rights Council (UN doc. A/HRC/9/23); O. de Schutter, “Programme of Work of the Special Rapporteur on the Right to Food”, (October 2008) Interim Report of the Special Rapporteur on the Right to Food to the 63rd session of the General Assembly (UN doc. A/63/278); O. de Schutter, “The Role of Development Cooperation and Food Aid in Realizing the Right to Adequate Food: Moving from Charity to Obligation”, (February 2009) Report of the Special Rapporteur on the Right to Food to the 10th session of the Human Rights Council (UN doc. A/HRC/10/5); O. de Schutter, “Crisis into Opportunity: Reinforcing Multilateralism”, (July 2009) Report of the Special Rapporteur on the Right to Food to the 12th session of the Human Rights Council (UN doc. A/HRC/12/31); O. de Schutter, “Seed Policies and the Right to Food”, (July 2009) Interim Report of the Special Rapporteur on the Right to Food to the 64th session of the General Assembly (UN doc. A/64/170); O. de Schutter, “Agribusiness and the Right to Food”, (December 2009) Report of the Special Rapporteur on the Right to Food (UN doc. A/HRC/13/33); O. de Schutter, “Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge”, (December 2009) Addendum to Report of the Special Rapporteur on the Right to Food (UN doc. A/HRC/13/33/Add.2); O. de Schutter, “Countries Tackling Hunger with a Right to Food Approach. Significant Progress in Implementing the Right to Food at National Scale in Africa, Latin America and Asia”, (May 2010) Briefing Note 1; O. de Schutter, “The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System”, (November 2011) Briefing Note 4; O. de Schutter, “The Adequacy of Diets and the Right to Food: the Agriculture-Food-Health Nexus”, (March 2012) Report Presented at the 19th Session of the United Nations Human Rights Council (UN doc. A/HRC/19/59); O. de Schutter, “From Charity to Entitlement: Implementing the Right to Food in Southern and Eastern Africa”, (June 2012) Briefing Note 5 ; O. de Schutter, “The Fisheries Sector and the Right to Food”, (August 2012) Interim Report of the Special Rapporteur on the Right to Food to the 67th session of the General Assembly (UN doc. A/67/XX); O. de Schutter, “A Rights Revolution: Implementing the Right to Food in Latin America and the Caribbean”, (September 2012) Briefing Note 6 . For a discussion, see O. de Schutter, “The Right of Everyone to Enjoy the Benefits of Scientific Progress and the Right to Food: From Conflict to Complementarity”, (2011) 33 *Human Rights Quarterly*, 2.

Rapporteur's work on the implementation of the right to food was the economic concentration in markets along the successive segments of the food supply chain.¹⁸

Connecting the concerns expressed by the proponents of 'food sovereignty' for the loss of control of local and national food systems in favour of a few multi-national corporations, with the broader discourse on the right to food as a global, justice-driven socio-economic right, the Special Rapporteur expressed the view that exploring the economic intricacies of food markets (as well as markets for its inputs and products) would guarantee a more effective implementation of the right to food. Particularly, he emphasized issues of just distribution of the *value* generated by the food supply chain, which he considered necessary for the material, rather than merely superficial, fulfilment of the right to food. It was in continuation of this line of reasoning, and perhaps surprisingly for the uninitiated, that the Special Rapporteur underscored the role of competition law and policy in securing the meaningful realisation of the right to food.¹⁹

The Special Rapporteur's attempt to create a dialogue between the right to food and competition law and policy, despite its seeming novelty, is neither unique nor unprecedented. Competition and intellectual property law experts had engaged in similar debates in the pharmaceutical industry, particularly in limiting the rights of patent holders where these jeopardised the fulfilment of the right to health,²⁰ and more subtly when these interfered with the enforcement of competition law in the pharmaceutical sector.²¹ Given the common genesis and legal standing of the right to health and the right to food²² and the close relationship between the two,²³ it was perhaps only natural that developments in the implementation of the right to health should come in to inform discussions on the realisation of the right to food.

¹⁸ See O. de Schutter, "Access to Land and the Right to Food", (August 2010) Interim Report of the Special Rapporteur on the Right to Food to the 65th session of the General Assembly, (UN doc. A/65/281); O. de Schutter, "Food Commodities Speculation and Food Price Crises. Regulation to Reduce the Risks of Price Volatility", (September 2010) Briefing Note 2; O. de Schutter, "Addressing Concentration in Food Supply Chains. The Role of Competition Law in Tackling the Abuse of Buyer Power", (December 2010) Briefing Note 3; O. de Schutter, "Agroecology and the Right to Food", (March 2011) Report Presented at the 16th Session of the United Nations Human Rights Council, (UN doc. A/HRC/16/49); O. de Schutter, "Towards More Equitable Value Chains: Alternative Business Models in Support of the Right to Food", (August 2011) Interim Report of the Special Rapporteur on the Right to Food to the 66th session of the General Assembly, (UN doc. A/66/262).

¹⁹ See O. de Schutter, "Addressing Concentration in Food Supply Chains. The Role of Competition Law in Tackling the Abuse of Buyer Power", (December 2010) Briefing Note 3; J. Tobin, *The Right to Health in International Law* (Oxford University Press, 2012).

²⁰ See the discussions in I. Haracoglou, *Competition Law and Patents: A Follow-on Innovation Perspective in the Pharmaceutical Industry* (Edward Elgar, 2008), Chapter 4; United Nations Economic and Social Council, "Human Rights and Intellectual Property", (December 2001) Statement by the Committee on Economic, Social and Cultural Rights (UN doc. E/C.12/2001/15) <<http://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.15HRIntel-property.pdf>>; F. Abbott, S. Flynn, C. Correa, J. Berger and N. Nyak, "Using Competition Law to Promote Access to Health Technologies", (May 2014) United Nations Development Programme ('UNDP') Guidebook <<http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/using-competition-law-to-promote-access-to-medicine.html>>.

²¹ See, for instance, UNDP Guidebook, (20).

²² Both were recognised in the Universal Declaration of Human Rights 1948, and were elaborated on in the Intentional Covenant of Economic, Social and Cultural Rights 1976.

²³ See (1).

Although the actual or potential impact of human rights rhetoric informing and empowering competition law enforcement has not yet been examined in depth,²⁴ we believe that the right to food, like the right to health, may provide context and content to competition law and thereby guide its enforcement. Furthermore, we believe that an in-depth analysis of competition policy issues in the food sector will provide a blueprint for conceptualising competition law not only as an instrument for achieving economic efficiency, innovation, consumer welfare and/or increased national productivity, but also as a sophisticated tool to ensure distributive justice, particularly with respect to the right to food. Competition law may become an instrument to address the structural inequality that follows the development of a concentrated food system that puts some actors, the farmers of the developing world, at a position of permanent disadvantage. This approach would re-conceive, to some extent, competition law as a form of social regulation, rather than merely as a tool for promoting economic efficiency, as it has become in the wake of the 1970s Chicago School revolution.²⁵ A further step in this agenda, beyond the scope of the present article, would be to integrate competition law into the broader discussions of constitutionalism, social rights and the “social dimension of the rule of law”.²⁶

To date competition authorities have largely ignored global food value chains (‘FVCs’) despite these chains integrating a range of market actors, encompassing modern and traditional forms of commerce and different means of self-regulation and a heterogeneous community of ‘consumers’ as well as suppliers. The neglect of FVCs may be partly due to (i) the gradual retreat of competition law from regulating vertical competition and economic power, and (ii) the emergence of economic efficiency and consumer surplus-driven competition law, which has relegated issues of distributive justice to other areas of law or to taxation.²⁷ We hope,

²⁴ For the beginning of some discussion, see I. Lianos, “Competition Law in the European Union after the Treaty of Lisbon” in *The European Union After the Treaty of Lisbon* (edited by D. Ashigbor, N. Countouris and I. Lianos, Cambridge University Press, 2012), 252; I. Lianos, “Polycentric Competition Law”, (2018) 71(1) *Current Legal Problems*, 161. Most studies looking at the intersection between human rights and competition law emphasise the limits certain rights, such as property, freedom to choose one’s business partner, due process rights etc., impose on competition law enforcement, which is, of course, important but they ignore the empowerment dynamics of competition law that may be generated by human rights law. See, for instance, A. Andreangeli, *EU Competition Enforcement and Human Rights* (Edward Elgar, 2008); A. Andreangeli, “Between Economic Freedom and Effective Competition Enforcement: The Impact of the Antitrust Remedies Provided by the Modernisation Regulation on Investigated Parties Freedom to Contract and to Enjoy Property”, (2010) 2 *Competition Law Review*, 225; N. Wahl, “The Freedom to Conduct a Business: A Right of Fundamental Importance for the Future of the European Union” in *The Internal Market and the Future of European Integration* (edited by F. Amtenbrink, G. Davies, D. Kochenov and J. Lindeboom, Cambridge University Press, 2019), 273.

²⁵ See, I. Lianos, “The Poverty of Competition Law – The Long Story”, (2018) UCL CLES Paper 2/2018, 13-19, https://www.ucl.ac.uk/cles/sites/cles/files/cles_2-2018.pdf; I. Lianos, Competition Law as a Form of Social Regulation (forth. 2019) Antitrust Bulletin.

²⁶ On this broader debate, see J. King, “The Social Dimension of the Rule of Law” (2018) Blog of the International Journal of Constitutional Law <<http://www.iconnectblog.com/2018/04/i-connect-symposium-on-constitutional-boundaries-the-social-dimension-of-the-rule-of-law/>>; J. King, “Social Rights in Comparative Constitutional Theory” in *Comparative Constitutional Theory* (edited by G. Jacobson and M. Schor, Cambridge University Press, 2018), 144.

²⁷ The emergence of economic efficiency-driven competition law is reminiscent of a similar movement that took place in welfare economics, (the intellectual backbone of competition law), which, in the early days of the 20th century was purged of its distributive justice concerns courtesy of the second welfare theorem. Competition law’s sole focus on price and output on the basis of a narrow view of ‘consumer welfare’ and of believing ‘consumers’ to be a homogeneous group, whose interests are always opposed to those of a distinct, homogenous group of ‘producers’, conceals not only the many different factors that distinguish consumers from one another, their income level being one among many, but also the difficulty of integrating broader considerations that go beyond competition law’s traditional focus on price and output. This is related to the idea of ‘representative

however, that the societal importance of the food sector and its vulnerability to politics, whether at the national or global level, aggravated by the looming climate change crisis, will serve as a wake-up call to even the most fervent adherents of ‘monocentric competition law’, that the rights’ and entitlements’ rhetoric of the ‘right to food’ needs to be taken seriously, particularly as welfare economics is re-calibrating its emphasis on satisfying the *needs* rather than just *wants* of ‘consumers’ or the ‘general public’.²⁸

In this article we argue that competition law, with its inherent focus on market regulation and its commitment to providing a level playing field to market players, offers a credible institutional complement for addressing the challenge of effectively implementing the right to food. It is our view that not only does the implementation of the right to food stand to benefit from the market access-oriented approach promoted by competition law but competition law itself stands to gain by becoming more “holistic” and fully embracing its role as a tool for social order and reform that takes into account the values inherent in the right to food.²⁹ We aim to provide the structure of such holistic competition law and policy in this crucial sector and dissect the actual and potential impact of a rights-based rhetoric on competition law enforcement. We draw upon the relevant literature to understand the nature and enforceability of human rights and to suggest that a rights-based approach is not inherently at odds with the exigencies of rigorous competition law enforcement. To demonstrate the potential for adopting a rights-based approach in the enforcement of competition law and the institutional benefits of adopting such an approach, we draw upon decisions of competition authorities in which they have attempted to reconcile competition enforcement concerns with social rights, particularly the right to health.

To this end, we outline in Section 2 the source and conceptual framework of the right to food, the nature of obligations it places on states, and its potential enforceability. In section 3, we highlight the potential for conflict between right to food values and core competition law concerns along the FVC and examine the potential of competition law as a response to the fulfilment of the right to food. We highlight the core values of the right to food that may be kept in mind in competition enforcement and address conceptual and institutional features of competition law, which, in our view, render it an appropriate response for meeting the challenges of implementing the right to food. In section 4, we examine the intersection of the right to food and positive competition law by exploring the way substantive conflicts between the different values may be resolved. In section 5 we conclude that the conceptual and institutional appropriateness and utility of competition law as a response to implementing the right to food outweighs the objections that may be raised from the dominant tendency to restrictively interpret its goals.³⁰

agent’, consumer or producer. Neoclassical economics focuses on the choices of a ‘representative’ standard, utility-maximising individual “whose choices coincide with the aggregate choices of the heterogeneous individuals”, see A. Kirman, “Whom and What Does the Representative Individual Represent?”, (1992) 6(2) *Journal of Economic Perspectives*, 117.

²⁸ R. Cooter and P. Rappoport, “Were the Ordinalists Wrong About Welfare Economics?”, (1984) 22(2) *Journal of Economic Literature*, 507.

²⁹ On the perils and advantages of “holistic” competition law in the food sector, see I. Lianos and C. Lombardi, “Superior Bargaining Power and the Global Food Value Chain: The Wuthering Heights of Holistic Competition Law?”, (2016) 1 *Concurrences*, 22.

³⁰ For a useful, critical discussion of this literature, see I. Lianos, “Some Reflections on the Question of the Goals of EU Competition Law” in *Handbook in EU Competition Law: Substantive Aspects* (edited by I. Lianos and D. Geradin, Edward Elgar, 2013), 1-84.

2. Understanding the 'Right to Food'

2.1 The Conceptual Framework of the Right to Food

An individual's right to food ('RTF') was first articulated in the Universal Declaration of Human Rights 1948, as one of the dimensions of the "right to a standard of living adequate for the health and wellbeing".³¹ The RTF featured more prominently in the International Covenant on Economic, Social and Cultural Rights 1976 ('ICESCR'), which recognised the independent "fundamental right of everyone to be free from hunger" and affirmed the commitment of ICESCR signatories, both individually and through international co-operation, to take all measures necessary to enforce the RTF.³² The scope of the RTF was somewhat expanded in 1990, when, in pursuance of Articles 24 and 27 of the Convention on Rights of the Child 1990 ('CRC'), individual states recognised that the right to "adequate, nutritious food" was fundamental to a child's right to health and its "physical, mental, spiritual, moral and social development".³³ In addition to international treaties, the RTF also featured in the UN Guidelines for Consumer Protection 1985. These recognise the rights of consumers to basic needs, such as the right to food and water, the right to redress, the right to consumer education and the right to a healthy environment. These also recognise the rights of consumers to safety, to be informed, to choose and to be heard, which had been introduced through the United States Consumer Bill of Rights 1962.³⁴

In its 20th meeting in April 1999, and in response to a request by states that had attended the WFS that they be provided with "a better definition of the rights relating to food in Article 11" of the ICESCR, the UN Committee on Economic, Social and Cultural Rights (the 'ICESCR Committee'), adopted the General Comment No. 12 on the Right to Adequate Food (the 'General Comment') with the express objective of giving "particular attention to the [WFS] Plan of Action in monitoring the implementation of the specific measures provided for in Article 11 [of the ICESCR]".³⁵

In terms of the General Comment, the RTF is universal, fundamental to all other human rights and has to be interpreted broadly as being more than the right to "a minimum package of calories, proteins and other specific nutrients". The General Comment also clarifies that the right to *adequate* food, though distinct from, is closely linked to *food security* for whilst adequacy is largely determined by the prevailing "social, economic, cultural, climactic, ecological and other conditions", security includes the long term accessibility and availability

³¹ See (1).

³² International Covenant on Economic, Social and Cultural Rights 1976, Article 11. See United Nations Human rights, Office of the High Commissioner, International Covenant on Economic, Social and Cultural Rights, ([ohchr.org](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx)) <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>>.

³³ United Nations Convention on the Rights of the Child 1990. See, in particular, Article 24(2)(c) and Article 27(3). United Nations Human Rights, Office of the High Commissioner, Convention on the Rights of the Child 1990, ([ohchr.org](http://www.ohchr.org/en/professionalinterest/pages/crc.aspx)) <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>.

³⁴ Department of Economic and Social Affairs, United Nations Guidelines for Consumer Protection, (1999) ([unctad.org](http://unctad.org/en/PublicationsLibrary/UN-DESA_GCP1999_en.pdf)) <http://unctad.org/en/PublicationsLibrary/UN-DESA_GCP1999_en.pdf>. The United Nations Conference on Trade and Development ('UNCTAD') is expected to publish a revised version of these guidelines shortly.

³⁵ This definition of food security is derived from United Nations Economic and Social Council, General Comment No. 12: The Right to Adequate Food (Article 11), (1999) ([fao.org](http://www.fao.org/fileadmin/templates/righttofood/documents/RTF_publications/EN/General_Comment_12_E_N.pdf)) <http://www.fao.org/fileadmin/templates/righttofood/documents/RTF_publications/EN/General_Comment_12_E_N.pdf>, henceforth ('the General Comment').

of food.³⁶ The General Comment maintains that the RTF, at its core, is about the availability of food in a quantity and quality sufficient to satisfy the dietary³⁷ needs of individuals free from adverse substances³⁸ and acceptable within a given culture³⁹ as well as the accessibility of such food in ways that are sustainable and do not interfere with the enjoyment of other human rights.

‘Availability’ is defined in the General Comment to mean the possibility of a person either feeding him or herself directly from the productive land or other natural resources or from there being well-functioning, distribution, processing and market systems that can move food from the site of production to where it is needed in accordance with the demand.⁴⁰ ‘Accessibility’ includes the ability or capacity of persons to gain economic as well as physical access to food, and ‘economic accessibility’ implies that the personal or household financial costs associated with the acquisition of food for an adequate diet need be at a level where fulfilling them does neither threatens nor compromises the attainment and satisfaction of the households’ other basic needs, whereas ‘physical accessibility implies’ that everyone, including infants and young children, elderly people, the physically disabled and the terminally or mentally ill, has access to adequate food.⁴¹ ‘Adequacy’ refers to the nutritional appropriateness of the food.⁴²

2.2 The Nature of the Obligations on States to Fulfil the RTF

The emergence of the RTF raised interesting issues as to the nature of obligations it entails and, more generally, its political, moral and/or legal dimensions. A follower of Hohfeld may expect rights to involve a complex set of permissions and constraints regarding the actions of the right-holder, either providing him with “privileges” linked to certain freedoms or permission to act (“freedom rights”) or imposing correlative duties on others, which give rise to “claims” on the part of the right-holder (“claim rights”).⁴³ On the basis of these privileges and claims (i.e. ‘first-order rights’), right-holders may derive ‘powers’, defined as “one’s affirmative ‘control’ over a given legal relation as against another” (with the opposite being disability), and ‘immunities’, which determine “one’s freedom from the legal power or ‘control’ of another as regards some legal relation” (with the opposite being liability).⁴⁴ These ‘second-order’ rights support legal rights concerning the alteration of the first-order rights. Such person may also recognise that rights can also be negative or positive where the holder of a negative right is entitled to non-interference whilst the holder of a positive right is entitled to the provision of some good or service.

The precise nature of the obligations that the RTF imposes on states must be examined in light of the obligations imposed by international human rights generally and by economic, social and cultural rights and the ICESCR specifically. Whist economic, social and cultural rights are broadly recognised, the obligations corresponding to these rights are not. Obligations in this regard are largely formulated as broad ‘obligations of result’ rather than ‘specific obligations

³⁶ *Ibid*, [7].

³⁷ *Ibid*, [9].

³⁸ *Ibid*, [10].

³⁹ *Ibid*, [11]

⁴⁰ *Ibid*, [12].

⁴¹ *Ibid*, [13].

⁴² See (15)-(17).

⁴³ W. Hohfeld, “Some Fundamental Legal Conceptions as Applied to Legal Reasoning”, (1913) 23 *Yale Law Journal*, 16.

⁴⁴ *Ibid*, 55.

of conduct’. This formulation has its strengths and weaknesses. Its strength lies in that it allows for flexibility, making it possible for states to comply with their obligations in ways which correspond to their particular situations. The weakness is that the obligations (and the neglect of them) are very difficult to pinpoint.⁴⁵

The basis for state obligations derives from Article 2 of the ICESCR, which identifies these as a set of ‘obligations of result’. State parties are under an immediate obligation to advance and progressively work towards the realisation of rights under the ICESCR by taking steps “to the maximum of their available resources” and “by all appropriate means, including particularly by the adoption of legislative measures”.⁴⁶ Additionally, under paragraph 2 of Article 2 of the ICESCR, states are obliged to guarantee that the rights are exercised without discrimination and, under Article 3, are duty-bound to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights.⁴⁷

The term “progressive realisation” was first interpreted and explained in General Comment No. 3 as:⁴⁸ “realisation over time, or in other words progressively...is, on the one hand, a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective...which is to establish clear obligations for State parties in respect of the full realisation of the rights in question. It, thus, imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”.

Furthermore, in terms of General Comment No. 3, each state is required to fulfil a ‘minimum core obligation’ “to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”.⁴⁹ The minimum core obligation in respect of the RTF is the right to be provided essential foodstuffs. In order for a state to be able to attribute its failure to meet its minimum core obligations to a lack of available resources it must demonstrate that it has made every effort to use all of the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.⁵⁰ General Comment No. 3 was subsequently replaced by General Comment No. 31, which explains that Article 2 of the ICESCR, imposes a general obligation on states to respect the ICESCR rights and to ensure them to all individuals in their territory and subject to their jurisdiction. It further asserts that states are the primary duty bearers under international human rights law and pursuant to the principle articulated in Article 26 of the Vienna Convention on the Law of Treaties 1969, are required to give effect to the

⁴⁵ Rights, (9), [47]. [Is this meant to be a reference to (8), which talks about rights in the work of Claeys, or to (9), which is the work by Williams and Death?]

⁴⁶ International Covenant on Economic, Social and Cultural Rights (‘ICESCR’) 1976, Article 2(1).

⁴⁷ *Ibid*, [102].

⁴⁸ UN Committee on Economic, Social and Cultural Rights, “The Nature of States Parties’ Obligations (Article 2, Paragraph 1 of the Covenant)”, (December 1990), General Comment No. 3, E/1991/23, [9], <<http://www.refworld.org/docid/4538838e10.html>>.

⁴⁹ For a detailed discussion of the meaning and import of minimum core obligations, see J. Tasioulas, “Minimum Core Obligations: Human Rights in the Here and Now”, (2017) The World Bank (122563-WP-Tasioulas2-PUBLIC).

⁵⁰ *Ibid*, [10].

obligations under the ICESCR in good faith.⁵¹ States are also required to adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations in terms of compliance with the ICESCR.⁵² Companies are not international legal persons and have largely moral responsibilities for which they cannot be held legally accountable under international human rights law. However, they may sometimes be found complicit in states' violations of these rights.⁵³

Further, following in the footsteps of Shue's influential work on basic subsistence and security rights,⁵⁴ the General Comment No. 12 stated that the obligations of states with regard to the realisation of RTF are threefold: the obligation to respect, to protect and to fulfil.⁵⁵ The obligation to respect entails continuance of the existing access to the right to food. The obligation to protect entails the obligation to protect individuals from being deprived of their access to adequate food by enterprises or individuals. The obligation to fulfil comprises the obligation to facilitate individuals in gaining access to and utilising resources and means for ensuring their livelihood and where people are deprived of such access, whether it be due to natural or other disasters, to fulfil this right directly.⁵⁶ These legally binding obligations, are

⁵¹ UN Human Rights Committee ('UNHRC'), [80], "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", (May 2004), General Comment No. 31 CCPR/C/21/Rev.1/Add.13, [3], <<http://www.refworld.org/docid/478b26ae2.html>>.

⁵² *Ibid*, [7].

⁵³ T. Feunteun "Cartels and the Right to Food: An Analysis of States' Duties and Options", (2015) 18(2), Journal of International Economic Law, 341, 9. However, also consider the UN Human Rights Council ('UNHRC'), "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", (2008), which was endorsed by the UNHRC on 16 June 2011. Under the Framework, the responsibilities of companies are not based on any international legal obligation or standard but on social expectations. Therefore, it may be argued that these responsibilities fall within the ambit of corporate social responsibility ('CSR'), which is understood to be a set of social rules and principles compliance with which is optional for businesses. However, the view may also be taken that these are an expression of a policy consensus within the international community about the responsibilities of business. A third, intermediate position recognises that the Framework has value in that it articulates certain core human rights and principles in relation to businesses and that the Guiding Principles offer a number of concrete steps to be taken by governments and companies in order to meet their respective responsibilities but they do not on their own constitute 'global standards'. The nature of the innovations presented by the Framework and the Guiding Principles has long been the subject of debate. A typical question posed is whether and the extent to which they represent a real and definitive shift to CSR, whereby corporate human rights responsibilities are ultimately a voluntary undertaking, thus, steering the debate away from the search for clear international legal standards applicable to companies. This debate continues as states adopt a range of approaches, some openly dissenting with the majority and most ready to seek better ways to regulate and hold companies accountable. Whilst CSR with an added element of human rights seems to be the accepted formula at present, the evolving understanding and expectations of international law in relation to corporations seem to be moving in directions that will move the responsibility of corporations and businesses beyond CSR into the realm of legal liability. See C. Lopez, "The 'Ruggie Process': From Legal Obligations to Corporate Social Responsibility?" in *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (edited by S. Deva and D. Bilchitz, Cambridge University Press, 2013), 59-60.

⁵⁴ H. Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (2nd ed., Princeton University Press, 1996).

⁵⁵ See Kirman, (27), 20-22; Feunteun (53). The classification discussed here derives from the 'Protect, Respect and Remedy' Framework (henceforth, the 'Framework'), also known as the 'Ruggie Framework', proposed by Professor John Ruggie, the then UN Special Representative for business and human rights. The Framework had virtually unanimous support from states, businesses and civil society organisations. See UNHRC, " Human Rights Council, 'Protect, Respect and Remedy: A Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General ('SRSG')l on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' Enterprises", A/HRC/8/5 (7 April 2008) A/HRC/8/5, 3-5, (SRSG henceforth, '2008 Report').

⁵⁶ Feunteun (53) *Ibid*, [15].

distinct from responsibilities that are not legally binding.⁵⁷ We discuss these obligations more fully below.

(i) *Obligation to Respect:* The obligation to respect, in both its domestic and extraterritorial application, is primarily a negative obligation. It requires a state to refrain from acting in a manner that would affect adversely the RTF.⁵⁸ To fulfil this obligation, the state (and all its organs and agents) must abstain from doing anything that violates the integrity of the individual or infringes his or her freedom, including the freedom to use the material resources available to that individual in the way he or she finds best satisfy basic needs.⁵⁹ The majority of the examples of this obligation are of the state performing an action that violates a negative obligation, such as when a state arbitrarily fails to respect the RTF by withdrawing something, rather than perhaps the more likely and more nuanced scenario of permitting the continuation of a state policy that fails to fulfil the obligation to respect. Case law suggests states can also be held responsible for implementing international agreements that violate their obligations under international human rights law.⁶⁰

(ii) *Obligation to Protect:* The obligation to protect is primarily a positive obligation on the state to take measures to prevent violations of a human right by third parties.⁶¹ In terms of competition law, this means that the state may be under an obligation to protect individuals from violations of the RTF, triggered by anti-competitive actions,⁶² “through the direct action of States or other entities regulated by States”.⁶³ The obligation to protect may exist at multiple levels. Article 2 of ICESCR provides that states must pass laws to affect the obligation to protect the RTF.⁶⁴ Arguably, states may also establish bodies (including national competition authorities) to investigate and provide effective remedies against violations of the RTF. It is important to note that there is some overlap between the obligation to protect and the obligation to fulfil because a state would also fail to protect the RTF if it took no action to punish and impose fines, on violations of RTF by its organs or by companies (whether domestically or extraterritorially) do not go unpunished.⁶⁵

Although the ICESCR does not have a specific provision concerning the extraterritoriality of this obligation, the ICESCR Committee has consistently cited other sources of international law in support of the existence of such an obligation.⁶⁶ A state must, therefore, ensure that its

⁵⁷ Feunteun, (53), 8.

⁵⁸ See Kirman, (27), 20; Feunteun, (53), 11.

⁵⁹ Rights, (9), [67]. [Is this meant to be a reference to (8), which talks about rights in the work of Claeys, or to (9), which is the work by Williams and Death?]

⁶⁰ Feunteun, (53), 11.

⁶¹ Kirman, (27), 21.

⁶² Feunteun, (53), 12.

⁶³ *Ibid.*

⁶⁴ *Ibid.* For example, throughout the world, legislative measures are considered necessary to protect consumers against harmful food products or against the commercial promotion of harmful practices. The Codex Alimentarius, operated by the joint Food and Agriculture Organisation ('FAO')/ World Health Organisation ('WHO') Codex Alimentarius Commission, covers a broad range of these issues, and a harmonisation of national laws is taking place. The Commission also recommended, in 1979, a Code of Ethics for International Trade in Food. There are others in the same field: the International Code of Marketing of Breastmilk Substitutes, drawn up under the auspices of the WHO and the United Nations Children's Fund ('UNICEF') secretariats, national Governments, infant health experts, the infant food industry and consumer and public interest groups, is a case in point.

⁶⁵ *Ibid.*

⁶⁶ For example, General Comment No. 12, (35), [36].

own home state transnational corporations ('TNCs') (and those from other nations subject to its jurisdiction) do not deprive individuals of access to adequate food domestically. It ought also to ensure that its own TNCs do not do the same internationally.⁶⁷

To fulfil the obligation to protect, the state and its agents must take all necessary measures to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual, including preventing the infringement of the enjoyment of his material resources.⁶⁸ With respect to the RTF, the obligation to protect implies the responsibility of states to counteract or prevent activities and processes that negatively affect food security, particularly for the most vulnerable in society. Some degree of protection may be required against more assertive or aggressive subjects, such as against more powerful economic interests when they are acting in a ruthless way, fraud, unethical behaviour in trade and/or contractual relations, the marketing and dumping of hazardous or dangerous products etc.⁶⁹

(iii) *Obligation to Fulfil:* This is primarily a positive obligation and comprises three obligations on a domestic state level:⁷⁰ the obligation to provide, the obligation to facilitate and the obligation to promote.⁷¹ To fulfil these obligations, the state is required to take the measures necessary to ensure each person within its jurisdiction has opportunities to obtain satisfaction of those needs, recognised in human rights instruments, which cannot be secured by individual efforts.⁷² This also means that states are responsible for ensuring that competition policy and regulation respects, protects and supports the fulfilment of the right to food.⁷³

The UN Conference on Trade and Development's "United Nations Set of Principles and Rules on Competition: The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" (the 'UN Set') also urges states to take legislative, judicial, and administrative action, at national or regional levels, for the control of restrictive business practices, remedial or preventive measures, whistle-blowing procedures to facilitate the reporting and investigation of cartels, regional and sub-regional information exchange to aid enforcement, and the requesting/sharing of technical assistance (with states or international bodies) when the requisite wherewithal to take appropriate measures is lacking.⁷⁴ In addition, it is likely that introducing measures to educate farmers as well as employees within agribusinesses about the harm of cartels and about how to identify and report suspicious

⁶⁷ Feuntuen, (53), 12.

⁶⁸ Rights, (9), [68]. [Is this meant to be a reference to (8), which talks about rights in the work of Claeys, or to (9), which is the work by Williams and Death?]

⁶⁹ *Ibid*, [175].

⁷⁰ Kirman, (27), 21.

⁷¹ Feuntuen, (53), 12.

⁷² Rights, (9), [69]. [Is this meant to be a reference to (8), which talks about rights in the work of Claeys, or to (9), which is the work by Williams and Death?]

⁷³ Feuntuen, (53), 12.

⁷⁴ UN Conference on Trade and Development ('UNCTAD'), "The United Nations Set of Principles and Rules on Competition: : The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices", (2000) TD/RBP/CONF/10/Rev.2, <<https://unctad.org/en/docs/tdrbpconf10r2.en.pdf>>. For an in-depth analysis of its possible effect, see I. Lianos, "The Contribution of the United Nations to the Emergence of Global Antitrust Law", (2007) 15(2) *Tulane Journal of International and Comparative Law*, 415.

behaviour would satisfy the “promote” aspect of the obligation.⁷⁵ International cooperation and assistance is part of the positive duty to fulfil, which is incumbent upon all states.

In summary, the obligation to respect is a duty to refrain from activities that harm human rights and may be deemed to consist in a basic negative duty. The obligations to protect and fulfil are both positive duties. The obligation to protect is the duty to take reasonable measures to protect people from harm to their human rights by other individuals or corporations. Therefore, states are required to regulate private entities in order to ensure, as far as is reasonably possible, that they do not harm the human rights of others. The obligation to fulfil includes the duty to take the measures necessary to ensure that individuals enjoy their human rights. This obligation may be divided further into three obligations: the obligation to facilitate, the obligation to promote and the obligation to provide for the implementation of a right.

2.3 The Enforceability and Justiciability of the RTF

The issue of enforceability and justiciability of the RTF, in particular, and of international human rights ('IHR') more generally has become more conspicuous due to the fact that the UN envisages two categories of human rights: the first category comprises civil and political rights, the second comprises economic, social and cultural rights. However, whilst the UN and other human rights organs have carefully elaborated civil and political rights, they have allowed economic, social and cultural rights to remain relatively vague. Consequently, despite repeated affirmations on their part that the two categories of rights are “indivisible and interdependent”,⁷⁶ there is a persistent lack of clarity as to the enforceability and justiciability of economic, social and cultural rights.⁷⁷

2.3.1 Enforceability

It is generally argued that economic social and cultural rights, including the RTF, are not legally enforceable as human rights. Thus, for example, it has been argued that “among other rights, the right to food is not an individual right but rather a broadly formulated programme for governmental policies in the economic and social fields”.⁷⁸ Whilst the apparent lack of their enforceability has cast doubt on whether economic, social and cultural rights are human rights at all, van Hoof has argued, “one cannot simply “transplant” conceptions and ideas derived from municipal systems into international law because, often, these are not attuned to the realities of international relations”. In fact, as he notes, “it is the exception rather than the rule that norms of international law can be enforced through courts of law” and it is a mistake to confound the question of whether a right has become a justiciable right with the question of whether the right exists under international law.⁷⁹

In any event, a number of economic rights have been shown to be enforceable in the context of domestic law, provided that they are formulated in a sufficiently precise and detailed manner, whether they stem from international or domestic legal instruments. Such is the case, for example, with some of the economic rights proclaimed in the ICESCR, which have been

⁷⁵ Feuntuen, (53), 13.

⁷⁶ See, in particular, UN General Assembly Resolution 32/130.

⁷⁷ United Nations Centre for Human Rights ('UNCHR'), “Right to Adequate Food as a Human Right”, (1987) Report E/CN.4/Sub.2/1987/23 7 July 1987 [41].

⁷⁸ *Ibid* [42].

⁷⁹ As cited in *Ibid*, [43].

spelled out in greater detail within the framework of the system of international labour conventions and recommendations adopted by the International Labour Organisation ('ILO').⁸⁰ However, the fact remains that some of the obligations imposed by the ICESCR, taken at their highest and most general level, cannot easily be made justiciable. However, that does not detract from the fact that these obligations exist and cannot be neglected.⁸¹ This makes it all the more imperative that strategies are developed for their enforcement.

2.3.2 *Justiciability*

The issue of justiciability of economic, social and cultural rights is often raised as an independent issue in a discussion of their enforceability.⁸² Justiciable rights are rights that can be applied in the courts, which means that a victim may seek a judicial remedy for violations of those rights. Whilst the non-justiciable nature of economic, social and cultural rights is said to follow from the vague obligation provision which hampers the finding of a violation, and the flawed positive/negative dichotomy, it is exacerbated by the absence of an individual complaints system under the ICESCR. Civil and political rights have been the subject of individual complaints before the Human Rights Council ('HRC') under the Optional Protocol to the International Covenant on Civil and Political Rights ('ICCPR'). While the HRC has decided over 1,500 cases, which have helped concretise the meaning of ICCPR rights, the ICESCR Committee has not decided any.⁸³ This has widened the gap in normative material, between the two sets of rights.

Furthermore, whilst civil and political rights have long been recognised as justiciable in a number of national courts, economic, social, and cultural rights have only been made justiciable more recently, particularly in the developing world.⁸⁴ In India, constitutional jurisprudence provides for the justiciability of economic, social, and cultural rights based on "the right to life".⁸⁵ Additionally, the Indian Supreme Court held that a shortage of funds could not excuse

⁸⁰ *Ibid*, [44].

⁸¹ *Ibid*, [116].

⁸² Sarah, Joseph, *Blame It on the WTO? A Human Rights Critique* (Oxford University Press, 2011), 27.

⁸³ *Ibid*.

⁸⁴ For instance, see two South African cases (a) *Government of Republic of South Africa v Grootboom* which concerned the right to housing *Government of Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 169. (CC), <https://www.escr-net.org/caselaw/2006/government-republic-south-africa-ors-v-grootboom-ors-2000-11-bclr-1169-cc>; (b) *Minister for Health v Treatment Action Campaign* concerned a challenge, based on the right to health, to the restricted availability of nevirapine, a drug which restricted the transmission of HIV-AIDS from mothers to babies in South Africa *Minister for Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC), <https://www.escr-net.org/caselaw/2006/minister-health-v-treatment-action-campaign-tac-2002-5-sa-721-cc>. This case not only assures poor people of access to HIV/AIDS treatment but also establishes a conceptual framework for judicial review and enforcement of economic, social and cultural rights, including the right to food, in South Africa and elsewhere. Marc J. Cohen Mary Ashby Brown 'Access to Justice and the Right to Adequate Food: Implementing Millennium Development Goal One,' Sustainable Development Law & Policy Volume 6 Issue 1 Fall 2005: Development Goals & Indicators, 56.

⁸⁵ Constitution of India 1950, Article 21. This constitutional right was central to the case of the *People's Union for Civil Liberties ('PUCL') v. Union of India* where the Indian Supreme Court held that 'it was the primary responsibility of the Central government and that a shortage of funds could not excuse the government's failure to fulfil its obligations. In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No. 196 of 2001, < <https://www.escr-net.org/caselaw/2006/peoples-union-civil-liberties-v-union-india-ors-supreme-court-india-civil-original>> (accessed 24 April 2019); *People's Union for Civil Liberties ('PUCL') v. Union of India & Others*, Initial Petition <<http://www.righttofoodindia.org/case/petition.html>>. The PUCL petition paved the way for the National Food Security Act 2013, which entitled 67% of the population to receiving cheap grains.

the government's failure to fulfil its obligations.⁸⁶ The PUCL petition paved the way for the landmark National Food Security Act 2013, which entitled 67% of the population to receiving cheap grains. Section 10(1) of the Act stipulated that the Act must be fully implemented in a year. In 2015, the PUCL filed a further petition before the Supreme Court to ensure the implementation of the Act.⁸⁷

Brazil provides another example of the justiciability of the right to food. Brazil had ratified the ICESCR in 1992, and its Constitution automatically incorporated the treaty into national law. Brazil's Constitution also guarantees the "inviolability of the right of life" and, a 2003 amendment, explicitly recognises the right to food.⁸⁸ Although the Brazilian courts have tended to defer such rights to the executive and legislative branches, the country's 'Public Civil Suit Law' permits municipalities and non-governmental organisations to sue government agencies in order to advance individual or collective rights. Through the mechanism of public civil enquiries instituted in 1988, state and federal prosecutors carried out a number of enquiries on RTF.⁸⁹ In 2002 and 2003, prosecutors, in Brazil, recommended that the Ministry of Health expand food assistance to children uncovered by the state's *Bolsa Alimentação* program, which provides funds to nutritionally vulnerable families in exchange for their participation in health and nutrition education.⁹⁰ Public prosecutors also pressed the federal government to extend school feeding programs to 2.5 million children who had been excluded due to mismanagement. Also, in 2003, federal prosecutors used a public civil inquiry to join with civil society organisations to monitor policies and expenditures aimed at realising the RTF.⁹¹

Despite these 'successes' the fact remains that the RTF, like other economic, social and cultural rights, is not considered to be justiciable by many authorities, especially when compared to civil and political rights, which are given a much higher status. Even when economic, social and cultural rights are laid down in national constitutions, they are often treated as guidelines for governments rather than individual rights that are enforceable in the courts. It is suggested that this is because the judiciary should not have power over policies and resources that are the responsibility of the executive arm of government. However, the ICESCR Committee has pointed out that courts are already involved in many matters that have important resource implications. It also argues, General Comment No. 9, that to put economic, social and cultural

Although section 10(1) of the Act stipulated that the Act must be fully implemented in a year it had not been implemented even in 2015, when PUCL filed a further petition seeking its implementation.

⁸⁶ M. Dev, "Right to Food in India", (2003) Working Paper No. 50, Centre for Economic and Social Studies , 30-31.

⁸⁷ Jitendra, "PUCL Moves Supreme Court over Non-Implementation of Food Security Act", ([downtoearth.org.in](https://www.downtoearth.org.in), 17 August 2015) <<https://www.downtoearth.org.in/news/governance/pucl-moves-supreme-court-over-non-implementation-of-food-security-act-50036>>.

⁸⁸ Article 227 of the Brazilian Constitution reads: 'It is the duty of the family, the society and the state to ensure children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, professional training, culture, dignity, respect, freedom and family and community life, as well as to guard them from all forms of negligence, discrimination, exploitation, violence, cruelty and oppression.' <http://english.tse.jus.br/arquivos/federal-constitution> (accessed 1 July 2019). Also see, Food and Agriculture Organisation ('FAO') 'The right to food is now in the Constitution of Brazil' <http://www.fao.org/right-to-food/news/detail-events/en/c/157360/> (accessed 10 May 2019).

⁸⁹ As cited in Cohen and Brown, (84), 56.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

rights beyond the reach of courts is arbitrary and incompatible with the international principle that those rights are indivisible from, and interdependent on, civil and political rights.⁹²

It has also been argued that, like other economic, social and cultural rights, the RTF is not an individual right but rather part of a broadly formulated programme for governmental policies in economic and social fields. A provisional answer to this criticism is that Article 11 of the ICESCR, which deals with the RTF, proclaims it as “the right of everyone”. It is, thus, formulated not as a broad collective proposition but as a human right belonging to individuals. Also, the suggestion that the RTF is merely programmatic implies that broad programmes for implementation are not necessary for other human rights. In fact, whether a government is dealing with hunger, torture or a widespread pattern of disappearances, a programme for eradicating the evil in question will often be necessary.⁹³

In 2004, an Intergovernmental Working Group, established under the auspices of FAO, agreed to comprehensive voluntary guidelines on implementing the RTF. These guidelines recommend creating “administrative, quasi-judicial and judicial mechanisms to provide adequate, effective and prompt remedies accessible, in particular, to members of vulnerable groups”.⁹⁴ However, critics argue that implementing justiciable economic, social, and cultural rights, and the RTF in particular, would be costly;⁹⁵ and would require governments to provide food to all their citizens, irrespective of the availability of resources.⁹⁶ However, the human rights framework – to respect, protect, and provide – requires that states refrain from violating human rights and undertake measures to prevent other parties from interfering with those rights. Therefore, fulfilling the right to food does not translate into the direct provision of food to all citizens but, rather, a broader commitment by the state to create an institutional framework in which citizens can achieve freedom from hunger.⁹⁷

The flexibility of this framework, enables us to envision the right to food as having both a demand-side dimension, the protection of the rights of the final consumers to benefit from food products that satisfy their basic nutritional needs and are priced according to their willingness to pay, as well as a supply-side dimension, which relates to the sustainability of food supplies. The latter requires, to a certain extent, that the most atomistic, from a competition perspective, segment of the FVC, farmers, are able to cover their costs and charge prices that are close to their willingness to sell⁹⁸. These demand-side and supply-side dimensions and the related producer/consumer dichotomy should not however be perceived as being in tension with each other. One needs to take into account the ‘overlapping games’ and the complex web of social relations in which the same individuals may participate in the multiple spheres of their lives. In view of the high percentage of the workforce involved in primary activity in most developing countries, the final consumer of food products is, to a great extent, also contributing to food

⁹² United Nations General Assembly, “Preliminary Report of the Special Rapporteur of the Commission on Human Rights on the Right to Food”, (July 2001), A/56/210, [35].

⁹³ *Ibid*, [42].

⁹⁴ Cohen and Brown, (84), 54.

⁹⁵ U.S. General Accounting Office, “Food Security: Preparations for the 1996 World Food Summit”, (1996) Report to Congressional Requesters, GAO/NSIAD-97-44.

⁹⁶ Economic, Social, and Cultural Rights, “Address Before the U.S. Government Delegation to the 59th Session of the U.N. Commission on Human Rights”, (April 2003) as referred to in Cohen and Brown, (84), 55.

⁹⁷ Economic, Social, and Cultural Rights, “Address Before the U.S. Government Delegation to the 59th Session of the U.N. Commission on Human Rights”, (April 2003), 55.

⁹⁸ For instance, the ability of farmers to cover the paid costs (e.g. inputs) but also imputed costs (e.g. the opportunity costs of their labour).

production activities and therefore depends on the revenues made by these activities in order to buy food for their families.

This brings forward the link between the right to food and competition law, to the extent that competition law aims to protect the competitive process against abuses of economic power through some form of unilateral conduct and collusive practices, or increasing market concentration achieved through mergers and acquisitions, and to ensure that intermediary or final consumers benefit from lower prices, more variety and choice, and higher innovation.

3. Competition Law and the RTF

The potential role of competition law in fulfilling the RTF is linked directly to the FVC being structured essentially as a succession of markets in which economic actors interact with each other and, thereby, shape not only their individual relationships but also the structure of the markets in which they operate as well as adjacent markets. This has implications on the structural positioning and power of the various actors in the FVC: e.g. inputs or processing corporations, farmers, retailers, and the final consumers.

The power relations in the FVC are characterised by international actors and local producers operating within the geographic area determined by the logistics of the product. Additionally, the entire FVC is continuously reshaped in meeting the changes in consumer demand. With regard to unilateral (non-collusive) practices, the market power of a firm in the food industry, as in any other industry, usually triggers the attention of competition watchdogs if it corresponds to the notion of ‘dominance’, that is “a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and, ultimately, of its consumers”.⁹⁹ This notion of dominance, therefore, leaves, at least partially, undisclosed the relative power of the company on its trading partners.¹⁰⁰

Globalised markets are the result of a complex nexus of interconnections between firms, where the relative power of a firm and its market power are deeply intertwined, to the extent that, in some cases, the relative power of a firm, rather than its market share and concentration, may better explain the causes of markets distortions. Several studies have tried to find a correlation between the level of concentration of modern retailers and the ratio of the passing on of price benefits or the creation of market efficiency,¹⁰¹ on one hand, or the creation of inefficiencies, on the other. The creation of a negative externality associated with a high level of concentration would, indeed, presume the existence of an abuse of superior bargaining power the effect of which is distorting the market. However, research findings on this point are mixed. While some papers find a connection between the levels of retail concentration and higher consumer

⁹⁹ See Judgment of the European Court of Justice, Case 27/76, *United Brands v. Commission*, [1978] E.C.R. 207, [65]; Judgment of the European Court of Justice, Case 85/76, *Hoffmann La Roche v. Commission*, [1979] E.C.R. 461, [38].

¹⁰⁰ In relation to ‘relative power’, we mean the power exerted by a firm on a commercial partner.

¹⁰¹ S. Tandon, M. Landes and A. Woolverton, “The Expansion of Modern Grocery Retailing and Trade in Developing Countries”, (2011) Report of the United States Department of Agriculture (‘USDA’) Economic Research Service, Report No. (ERR-122) 33pp.

prices,¹⁰² others state that there is no empirical basis on which to allege such correlation and that, in many cases, the opposite is true.¹⁰³

In FVCs, the effects of the use of bargaining power through contracting and technology transfer are equally debated.¹⁰⁴ Some scholars have found positive effects of contracting in situations of unbalanced bargaining power, in particular with regard to the development of quality standards in developing and transition economies, through technology and know-how transfer,¹⁰⁵ income stability and the food security of participating households.¹⁰⁶ By contrast, others have denounced the repeated abuse of such superior bargaining power by multinational organisations exploiting poor countries farmers and extracting rents through unfair contract terms.¹⁰⁷

Competition law regimes are specifically designed for and equipped to regulate different dimensions of market power. The means these regimes have at their disposal for this purpose include the power to check an alleged abuse of a dominant market position, to prohibit agreements that have the object or effect of reducing competition in the market and to monitor and approve mergers. Competition authorities established in pursuance of these regimes exercise their powers in regulating practices in all market sectors (unless they are specifically excluded from such jurisdiction) and regardless of the country from which these practices originate, provided that the impact of the practice is felt within the jurisdiction of the relevant competition authority.

The ultimate goal of competition law is to protect the process of competitive rivalry. This, in practice, entails preventing the creation of positions of significant market power through external growth and cooperation agreements whilst also stamping out attempts to buttress existing positions of substantial market power through market foreclosure. Given their inherent powers, competition regimes can and do check market abuses in food markets in exactly the same manner as they may do in other markets. For example, competition law may address

¹⁰² See R. Cotterill, “Market Power in the Retail Food Industry: Evidence from Vermont”, (1986) *The Review of Economics and Statistics*, 379; R. Cotterill and C. Harper, *Market Power and the Demsetz Quality Critique: An Evaluation for Food Retailing* (University of Connecticut, 1995).

¹⁰³ See. P. Kaufman and C. Handy, “U.S. Fresh Produce Markets: Marketing Channels, Trade Practices and Retail Pricing Behaviour”, (1989) Report of the USDA Economic Research Service, ; J. Binkley and J. Connor, “Market Competition and Metropolitan-Area Grocery Prices” (1996)
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1238553>.

¹⁰⁴ J. Swinnen, “Global Agricultural Value Chains, Standards and Development”, (2014) Robert Schuman Centre for Advanced Studies, Research Paper No. RSCAS.

¹⁰⁵ J. Swinnen and A. Vandeplas, “Quality, Efficiency Premia and Development”, (2015) LICOS Discussion Paper No. 184/2007.

¹⁰⁶ See B. Minten, L. Randrianarison and J. Swinnen, “Global Retail Chains and Poor Farmers: Evidence from Madagascar”, (2009) 37 *World Development*, 1728; C. Handschuch, M. Wollini and P. Villalobos, “Adoption of Food Safety and Quality Standards among Chilean Raspberry-Producers – Do Smallholders Benefit?” (2013) 40 *Food Policy*, 64; S. Asfaw, D. Mithöfer and H. Waibel, “EU Food Standards, Pesticide Use and Farm-Level Productivity: The Case of High-Value Crops in Kenya”, (2009) 60 *Journal of Agricultural Economics*, 645; J. Subervie and I. Vagneron, “A Drop of Water in the Indian Ocean? The Impact of GlobalGap Certification on Lychee Farmers in Madagascar”, (2013) 50 *World Development*, 57.

¹⁰⁷ See C. Dolan and J. Humphrey, “Governance and Trade in Fresh Vegetables: The Impact of UK Supermarkets on the African Horticulture Industry”, (2000) 37 *Journal of Development Studies*, 147; T. Reardon, C. Timmer, C. Barrett and J. Berdegué, “The Rise of Supermarkets in Africa, Asia and Latin America”, (2003) 85 *American Journal of Agricultural Economics*, 1140; M. Warning and N. Key, “The Social Performance and Distributional Consequences of Contract Farming: An Equilibrium Analysis of the Arachide de Bouche Programme in Senegal”, (2002) 30 *World Development*, 255.

concerns arising from the increasing concentration in the factor provider, processing or retail sectors and ensure that firms already dominant in these sectors do not abuse their market power and those that are not already dominant only merge or combine after strict scrutiny of the possible impact of the merger or combination on competition in the market. Competition regimes may also examine vertical agreements including but not limited to exclusive dealing, two-part tariffs, slotting fees, over-riders, discounts, resale price maintenance etc., to ensure that these do not, either actually or potentially, reduce the level of competition in the market. These regimes may also examine the impact on competition of the introduction of private labels by retailers to compete with products of other suppliers.

The enforcement activity of competition authorities has largely focused on horizontal competition from established competitors (those producing substitute products) or on the threat of entry of potential competitors. Rivalry between established competitors is often gauged by reference to the level of market concentration, which is often measured by a concentration ratio, the market share of the largest producers in a specific market. In contrast, vertical competition, competition concerning the allocation of the surplus value generated by an FVC, which relates to the bargaining power of suppliers and the power of buyers, has not been the focus of competition authorities. The relative bargaining power of a supplier upstream, or of a customer downstream, has been considered as playing a less important role than ‘horizontal competition’. This is because it is assumed that, in most cases, they play a quite limited role in relation to the overall economic efficiency (in terms of lower prices and higher output) of the transactions for the final consumers.

Consequently, in the food sector, competition law has mainly focussed on the exercise of market power at different levels of the FVC, which has led to higher prices, lower output and restrictions on innovation. Although competition authorities have only intervened if and where there is evidence of a restriction of horizontal competition at some segment of the value chain, the high volatility of agri-food commodity prices and food prices has also been a matter for concern. A number of studies suggest that price transmission of these fluctuations is not evenly distributed along the supply chain,¹⁰⁸ and that cost shocks are only partially passed on.¹⁰⁹ Furthermore, a fall in commodity prices does not necessarily lead to a corresponding decline of retail prices.¹¹⁰

This asymmetric price pass-through is often completed at the expenses of farmers, who receive a lower share of the ‘food dollar’,¹¹¹ and bear most of the risks related to price volatility. Although it has been suggested that the cause of this asymmetry lies mainly in the unbalanced market power generated by the high concentration at retail level, drawing such a conclusion for policy reasons may conceal many other potential causes for the asymmetric price transmission in operation.¹¹² For instance, it has been alleged that government intervention may

¹⁰⁸ See P. Vavra and B. Goodwin, *Analysis of Price Transmission Along the Food Chain* (OECD Publishing, 2005); H. Kinnucan and O. Forker, “Asymmetry in Farm-Retail Price Transmission for Major Dairy Products”, (1987) 69 *American Journal of Agricultural Economics*, 285; Backer and Miroudot [need reference]!!; Organisation for Economic Co-operation and Development (“OECD”), “Competition in the Food Chain”, (2013) Report DAF/COMP(2013)15.

¹⁰⁹ OECD, (108), 23.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, 6.

¹¹² Vavra and Goodwin, (108).

contribute, in some instances, to generating an asymmetric transmission of prices.¹¹³ The asymmetry of the transmission of price changes along the supply chain may also raise issues of fairness in the food supply chain,¹¹⁴ and structural inequality, thereby, justifying some regulatory intervention.

The concept of structural inequality may be used in order to denote the vulnerability to domination that a type of market actors may experience due to social-structure processes, beyond their control¹¹⁵. In view of the economic concentration observed in all agricultural input markets, as well as in processing and distribution,¹¹⁶ farmers, the most competitive segment in the global food value chain, suffer from a position of structural weakness in their interactions with the other segments of the food value chain, which leads to exploitation that persists through time. This economic concentration results from the expansion of IP rights in the agriculture, in particular through the development of biotechnology, which provides to some mostly global firms the possibility to extract monopolistic rents, and the quite significant number of M&As in this sector, the last four decades, without any significant intervention of competition authorities to stop these successive merger waves. A possible way to deal with this unsatisfactory situation is to organise transfers, for instance public subsidies, that would compensate farmers for the persistent structural weak position in which they are put in because of the lack of competition. This is largely followed in the EU with the constitution of the Common Agricultural Policy. However, such an approach will not adequately (that is permanently) deal with the structures that enabled this inequality to emerge at the first place. As Iris Marion Young observes, '(i)nstead, promoting justice in social structures and their consequences implies restructuring institutions and relationships to *prevent* these threats to people's basic well-being'¹¹⁷.

Emphasising the role of fairness, structural inequality and distributive justice in competition law enforcement is likely to better accommodate the concerns raised by the proponents of the RTF, to the extent that their claims are broader than just lower prices for end-consumers and relate to the organisation of the agricultural production and consumption process along sustainability lines. However, because of the emphasis put on horizontal competition, the competition law toolkit lacks the tools and concepts to address these broader concerns.

3.1 Gaps in the Conceptual Toolkit: A Practical Example

The narrow perspective taken by competition law in regulating economic power in food markets becomes more evident if we focus on a specific example, such as the decision of the

¹¹³ See B. Gardner, "The Farm-Retail Price Spread in a Competitive Food Industry", (1975) 57 *American Journal of Agricultural Economics*, 399; Vavra and Goodwin, (134); Kinnucan and Forker, (132).

¹¹⁴ OECD, (108), 21.

¹¹⁵ See, I.M. Young, *Responsibility for Justice* (OUP, 2011); P. Pettit, Freedom in the Market, (2006) 5(2) Philosophy and Economics 131; R. Claassen & L. Herzog, Why economic agency matters? An account of structural domination in the economic realm, forth. 2019 European Journal of Political Theory, DOI: 10.1177/1474885119832181 (noting the importance of preserving the 'economic agency' of the economic actors (their autonomy of action) from domination). For a discussion of 'structural inequality' and competition law, see I. Lianos, Competition Law as a Form of Social Regulation (forth. 2019) Antitrust Bulletin,

¹¹⁶ For a discussion, see I. Lianos, Global Food Value Chains and Competition Law - BRICS Draft Report (January 1, 2018), available at SSRN: <https://ssrn.com/abstract=3076160> .

¹¹⁷ Young (115), 34 (emphasis added).

Competition Commission of India ('CCI') in the *Monsanto Cases*.¹¹⁸ These cases were brought by seed manufacturers in India against Mahyco Monsanto Biotech India Limited's ('MMBL') in their capacity as its sub-licensees. MMBL is the Indian subsidiary of Monsanto Inc. USA ('MIU') and is the license holder of MIU's cottonseed technology, BG-1 (which is not patented in India) and BG-II (which became patent protected in India in 2002). In terms of the sub-licensing agreements, Indian seed manufacturers were to pay MMBL a non-refundable upfront fee plus a recurring fee or trait value ('TV'), which was calculated as a percentage of the minimum retail price of the seed. This was to be charged upon each renewal of the sub-license.

The sub-licensees alleged that MMBL had violated the provisions of the Indian Competition Act 2010 by threatening its sub-licensees with the possibility of the termination and non-renewal of the sub-licenses if they did not pay an excessive and extortionary TV. The sub-licensees further alleged that MMBL had exploited government permissions to create a monopoly and that it had also abused its position in the market by forcing restrictive, one-sided and arbitrary sub-licensing agreements on seed manufacturers. By way of example, the seed manufacturers cited provisions in the sub-licensing agreements whereby MMBL restricted them from acquiring new technology even if it was available at a lower cost, linked the TV payable by them to the minimum retail price of the seed without providing any economic justification and threatened to terminate the sub-licensing agreement if the seed manufacturers failed to comply with these conditions.

In its preliminary decision, the CCI found that MMBL had *prima facie* violated the provisions of the Indian Competition Act 2002 on two counts: (i) it had abused its dominant position in the upstream market for the "provision of Bt cotton technology in India",¹¹⁹ and (ii) it had entered into anti-competitive sub-licensing agreements with seed manufacturers in India. The CCI was of the view that given the technological dependence of the seed manufacturers on MMBL, the conditions prescribed by MMBL in the sub-licensing agreements were "stringent and unfair" and tantamount to "denial of market access". They also had the effect of "curbing innovation". The CCI considered that MMBL appeared to be using its position in the upstream market to protect its group companies in the downstream market. CCI held that these the notification requirements coupled with the stringent termination conditions in the sub-license agreement entered into between MMBL and aggrieved parties were in the nature of refusal to deal and exclusive supply agreements. Specifically, the CCI noted that MMBL's power to terminate the sub-license agreement was unduly harsh and not commensurate with the need to protect its IPRs. Accordingly, the CCI ordered its Director General of Investigations to carry out a detailed inquiry into these violations in consultation with the relevant stakeholders.

A decision such as the one taken by the CCI in the *Monsanto Cases* stays within mainstream competition law. It fails to address the specific values of the RTF. In fact, the CCI's decision affirms its commitment to consumer welfare, judged in terms of choice available to and price charged to consumers, rather than a more holistic consideration of the social impact of market abuse or anti-competitive practice. Had the CCI taken RTF values into consideration in reaching its preliminary decision in the *Monsanto Cases* it is likely to have considered the impact of IPRs in the genetically modified seeds and the high concentration in the biotechnology sector on the ability of farmers using these genetically engineered seeds to generate

¹¹⁸ Order of the Competition Commission of India Under Section 26(1), Dated 10 February 2016, in Reference Cases Nos. 2 and 107 of 2015.

¹¹⁹ *Ibid.*

sufficient income for themselves.¹²⁰ The CCI is also likely to have taken into consideration the impact of these IPRs and the extent of concentration on crop diversity, particularly in respect of farmers' indigenous crops, and on the environment. It is also likely that the CCI would have then balanced this impact with the need to protect Monsanto's IPRs in order to promote further research and innovation in the bio-technology sector. In taking these factors into account, the CCI is also likely to have examined the social impact of Monsanto products as well as of the sub-licensing agreements entered into by MMBL and considered the impact of these agreements on the holistic wellbeing of consumers (here the seed manufacturer) but also the farmers, further downstream, rather than adhering to the narrow version of consumer welfare, which focuses on the choices available to and prices payable by the seed manufacturers.

Mahyco Monsanto Biotech challenged the CCI's order to investigate its directors for alleged abuse of the company's dominant position in India in the Bt cotton business before the Delhi High Court. However, in October 2018, the High Court dismissed MMBL's plea.¹²¹ Subsequently, MMBL challenged the order of the High Court before the Supreme Court of India. In February 2019, the Supreme Court also rejected MMBL's plea, thereby, allowing the CCI to continue with its investigations.¹²² The matter is now back with the CCI and it will be interesting to see the extent to which the CCI explicitly addresses the values of the right to food, or even the right itself, in its final decisions.

3.2 Re-orienting the Focus of Competition Law within the Mainstream Framework

The indifference of mainstream competition law to the type of considerations that would be relevant for implementing the RTF does not mean that the focus of competition law cannot be re-oriented, to address some of the concerns raised by the proponents of the RTF, while staying within the mainstream framework. We discuss two possibilities below.

3.2.1 *Greater Focus on the Exercise of Buyer Power*

The increased focus on buyer power, whether it arises from concentration in a given sector or through vertical integration, allows competition law regimes to check restrictions of competition that reduce the incomes of agricultural producers and/or produce exclusionary effects. Traditionally, competition law has refrained from interfering in the exercise of buyer power due to its cost-reducing impact for final consumers. However, this approach ignores the social cost of the exercise of buyer power, which may go beyond traditional output effects and include abuse of monopsony in labour markets (leading to traditional competition concerns, such as lower wages, or to less conventional ones, such as child labour) and reduced income for agricultural producers.

¹²⁰ King, (26).

¹²¹ Economic Times, "High Court Dismisses Mahyco Monsanto Plea Against CCI Probe Order", (economicstimes.indiatimes.com, 13 October 2018), <<https://economicstimes.indiatimes.com/news/economy/agriculture/high-court-dismisses-mahyco-monsanto-plea-against-cci-probe-order/articleshow/66190157.cms>>.

¹²² Economic Times, "Supreme Court Refuses to Stay CCI Monsanto Probe", (economicstimes.indiatimes.com, 18 February 2019), <<https://economicstimes.indiatimes.com/industry/healthcare/biotech/supreme-court-refuses-to-stay-cci-monsanto-probe/articleshow/68054122.cms>>.

Global value chain literature emerged out of the growing importance of new global buyers ('big retail') constituting 'buyer-driven global commodity chains', which increasingly dictate "the way the chains operate by requiring suppliers to meet certain standards and protocols, despite limited or no production capabilities",¹²³ but also by largely determining "the location of high-value activities and the conditions under which other firms participate in GVCs",¹²⁴ and sometimes through forcing an unfair balance of risks onto suppliers. Combined with economic or technological dependence, buyer power, for instance at the retail level, may force agricultural producers to produce at progressively lower prices. An undertaking with buyer power can take advantage of its power by reducing its demand so as to force suppliers to sell to it at a lower price than that which would have prevailed in a competitive market. The buyer's purchasing volume will influence the market price for the whole product, reducing the overall market price that is paid. The lower price obtained by the buyer will reflect the lower marginal cost of supply with the result that the least efficient or marginal suppliers, who have the higher average total costs, will reduce output to the level that equals their marginal costs in order to reduce their average total costs. These firms will assign their production capacities to other products that would have been the supplier's second choice in a competitive market. In the event that such a cycle is regularly reproduced, it has the effect of driving the agricultural producer out of the market altogether.

Faced with a reality of decreasing revenues, small farmers are pressed to produce even more agricultural commodities in order to earn short-term income in an attempt to meet daily expenses, which, in turn, leads to an oversupply and the vicious circle of the further depression of prices, sometimes even below the average cost of production. The 'waterbed effect' is another effect of the exercise of buyer power that may also translate into increased prices for consumers as well as a reduction in competition in the retail market. This occurs when the powerful commodity buyer in a concentrated market is able to demand such large discounts from the agricultural producer in return for bulk buying that the producer has no choice but to raise the prices for other buyers. Indeed, large buyers in developed countries also demand high volume discounts, thereby, obliging the suppliers to raise the prices for other buyers and, thus, exacerbating the comparative competitive advantage of large retailers and leading to more concentration on the retail side of the market. Final consumers are also harmed by reductions in quality or choice and by the decreased levels of innovation by producers without enjoying the benefit, because of the gatekeeper effect of large supermarkets and industrial processors, of significantly lower prices. Consumer sovereignty also suffers from the ability of dominant buyers to dictate to consumers the diversity of products that come to the market.

3.2.2 Extra-Territorial Reach of Competition Law

The extra-territorial reach of competition law would allow competition regimes to expand their geographic and material scope beyond direct consumer effects within their jurisdiction. In the traditional approach to competition law, if a dominant buyer engages in conduct that harms producers in one country and consumers in another (because the products are largely exported), the competition regime in the country where the consumers are located may be rendered

¹²³ *Ibid*, 10.

¹²⁴ OECD, World Trade Organisation ('WTO') and World Bank Group, "Global Value Chains: Challenges, Opportunities and Implications for Policy", (2014) Report Prepared for Submission to the G20 Trade Ministers Meeting, 21.

ineffective if, for its enforcement, the allegedly anticompetitive conduct must have direct and “substantial effects” on consumers situated in its territory.

More broadly, this raises the issue of the application of competition law to anticompetitive conduct involving intermediary products when the anticompetitive conduct (e.g. a cartel or an exclusionary conduct by a dominant market player) occurs outside the specific jurisdiction, e.g. the EU, and the intermediary products are not directly sold in the EU but are incorporated as components into a finished product that is then sold in the EU (i.e. ‘indirect sales’). Would the simple fact that the finished product incorporating the cartelised component is sold in the EU be considered as sufficient evidence of “qualified effects”, this being one of the standards to which the Court of Justice referred to in *Intel* when assessing the extraterritorial scope of EU competition law,¹²⁵ or should there be evidence that the cartelised component caused an anticompetitive price increase in the finished product? Would the exclusion of small-holders because of exclusionary conduct taking place in the jurisdiction exporting the agricultural commodities and the impact this may have on the model of agriculture practised and its effects on long-term sustainability of farming in this region and on the value of its ecosystems be of concern for the competition law regime of the jurisdiction in which these commodities are imported if the exclusionary conduct does not produce any price effects but actually may lead to a drop in prices? Should one integrate such non-price concerns into the quality dimension of competition and would it be possible to fully take into account these concerns if one of the premises of the cost-benefit analysis practised in competition law is that only preferences that may be evidenced by a higher willingness to pay matter because of the focus on revealed preferences?¹²⁶ Could harm that cannot be translated into price effects for the final consumers in the importing jurisdiction, such as harm to the sustainability of small holder agriculture or activities contributing to climate change in the specific region with devastating effects to its ecosystems, be considered as a dimension of quality that is often taken into account?

This is not something that should be excluded outright as recent research on the cost-benefit analysis argues for the consideration of “moral commitments”,¹²⁷ such as biodiversity, and there exist methods to evaluate such non-price concerns for the consumers (in which case the competition law standard is ‘consumer welfare’ or ‘consumer well-being’) or the broader public (in which case the standard is ‘public interest’) of the importing country.¹²⁸ Going

¹²⁵ The EU Courts have taken two approaches in establishing the Commission’s jurisdiction so as for it to be compatible with public international law. The first approach is based on the principle of ‘territoriality’, with the Court holding that the decisive factor is the place where the anticompetitive conduct is implemented. The second approach is based on the ‘qualified effects’ of the practices in the EU when it is foreseeable that the anticompetitive conduct will have an immediate and substantial effect in the EU. See Case C-413/14 P, *Intel Corp. v European Commission*, ECLI:EU:C:2017:632.

¹²⁶ Competition law relies on the price-based revealed preferences model, (i.e. the prices being revealed in a market).

¹²⁷ E. Posner and C. Sunstein, “Moral Commitments in Cost-Benefit Analysis”, (2017) Coase-Sandor Working Paper Series in Law and Economics, No. 802.

¹²⁸ If markets either do not exist or are distorted, preferences may be evaluated by estimating an implicit value based on an individual’s behaviour in a real-life situation in which this individual faces a trade-off between two competing consumption alternatives. Should the relevant market prices not be available, the contingent valuation method aims to calculate the value of a consumer gain or loss through a survey of a sample of consumers, by testing their willingness to pay (‘WTP’) when they are faced with a hypothetical consumption choice-set. A common characteristic of these approaches is that they focus on the price parameter, which explains the success they enjoy among competition authorities. However, such ignores other dimensions of the decision-making process, such as aesthetic, societal or ethical values, which cannot be easily “evaluated” using a price-based approach, such as WTP.

further, would it be possible to include in the cost-benefit analysis “empathetic preferences” for the wellbeing of small-holder farmers or the local communities in the exporting jurisdiction that may suffer from environmental degradation and loss in sustainability, on the basis of some cosmopolitan perspective on well-being or welfare? In the latter case would competition law regimes be allowed extra-territorial reach not only in order to offer protection to their consumers but also to protect producers and broader communities in other jurisdictions?

3.4. Beyond filling the Gaps: The Recommendations of the UN Special Rapporteur on the RTF for Competition Law

The RTF may provide some impetus for this widening of competition law to embrace the concerns raised above. Of particular interest in this regard is a Briefing Note of the UN Special Rapporteur on the RTF (the ‘Note’), which places a special emphasis on the “direct link between the ability of competition regimes to address abuses of buyer power in supply chains and the enjoyment of the right to adequate food”. It also attaches great importance to the global governance of competition law enforcement in the food sector for the fulfilment of the RTF.¹²⁹ The Note also highlights the important concerns arising from growing concentration in agribusiness, rather than merely focusing on the concerns arising from the concentration in the retail sector, which has attracted a lot of attention with competition authorities eager to deal with the bargaining power of large supermarkets, in both developed and developing countries. The Note states that concentration in agribusiness affects the effective realisation of the right to adequate food for the poorest and most underprivileged segments of both the developing and developed societies.

It has proven challenging to link the loss of biodiversity to the very wide range of benefits that humans derive from natural systems within which such biodiversity is embedded. For this reason, the operational focus, initiated by the Millennium Ecosystem Assessment (‘MEA’) of 2005, has shifted to measuring ecosystem services (‘ESS’).

Valuation studies on the benefits of biodiversity and the services provided by different ecosystems have been growing at an exponential rate. Some of these studies value changes in service flows as a result of either policy inaction or a policy or measure designed to modify the habitat that provides the services. A survey of the main values of ESS in money terms reveals a wide range, depending on the location, method of estimation, etc. This suggests that there are major limitations to the use of existing estimates when it comes to valuing services in a specific cost-benefit context. The literature on “benefit transfer” notes that while it is possible to make such transfers, they should be done with care as they introduce additional errors into the measurement of the benefits and/or costs. These studies rely on stated preferences, non-market-based valuation techniques and/or methodologies rather than on revealed preferences methodologies, which rely on markets (real or simulated) to provide information on the valuation of various social ‘goods’. For a discussion, see C. Reid, “Between Priceless and Worthless: Challenges in Using Market Mechanisms for Conserving Biodiversity”, (2013) 2(2) *Transnational Environmental Law*, 217.

The use of ecosystem and biodiversity values in making cost-benefit assessments at different geographical levels may also be examined at the global as well as the national level, where the figures are used to inform policies regarding protected area targets, targets for reforestation etc., or for interventions involving specific habitats or types of biodiversity. The acceptability and use of cost-benefit methods for policy purposes is still relatively limited. Commentators have noted the increasing sensitisation of policymakers to economic values of ESS, which is encouraging, but examples where policies have been influenced by a formal analysis of benefits and costs remain few. One can expect an increased use of these methods as governments become more convinced of their credibility and begin to see how they can help in making decisions of greater benefit to society. See A. Markandya, “Cost Benefit Analysis and the Environment: How to Best Cover Impacts on Biodiversity and Ecosystem Services”, (2016) OECD Environment Working Papers No. 101.

¹²⁹ O. de Schutter, (19).

Furthermore, according to the Note, downward pressure on producers' income forces less efficient producers to merge. However, consumers fail to benefit from the cost savings and economies of scale produced by these mergers due to the gatekeeping role of large commodity buyers, processors and retailers. The Note also observes the practice of large retailers in the developed world to pass on to small farm suppliers the cost of compliance with the retailer's standards on hygiene, food safety etc. This, in turn, increases the costs of smaller farms and leads to the increase of large farms (i.e. 'horizontal concentration') as well as of those farms controlled directly by the exporters (i.e. 'vertical integration') often at the cost of the smallest and most hapless producers and farmers.

In terms of the Note, the social consequences of horizontal concentration and/or vertical integration and the attendant downward pressure on farm prices are significant. As agricultural income becomes depressed, farms increasingly employ child labourers and dispense with proper environmental precautions. The pressure is particularly intense on small farms that are pressed to produce even more agricultural commodities in order to earn short-term income to meet daily expenses. This, in turn, leads to an oversupply of certain goods which further depresses prices pushing them, at times, to below the average cost of production. Large buyers in developed countries also demand high volume discounts, which leads to the 'waterbed' effect.¹³⁰ Consumers are also ultimately harmed by reductions in quality and by the decrease in choice and level of innovation by producers without enjoying the benefit of significantly lower prices. Furthermore, consumer sovereignty suffers from the ability of dominant buyers to dictate to consumers the diversity of the products that come to market.

In light of this discussion, the Note recommends, that "competition law regimes should be improved to comport with general human rights principles of equality and non-discrimination and to facilitate the realisation of human rights, including among others the right to food, the right to work and the right to development".¹³¹ This implies that countries exporting agricultural commodities should not adopt "competition laws focused on consumer welfare on the model proposed by the Organisation for Economic Co-operation and Development ('OECD') but should instead seek to "ensure that, in the competition law regime that they set up, they offer a sufficient high level of protection of their producers against abuses of dominant positions by commodity buyers, food processors or retailers, as part of their obligation to protect the right to food in their jurisdiction".¹³²

It is evident from the Note that the Special Rapporteur considers it important that "substantive competition laws should recognise that consumer harms arising from excessive buyer concentration are incipient and, therefore, indeterminate in character but that this indeterminacy should not be a reason for failing to control such conduct" and that a "more enriched conception of consumer welfare" is needed, "one that takes account of consumers' interests in sustainability – rather than focusing purely upon short-term price changes".¹³³ Furthermore, the Special Rapporteur is of the view that, given that competition authorities in the major developed countries are either unable or unwilling (or both) to control excessive buyer power, developing jurisdictions, in which the majority of impoverished farmers are located, should set up "credible competition authorities of their own". Developed countries

¹³⁰ See section ([reference]) above.

¹³¹ *Ibid*, 4.

¹³² *Ibid*, 5.

¹³³ *Ibid*.

should also design competition law regimes that address the negative effects of high concentration and buyer power when assessing the various interests at play within FVCs.

4. The Competition Law Response: an appropriate strategy for realising RTF

Whether competition law may or may not, in fact, be an appropriate institutional mechanism in promoting the RTF, it remains that should the RTF, like any other fundamental or human right, be considered as carrying some level of legal or strong moral obligation, it should, at least, be possible that it may produce some indirect effects, including the duty of conformity in interpretation by the authorities in charge of competition law enforcement. Facing a choice between different interpretations of their competition law provisions, competition law enforcers should make efforts to select the option that maximises the RTF whilst preserving the competitive process. This form of legal pluralism will enable competition authorities to ensure coherence in policy between the RTF and competition law. However, doing so depends upon the flexibility of competition law to address RTF concerns, such as long-term sustained growth and social wellbeing in the compass of its traditionally understood goals of productive, allocative and dynamic efficiency and/or (narrowly-defined) consumer welfare. We will explore this question by first conceptualising the various strategies of bringing together the RTF rhetoric with the avowed priorities of competition law. We then explore the potential of competition law to accommodate the strategies on offer.

4.1 The “Spheres” of RTF and Competition Law: Separate or Integrated?

Assuming that the question of the nature of the RTF is settled, the function of the RTF still needs to be delimited. Is it to provide the right-holder control over another’s duty and, consequently, preserve the control of the right-holder over her/his choices, as the ‘theory of rights’ puts forward, or is it to promote the right-holder’s interests, for instance in the context of some utilitarian trade-off? One may expect in some cases that these two functions of rights would coincide in which case it may be possible that the specific right fulfils both functions and protects interests and choices.

Rights, of course, may seek to provide the starting point for some form of utilitarian calculus, allocating resources to some actors in order to enhance their role in a subsequent exchange (one may think of property rights as an illustration). Rights may also be perceived as being of deontological nature, excluding certain spheres of justice from the utilitarian calculus and more generally from economic analysis. Nozick’s non-consequentialist perception of moral rights as absolute “side constraints” on action¹³⁴ and his absolute prohibition on trade-offs involving rights between actors acting within the constraints imposed by rights provides an absolutist illustration of the ‘separability’ thesis.

Scholars highlighting the existence of alternative ‘economies of worth’ explain that these encompass a plurality of forms of justification for human action at the level of different ‘polities’ and ‘common worlds’.¹³⁵ In a same ‘common world’, people share the same worth. In such situations, disagreement may be resolved through a ‘test of worth’. However, it is more difficult to resolve disagreements when people invoke different orders of worth, which entails

¹³⁴ R. Nozick, *Anarchy, State and Utopia* (Basic Books, 1974), 28-35.

¹³⁵ L. Boltanski and L. Thévenot, *On Justification: Economies of Worth* (Princeton University Press, 2006).

making compromises between them. Compromises between orders of worth are likely to always remain problematic and subject to criticism. It may be possible to arrive at an agreement while still preserving the boundaries of different ‘spheres of justice’ if we are to understand the process, through which members of the larger community within which the spheres exist, develop diverse criteria for evaluating diverse social goods.¹³⁶ Such an agreement, however, is likely to be more abstract than concrete.

An alternative strategy is that of integrating the various ‘spheres of justice’ or ‘economies of worth’ into a single reference framework, thereby, facilitating the commensurability of the two. This is not an easy task and would require a great level of abstraction and axiomatisation that may not necessarily be implemented by existing institutions as it may demand new forms of expertise. In the present case, this means integrating the RTF into the economic welfare perspective taken by modern competition law.

Pigou, the successor of Marshall at the Chair of Economics at the University of Cambridge in the early 20th century, presented a possible strategy for such integration. He defined ‘economic welfare’ narrowly as the purely economic or material part of a hierarchy that proceeded from a material end of a scale, which included goods essential for survival and health, such as “food, clothing, house-room and firing”, followed by other ‘necessaries’ and finally by purely non-economic or non-material products (i.e. ‘professional services’) at the other end of the scale.¹³⁷

His measure of the increase of welfare was heavily biased towards re-distribution in favour of the poor so that they could satisfy more of their material needs (not wants). He proceeded on the assumption that a pound was worth more to a poor person than to a rich one (the extended law of ‘diminishing marginal utility’) and was of the view that policies that increased the “national dividend” or national product, while not leading to a fall of the absolute share accruing to the poor or policies that shifted the distribution of the dividend towards the poor, without decreasing the total dividend would increase material welfare.

This premise relied on a specific concept of ‘utility’, which is different from that of the ordinalist school that has since prevailed in neoclassical economics. The economists of the ‘material welfare’ school perceived utility objectively, as socially useful for the material wellbeing of an individual (or people), and, thus, related to the *needs* of the individual as defined by the material end of the hierarchy of goods or satisfactions (i.e. products essential for the survival and health of the human race prior to any other kind of products). On the contrary, ordinalists perceive utility as a subjective concept, what Pareto called ‘ophelimity’, understood as the capacity to satisfy the *desires* of an individual, whether legitimate or not. This led to different views over the possibility of interpersonal comparisons of utility, which were deemed possible by the likes of Pigou whilst being deemed impossible by ordinalists.

However, proponents of the material welfare school were of the view that the transference of income from a relatively rich person to a relatively poor person would increase the aggregate level of economic welfare because it would enable the latter to satisfy more intense needs. Of course, the material welfare school also acknowledged the need to take into account the deleterious effects of these transfers on incentives. Also, for the material welfare school, these comparisons of utility were not made between specific persons but between classes of people,

¹³⁶ M. Walzer, *Spheres of Justice: In Defense of Pluralism and Equality* (Basic Books, 1983).

¹³⁷ A. Pigou. *The Economics of Welfare* (Macmillan and Co., 1932).

sociological categories such as ‘poor’, ‘rich’, ‘consumers’, ‘producers’. These comparisons, therefore, described averages rather than specific individuals.

Hence, it was possible to compare the relative welfare of two individuals, after locating their positions in a hierarchy, where the welfare of those deprived of ‘necessaries’, such as food, weighed more than the welfare of someone deprived of an allegedly less materially important commodity, such as a luxury good or entertainment. Focusing on *desires* and applying the same utility analysis for any type of good, to the extent that these are considered scarce for the purpose of satisfying the individual’s desires, led ordinalists to regard utility as relating to preferences, objectively observed through behaviour in the marketplace. Since one cannot observe the satisfaction enjoyed by other people, the extended law of diminishing marginal utility could not be justified as it involved “an element of conventional valuation” and was, thus, “essentially normative”.¹³⁸

Alternative views emphasising justice, rather than just wellbeing, introduce the concept of ‘primary social goods’ designed to measure the relevant wellbeing in a society.¹³⁹ Such goods are defined as “all-purpose”, in the sense that these are things a person wants, whatever else he wants, which offer a basis for social agreement on which one may discuss matters of social responsibility.¹⁴⁰

The right to have access to food is also an important concern for alternative approaches to welfare than that of the classic actual or revealed preferences, such as the ones stated in the objective list of preferences (or capabilities) approach. Sen has put forward the view of wellbeing mainly in terms of a person’s capabilities and the “functionings” an individual achieves, i.e. what the person does and experiences.¹⁴¹ According to Sen, being well-nourished constitutes a “functioning” with which social policy should directly concern itself by providing individuals with a “capability” to achieve a certain form of “functioning”. The focus on the promotion of capabilities, rather than on providing resources or assistance to functionings directly leaves an important space to be occupied by individual choice, which seems, at first instance, to be compatible with the logic of markets.

Achieving conciliation between the various values pursued may, thus, take different forms, the choice eventually reflecting a number of considerations, including those of institutional capacity that we have highlighted previously. Tools of analysis of conflicts may range from lexicographic/serial order approaches¹⁴² to the constitution of “prioritarian social welfare

¹³⁸ L. Robbins, *An Essay on the Nature and Significance of Economic Science* (Macmillan & Co., 1932), 141.

¹³⁹ J. Rawls, *A Theory of Justice* (Harvard University Press, 1971).

¹⁴⁰ J. Rawls, “Social Utility and Primary Goods”, in *Utilitarianism and Beyond* (edited by A. Sen and B. Williams, Cambridge University Press, 1982), 159.

¹⁴¹ A. Sen, *Commodities and Capabilities*, (North-Holland, 1985), , which advances the moral significance of individuals’ capability of achieving the kind of lives they have reason to value. For a different objective list approach see, M. Nussbaum, *Creating Capabilities: The Human Development Approach*, (Harvard University Press, 2001), 416-418. For Sen, wellbeing depends on the agent using these capabilities, while for Nussbaum this is not essential, her point being that there is cross-cultural agreement enabling us to form an objective list. Being well-nourished is, of course, an essential component of wellbeing, in particular ensuring bodily health.

¹⁴² Rawls, (139), 38, defines lexicographical or serial/lexical order as following: “this is an order which requires us to satisfy the first principle in the ordering before we can move on to the second, the second before we can consider the third, and so on. A principle does not come into play until those previous to it are either

functions” in order to provide “distributional weights” that will provide more weight to utility changes affecting individuals whose RTF has been denied (because, for instance, they are malnourished), as compared to individuals operating at higher utility levels.¹⁴³

These debates show that there are various strategies that may be deployed in implementing the RTF. Some focus on the need to preserve the boundaries of each of these separate spheres while ensuring their communication and congruent development. Others envision procedures or theoretical constructs that enable the mutual integration of values, thus, providing a wide field of possible experimentation in line with the strategies for the development of ‘polycentric competition law’.¹⁴⁴

The concept of polycentric competition law aims to help us understand the necessary interplay between these different (legal) institutions and fields of justification. At an abstract level, there are various strategies to organise this interplay and ensure effective problem-solving. As one of the authors has explored in another work, one may refer to the concept of ‘framing struggles’, which starts from the premise that there may be alternative approaches from different institutional arenas that could be relevant in a problem-solving activity, in particular when activities sit at the intersection of multiple institutional spheres, in our case the right to food and human rights law, competition law or economic regulation. One may expect a clash of institutional logics, to the extent that the solution to the problem may be different, although not necessarily diverging, should one choose one or another of these legal spheres. The issue may in this case lead to a framing struggle to determine the dominant logic that will prevail in the specific decision-making context. In other words, framing the issue as pre-eminently a right to food/ global justice issue or a competition law issue may have implications, as the institutional logics and overall values of each of these legal spheres are not similar. Alternatively, one may want to borrow instruments and/or the overall logic from a different institutional realm and transplant them back, “repurposing them for the occasion”,¹⁴⁵ thereby, leading to “cross-institutional isomorphism”.¹⁴⁶

Another approach may be the integration of multiple frameworks that articulate and maintain “alternative conceptions of what is valuable or worthy”.¹⁴⁷ Relying on “multiple principles of evaluation in play”, these multiple institutional frameworks can be used as problem-solving resources (i.e. ‘multiple performance’). These could, for instance, involve an alchemy of various values and tools coming from different legal fields and disciplines and the establishment of meta-values and meta-principles that would enable commensuration, or could account for the diversity of values or orders of worth in productive friction by preserving and

fully met or do not apply. A serial ordering avoids, then, having to balance principles at all; those earlier in the ordering have an absolute weight, so to speak, with respect to later ones, and hold without exception. We can regard such a ranking as analogous to a sequence of constrained maximum principles. For we can suppose that any principle in the order is to be maximised subject to the condition that the preceding principles are fully satisfied”.

¹⁴³ See M. Adler and C. Sanchirico, “Inequality and Uncertainty: Theory and Legal Applications”, (2006) 155 *University of Pennsylvania Law Review*, 279; M. Adler, “Future Generations: A Prioritarian View”, (2009) 77 *George Washington Law Review*, 1478.

¹⁴⁴ See I. Lianos, Polycentric Competition Law, (2018) 71(1) *Current Legal Problems*, 161.

¹⁴⁵ M. Granovetter, *Society and Economy* (Harvard University Press, 2017), 172.

¹⁴⁶ *Ibid*, 175.

¹⁴⁷ D. Stark, *The Sense of Dissonance: Accounts of Worth in Economic Life* (Princeton University Press, 2009), 5.

promoting spaces of polycentricity (or polyarchy), where the values and principles of multiple spheres will be implemented, eventually through some form of lexicographic approach¹⁴⁸.

The richness of the institutional options to accommodate alterity, in terms of regulatory values, is not often understood by dogmatic legal research. Much like the incongruence between the values of mainstream competition law and the RTF discussed above, there has been a quite voluminous debate on the possible tension between the values of international trade as represented by the World Trade Organization ('WTO') and human rights as well as the underlying purposes of the two regimes.¹⁴⁹ Indeed, reacting to the efforts made by some trade law scholars to enforce human rights through the WTO, on the basis of a constitutional ordoliberalism inspired perspective,¹⁵⁰ Alston has cogently argued that rights conferred to traders by the WTO are simply not analogous to human rights due to their fundamentally different rationale.¹⁵¹ "Human rights are recognised for all on the basis of the inherent human dignity of all persons. Trade-related rights are granted to individuals for instrumental reasons. Individuals are seen as objects rather than as holders of rights. They are empowered as economic agents for particular purposes and in order to promote a specific approach to economic policy, not as political actors in the full sense ... nor as holders of a comprehensive and balanced set of individual rights. There is nothing, *per se*, wrong with such instrumentalism but it should not be confused with a human rights approach".¹⁵²

These debates constitute an example of the 'framing struggles' that so often characterise the interaction between 'absolutist' doctrines emphasising the maximisation or the implementation of a dominant value, often to the detriment of others that are considered 'external' to the DNA of the specific discipline or area of law. However, as we indicated above, this is only one of the possible strategies, which, therefore, leaves open other possible avenues of experimentation and in-between thinking across different legal but also disciplinary fields.

Establishing the link between the human right-based logic of the RTF with the welfarist approach followed by competition law is not only a conceptual and methodological challenge. The implementation of the RTF through competition law may be hampered by the usual reservations expressed to the adjudication of socio-economic rights. First, the polycentricity of the issues raised by the integration of the values catered by the recognition of the RTF in the context of a competition law dispute, to the extent that, as we explained above, these may relate to both demand-side and supply-side dimensions.¹⁵³ Second, the usual reticence of courts to adjudicate socio-economic rights when this involves difficult decisions over resource allocation in the absence of democratic legitimisation to decide such matters. Third, the difficult question of the horizontal effect of socio-economic rights, to the extent that these may impose

¹⁴⁸ For a discussion, see I. Lianos, "Polycentric Competition Law", (2018) 71(1) *Current Legal Problems*, 202 seq.

¹⁴⁹ Joseph, (82), 36.

¹⁵⁰ See E. Petersmann, "The WTO Constitution and Human Rights", (2000) 3 *Journal of International Economic Law*, 19; E. Petersmann, "Human Rights and International Economic Law in the 21st Century. The Need to Clarify their Interrelationships", (2001) 4(1) *Journal of International Economic Law*, 3; E. Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration", (2002) 13(3) *European Journal of International Law*, 621.

¹⁵¹ P. Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann", (2002) 13 *European Journal of International Law*, 825.

¹⁵² *Ibid*, 826.

¹⁵³ This concern originated in L Fuller, "The Forms and Limits of Adjudication", (1978) 92 *Harvard Law Review*, 353.

duties, not only on the state, but also on private parties. Last, beyond the issue of justiciability, one may also envisage possibilities for adjudicating non-justiciable socio-economic rights, following the example of some constitutional courts,¹⁵⁴ in view of the pervasive inequalities observed in the implementation of the RTF for the populations of developing and developed countries, the structural vulnerability from which a significant percentage of the human population suffer in terms of hunger and malnutrition and the extreme bargaining differential between developing countries' consumers and/or farmers and the lead firms dominating the various global FVCs upon which they depend.

The issue of the horizontal (third-party) effect of the RTF is particularly important in the context of competition law to the extent that the RTF would give rise to correlative duties on the private actors that have been found to simultaneously infringe competition law and jeopardise the right to food. While the horizontal effect of social rights (as well as more generally fundamental rights and freedoms) has been accepted in some legal orders,¹⁵⁵ it is still a relatively marginal view in others.¹⁵⁶ The issue may be raised in view of the relatively vague nature of the RTF, which, depending on the perspective one takes on theories of rights, may be understood as imposing correlative duties and obligations on specific duty-bearers, in this case the states that have committed to its implementation, as proponents of the 'will' theories of rights would have argued, or may give rise to more general claims over the attention given to the interests of the right-holders without these necessarily being prescribed to specific duty-holders and giving rise to determinate duties, as the proponents of the 'interest' theories of rights would submit.¹⁵⁷ Should one adopt the 'interest' theory of rights, it would probably be easier to conclude that the RTF should have an effect on the private actors involved in the production and distribution of food. However, we believe that one need not necessarily invoke the third-party effect of the RTF to come to this conclusion.

In fact, as mentioned above, food production and distribution are managed by a global food system, which is dominated by a transnational model dominated by global FVCs managed by lead firms. These lead firms exercise an almost regulatory function in these global value chains as they decide who does what, who gets what asset of production and how the surplus value generated by the chain is allocated amongst its members. This private and transnational form of government should not escape scrutiny for the simple reason that the RTF was initially conceptualised as targeting states. The presence of network effects in digital agriculture and the risk that global food production will be managed by a small number of unaccountable global

¹⁵⁴ See, for instance, E. Christiansen, "Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court", (2007) 38 *Columbia Human Rights Law Review*, 321; S. Liedenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (Juta & Co Ltd., 2010).

¹⁵⁵ See, for instance, in Germany, on the third-party effect (termed 'Drittewirkung'), C. Starck, "Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court" in *Human Rights in Private Law* (edited by D. Friedmann and D. Barak-Erez, Hart Publishing, 2001), 97. For an EU perspective, see A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006); E. Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union – A Constitutional Analysis* (Oxford University Press, 2019). For an international law perspective, see S. Gardbaum, "The 'Horizontal Effect' of Constitutional Rights", (2003) 102 *Michigan Law Review*, 387-459; J. Ruggie, "Protect, Respect, and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises", (2008) 3(2) *Innovations, Technology, Governance, Globalisation*, 189.

¹⁵⁶ See the discussion in J. King, "Social Rights in Comparative Constitutional Theory" in *Comparative Constitutional Theory* (edited by G. Jacobsohn and M. Schor, Cambridge University Press, 2018), 162-164.

¹⁵⁷ For a discussion of these general theories of rights, see *ibid*, 148-149.

oligopolies that benefit from an entrenched position of power and a limited degree of competition are additional arguments that support adopting a broader perspective on duty-bearers for the bundle of rights recognised by the RTF. Similar arguments have been made with regard to fundamental rights and the Internet, which is also dominated by digital platforms controlling global digital value chains.¹⁵⁸

Having made the argument that the RTF and competition law may not be conceptualised in complete isolation from each other, we turn to an illustration of what may be possible by looking to the debate initiated by the intersection of international trade, competition law and the right to health.

4.2 An Illustration of the Possible: The International Trade-Right to Health Debate

4.2.1 *The Nexus Between the WTO TRIPS Regime and International Human Rights*

4.2.1.1 *The WTO Framework*

The trade and human rights debate suggests that international human rights may, sometimes, bite and prevail over WTO norms or, at the very least, operate as broad interpretative principles capable of providing valuable guidance for the interpretation of WTO norms and the duties and rights conferred on trade parties in the WTO regime. This is the case despite the fact that with the establishment of the WTO, the international trade system included, for the first time, a quasi-judicial dispute settlement mechanism, binding upon WTO Members, which allowed economic sanctions to be imposed on states that failed to comply with the disciplines imposed on them and, thereby, was believed to create an imbalance between the commitments of states under the WTO framework and their other international obligations, including those under human rights treaties.¹⁵⁹

Whilst the design of the WTO regime suggested that in case of the conflicts between trade and human rights obligations, states were likely to prioritise their duties under the WTO, actual experience reveals that a human rights norm is more likely to prevail over a WTO norm. This is partially because there is nothing in the WTO and human rights regimes that makes them inherently incompatible with each other. It is also partly due to the fact that whilst human rights are goals or *ends in themselves*, free trade rules are *means* by which certain ends, including ends that are may support or even equate with human rights (such as, according to the WTO preamble: sustainable development, raising standards of living and ensuring full employment), may be achieved. Indeed, this position was affirmed by Lamy, the Director General of WTO from 2005 to 2013, in a speech in 2006, in which Lamy stated that “the WTO is not more important than other international organisations and WTO norms do not necessarily supersede or trump other international norms”.¹⁶⁰

States themselves declared the primacy of their human rights obligations in the Vienna Declaration and Plan of Action of 1993, Article 1, which proclaims that human rights are “the first responsibility of governments”. Unfortunately, however, the alleged primacy of

¹⁵⁸ G. Teubner, “Horizontal Effects of Constitutional Rights in the Internet: A Legal Case on the Digital Constitution”, (2017) 3 *Italian Law Journal*, 193.

¹⁵⁹ Joseph, (82), Foreword.

¹⁶⁰ P. Lamy, “The WTO in the Archipelago of Global Governance”, (2006) Speech at the Institute of International Studies, UC Berkeley.

international human rights law has not generally been reflected in state practice.¹⁶¹ Whilst this may partly be attributed to a *de facto* relationship developing between the WTO and international human rights regimes due to the dispute resolution mechanisms provided in the former, it is also due to states perceiving the existence of a greater self interest in complying with the trade system than with human rights regimes.¹⁶²

4.2.1.2 From the Right to Public Health to the Right to Health

Interestingly, however, human rights bodies have been more bullish than WTO Panels and the WTO Appellate Body in asserting the primacy of their regime over other legal regimes. For instance, the ICESCR Committee has noted that states must take their ICESCR obligations into account when entering into treaties or joining international organisations. For instance, in General Comment 14 on the Right to Health, the Committee states that “in relation to the conclusion of other international agreements, states parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health”. Therefore, according to the Committee, a state should take its ICESCR obligations into account in joining the WTO, when negotiating rules in the WTO, when seeking to enforce those rules and when implementing them domestically. Thus, under international human rights law, it is safe to assume that WTO obligations do not absolve a state from its human rights obligations if both sets of obligations should clash.¹⁶³

A number of provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the ‘TRIPS Agreement’) directly affect public health interests.¹⁶⁴ The TRIPS Agreement does not explicitly refer to the ‘right to health’ but it mentions the “right of WTO Members to adopt measures necessary to protect public health provided such it is consistent with the agreement”.¹⁶⁵ In fact, the Doha Declaration on the TRIPS Agreement and Public Health was adopted, in part, to clarify that the right to protect public health plays an essential role in the interpretation of the agreement.¹⁶⁶ In any implementing action under the TRIPS Agreement and in any dispute settlement proceeding, this ‘right to protect public health’ must be acknowledged and given effect.¹⁶⁷

The TRIPS Agreement also expressly addresses competition issues¹⁶⁸ and, thereby, operates as a meeting point for IPRs and competition issues, while also recognising the right of states to protect public health. The TRIPS Agreement provides WTO Members with discretion in the

¹⁶¹ Joseph, (82), 49-50.

¹⁶² *Ibid*, 50.

¹⁶³ *Ibid*, 54.

¹⁶⁴ F. Abbott, “TRIPS and Human Rights: Preliminary Reflections in International Trade and Human Rights, Foundations and Conceptual Issues”, in F. Abbott, C. Breining-Kaufmann & T. Cottier, eds., *International Trade and Human Rights: Foundations and Conceptual Issues*, University of Michigan Press, 2006, p. 145.

¹⁶⁵ Article 8(1) of the TRIPS Agreement.

¹⁶⁶ F. Abbott, “The Doha Declaration on the TRIPS Agreement and Public Health: Lighting a Dark Corner at the WTO”, (2002) 5 *Journal of International Economic Law*, 469.

¹⁶⁷ F. Abbott, “The ‘Rule of Reason’ and the Right to Health: Integrating Human Rights and Competition Principles in the Context of TRIPS” in *Human Rights and International Trade* (edited by T. Cottier, J. Pauwelyn, and E. Bürgi, Oxford University Press, 2005), 284.

¹⁶⁸ Articles 8.2, Article 40 and Article 31(a) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS Agreement’) are particularly relevant in this regard.

development and application of competition law to arrangements and conduct in the field of IPRs,¹⁶⁹ and as with the other provisions of the TRIPS Agreement, it may be argued that the competition law provisions should also be interpreted in conformity with the commitment in the TRIPS Agreement to protect public health.

Beyond the intersection, within the TRIPS Agreement, of provisions on IPRs with the right (of states) to protect public health, one may also refer to the broader international treaties' ecosystem, for instance in the domain of human rights, that may also be relied upon when interpreting or implementing the provisions of the TRIPS Agreement, including its competition law-related provisions. It is important to refer to Article 12 of the ICESCR, which recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. It states that steps to be taken by states in respect of implementing this right explicitly include the "prevention, treatment and control of epidemic, endemic, occupational and other diseases"¹⁷⁰ and the "creation of conditions which would assure to all medical service and medical attention in the event of sickness".¹⁷¹

The requirements of Article 12 are further fleshed out in the Committee's General Comment 14 in which the "right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standard of health". Health facilities, programmes and resources (goods and services) must be available, accessible, acceptable and of good quality. Affordability may constitute an element of accessibility. The right includes access to "essential drugs", as defined by the World Health Organisation ('WHO'), of suitable quality on a non-discriminatory basis. In fact, the right of access to such drugs is described as a minimum core obligation and, therefore, a presumptively immediate, rather than progressive, obligation.¹⁷²

A 2006 report by Hunt, Special Rapporteur on the Right to Health, revisited the issue of the "human right to medicines". The WHO list was retained as a starting point for identifying the core obligation of a state in respect of providing essential medicines. However, states also have progressive obligations with regard to the provision of all effective drugs, whether on the list or not. As with all progressive obligations, states should not take retrogressive steps with regard to the availability of such drugs, which may preclude the introduction of a patent regime, which, in turn, would cause prices to skyrocket.

Another core obligation identified in General Comment 14 is to "take measures to prevent, treat and control epidemic and endemic diseases". This obligation is separate to the obligation

¹⁶⁹ Abbott, (164), 286. The text of Article 8.2, for instance, requires that competition measures be 'consistent' with the TRIPS Agreement and suggests that competition law should not be used as a disguised mechanism for undermining the basic rights accorded under the Agreement. Article 40.2 expressly envisions that members may 'specify', in their legislation licensing, practices that "may, in particular cases, constitute an abuse" of IPRs. Furthermore, the Doha Declaration on the TRIPS Agreement and Public Health, [5], has confirmed the flexibility inherent in parallel trade and compulsory licensing rules.

¹⁷⁰ ICESCR 1976, Article 12(2)(c).

¹⁷¹ ICESCR 1976, Article 12(2)(d).

¹⁷² General Comment 14 links the identification of essential drugs to the WHO's list of essential medicines, which has been updated from time to time since its initial adoption in 1977. Only about 5% of drugs on the current list are protected by a patent. One important criterion for inclusion on the WHO list is cost effectiveness. Given that many states cannot afford patented medicines, they are not "cost effective" so they are excluded from the list. The exclusion of patented medicines is caused by their high prices, rather than any lack of comparable (or superior) effectiveness compared to cheaper medicines on the list.

regarding the provision of essential medicines. The Committee has also included the following as examples of state practices that violate Article 14: “the adoption of laws or policies that interfere with the enjoyment of any of the components of the right to health and the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organisations and other entities, such as multinational corporations”.

It is evident that the Committee believes that a state’s acceptance of the TRIPS Agreement or other WTO obligations would breach its ICESCR obligations if fulfilling these obligations would jeopardise enjoyment of the right to health. In an earlier statement, made in 2001, about the relationship between IPRs and other ICESCR rights, the Committee had stated in a more blunt fashion that any IP regime that makes it more difficult for a state to comply with its minimum core obligations in relation to the right to health, food etc. would be inconsistent with the states’ legally binding obligations.¹⁷³

4.2.2 *The Role of Competition Law in Progressively Realising the Right to Health*

In considering the relationship between the right to health, the TRIPS Agreement and its provisions on public health and competition law, Abbott is of the view that practices that have traditionally been associated with abusive licensing, such as exclusive grant-backs and tying arrangements as well as practices related to sales, the marketing of patented and trademarked medicines, the submission of false or misleading information to regulatory authorities regarding the patent status of medicines, may be considered to constitute a *per se* unreasonable interference with the right to health as well as a restriction of competition.¹⁷⁴ He further posits that the human right to health may also potentially inform the rule of reason in the competition law context by integrating into the balancing exercise non-economic interests associated with the bundle of rights, or some of them, recognised by the right to health. Abbott elaborates that the WTO Appellate Body has already adopted a rule of reason approach (albeit indirectly) in cases such as *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*,¹⁷⁵ which suggests that the application of a rule of reason approach may be employed differently when the human right to health is at stake.

Abbott argues that the notion of protecting consumer interests in the competition law context might prove to be “softer” than importing the human right to health. This is because whilst governments are basically free to choose the basis of their competition policy, they are

¹⁷³ Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights E/c.12/2001/15 14 December 2001 <https://www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.15HRIntel-property.pdf> (accessed 1 July 2019).

¹⁷⁴ Abbott (164), 291.

¹⁷⁵ *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, AB-2000-11 WT/DS135/AB/R (12 March 2001). In this case, Canada had claimed an inconsistency in French regulations that banned the import of asbestos-containing products on public health and safety grounds. The panel held that similar cement products with and without asbestos were “like products” from a national treatment standpoint and that the French regulations must, therefore, be considered under an Article XX(b) exception to the General Agreement on Tariffs and Trade (‘GATT’), Article III. The Appellate Body rejected the approach of the panel, saying that it had analysed the question of “like products” too narrowly and indicated that it was important to differentiate between products that will kill you and those that will not, even if they are both used as structural support for buildings and that two functionally equivalent products, one with well-established carcinogens and one without, are not “like products”.

compelled to take the right to health into account in a rule of reason-like analysis because it is established by international law. This might even be seen to limit the flexibility of WTO members in deciding whether to address anticompetitive conduct in the field of the TRIPS Agreement on purely, narrowly-defined, economic efficiency grounds, if this jeopardises the right to health. If the right to health demands progressive realisation and if anticompetitive conduct interferes with that path then members may be obliged to act with the various tools at their disposal, including competition law.¹⁷⁶

Another area in which it is believed that competition law can contribute to the realisation of the right to health is vaccines. From a competitive viewpoint, the vaccine sector is characterised by a stable oligopoly at a global scale, with the first four operators –GlaxoSmithKline, Merck & Co., Sanofi Pasteur and Pfizer – together holding 80% of the overall market.¹⁷⁷ These companies sell their products worldwide and are aligned on tiered pricing policies, i.e. prices layered according to a given set of conditions. The strategy is essentially designed in order to enable the seller to discriminate between its buyers depending on the financial resources of the latter, both in terms of available wealth and (so-called) “willingness to pay”. However, because of the confidentiality of pricing policies adopted by these companies, the vaccine’s demand-side is usually neither able to compare the price that is offered with the ones charged to other customers nor to know of and control the specific reasons for which it has been assigned to a given tier. Also, purchasers do not have any reliable information on the costs incurred by the offer/producer.

This does not necessarily require the balancing of incommensurable values or the development of a common metric of wellbeing that would integrate the different values at play (e.g. economic efficiency, right to food, promotion of innovation etc.) but more simply it could lead to competition law enforcement if a restriction of competition also has the effect of frustrating the aims pursued by another regulatory framework to the extent that the conduct found to be illegal would not have been possible had the market been competitive. Hence, there must be some (loose) causal link between the effects of the restrictive conduct on the right to health and economic concentration or impaired competition for competition law to intervene.

Even more so than the interaction between the right to health and IPRs, which is more conducive to substantive conflicts as IPRs may provide their holders with the power to raise prices without being disciplined by competition and, thus, affect the right to health (its dimension of affordable drugs), the intersection of competition law with the right to health may be less conducive to substantive conflicts in light of their convergent logic to facilitate access to essential medicines and maximise consumer welfare. From this perspective, access to essential medicines, including access to certain vaccines,¹⁷⁸ may be considered as a significant component of the right to health but also as a component of consumer welfare when assessing competition in pharmaceutical markets. An “access to safe, effective, quality and affordable essential medicines and vaccines for all” has been established by the UN as a specific target within its sustainable development goals to be achieved by 2030.¹⁷⁹ This access to essential

¹⁷⁶ Abbott (164), 294.

¹⁷⁷ G. Pitruzzella and L. Arnaudo, “On Vaccines, Pharmaceutical Markets and a Role for Competition Law in Protecting (Also) Human Rights”, (2017) 38(8) European Competition Law Review, 347-352.

¹⁷⁸ World Health Organisation (‘WHO’), “WHO Model List of Essential Medicines”, (2017).

¹⁷⁹ See K. Buse and S. Hawkes, “Health in the Sustainable Development Goals: Ready for a Paradigm Shift?”, (2015) Globalization and Health, 1 seq.; K. Yoo, “Interaction of Human Rights Law and Competition

medicines largely depends on the commercial decisions of pharmaceutical companies, primarily in the area of their pricing strategies. Competition law plays an important role in realising the right to health as it seeks to monitor and curb excessive pricing by dominant undertakings and/or cartel activity.¹⁸⁰ In addition to devising regulation to support the right to health, competition authorities can also engage in advocacy. The European Parliament has noted the positive effects of such combined action in its resolution on access to medicines, in which it “stresses that better regulation will promote competitiveness” and it also recognises the “importance and effectiveness of antitrust tools against anticompetitive behaviours, such as the abuse or misuse of patent systems and the abuse or misuse of the system for authorisation of medicines in violation of Articles 101 and/or 102 of the Treaty on the Functioning of the European Union (“TFEU”).¹⁸¹

4.2.3 Lessons for the Implementation of the Right to Food

The experience of international trade regime, particularly the TRIPS regime, its interaction with the right to health and the role played by competition law in the progressive realisation of the right to health provides interesting and important insights into the potential for the realisation of the RTF. The TRIPS Agreement is particularly relevant for the RTF to the extent that it addresses the protection of plant variety (and also patents and other IPRs, which have become essential in modern agricultural production).¹⁸² The experience with the right to health suggests that, despite the potential for discord between the TRIPS Agreement and the RTF, these provisions of the TRIPS Agreement may be interpreted in a way that is compatible with the realisation of the universal RTF. Furthermore, just as competition law can check and monitor pricing practices in respect of pharmaceutical products, including vaccines and other essential medicines, it can also regulate the markets for plant varieties and/or patents for the benefit of the consumer, intermediary consumers (e.g. farmers) and/or final consumers.

The starting point in this discussion, as in the case of the right to health, is in recognising the flexibility allowed to states in interpreting the TRIPS Agreement in accordance with international human rights and that there is a potential that considerations of international human rights may outweigh those of international trade when it comes to these provisions. The next step is to identify areas in which the TRIPS Agreement and the RTF may interact with each other, such as in the protection of plant varieties. Plant variety protection is a form of IP

Law: The Right to Access to Medicines and Consumer Welfare in the US Pharmaceutical Sector”, (2018) 43(1) Vermont Law Review, 126.

¹⁸⁰ The UK Competition and Markets Authority (‘CMA’) fined Pfizer and Flynn Pharma a total of £89.4 million for excessive pricing of the anti-epilepsy drug, phenytoin sodium: UK Government, “Phenytoin Sodium Capsules: Suspected Unfair Pricing”, (2018) CMA Cases CA98 <<https://www.gov.uk/cma-cases/investigation-into-the-supply-of-pharmaceutical-products>>. The CMA also has an investigation pending against Actavis on the pricing of hydrocortisone tablets: UK Government, “CMA Alleges Anti-Competitive Agreements for Hydrocortisone Tablets”, (2017) CMA Press Release <<https://www.gov.uk/government/news/cma-alleges-anti-competitive-agreements-for-hydrocortisone-tablets>>, while the Italian Competition Authority has already fined Aspen for excessive prices: Italian Competition Authority, “Incremento Prezzo Farmaci Aspen-Inottemperanza”, Decision No. 26432, A480B, Published in Bulletin No. 10/2017.

¹⁸¹ European Parliament, European Parliament Resolution of 2 March 2017 on EU Options for Improving Access to Medicines (2016/2057(INI)), Point 20.

¹⁸² Article 27.3(b) of the TRIPS Agreement. For a critical analysis, see I. Lianos, “The Interaction of Competition, Regulation and IP Rights in Agriculture: Towards a Dynamic Equilibrium?” in *The Interplay Between Competition Law and IP: An International Perspective* (edited by G. Muscolo and M. Tavassi, Kluwer, 2019), 319.

protection granted to those who breed or develop new plant varieties.¹⁸³ It usually has less exclusionary potential than patents in view of some of the flexibility introduced by an international convention, the Union for the Protection of New Varieties of Plants Convention ('UPOV'), adopted in 1961, to safeguard the interests of farmers and breeders with exemptions permitting farmers to save seed from one growing season to another and allowing breeders to use protected seeds for research purposes.¹⁸⁴ In contrast to patents, which are essentially state-sanctioned monopoly rights that may exclude the use of plant genetic resources without a license from the patent-holder, plant variety rights constitute a *sui generis* regime, a unique system that has been specially designed to fit the need of farmers to have access to seeds and, therefore, can be structured to take into account a state's competing obligations to promote and safeguard the RTF (a supply-side perspective on the RTF).¹⁸⁵

Furthermore, competition law can play a role in supporting the realisation of the RTF by regulating the licence fees for utilising plant varieties and/or patents as well as the conditions under which these licenses may be granted.¹⁸⁶ Competition authorities in each state may also evaluate which pricing strategies or conditions may be judged problematic from both a consumer welfare and RTF perspective (a demand-side perspective on the RTF).

5. Conclusion

It is evident from the UN 2030 Agenda for Sustainable Development that global food security remains a matter of urgent and high priority for the foreseeable future and it is, therefore, imperative to discuss creative and innovative mechanisms through which the hunger gap in both developing and developed countries may be addressed.¹⁸⁷

The urgency in this issue is evident from the fact that a few years ago, a number of developing countries, namely, Cuba, the Dominican Republic, El Salvador, Haiti, Honduras, Kenya, Nicaragua, Pakistan, Sri Lanka, Uganda and Zimbabwe, submitted a proposal to the UN General Assembly, calling for a "food security box", which would recognise the specific food security needs and special situations of developing countries. These countries also asked for specific policy instruments, among which was included a policy instrument for protection against monopolies. Specifically, these countries argued that they be given an easily accessible mechanism to protect themselves against the abuse of monopoly power and to seek compensation.¹⁸⁸ Hence, it seems that there is some demand for the implementation of the social minimum required for the proper implementation of the RTF. This can be determined as giving rise to a bundle of food resources that are necessary for a proper healthy subsistence, which

¹⁸³ S. Edwordson, "Reconciling TRIPS and the Right to Food" in Human Rights and International Trade (edited by T. Cottier, J. Pauwelyn, and E. Bürgi, Oxford University Press, 2005), 2.

¹⁸⁴ International Convention of the Protection of New Varieties of Plants, Ger.-Neth.-U.K., 2 December 1961, 815 U.N.T.S. 89 (revised 10 November 1972, 23 October 1978, and 19 March 1991).

¹⁸⁵ Edwordson, (183), 2.

¹⁸⁶ The Indian *Monsanto Cases* are an interesting example of the potential role that competition authorities may play in this regard. However, it remains to be seen whether and the extent to which the Competition Commission of India takes into account the right to food. (Refer to section 3.1 above).

¹⁸⁷ United Nations, General Assembly, "Transforming Our World: The 2030 Agenda for Sustainable Development", (2015) Resolution Adopted by the General Assembly, Goal 2, which is to "end hunger, achieve food security and improved nutrition and promote sustainable agriculture".

¹⁸⁸ United Nations, (92) [85].

may be context-specific (e.g. depending on the climatic zone) if not culturally and community-specific.

To the extent that the production and distribution of food has become transnational and now forms a global food system managed by global FVCs dominated by powerful private actors (global and/or local oligopolies in most segments of the FVC), establishing a situation of structural inequality to which the RTF aims to respond, competition law may play a significant role in facilitating the implementation of the aims of the RTF and in ensuring the proper structural conditions for an efficient and just system of food production and distribution. Whilst the role of competition law in the realisation of the right to food remains underexplored, the case for its greater utilisation draws support and inspiration from the role it has played in relation to the pharmaceutical sector in respect of the right to health. In fact, the experience of the international trade regime, in particular the TRIPS regime, with respect to the right to health and the role played by competition law in the progressive realisation of this right, provides interesting and important insights into the potential for the realisation of the RTF, especially in regard to the need to preserve biodiversity and ecosystem services, which are essential for a sustainable global food system. Competition law offers not only a flexible solution for balancing market exigencies with consumer benefit in the markets for plant varieties or patents; it is also likely to make important contributions towards countering the loss of biodiversity and, thereby, towards a more holistic and a more broadly envisaged concept of consumer well-being far beyond its narrowly-defined focus on product prices, and/or public interest.

In this article we have explored both the theoretical foundations that connect competition law with the RTF and the appropriateness and benefits of employing competition law in service of the RTF. We have argued that such an agenda for competition is neither unprecedented (to the extent that it has been employed in relation to the right to health) nor impossible. Our aim, in undertaking this exercise, has been to argue and demonstrate that competition law has utility beyond the confines of the narrow vision of markets as arenas for price-setting. Competition law is well-equipped to take on the challenges of modern global markets in which the fundamental well-being of consumers, present and future, rather than just their price preferences, are at stake.