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# TRADE-RELATED INTERNATIONAL FOOD SECURITY AND THE DEVELOPING WORLD

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*Taking a historical narrative as a departure point, this article begins by telling the story of how food security has traditionally been understood in the international community and has become intertwined with the rise and fall of agricultural trade under GATT/WTO rules. The different approaches towards food security over the past six decades have ranged from the supply-side to the entitlements-based approach, through the human security and rights-based approaches. It is further argued in this article that trade-related food security operates on two distinct and sometimes unrelated levels. Externally, despite a prevailing view among some Member governments that food security is outside the scope of the WTO and should be kept that way, the Secretariat has pursued food security-related trade links on behalf of the WTO in various international fora. Increasingly, food security is conceived of by the broader international community as a global public good, which calls for a more comprehensive, multi-stakeholder approach towards its regulation and governance, which is a view that is not unanimously held in the WTO. Internally, the WTO legal and policy framework for trade-related food security remains fragmented, inchoate and subject to regulatory capture by Member governments. The current state of trade-related international food security in the multilateral trading system is explored through the incomplete agricultural reform programme, the resort by some key WTO developing and transitional economy Members to public stockholding for food security purposes and domestic food aid, and the disjuncture between some Members' policy on domestic support measures/export restrictions and their participation in global agricultural trade.*

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## I. INTRODUCTION

According to the United Nations, the world population of 7.2 billion is projected to increase by almost one billion people within the next twelve years, reaching 8.1

billion in 2025, and 9.6 billion in 2050.[1] Current estimates from the Rome-based food and agricultural agencies show that approximately 805 million people worldwide – or one in nine of the world's population – were chronically undernourished in the period 2012-2014, the majority of whom live in the developing world.[2]

Over the coming decades, global agriculture faces multiple challenges with food stocks, which are under threat from a multi-dimensional global resource crisis. Given the anticipated rise in population, countries will have to produce more food to feed their burgeoning populations. In addition, there is a higher demand for food as a result of increased incomes, higher protein diets, and the economy of biofuels.[3]

In some developing countries and emerging industrial countries like China, Brazil and India, there has been a downward trend in grain stocks which is linked to increased urbanisation and higher levels of real income and a turn instead towards high protein meat and dairy products.[4] This has affected agricultural production because protein-rich diets require the availability of more arable land and water in order to provide feedstuffs for cattle in pursuit of beef and milk production, thereby competing with cereals production.

Many such countries are locked in fierce competition over dwindling energy and water supplies in a quest to feed their people and alleviate poverty. Added to this, there is a scarcity of arable land for both crops and pastures, and problems persist with access to seeds and the management of agricultural supply chains. These factors when combined with the effects of climate change and other weather-related issues, such as drought and widespread flooding, potential supply

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[1] *World Population Prospects: The 2012 Revision, Highlights and Advance Tables* XV (UN Department of Economic and Social Affairs, Population Division, Working Paper No. ESA/P/WP.228, 2013).

[2] FAO, IFAD &WFP, *The State of Food Insecurity in the World 2014: Strengthening the enabling environment for food security and nutrition* 8 (Rome: UN Food and Agriculture Organization) (2014) [hereinafter *State of the Food Security in the World*].

[3] Mary E. Footer, *Biotechnology and the International Regulation of Food and Fuel Security in Developing Countries in* INTERNATIONAL ECONOMIC LAW, GLOBALIZATION AND DEVELOPING COUNTRIES 331-53 (JULIO FAÚNDEZ & CELINE TAN eds.) (Cheltenham: Edward Elgar) (2010).

[4] For India and China, *see* Gina Kennedy, Guy Nantel & Prakash Shetty, 'Globalization of food systems in developing countries: a synthesis of country case studies' *in Globalization of food systems in developing countries: impact on food security and nutrition*, FAO Food and Nutrition Paper No. 83 at 10 (Rome: UN Food and Agriculture Organization) (2004).

disruptions, increased transportation costs and speculative commodity trading, may lead to precarious situations in terms of trade-related food security.[5]

Among the threats to global food security is the rise in food prices, especially for staple crops like maize, rice, soybean and wheat.[6] People in the developing world are hit hardest by the rising food prices where average expenditure on food forms 60-80% of their household budgets compared to 20% in the industrialised world.[7] Higher food prices due to increased demand for basic food commodities in global markets, notably in respect of cereals, have benefited developed rather than developing country suppliers. This has occurred precisely because many of the latter cannot meet global demand in terms of quantity and price. Perversely, many developing countries and least developing countries ("LDCs") have had to resort to the importation of cereals at high prices in world markets in order to feed their growing populations. At the same time, there are significant concerns about national food security arising from the sheer volatility of world food commodity prices. These relate less to the differing levels of food prices and more to their variability.[8]

Of particular concern in terms of food security is the plight of net-food importing developing countries, the majority of which are located in sub-Saharan Africa. Many of them are agricultural exporters who have seen gains from the liberalisation of agricultural export trade in the 1980s and 1990s as a result of IMF structural adjustment policies. Even so, there have been examples of governments undertaking public policy actions to address domestic food security concerns, which have actually exacerbated global price rises–as has occurred with restrictions on rice exports from Cambodia, China, Egypt, India, Indonesia and Vietnam in 2008.[9] In other cases, government policies have led to shortcomings in ensuring national food security due to insufficient public stock-holdings of staple food

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[5] Susan Prowse, *Responses by the international trade and food aid community to food security in* FOOD CRISES AND THE WTO: WORLD TRADE FORUM 273-297, 275 (BARIS KARAPINAR & CHRISTIAN HÄBERLI eds.) (Cambridge: Cambridge University Press) (2010)[hereinafter PROWSE].

[6] Christopher L. Gilbert, *Food Reserves in Developing Countries: Trade Policy Options for Improved Food Security*, Issue Paper No. 37(Geneva: ICTSD, 2011), *available at* http://www.ictsd.org/downloads/2011/12/food-reserves-in-developing-countries.pdf. [hereinafter GILBERT].

[7] UNCTAD, Anuradha Mittal, *Food Price Crisis: Rethinking Food Security Policies* 1 (2009) (G-24 Discussion Paper Series No. 56).

[8] GILBERT, *supra* note 6, §2.1, High Prices or Volatile Prices?

[9] Brahmbhatt, Milan & Luc Christiaensen, *Rising Food Prices in East Asia: Challenges and Policy Options* 11-12, Paper No. 4498 (Washington, D.C.: World Bank) (2008).

crops or commodities, as has occurred in Malawi and Zambia.[10] A factor that further affects the accessibility of food is the effectiveness of its distribution,[11] which often remains imperfect in many developing countries due to logistical reasons.

Global and national food security developments have led to considerable discussions at the World Trade Organization ("WTO") about the need for greater government intervention in basic commodity markets to guarantee food supplies at reasonable prices to the poorest. However, many developing and least developing country WTO Members continue to pursue food security policies and to take legislative or regulatory action in the domestic sphere, including the use of market intervention techniques, such as public stock-holding, even if they conflict with their own domestic and international trade interests.[12] Many food importing developing countries have seen 'a shift away from national food stocks towards trade-based policies', but this has happened with the onset of a reverse trend whereby many such countries have found foreign markets closed to them, when they have needed them the most.[13]

Not surprisingly, many government trade officials in the developing world remain uncertain about how to integrate food security into the multilateral trading system. They are unsure as to how they can deal with the inconsistencies that arise in securing their own domestic food supplies while encouraging agricultural exports in accordance with WTO disciplines. On top of all this, resorting to humanitarian food stocks, i.e. emergency food aid, by some developing country governments, for vulnerable groups may have a highly distortionary effect on normal supply channels and local markets.[14]

Against this background, the next section tells the story of how food security has traditionally been understood in the international community and at various points in time, has become intertwined with the rise and fall of agricultural trade under the GATT/WTO rules. Of note are the different approaches that have been taken towards food security, which range from the supply-side to the entitlements-based approach, through to the human security and rights-based approaches. Attention is to be paid to the way in which agriculture was effectively kept out of the GATT

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[10] GILBERT, *supra*, note 6, at 18 with reliance on Dana, Julie, Christopher L. Gilbert & Euna Shim, *Hedging grain price risk in the SADC: Case studies of Malawi and Zambia*, 31 FOOD POLICY, 357-71 (2006).
[11] PROWSE, *supra* note 5, at 276.
[12] GILBERT, *supra* note 6, §4. 4, The Balance Between Trade and Food Security Stocks.
[13] *Id.* §1, Introduction.
[14] PROWSE, *supra* note 5, at 277.

1947,[15] and so far has only been partially regulated by the disciplines on agricultural trade under the WTO.[16] Presently, such trade is still subject to the agricultural reform agenda and the Doha Development Round of multilateral trade negotiations ("MTN"), also known as the Doha Development Agenda ("DDA").[17]

Using this historical context as a departure point, there follows an analysis of trade-related food security in the multilateral trading system. It is argued in this article that trade-related food security operates on two distinct and sometimes unrelated levels. On the external plane, despite a prevailing view among some Member governments that food security is outside the scope of the WTO and should be kept that way, the Secretariat has pursued food security-related trade links on behalf of the WTO in various international *fora*. The impetus for this development, which is primarily economic in character, was driven by the global food security crisis that resulted from the global financial crisis of 2007/08.

Food security is being increasingly conceived of as a global public good by the broader international community, and that calls for a more comprehensive, multi-stakeholder approach towards its regulation and governance. However, while the WTO may form a part of that broader international community, it plays a very limited and virtually non-descript role in it. WTO Members fail to recognise the public good aspect of food security or to acknowledge that a collective action approach to trade-related food security may reap benefits for them.[18]

On the internal plane, the legal and policy framework for trade-related food security at the WTO remains fragmented, inchoate and subject to regulatory capture by Member governments, especially when it comes to food security reserves, which are a manifestation of food sovereignty. The reasons for the current state of trade-related food security in the multilateral trading system is

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[15] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, *reproduced in* WTO, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 424-92 (Cambridge: Cambridge University Press) (1999) [hereinafter THE LEGAL TEXTS].

[16] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, *reproduced in* THE LEGAL TEXTS*, id.*, 4-14 [hereinafter WTO Agreement].

[17] WTO Ministerial Conference, Fourth Session, Doha, Qatar, 9-13 Nov. 2001, at which another set of multilateral trade negotiations (MTN), known as the Doha Development Agenda (DDA) because of its emphasis on developing country trade, was launched.

[18] Tim Josling, *The WTO, Food Security and the Problem of Collective Action,* prepared for Conference on Food Price Volatility, Food Security and Trade Policy, World Bank, Washington, D.C., Sept. 18-19, 2014, *available at* http://www.worldbank.org/content/dam/Worldbank/Event/DEC/DECAR-food-conference-sep-2014/DECAR-Food-Conference-Sep18-19-Paper_Josling-The%20WTO%20and%20Food%20security.pdf. [hereinafter JOSLING].

explored through three dimensions: the incomplete agricultural reform programme at the WTO; the resort by some key developing and transitional economy members to public stockholding for food security purposes and domestic food aid, in pursuit of revisionist food sovereignty policies; and the disjuncture between some WTO Members' policy on domestic support measures/export restrictions and their agricultural trade world markets. In the run up to the 2013 Bali Ministerial Conference,[19] the impetus for change did acquire a new, more political focus among WTO Members, who have taken national food sovereignty back and placed it at the heart of the debate about access to adequate food.

A final section sets out the main findings and conclusions from the previous two sections, dealing with trade-related food security on the external and internal planes.

## II. TRADE-RELATED INTERNATIONAL FOOD SECURITY IN HISTORICAL CONTEXT

In the international community, the concept of food security has taken on different meanings at different times over the past seventy years, based on a combination of socio-economic and political factors. It is also apparent that what food security means in terms of the broader, UN-based international community is not necessarily shared by trade diplomats who have been responsible for overseeing the multilateral trading system from the origins of the GATT 1947 to the present day. In each of the following four sub-sections, we shall see that over the course of time, there have been four different approaches to the issue of trade and food security in the international community, which can best be described as supply-side, entitlement-based, human security-orientated and rights-based respectively.

### *A. Food security in the post 1945 period and the supply-side approach*

After the Second World War, President F. D. Roosevelt's call for 'freedom from want' and the emergence of the new science of nutrition were both aimed at 'ensuring humanity's freedom from hunger'.[20] Already, in founding the UN

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[19] WTO Ministerial Conference, Ninth Session, Bali, 3-6 Dec. 2013.

[20] Joint Declaration by the President of the United States of America (Franklin D. Roosevelt) and Mr Winston Churchill representing His Majesty's Government in the United Kingdom, known as the Atlantic Charter, 14 Aug. 1941, US Department of State Bulletin, August 16, 1941, at 125, 55 Stat. 1600 E.A.S. No. 236 /London HMSO 1941 [United States No. 3 (1941), Cmd. 6321]; *see also* D JOHN SHAW, A HISTORY OF FOOD SECURITY: A HISTORY SINCE 1945 at 8 (Basingstoke, Hants./New York, N.Y: Palgrave Macmillan) (2007)[hereinafter SHAW].

specialist agency- the Food and Agricultural Organization ("FAO"), it was recognized that 'freedom from want means a secure, adequate, and a suitable supply of food for every man'.[21] The Constitution of the FAO,[22] established in 1945, endorsed the objective of seeking to free humankind from hunger[23] and added two further objectives. The first was to '[raise] levels of nutrition and standards of living of peoples'.[24] The second was to '[secure] improvements in the efficiency of the production and distribution of all food and agricultural products' and to 'ensure humanity's freedom from hunger'.[25]

Until the 1970s, the approach to food security was very much a functional one, which concentrated on the availability of food and the security of food supplies at the global level. It was reinforced by the idea that in the post-war period, it would also be necessary to support and reinforce the agricultural sector and farmers' production levels for some time to come. This was also the case in many developed countries where adequate food supplies remained a major concern in the post-war period. The situation was made more complex due to the realisation that the state of human nutrition and the prosperity of agriculture in the future, were intertwined with, and dependent upon, the volume of trade. It was therefore necessary to come up with a long-term food and agriculture policy that could not only reconcile the interests of consumers and producers, but also the interests of agriculture and trade.[26]

The failed project to establish an International Trade Organization ("ITO")[27] meant that only the GATT 1947 came into force and was applied, albeit on a provisional basis,[28] until the entry into force of the WTO in 1995. In the post-war

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[21] Final Act and Section Reports, United Nations Conference on Food and Agriculture, Hot Springs, Virginia, 18 May - 3 June 1943 (Washington, DC: United States Government Printing Office, 1943).

[22] FAO CONST. of 1945 (amended) [hereinafter FAO Constitution]. For an overview of the FAO, *see* Jean Pierre Dobbert, *Food and Agriculture in* UNITED NATIONS LEGAL ORDER 907-92 (OSCAR SCHACHTER & CHRISTOPHER C. JOYNER, eds.) (Oxford: Oxford University Press) (1995).

[23] *Id.* Preamble to the FAO Constitution, recital I.

[24] *Id.* recital 2.

[25] *Id.* recital 4.

[26] SHAW, *supra* note 20, at 18.

[27] Final Act and Related Documents of the United National Conference on Trade and Employment, Havana, Cuba, Nov. 21, 1947 to Mar. 24, 1948 with draft *Charter for an International Trade Organisation*, UN Doc. ICITO/1/4 (1948).

[28] MARY E. FOOTER, AN INSTITUTIONAL AND NORMATIVE ANALYSIS OF THE WORLD TRADE ORGANIZATION 16 (Leiden/Boston: Martinus Nijhoff Publishers) (2006) [hereinafter FOOTER].

era, the history of GATT was bound up with the rise and fall of international trade in agricultural products despite the GATT's inauspicious beginnings.[29]

For example, under the original GATT 1947 Article XVI on 'Subsidies' was worded in a manner to only require GATT contracting parties to notify 'any subsidy, including any form of income or price support which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into its territory.'[30] In other words, subsidies were broadly conceived of as any form of governmental support; they mostly related to the agricultural sector concerning the stabilisation of levels of producer income or domestic prices.[31] Furthermore, no distinction was made between export and production subsidies and the weak obligation of 'notification' was honoured more in its breach than in its observance.[32]

Article XVI GATT 1947 was amended at the 1954-1955 Review Session. Section B on 'Additional Provisions on Export Subsidies' added new paragraphs[33] that dealt *inter alia* with: the harmful effects of export subsidies (paragraph 2); the 'avoidance' of export subsidies on 'primary products', which were discouraged rather than banned[34] (paragraph 3); and a prohibition on subsidies 'other than on primary products' (paragraph 4). While the inclusion of paragraph 4 has been seen as a narrowing down and completion of the special treatment of agriculture in the GATT 1947,[35] this is not the case. It was the widespread use of subsidies on agricultural products by the US and European contracting parties, coupled with the politically prohibitive cost of reducing such subsidies by those GATT developed countries, which led to the differential treatment between subsidies on 'primary' and 'non-primary' products.[36] This was to the dismay of developing countries, who

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[29] For details, see *id.*

[30] Article XVI:1 *GATT 1947*, THE LEGAL TEXTS, *supra* note 15, at 445.

[31] Freya Baetens & Holger Hestermeyer, *Article XVI – Subsidies in* WTO – TRADE IN GOODS 365-85, 370-71, ¶ 8 (RÜDIGER WOLFRUM, PETER-TOBIAS STOLL & HOLGER P HESTERMEYER eds.)(Leiden/Boston: Koninklijke Brill N.V.) (2010) [hereinafter BAETENS & HESTERMEYER].

[32] *Id.* at 368-69, ¶ 3.

[33] Article XVI *GATT 1947,* THE LEGAL TEXTS, *supra* note 15, at 445.

[34] BAETENS & HESTERMEYER, *supra* note 31, at 378, ¶ 22. The term 'primary product' is understood as 'any product of farm, forest or fishery, or any mineral, in its natural form as is customarily required to prepare it for marketing in substantial volume in international trade', in accordance with the term provided in the Interpretative Note 2 to Section B of Article XVI *GATT 1947*, THE LEGAL TEXTS, *supra* note 15, at 483-84.

[35] R. Sharma, *Module 4 – Agriculture in the GATT: A Historical Account in* FAO, MULTILATERAL TRADE NEGOTIATIONS ON AGRICULTURE – A RESOURCE MANUAL (2000), *available at* http://www.fao.org/docrep/003/x7352e/X7352E00.htm.

[36] BAETENS & HESTERMEYER, *supra* note 31, at 378, ¶ 22.

felt that the GATT was discriminating against their export trade in primary products.[37]

The details of paragraph 3 and the Interpretative Note *Ad* Article XVI reinforced this idea among many developing countries. This is because of the change brought about in the language of Article XVI:3 GATT,[38] whereby for a contracting party to 'grant directly or indirectly any form of subsidy which operates to increase the export of the primary product from its territory' was made conditional on that contracting party not 'having *more than an equitable share of world export trade* in that product, account being taken of the shares of the contracting parties in such trade in the product during *a previous representative period*'. (emphasis added) Not only was the term 'equitable' inherently vague, but also, the focus on 'a previous representative period' ran the risk of 'fixing trade flows and hence excluding exporting countries which did not previously have a share in the trade in the product concerned'.[39]

At the behest of Brazil and Turkey,[40] safeguarding language was incorporated into the Interpretative Note *Ad* Article XVI:3 to ensure that a contracting party, which had experienced no exports of the relevant product during the previous representative period, would not be precluded from 'establishing its right to obtain a share of the trade in the product concerned'.[41] Even so, a continuing lack of definition of the term *more than an equitable share of world export trade* meant that the term was subject to extensive interpretation over the next two and a half decades,[42] leading to its application on a case-by-case basis. This did not help in creating certainty as to the viability of export subsidies on agricultural products. Furthermore, the final sub-paragraph of the Interpretative Note to paragraph 3 of Article XVI makes it clear that a commodity price stabilisation scheme or a similar scheme, which many developing countries favoured,[43] could still be considered as

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[37] JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 256 (Cambridge, MA/London: MIT Press) (1992).

[38] Article XVI:3 *GATT 1947*, THE LEGAL TEXTS, *supra* note 15, at 445.

[39] BAETENS & HESTERMEYER, *supra* note 31, at 379-80, ¶¶24-25.

[40] Report of Review Working Party III on 'Barriers to Trade other than Restrictions or Tariffs', L/334 (1 Mar. 1955) B.I.S.D. 3S/222, 226, ¶¶18-19 (1955); *see further, GATT, Analytical Index: Guide to GATT Law and Practice*, GATT/LEG/2, 419 (6th ed., 1994) [hereinafter *GATT, Analytical Index*].

[41] Final (unnumbered) part of the Interpretative Note, ¶3, § B, Article XVI *GATT 1947*, THE LEGAL TEXTS, *supra* note 15, at 484.

[42] *See GATT, Analytical Index*, *supra* note 40, at 419-21.

[43] SHAW, *supra* note 20, at 30.

an export subsidy where such a scheme was financed 'wholly or partially […] out of government funds in addition to funds collected from producer'.[44]

Early dispute settlement was another signal that agricultural trade was likely to prove problematic under the GATT 1947. For example, the Netherlands and Denmark brought a complaint against the United States ("US") for a breach of GATT rules concerning dairy quotas in *US – Import Restrictions on Dairy Products*.[45] Following this dispute, which was decided in favour of the two complainants, the US sought and was granted an open-ended waiver under Article XXV:5 GATT 1947[46] from its obligations under the General Agreement.[47] This GATT waiver left the US farm price support system, which had been instituted in the 1930s,[48] largely in place. It also resulted in huge agricultural surpluses where supply outstripped domestic and international demand. It thus helped to create large food stocks in the US government-held inventories that drained financial reserves and led to heated political debate about how to resolve the problem.[49]

Food security too was never a specific concern for the trade diplomats who established the GATT 1947 and the beginnings of the modern multilateral trading system. The Preamble to the GATT 1947 only contains general language, which states that '[the relations of GATT contracting parties] in the field of trade and economic endeavour should be conducted with a view to raising the standards of living'.[50]

A further feature of the post-war era was an emphasis on food sovereignty. Thus, it is not surprising to find by the end of the 1950s, an FAO report on domestic food stocks, which are defined as stocks that are 'held or controlled by governments on a continuous basis and subject to replenishment within reasonable periods' was released.[51] Domestic food stocks were intended to act: i) as a contingency against local food shortages, transport problems and other difficulties in internal distribution; ii) as a reserve against emergencies and other major unforeseen shortages; and iii) as a means to thwart hoarding and prevent excessive

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[44] BAETENS & HESTERMEYER, *supra* note 31, at 379, ¶23.
[45] GATT/CP.6/SR.10, (24 Sept. 1951), GATT B.I.S.D. (1952); *see* ROBERT E. HUDEC, THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY 165-184(New York: Prager Publishers) (1975).
[46] Article XXV:5, *GATT 1947*,THE LEGAL TEXTS, *supra* note 15, at 461.
[47] Decision of 5 March 1955, 3S/32 GATT B.I.S.D., at 35 (1955); *see also GATT, Analytical Index, supra* note 40, at 823, fn. 80.
[48] Agricultural Adjustment Act, 7 U.S.C. 624 (1933).
[49] SHAW, *supra* note 20, at 49.
[50] First recital, Preamble to the *GATT 1947*, THE LEGAL TEXTS, *supra* note 15, at 424.
[51] *National Food Reserve Policies in Underdeveloped Countries*, FAO Commodity Policy Studies No. 11 (1958).

price increase.[52] At the time, such public stockholding which is a particular feature of food sovereignty, excluded food stocks in private hands, or those held by governments for export or for strategic purposes. When it comes to food security in developing countries, 'inappropriate government intervention' in pursuit of public stockholding policies has been a recurring theme that has attracted criticism from some economists because 'it reduces the space left for the private sector' for operation and leads to a 'food dependency culture'.[53]

Simultaneously in the 1950s, the focus moved to the role that surplus domestic food stocks from the developed world could play in developing countries, at both, national as well as international levels. This development went hand-in-hand with the movement from 1930s onwards to ensure food security in the global grains market. This was done by means of consecutive international wheat agreements ("IWAs"),[54] which were based on multilateral contracting. These commodity agreements guaranteed IWA exporting members, supplies of wheat subject to a maximum price, with importing countries being guaranteed purchases at minimum prices.[55]

By the beginning of the 1960s, the dominant feature of the food and agricultural market remained the persistent over-production and export of wheat, in excess of effective demand which was reflected in ever increasing wheat stocks.[56] Despite its potentially distortionary impact on local market prices,[57] early post-war provision of food in kind (food aid) to developing countries had its origins in surplus wheat stocks.

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[52] SHAW, *supra* note 20, at 58.

[53] *See*, *e.g.*, GILBERT, *supra* note 6, § 4.6, Markets and Food Security, who explains that this can happen where a government intervenes to prevent 'hoarding' (private traders withholding inventory so as to drive up prices) or where the private sector fails to contract for additional supplies in advance. Consequently, government intervention may end up limiting the private sector to servicing the government, the World Food Programme (WFP) or other agencies rather than directly serving the consumers themselves; *see also id.*

[54] A series of multilateral cooperation instruments on wheat or so-called International Wheat Agreements, have been in operation since 1949 (revised in 1953, 1956, 1959 and 1962 for the grains trade and since 1967 for food aid matters); for a historical overview, see the International Grains Council, *available at* http://igc.int/en/downloads/brochure/gen08094rev2.pdf.

[55] *See* GILBERT, *supra* note 6, ¶ 3.2, Multilateral Contracting, and references contained therein.

[56] *See* FAO Group on Grains, *Review of the World Wheat Situation*, 3rd Report, FAO, Apr. 1960.

[57] PROWSE, *supra* note 5, at 276-77.

Throughout the latter part of the 1950s and the 1960s, the US and Canada sought to share the burden of providing food aid together with other major industrialised grain importing and exporting countries, especially in Western Europe[58] and Japan, which had previously provided little or no food aid.[59] For example, in the US, the Agricultural Trade Development and Assistance Act of 1954 (Public Law 480 or PL 480) was adopted by Congress.[60] It authorised the US Department of Agriculture to enter into concessional sales, i.e. long-term credit of agricultural commodities on a non-commercial basis, to developing countries and private entities and, wherever required, to donate directly for emergency relief and development. It also allowed the US Administration to provide government-to-government grants of agricultural commodities tied to policy reform. PL 480 thereby solved the paradox of what to do with the US surplus grain stock and how to address the problem of global hunger and malnutrition.[61]

Due to an increased demand for food commodities, in particular from the Indian subcontinent, and a decrease of global food stocks in the early 1960's, there was an increase in the price of such commodities in world markets and reduced availability of food surpluses. Recognising that the ultimate solution to the problem of hunger lay in the utilisation of food surpluses for multilateral development, the UN General Assembly in 1960 passed a resolution.[62] It recommended that countries provide assistance to food-deficient countries through the UN system and in accordance with the FAO 'principles of surplus disposal'. Countries should therefore take 'adequate safeguards … against the dumping of agricultural surpluses on the international markets' and '*in the recognition that the avoidance of damage to normal trading in foodstuffs will be best assured by multilateral trading practices*'.[63] (emphasis added) Shortly, thereafter, the World Food Programme ("WFP") was

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[58] European Economic Community (EEC) and its member States had accumulated large grain surpluses as a result of agricultural protectionist measures under their Common Agricultural Policy (CAP); *see* SHAW, *supra* note 20, at 74-5.

[59] *Id.*

[60] Agricultural Trade Development and Assistance Act, 7 U.S.C. 1691 (1954); it came to be known as the 'Food for Peace Act'.

[61] SHAW, *supra* note 20, at 49-50; MARK GIBSON, THE FEEDING OF NATIONS: REDEFINING FOOD SECURITY FOR THE 21ST CENTURY 212 (Boca Raton, FL: CSC Press/Taylor & Francis Group) (2012).

[62] Provision of Food Surpluses to Food-Deficient People through the United Nations System, UNGA Res. A/RES/1496 (XV) (Oct. 27, 1960). This UNGA Resolution eventually led to the establishment of the World Food Programme (WFP), which mainly used surplus food commodities for development programmes; for details, *see* SHAW, *supra* note 20, at 100-3.

[63] *Id.* ¶ 9.

established in 1961 by means of parallel resolutions of the FAO[64] and the UN General Assembly,[65] to deal with the utilisation of surplus food stocks. It was initially established on a three-year trial basis[66] and later extended in 1965 on a continuing basis 'for as long as multilateral food aid is found necessary'.[67]

Following a programme of studies, at a time of critical food shortages, which was undertaken by the UN Secretary General, the FAO and the Committee on Commodity Problems,[68] the UN General Assembly adopted a further resolution on multilateral food aid in 1968.[69] The Inter-Agency Study had broken new ground in calling for future multilateral food aid to be given in response to forecasts of developing countries' needs, rather than being governed by the food surpluses of developed countries. It identified four main purposes for which food aid should be given,[70] of which one is significant for our purposes. It relates to the means of arriving at 'economically determined needs', which was understood as that part of the gap between domestic production and total effective demand that a food-deficit developing country could not import commercially without excessively harming its economic development and multipurpose food reserves.[71]

These two UNGA resolutions on food surpluses and multilateral food aid notwithstanding, many developing countries as primary agricultural producers, were affected not only by developed countries' exports of surplus food production, but also by the latter's continued use of various import restrictions. An example of how critical the situation had become was the 1961 case of *Uruguayan Recourse to Article XXIII*,[72] when Uruguay launched a complaint against 15 developed GATT

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[64] FAO, World Food Programme, *Utilization of Food Surpluses*, FAO Conference, Res. 1/61, (24 Nov. 1961).

[65] World Food Programme, G.A. Res. 1714 (XVI) (Dec.19, 1961).

[66] SHAW, *supra* note 20, at 100, who also provides a detailed overview of the US Administration's role in the initial stages of the WFP's formation.

[67] Recommendations by the Intergovernmental Committee to the Economic and Social Council of the United Nations and to the Council of FAO on the Future of the World Food Program, MO/IGC, 7/19, 30 April 1965 (World Food Programme or WFP); *see also* SHAW *supra* note 20.

[68] *Programme of Studies on Multilateral Food Aid*, G.A. Res. 2096 (XX), UN DOC. E/4538 (Dec. 20, 1965).

[69] Multilateral Food Aid, G.A. Res. A/RES/2462 (XXIII), U.N. Doc. A/7427 (Dec. 23, 1968).

[70] SHAW, *supra* note 20, at 104.

[71] *Id.*

[72] Decision of 5 Mar. 1955, 3S/32 GATT B.I.S.D., at 35 (1955) Complaint of 21 Nov. 1961, L/1647 GATT B.I.S.D. (1961); The listing of restrictions on 5 Dec. 1961, L/1662 GATT B.I.S.D. (1961); *Report of the Panel on Uruguayan Recourse to Article XXIII,* L/1923, (15 Nov. 1962) GATT B.I.S.D (1962).; *see* ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW 31-2, 445-6 (London: Butterworths) (1993) [hereinafter HUDEC].

contracting parties.[73] It accused them of maintaining a total of 576 different trade restrictions that affected Uruguayan exports and resulted in an inequality in the terms on which primary producers in the temperate zone participated in world trade. Consequently, it demanded better levels of compliance from developed countries, particularly in agricultural trade. Since Uruguay refused to 'prosecute' its legal claim, backed up by relevant data and legal arguments, the panel noted that 'it was not charged with the examination of broader issues' and instead it made a limited series of recommendations calling for the removal of infringing measures admitted by some of the 15 respondent contracting parties.[74]

However, the complaint by Uruguay served to highlight *inter alia* the damage being done to the existing commercial interests of one developing GATT contracting party by the internal policies of a group of developed GATT contracting parties, the need for a better level of compliance by developed countries generally, and improved compliance in agricultural trade, particularly where it concerned the export interests of a developing country like Uruguay whose export interests, as a primary producer, were almost entirely in one sector.[75]

Shortly thereafter, in the GATT multilateral trading system, the Kennedy Round of Multilateral Trade Negotiations ("MTN") took place from 1963 to 1967. Its aims were to adopt measures that would expand the trade of developing counties as a means of furthering their economic development, eventually leading to the adoption of Part IV of the GATT 1947,[76] to further reduce or eliminate tariffs and other barriers to trade on industrial goods, and to adopt market access measures for agricultural and other primary products, the latter of which was only partially achieved.

In the light of overall inter-agency coordination on multilateral food aid and efforts to assist developing countries in increasing food production, the Kennedy Round

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[73] The following developed countries were the subjects of Uruguay's complaint, namely Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Italy, Japan, Netherlands, Norway, Sweden, Switzerland and the US.

[74] HUDEC, *supra* note 72, at 32.

[75] Uruguay did so with particular reference to the European Economic Community's Common Agricultural Policy (CAP) even though it was the first and last time that the CAP faced a direct legal challenge; *see id.* at 32.

[76] Protocol Amending the GATT to Introduce a Part IV on Trade and Development, (8 Feb. 1965) L/2314 GATT B.I.S.D.13S/2 (1966). This key amendment permitted modification of the most fundamental treaty obligation in the General Agreement (the grant of MFN) by stating that developed contracting parties do not expect reciprocity in the reductions or removal of tariffs and other non-tariff barriers from developing countries, which in turn meant that the latter did not have to reciprocate or at least not fully.

MTN did not deliver anything at all by way of trade-related food security. The GATT Contracting Parties did, however, conclude their negotiations on cereals in May, 1967 and adopted, together with the European Economic Community (and its six original member states) a Memorandum of Agreement on Basic Elements of a World Grains Arrangement,[77] a section of which dealt with international food aid that could be provided either in kind or in cash.[78]

Subsequently, the International Wheat Conference established the text of the International Grains Arrangement in 1967,[79] which consisted of two separate but linked legal instruments – the Wheat Trade Convention, with economic provisions, and the first Food Aid Convention ("FAC"), both from 1968.[80] Under the original FAC, members pledged to provide in-kind, tied food aid as part of their food surplus, totalling up to 4.5 million tons of grain annually to developing countries. They also guaranteed to continue providing minimum food aid even if scarcity forced world grain prices up. However, donor countries were free to decide how to distribute their food aid commitments, some of whom did so unilaterally, e.g. US, Canada and Japan, even though the FAC encouraged all participants to channel some aid multilaterally.

### *B. The world food crisis of the 1970s and the entitlements-based approach to food security*

In the early 1970s, a world food crisis marked by extreme food shortages arose in many developing countries in Africa and parts of Southeast Asia, and was due to a combination of factors. Initially, there were phases of adverse weather conditions that affected agricultural production in several parts of the world simultaneously. At the same time, global cereal production of wheat, coarse grains and rice fell by 33 million tons (approximately three per cent), instead of increasing by 25 million tons (approximately two per cent) as world demand then required. Consequently, a

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[77] Memorandum of Agreement on Basic Elements of a World Grains Arrangement, (30 June 1967) GATT B.I.S.D. 15S/18 (1968).

[78] *Id.* at 22-23, Art. 1,§ V, International food aid.

[79] International Grains Agreement (IGA), done at Washington, D.C., on 15 Oct. 1967, *in force* 1 July 1968, 727 UNTS 3. Founding members of the IGA were Argentina, Australia, Canada, Denmark, Finland, Japan, Norway, Sweden, Switzerland, UK, US and the European Economic Community or EEC (and its six original Member States).

[80] Wheat Trade Convention (with Annexes A and B) (WTC) and the Food Aid Convention (FAC), done at Washington, D.C., on 15 Oct. 1967, both *in force* 1 July 1968, 727 UNTS 8, and 198 respectively. The WTC continued earlier similar agreements and was subsequently replaced in 1971, 1986, 1993 and 1995. The FAC initially had a duration of three years and was subsequently superseded by later conventions that were adopted in 1971, 1980, 1986, 1995 and 1999, mostly with increased tonnages of grain (and latterly cash as well) by donor countries; *see also,* J.H. Parotte, *The Food Aid Convention: its history and scope*, 14:2 THE IDS BULLETIN 10-15 (1983).

drop of about 55 million tons of grain resulted in short supplies and led to increased prices on world markets. In 1974, Bangladesh saw a devastating famine caused by extensive flooding, government mismanagement of grain stocks, and failures in food distribution because of the state rationing system and speculative hoarding by farmers and traders that drove up the price of rice in particular.[81]

As if these events were not enough, very slow progress was made in creating a system of internationally-coordinated cereal reserves to meet crop shortfalls and other abnormal situations. Major grain-producing countries like the US and Canada tried to cope with supply-management measures, but these were usually designed to bring down the large food surpluses that had arisen, as was noted in the previous section. Both governments, therefore, sought to reduce the supply of grain to their own domestic as well as world markets by taking land out of production in so-called 'set-aside' programmes.[82] Finally, despite the fact that developing countries had increased agricultural production, on average by two percent per year over the previous two decades, many of them were still dependent upon imports, either in the ordinary course of trade or in the form of concessional sales under food aid programmes.

When the UN World Food Conference met at FAO headquarters in November 1974,[83] it was specifically to address the world food crisis and to set as its goal the eradication of hunger, food insecurity and malnutrition within a decade. 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'.[84]

While the FAO Council approved an International Undertaking on World Food Security ("International Undertaking"),[85] which for the first time recognised that 'world food security is a common responsibility of the entire international community',[86] its main thrust was on the production of food commodities. Efforts

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[81] Hossain Mahabubu, Firdousi Naher and Quazi Shahabbudin, *Food Security and Nutrition in Bangladesh: Progress and Determinants* 2:2 -E-JOURNAL OF AGRICULTURAL AND DEVELOPMENT ECONOMICS 103-232, 104 (2005).

[82] SHAW, *supra* note 20, at 115-16.

[83] FAO, World Food Conference, Rome, Nov.5-16, 1974, E/CONF.65/20, UN Sales Pub No.E.75.II.A3 at 2 (New York: United Nations, 1975); for details *see*, SHAW, *id.* at 134,139.

[84] Universal Declaration on the Eradication of Hunger and Malnutrition, adopted on 16 Nov. 1974 by the World Food Conference convened under UNGA Res 3180 (XXVIII) of 17 Dec. 1973 and endorsed by UNGA Res 3348 (XXIX) of 17 Dec. 1974, ¶ 1.

[85] Report of the Council of FAO, 64th Sess., Rome, 18-29 Nov. 1974, which includes Res 1/64 International Undertaking on World Food Security, as per the attached Annex [hereinafter *International Undertaking*].

[86] *Id.* ¶ 1.

at improving food security were therefore focused on strengthening the 'food production base of developing countries, appropriate national stock policies, food aid programmes, and other measures including long-term trade agreements'.[87]

Significantly, the *International Undertaking* called upon national governments to act holistically in adopting 'national and international measures to ensure an accelerated growth of food production'. It further endorsed national stock-holding policies, by 'all governments' with specific recommendations on supply and a set of 'Guidelines for establishing and holding [national] stocks'.[88] Similarly, the relevant safeguards called for an integrated approach to avoid 'adverse effects on the structure of production or international trade, paying particular attention to the interests of developing countries heavily dependent on food exports'.[89]

Finally, in 1975 the FAO Conference founded a Committee on World Food Security ("CFS"), as an intergovernmental body,[90] whose purpose was to serve as a forum in the UN system for the review and follow-up of policies concerning world food security. This included maintaining a continuous review of current and prospective demand, supply and stock positions for basic foodstuffs, and making periodic evaluations of the adequacy of current and prospective stock levels in exporting and importing countries in order to meet requirements in domestic and world markets, including food aid requirements, in times of crop shortages and serious crop failure.[91] The CFS was also tasked with overseeing the implementation of the *International Undertaking* by governments and recommending short-term and longer-term policy action to remedy any difficulty foreseen in assuring adequate cereal supplies for minimum world food security.[92]

However, by the end of the 1970s, new concepts about global food security began to appear, following research undertaken by Amartya Sen on the history and causes of famines. According to Sen, 'starvation is a matter of some people not *having* enough to eat, and not a matter of there *being* not enough food to eat'.[93] The reason for this was a breakdown in what Sen called people's 'entitlement', which related to his concept of economic development as a process of expanding people's 'capabilities'.

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[87] *Id.* ¶ 2.
[88] *Id.* § II, ¶ 5.
[89] *Id.* § III, ¶ 7.
[90] The Committee on World Food Security (CFS) was established on 26 Nov. 1975, at the 18th Sess. of the FAO Conference, Res. 21/75, under Article III, ¶ 9 of the FAO Constitution, *supra* note 22, as a committee of the FAO Council.
[91] *Id.* ¶ 5 a) and b).
[92] *Id.* ¶ 5 c) and d).
[93] Amartya Sen, *Ingredients of Famine Analysis: Availability and Entitlements* 96(3) Q.J.ECON.434 (1981).

Sen's theory of so-called 'entitlements' placed an emphasis on food security in terms of the individual's relationship to the commodity of food rather than being about the supply of food *per se*. Accordingly, what we can eat depends on what food we are able to acquire; the mere presence of food in the economy or market place does not automatically entitle a person to consume it. Sen's approach concentrated on 'each person's entitlements to commodity bundles including food', which he defined in terms of ownership rights. Thus, 'a failure to be entitled to any bundle with enough food' resulted in starvation.[94] Entitlement failures could arise either from a decline in initial ownership or endowment, or from a worsening of exchange possibilities such as unemployment, a fall in wages, or a rise in food prices. There was the further issue of uncertainty of command over food when the survival of a person depended on trading non-food goods for foodstuffs.[95] This is an issue that resonates with our contemporary global economy in terms of trade-related food security.

Sen's entitlements approach introduced the dimension of *access* to food into the debate about food security even though his methodology was far from being fully utilised, and was subsequently criticised.[96] The entitlements approach to food security contrasted with other approaches such as the supply-side approach, described in the previous section, because it took account of the distributional patterns that apply in a particular society or in a specific situation.[97] Food distribution ranks alongside income and local market distortions as a key cause of food insecurity in many developing countries.[98]

Moreover, Sen's emphasis on the relationship between food security and a diverse set of policy areas, such as the generation of employment and incomes, the delivery of health care, the stabilisation of food prices, the provision of drinking water, and the rehabilitation of the rural economy, holds great importance. Thus, people's entitlement to food depends not only on the operation of economic forces, including market mechanisms, but also on political forces.[99]

Sen's focus on entitlement also had the effect of emphasizing legal rights. It meant that 'other relevant factors, such as market forces, [could] be seen as operating

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[94] *Id.*

[95] *See* JEAN DRÈZE & AMARTYA SEN, HUNGER AND PUBLIC ACTION104-121 (Oxford: Clarendon Press) (1989).

[96] For a survey, *see* Stephen Devereux, *Sen's Entitlement Approach: Critiques and Counter-critiques* 29(3) OXFORD DEV. STUD., 245-63 (2001).

[97] SHAW, *supra* note 20, at231.

[98] PROWSE, *supra* note 5, at 276.

[99] SHAW, *supra* note 20, at 232.

*through* a system of legal relations, ownership rights, contractual obligations, legal exchanges, etc'.[100] Seen from this perspective, the law could stand between food availability and food entitlement, and 'famine deaths [could] reflect legality with a vengeance'.[101]

Already by 1983, FAO had revised and broadened its concept of food security to incorporate a third dimension of 'securing access to available food,' in addition to ensuring adequate food production and maximising the stability of food supplies. Securing access required that the demand and supply sides of the food security equation be brought into balance. In 1983, the FAO Conference adopted a resolution on World Food Security, which sought 'to ensure that all people at all times have both physical and economic access to the basic food they need'.[102]

The report behind the resolution, which was prepared by Edouard Saouma, former Director General of FAO,[103] was inspired by Sen's work. It distinguished between chronic and transitory food insecurity. The former was defined as 'a *continuously* (original emphasis) inadequate diet caused by the inability to acquire food'. By contrast, the latter was present when there was 'a *temporary* (original emphasis) decline in a household's access to enough food'.[104] This usually resulted from instability in food prices, food production, or household incomes, and in its worst form produced famine.[105]

While significant strides were being made in the context of food security at the international level, GATT rules proved largely ineffective in disciplining key aspects of agricultural trade. Of particular note was the fact that export and domestic subsidies came to dominate many areas of world agricultural trade while the stricter disciplines on the prohibition of quantitative import restrictions, such as those found under Article XI GATT 1947, were frequently flouted. An example of the latter is the case of *Japan – Restrictions on Agricultural Products (*the so-called

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[100] AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 166 (Oxford: Oxford University Press) (1981).

[101] *Id.*

[102] FAO Resolution on Progress in Implementation of the Plan of Action to Strengthen World Food Security, FAO Doc. C/83/29, Rome, FAO, 1983, ¶ 67 [hereinafter *WFS Plan of Action*].

[103] FAO, Committee on World Food Security, Rome, *Director-General's Report on World Food Security: A Reappraisal of the Concepts and Approaches*, CFS.83/4 (1983).

[104] *Id.*

[105] World Bank, *Poverty and Hunger: Issues and Options for Food Security in Developing Countries. A World Bank Policy Study* 49-50(Washington, DC: World Bank) (1986).

*'GATT-12 case')*.[106] In a complaint brought by the United States, the US claimed that Japan maintained quantitative import restrictions on 12 agricultural product categories that were inconsistent with the general prohibition on quantitative restrictions in Article XI:1 GATT 1947.[107] The GATT panel subsequently found ten of them to be in violation of the relevant GATT rules, including Japan's invocation of the agricultural exception under Article XI(2)(a) GATT 1947.[108]

A more interesting aspect of the *GATT-12* case is that it ended a relatively lean period of GATT dispute settlement as far as agricultural trade disputes were concerned. Instead, this particular case had the effect of strengthening 'the role of legalism within the GATT by demonstrating that contracting parties' politically-sensitive domestic programs could be changed through GATT dispute settlement'.[109] A development, not so dissimilar, recently occurred in the margins of the stalled Doha Development Round where the issue of food security came to the fore, based on the push by some developing countries' insistence –India's in particular – on public stockholding programmes. However, on that occasion, political dialogue was used to avoid a complaint being brought under the WTO dispute settlement system (see section IV. B. below). Eventually, the *GATT-12 case*, and others like it, provided a stepping stone towards development of the agricultural reform programme during the Uruguay Round MTN (1986-1994),[110] which tightened up the disciplining of agricultural trade. It was also the beginning of a turn towards a more legal and less political means of resolving some agricultural trade disputes.

### *C. The human security approach towards food security in the 1990s and the move towards agricultural trade reform*

If during the 1980s, the focus shifted on access to food and the importance of well-being that food security provides, by the early 1990's, food security formed part of the overall focus of policy-makers on the alleviation of poverty. It had also

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[106] *See Japan – Restrictions on Certain Agricultural Products* (18 Nov. 1987), L/6253, adopted 2 Feb. 1988, *BISD* 35S/163-245 (1988) [hereinafter '*GATT-12 Case'*]; *see further* HUDEC, *supra* note 72, at 212-17.

[107] Article XI:1, GATT 1947, THE LEGAL TEXTS, *supra* note 15, 437.

[108] *GATT-12 case*, *supra* note 106, ¶¶ 6.1-6.8, 6.9. It should be noted that Article XI:2(c) (i), *GATT 1947*, provides an exception to Article XI:I,*GATT 1947* for certain agricultural quotas, which are necessary to a government programme and which restricts the quantity of a like domestic product.

[109] *See* Erwin P. Eichmann, *Procedural Aspects of GATT Dispute Settlement: Moving towards Legalism* 8 INT'L TAX & BUS. LAW 38 (1990), and note 12 for a list of cases that were brought after the definitive ruling in the *GATT-12 case* was adopted.

[110] World Trade Organisation, Ministerial Declaration on the Uruguay Round*,* 20 Sept. 1986, BISD 33S/19, 25 (1987).

become a broader concern for the international community, especially following renewed famines in sub-Saharan Africa in the late 1970s and early 1980s, notably in Sudan and the Sahel, Uganda, Somalia and Ethiopia. However, such concerns did not lead to any perceived need to change the approach towards food security or to utilise new tools in addressing the issue.

The 1983 FAO resolution on World Food Security had identified three specific aims of food security, namely, 'ensuring production of adequate food supplies; maximizing stability in the flow of supplies; and securing access to available supplies on the part of those who need them'.[111] However, in individual countries these aims needed to be sustainable economically, socially, politically and environmentally and at the same time, preserve the long-term productive capacity of the natural resource base. All three aims could be seriously undermined by *inter alia* the inadequate development, dissemination, adaptation and adoption of agricultural research and technology, environmental degradation, and barriers to trade. In order to avoid or alleviate the risks that endangered food security at the global level, there was a need for greater participation of intergovernmental and UN processes, including better coordination with the FAO and related agencies.

From the mid-1990s onwards, the international community moved in a more coordinated fashion and at the same time reinforced a human security approach to international food security. The term human security is used here to denote interests other than state security that 'are vital, not only for human survival but also for human development'.[112] Such action began with the adoption of the *Rome Declaration on World Food Security* ("the Declaration on WFS") at the World Food Summit ("WFS") in 1996 when FAO Members placed food security at the heart of the organisation's work.[113] The contemporaneous *WFS Plan of Action* reaffirmed the earlier 1983 FAO Resolution on World Food Security, when it stated that food security exists 'when all people at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life'.[114]

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[111] *WFS Plan of Action*, *supra* note 102, ¶ 67.

[112] Anagha Joshi, *Food security in the Great Lakes region: reconciling trade liberalisation with human security goal in* THE CHALLENGE OF FOOD SECURITY: INTERNATIONAL POLICY AND REGULATORY FRAMEWORKS 44-91 (Rosemary Rayfuse & Nicole Weisfelt eds.) (Cheltenham: Edward Elgar) (2012) citing BARBARA VON TIGERSTROM, HUMAN SECURITY AND INTERNATIONAL LAW: PROSPECTS AND PROBLEMS 16-26 (Oxford: Hart Publishing, 2001).

[113] *Rome Declaration on World Food Security* adopted at the World Food Summit, 13 Nov. 1996, Rome Italy [hereinafter *Declaration on WFS*].

[114] *Id.* Art.1.

The *Declaration on WFS* reiterated the need for a peaceful, stable and enabling political, social and economic environment to allow states to give adequate priority to food security and poverty reduction.[115] In order to achieve this, each state should adopt a strategy consistent with its resources and capacities to achieve its individual goals. At the same time, states should cooperate regionally and internationally to organize collective solutions to global issues of food security. The accompanying *WFS Plan of Action* set a target to 'reduce the number of undernourished people to half their present level no later than 2015'.[116]

The FAO continued to provide valuable inputs on the issue of food security by concentrating on strengthening the international knowledge base on food production issues and trade in food and feedstuffs.[117] Simultaneously, a burgeoning number of institutions, including some 30 UN bodies, many bilateral programmes and a number of NGOs developed food and nutrition security objectives of one sort or another. Added to this, there were three regional development banks and the 15 international centres of the Consultative Group on International Agricultural Research ("CGIAR"), all of which undertook activities with a bearing on food security.[118]

Important in this respect is the almost concurrent development in the field of international trade, following the conclusion of the Uruguay Round MTN in 1994 and the establishment of the WTO.[119] Prior to 1995, the GATT Contracting Parties had largely disengaged from liberalising agricultural trade and with it commercial food transactions.[120] Governments of the major food exporting developed countries now saw market globalisation and liberalisation as broadly positive factors, both of which could help reduce fluctuations in food consumption, relieve part of the burden of stockholding and promote economic growth. This not only provided a major opportunity for reaching agreement on fair and free world trade within a liberalising global economy, but it also brought about the first substantive disciplines on agricultural trade in the multilateral trading system.

The Uruguay Round *Agreement on Agriculture* ("AoA")[121] was intended to bring about fundamental reform of the trade in food and feedstuffs in WTO Member

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115 I*d.* Art.3.
116 *Id.* Art.7.
117 SHAW, *supra* note 20, at 349.
118 *Id.*
119 WTO Agreement, *supra* note 16.
120 Ruosi Zhang, *Food Security: Food Trade Regime and Food Aid Regime* 7(3) *JIEL* 565 (2004) [hereinafter ZHANG].
121 Agreement on Agriculture (AoA), THE LEGAL TEXTS, *supra* note 15, at 33-58.

countries so as to correct and prevent restrictions and distortions in world agricultural markets.[122] The *AoA* is aimed at the progressive liberalisation of agricultural trade and expansion of market access by reducing export subsidies and domestic support and bringing about effective tariffs for agricultural products.[123] Key to the agricultural reform process is the push for all agricultural products to be brought under more effective multilateral rules and commitments and to be made subject to a process of 'tariffication' in the same way as manufactures are treated.

The process of tariffication seeks to convert a wealth of agriculture-specific non-tariff measures, such as import bans, quantitative import restrictions, variable import levies, discretionary import licensing, minimum import prices, etc., into tariffs or tariff quotas that afford *an equivalent level of protection.*[124] (emphasis added) Furthermore, no new non-tariff measures may be introduced.[125] As a result of the tariffication process, agricultural tariffs have remained high. Tariff quotas (also called tariff rate quotas or TRQs) made it possible for quantities of a commodity imported before the Article 4.2 *AoA* provision took effect, to continue to be imported duty-free or at a lower duty rate (so-called 'in-quota' quantities). Quantities exceeding the quota would be subject to a higher (often prohibitive) duty rate (so-called 'out-of-quota' quantities).

Initially, the basis and scope for tariff reform of agricultural products was for the simple average tariff to be reduced by 36% for developed countries by 2000 and 24% for developing countries by 2004 while LDCs were not required to make any reduction in tariffs. Furthermore, the so-called 'aggregate measure of support' or AMS, i.e. 'the annual level of support, expressed in monetary terms, [which is] provided for an agricultural product in favour of the producers of the basic agricultural product, or non-product-specific support provided in favour of agricultural producers in general,'[126] was to be reduced by 20% for developed countries by 2000 and by 13% for developing countries by 2004 – again with no reduction required from LDCs.

The AMS includes so-called 'Amber Box' measures. These are all those domestic support measures that are considered to distort production and trade (with some

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[122] *Id.* at 33, Preamble, recital 2; *Id.* at 46-47, Art. 20.

[123] *See* JOSEPH MCMAHON, THE WTO AGREEMENT ON AGRICULTURE: A COMMENTARY (Oxford: Oxford University Press) (2006), chapter 1 *in extenso* for the historical background to the agricultural reform process.

[124] Article 4.2 *AoA*, THE LEGAL TEXTS, *supra* note 15, at 36; footnote 1 to this provision contains a definitive list of non-tariff measures.

[125] *Id.*, with reference to the measures contained in footnote 1.

[126] This is the definition provided in Article 1(a) of the *AoA*, THE LEGAL TEXTS, *supra* note 15, at 33; *see also id.* at 53-54, Annex 3, Domestic Support – Calculation of Aggregate Measurement of Support.

exceptions) and have a direct impact on market and prices and must therefore be reduced.[127] There are also 'Green Box' measures that seek to balance agricultural trade liberalisation and the desire of WTO Member governments to pursue legitimate agricultural policy goals, including non-trade concerns that call for no reductions at all. Instead, Green Box measures are designed to encourage agricultural and rural development and agricultural input subsidies to low-income or resource-poor producers in developing countries, and to offer support to producers in developing countries.[128] Under the *AoA*, the issue of food security – at least as far as LDCs and net-food importing developing countries are concerned – is recognised as a legitimate policy goal and a non-trade concern.[129] The Green Box measures 'allow[s] countries to spend without limit on stocks intended for food security',[130] provided that they do not distort trade, or have only 'minimal, trade-distorting effects or effects on production'.[131] Such food reserves have to be government-funded but must not involve price support.[132]

Additionally, a specific *Decision on Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries* ("NFIDC Decision") was adopted at Marrakesh in 1994.[133] While not pronouncing on the issue of food security, Ministers acknowledged that the agricultural reform process might have consequences for least developed and net-food importing developing countries.[134] They therefore agreed to establish 'appropriate mechanisms' to ensure the continued availability of food aid and to ensure that 'any agreement relating to agricultural export credits makes appropriate provision for differential treatment' for such countries.[135] Given that no concrete measures were adopted to put teeth into the *NFIDC Decision*, it is mostly seen as a best

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[127] Amber Box measures are defined in Article 6 of the *AoA*, THE LEGAL TEXTS, *supra* note 15, 39-40. There are also the so-called 'Blue Box measures', which are Amber Box measures with conditions designed to reduce distortion. Thus, any domestic support that would normally be in the Amber Box is placed in the Blue Box if the support also requires farmers to limit production, as explained in Art. 6:5, *AoA,* THE LEGAL TEXTS, *supra* note 15.

[128] Green Box measures are defined in Annex 2 to the *AoA* on Domestic Support – The Basis for Exemption from the Reduction Commitments*, id*., 48-53, at ¶¶ 2-13.

[129] *See* Preamble, recital 6, Art. 20, *AoA,* THE LEGAL TEXTS, *supra* note 15, at 33, 46-47.

[130] GILBERT, *supra* note 6, Foreword.

[131] Annex 2, *AoA*, THE LEGAL TEXTS, *supra* note 15, at 48, ¶ 1.

[132] *Id.* §§ a, b, ¶ 1.

[133] Ministerial Decision on *Measures Concerning the Possible Negative Effects of the Reform Programme on Least-Developed and Net-Food Importing Developing Countries* (Apr. 15,1994), THE LEGAL TEXTS, *supra* note 15, at 395[hereinafter *NFIDC Decision*].

[134] *NFIDC Decision, supra* note 133, ¶ 2.

[135] *Id.* ¶¶ 3 - 4.

endeavours exercise,[136] and outside the proper remit of the WTO[137]–a view with which this author takes issue (see section IV.A. below).

Meanwhile, non-commercial food transactions in the form of food aid, including concessional sales,[138] which are traditionally seen as trade-distorting and disruptive for local markets,[139] had begun to gain some prominence. One important development in this respect was the adoption of a (revised) International Grains Agreement ("IGA") in 1995, which like its predecessor, consists of two different Conventions. One is the Grains Trade Convention or GTC,[140] which replaced the former IWA. It sought to further international cooperation in the grains trade, to secure the freest possible flow of the grains trade, including the elimination of trade barriers and unfair and discriminatory practices, to contribute to grain market stability, and to provide a forum for exchange of information regarding the grains trade.

The other was the adoption of a revised version of the earlier FAC in 1995,[141] which continued the 'narrow but explicit focus on assuring minimum levels of cereals food aid'.[142] In the spirit of international cooperation, and following a recommendation by WTO Member governments in respect of Least-Developed and Net Food-Importing Developing Countries, at the First Ministerial Conference, held in Singapore in 1996,[143] members of the Food Aid Committee

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136 PROWSE, *supra* note 5, at 278.

137 Christian Häberli, *Food Security and WTO Rules in* FOOD CRISES AND THE WTO: WORLD TRADE FORUM (KARAPINAR & HÄBERLI eds.) (Cambridge: Cambridge University Press)[hereinafter HÄBERLI].

138 Concessional sales usually involve transactions on long-term non-commercial or 'concessional' credit terms and/or sales at purchase prices below market value; *see* ZHANG, *supra* note 120, at 568. *See also, Food aid or hidden dumping? Separating wheat from chaff* 37 Oxfam Briefing Paper No. 7 (Mar. 2005) *available at* http://www.oxfam.org/sites/www.oxfam.org/files/bp71_food_aid.pdf., which is critical of concessional sales at 'below market value'. All too often, these are undertaken by developed countries in order to dump agricultural surpluses and to create new markets for their exports.

139 PROWSE, *supra* note 5, at 277.

140 The Grains Trade Convention (GTC), London, 7 Dec. 1994, *in force* 1 July 1995, 1882 UNTS 195. It covers the trade not only in wheat but also coarse grains such as maize (corn), barley, sorghum and other grains, such as rice and oilseeds and their products, as well as pulses.

141 The Food Aid Convention, London, 5 Dec. 1994, *in force* 1 July 1994, 1882 *UNTS* 185 (FAC 1995).

142 EDWARD CLAY, A FUTURE FOOD AID OR FOOD ASSISTANCE CONVENTION? 19 ODI Background Paper on Food Aid, (Paper No. 6) (July 2010) [hereinafter CLAY].

143 Singapore WTO Ministerial Declaration, ¶ 13, WT/MIN(96)/DEC (13 Dec. 1996) [hereinafter *Singapore Ministerial Declaration*].

decided to open the FAC for re-negotiation. They were encouraged by the WFS, which had met earlier in 1996, and had as one of its objectives in its *WFS Plan of Action* to 'meet the challenges of and utilize the opportunities arising from the international trade framework established in recent global and regional trade negotiations'.[144]

The text of the new FAC 1999 eventually replaced the earlier version of 1995,[145] with its objectives being the contribution to world food security and improvement of the ability of the international community to respond to emergency food situations and other food needs of developing countries. This was to be done by making appropriate levels of food aid available in a manner that was poverty-focused but consistent with agricultural development in recipient countries. The Convention was also to act as a framework for cooperation, coordination and information sharing amongst its members.[146]

The FAC 1999 included both commodity-based commitments as well as value or cash commitments, which for the first time could include transport and other operational costs.[147] The list of products eligible for food aid was extended to cover virtually the entire range of commodities and processed foods, as well as seeds of eligible products that could be used for humanitarian relief or in nutritional programmes.[148] The modifications have been criticised for bringing about a 'significant change in the [Food Aid] Convention' that ultimately allowed for 'parallel but different commitments and weaken[ed] the links to cereals aid and grain markets'.[149]Aside from a specific reference in the *NFIDC Decision* to the FAC 1986 (and *ipso facto* its later revisions) with respect to the level of food aid, in grant form and on a concessional basis,[150] the FAC 1999 included an exchange of letters between the IGC and WTO Secretariats that concerned the outcome of the negotiations for the revised agreement.[151] At that point, the parallel and interlocking developments in the food and trade communities indicated a level of cooperation between them that has remained unmatched ever since.

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144 *WFS Plan of Action*, *supra* note 102, Objective 4.1.
145 Food Aid Convention, done at London on 13 Apr. 1999, *in force* 1 July 1999, 2073 *UNTS* 135, expired on 30 June 2012 (hereinafter FAC 1999).
146 *Id.* Art. 1.
147 *Id.* Art. III, (c), (d), (g), (h) & Annex A.
148 *Id.* Art. IV(a)(viii).
149 CLAY, *supra* note 142, at 4.
150 *NFIDC Decision*, *supra* note 133, ¶ 3.
151 The exchange of letters between the IGC and WTO Secretariats from 25 Mar. 1999 and 14 Apr. 1999 respectively, took place shortly after the negotiations for the FAC 1999 had concluded and formed part of the accompanying documentation.

*D. The emergence of a rights-based approach to food security in the post-Millennium era*

At the turn of the Millennium, there arose a divergence in approaches towards global food security by the food and agriculture community and the international trade community.[152] In the case of the FAO and some similar institutions, there was a move away from a human security approach[153] towards a more human rights-based one, which was specifically endorsed by the UN human rights treaty bodies and its system of special rapporteurs.

The right to adequate food is nothing new since its normative content was already recognised in Article 25 of the Universal Declaration of Human Rights ("UDHR"), as part of the right to an adequate standard of living.[154] Likewise, Article 11 of the Covenant on Economic, Social and Cultural Rights ("ICESCR") states that it is the right of everyone 'to a standard of living adequate for the health and well-being of himself and of his family'.[155] In that context, the right to adequate food is specifically considered to be part of the minimum standard of nutrition and other basic necessities.

However, the link between food security and human rights was about to become more explicit with recognition of the importance of access to adequate food at the international level. General Comment No. 12 of the Committee on Economic, Social and Cultural Rights ("CESCR") on the Right to Adequate Food[156] responded to the FAO's concern when it elaborated upon the normative content of Article 11 ICESCR. Accordingly, Article 11(paragraphs 1 and 2) means that '[T]he right to adequate food is realized when every … [individual], alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.'[157]

It signifies that states are under a duty *to respect* existing access to adequate food for their populations; they should therefore abstain from adopting measures that

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[152] ZHANG, *supra* note 120, at 568.

[153] *See for example*, Des Gasper, *Human security: from definition to investigating a discourse in* THE ROUTLEDGE HANDBOOK OF HUMAN SECURITY 30 (MARY MARTIN & TAYLOR OWENS eds.) (New York: Routledge) (2014).

[154] Art. 25, Universal Declaration of Human Rights, GA Res. 217A (III), UNGAOR, 3rd Sess., UN Doc A/810 (1948) (UDHR).

[155] Art. 11, International Covenant on Economic, Social and Cultural Rights, UNGA Res 2200A (XXI), 21 UN GAOR at 49, UN Doc A/6316 (1966), adopted 16 Dec. 1966, *in force* 3 Jan. 1976, 999 UNTS 3 (ICESCR) Supp (No 16).

[156] CESCR General Comment No. 12: The Right to Adequate Food (Art. 11), adopted at 20th Sess. Committee on Economic, Social and Cultural Rights (CESCR), on 12 May 1999 (contained in Document E/C.12/1999/5) [hereinafter *General Comment No. 12*].

[157] *Id.*¶ 6, *General Comment No. 12*.

prevent such access. They have an obligation *to protect*, which means they must ensure that individuals and business enterprises involved in commercial agricultural production should not deprive individuals of their right to adequate food supplies. Finally, governments have a duty *to fulfil*, i.e. *to facilitat*e, people's access to food, including the utilisation of resources essential to the production of food and, where necessary, to ensure the livelihoods of their people by providing food directly, i.e. by means of food aid.[158]

In 2000, the UN Millennium Summit met in a special session of the UN General Assembly and adopted the UN Millennium Declaration[159] with its eight Millennium Development Goals ("MDGs"), one of which was the eradication of extreme poverty and hunger by 2015 ("MDG 1").[160] It can be recalled that the eradication of hunger was clearly reflected in the target set by the WFS in its Declaration of 1996.[161] Simultaneously, the *WFS Plan of Action* had set a target of reducing the number of undernourished people to half their present level no later than 2015.[162] This coincided with the agreement reached by states at the Millennium Summit to 'halve between 1999 and 2015 the proportion of people who suffer from hunger',[163] a goal which, it appears, is within reach of the international community.[164]

At the World Food Summit + 5, held in Rome in 2002,[165] a *Declaration of the World Food Summit: five years later* was adopted ("Declaration of the WFS+5"), recognising the establishment of an International Alliance Against Hunger ("IAAH").[166] The IAAH groups governments, international organizations, civil society organizations (CSOs), and the private sector together and tasks them with reinforcing their efforts to act as an international alliance against hunger.[167] Its mandate is to deal with advocacy, accountability, resource mobilization and co-ordination in order to

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158 *Id.*¶ 15.
159 United Nations Millennium Declaration, UNGA Res. A/55/L.2 (8 Sept. 2000).
160 *Id.* ¶ 11, generally referred to as Millennium Development Goal 1 [hereinafter MDG 1].
161 *Declaration on WFS*, *supra* note 113.
162 *WFS Plan of Action*, *supra* note102*,* ¶ 7.
163 Target 1.C of MDG 1, *supra* note 160.
164 *State of World Food in security 2014*, *supra* note 2, at 9. However, the developing world is not on target to achieve the World Food Summit's target of halving the number of undernourished people in developing and LDCs by 2015; *see id.*
165 *See Declaration of the World Food Summit: five years later – International Alliance Against Hunger*, Rome (10-13 June 2002) *available at* ftp://ftp.fao.org/docrep/fao/meeting/005/y7106e.pdf [hereinafter *Declaration of the WFS+5*].
166 *Id.* ¶2.
167 *Id.*

strengthen national and global commitments and actions to end hunger.[168] By 2002, around 150 developing and transitions countries had been able to produce national food security strategies and since then there have been further developments under the IIAH, which has worked with individual countries on developing National Alliances Against Hunger.[169] The *Declaration of the WFS+5* called for a set of voluntary guidelines to be drawn up to support Member States' efforts to achieve the progressive realisation of the right to adequate food, in the context of national food security,[170] despite some reservations about the efficacy of doing this.[171] Two years later in 2004, the FAO adopted a set of *Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security* ("Voluntary Guidelines").[172] The *Voluntary Guidelines* were addressed to all States party to the ICESCR, as well as those states that had not yet ratified the Covenant, and included both developed and developing countries. They built upon CESCR General Comment No. 12 in making a rights-based approach to food security essential to FAO food policy.

Although a non-binding or soft-law instrument, the *Voluntary Guidelines* nevertheless provides practical recommendations for national authorities as to how they may fulfil the right to adequate food. For example, practical guidance is given on implementing this right in the context of markets, by ensuring non-discriminatory market access, consumer protection and equitable distribution policies (Guideline 4). The guidance is extended likewise, to social safety, food safety nets (Guideline 14) and international food aid (Guidelines 15). Finally, there is guidance on how to operationalise the *Voluntary Guidelines* by means of 'Right to Food Impact Assessments', which includes monitoring, indicators and benchmarks (Guideline 17).[173]

Finally, the *Declaration of the WFS+5* urged all WTO Member governments 'to implement the outcome of the Doha Conference, especially the commitments regarding the reform of the international agricultural trading system'.[174] Attention

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[168] For details of the IIAH's mandate and Statement of Principles, see its 2006 Guide for National Alliances Against Hunger, which is *available at* http://www.theaahm.org/fileadmin/templates/iaah/docs/Guide_for_NAAH_06_en.pdf.
[169] *Id.*
[170] *Declaration of the WFS+5*, *supra* note 165, ¶ 10.
[171] *See id.*
[172] *FAO Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, adopted by the 127th Session of the FAO Council, Nov. 2004 [hereinafter *Voluntary Guidelines*].
[173] *Id.* Guidelines 4, 14, 15 & 17 at 13-14, 25-27, 27-28 & 30-31 respectively.
[174] *Declaration of the WFS+5*, *supra* note 165, ¶ 12.

was drawn to the *Doha Ministerial Declaration*[175] which referred to those efforts, given that 'international agricultural trade [had] a role to play', which was consistent with Commitment 4 of the *WFS Plan of Action*[176] in 'promoting economic development, alleviating poverty and achieving the objectives of the World Food Summit, in particular in developing countries'.[177]

However, a different approach was discernible in the multilateral trading system that did not countenance a human rights bias. Notwithstanding the push for new disciplines aimed at reforming agricultural trade, developing countries and NGOs remained largely critical of the ongoing effects of trade liberalisation, following the establishment of the WTO in 1995. This was due in part to the lack of accountability of transnational corporations operating in the global economy and to the IMF structural adjustment programmes, by which many of the poor and food-insecure countries were bound.[178]

In terms of trade-related food security, as we noted in the previous section, the *AoA* provided a framework agreement for disciplining international agricultural trade but it did not really address food security. The *AoA* had ushered in the first phase of the agricultural reform programme, aimed at reaching substantial progressive reductions in support and protection and WTO Members had committed to starting negotiations on continuing the reform process by the end of the 'implementation period',[179] i.e. six years after 1995 or by the beginning of 2000, at the latest. Progress towards this goal had proved elusive at the first three WTO ministerial meetings held in Singapore, 1996,[180] in Geneva, 1998,[181] and in Seattle, 1999.[182] It was not until the adoption of the Ministerial Declaration at the Fourth WTO Ministerial Meeting, held at Doha in 2001[183] that negotiations got under way.

At Doha, Ministers committed themselves to 'comprehensive negotiations aimed at: substantial improvements in market access; reductions of– with a view to

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[175] The reference is to ¶¶ 13,14 of the *Ministerial Declaration*, WT/MIN(01)/DEC/1 (20 Nov. 2001), adopted at the WTO Ministerial Conference, Fourth Session, Doha, 9-14 Nov. 2001 (hereinafter *Doha Ministerial Declaration).* Those paragraphs in the *Doha Ministerial Declaration* form part of the Work Programme and deal specifically with the agricultural reform programme under Art. 20 *AoA*, THE LEGAL TEXTS, *supra* note 15, at 46-47.

[176] Commitment 4.1 of the *WFS Plan of Action*, *supra* note 102.

[177] *Declaration of the WFS+5*, *supra* note 165,¶ 12.

[178] SHAW, *supra* note 20, at 356.

[179] Preamble, Art. 20, *AoA*, THE LEGAL TEXTS, *supra* note 15, at 46-47.

[180] *See Singapore Ministerial Declaration*, *supra* note 143.

[181] WTO, Ministerial Conference, Second Session, Geneva, 18-20 May 1998.

[182] WTO, Ministerial Conference, Third Session, Seattle, 30 Nov. -3 Dec. 1999.

[183] *Doha Ministerial Declaration*, *supra* note 175.

phasing out– all forms of export subsidies; and substantial reductions in trade-distorting domestic support.'[184] Significantly, for our purposes, they agreed that 'special and differential treatment for developing countries' should be 'an integral part of all elements of the negotiations and […] be embodied in the schedules of concessions and commitments'.[185] This would ensure that the negotiations would be 'operationally effective' and 'enable developing countries to effectively take account of their development needs, including food security and rural development'.[186]

On the issue of food aid, which is one means of addressing international food security concerns and forms a central plank of the WTO *NFIDC Decision*, the *Paris Declaration on Aid Effectiveness* was adopted by OECD Member Governments in 2005.[187] The *Paris Declaration* suggested ways of improving the effectiveness of aid delivery so as to meet individual country situations. Besides specifying indicators, timetables and targets to accelerate the pace of delivery,[188] the *Paris Declaration* indicated ways of monitoring and evaluating the implementation of food aid,[189] with an emphasis on mutual accountability between countries and development partners.[190] It also sought to strengthen donor capacity[191] and to improve national food procurement systems.[192]

A more direct link between food aid and multilateral trade also exists in the *NFIDC Decision* in the context of the FAC. Despite many attempts over the years to revise the FAC,[193] it was eventually allowed to expire and was replaced in 2012 by the Food Assistance Convention ("FAssC").[194] The preambular text makes it clear that while states have a 'primary responsibility for their own national food security, and therefore for the progressive realisation of the right to adequate food',

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[184] *Id.* ¶ 13,
[185] *Id.* ¶¶ 13,12.
[186] *Id.*¶ 13.
[187] OECD, Paris, Mar. 2, 2005, *The Paris Declaration on Aid Effectiveness – Ownership, Harmonisation, Alignment, Results and Mutual Accountability, available at* http://www.oecd.org/dac/effectiveness/34428351.pdf [hereinafter Paris Declaration].
[188] *Id.* ¶¶ 8,9.
[189] *Id.* ¶¶ 10-13.
[190] HANS PAGE, GLOBAL GOVERNANCE AND FOOD SECURITY AS GLOBAL PUBLIC GOOD, CENTER ON INTERNATIONAL COOPERATION, NEW YORK UNIVERSITY, 13 (Aug. 2013) [hereinafter PAGE].
[191] Paris Declaration, *supra* note 187, ¶¶ 17-21.
[192] *Id.* ¶¶ 28-30.
[193] *See* the last version of the FAC, which was the FAC 1999, *supra* note 145.
[194] United Nations, The Food Assistance Convention, London (Apr. 25, 2012) [hereinafter FAssC).

as set out in the *Voluntary Guidelines* of 2004,[195] the FAssC follows a similar format to its predecessor, the FAC 1999 (see previous section).

There are also some obvious differences between the two food aid conventions. The original link between aid and trade under the FAC, which was tied back into the *NFIDC Decision*, has disappeared to some extent. Instead, there is a 'conflicts' clause in the FAssC that allows WTO obligations to prevail and does not prejudice the positions a contracting party to the FAssC may take in the WTO.[196] While the FAssC may have 'elected the WTO as the preferred forum for addressing the link between food aid donations and distortions of agricultural trade', it is uncertain whether the organisation will be able to rise to the challenge of being part of any reformed international legal framework for food aid donations that would make food aid more efficient.[197] The FAssC supports donations coming from (mostly) major exporting developed countries although such donations may now be made both in kind and in cash,[198] and donors have committed to not tying such aid to 'commercial exports of agricultural products … to recipient countries'.[199] Like its predecessor the FAC 1999, the FAssC continues to be administered by the IGC.[200]

In terms of the relationship between the wider international community's concerns about global food security and international trade, Olivier De Schutter, the former UN Special Rapporteur on the Right to Food, recommended stronger integration of food security issues, arising from the right to food in trade policies, intellectual property regimes, competition laws and the regulatory framework governing supply chains in the agrifood sector. During his term of office,[201] he called for a new focus on the impact of trade on the most vulnerable and the food-insecure as a result of the global food security crisis.[202]

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[195] *Id.* Fourth recital of the Preamble, FAssC; for the *Voluntary Guidelines*, *see supra* note 172.
[196] *Id.* Art.3.
[197] ANNAMARIA LA CHIMIA, TIED AID AND DEVELOPMENT AID POLICIES IN THE FRAMEWORK OF EU AND WTO LAW: THE IMPERATIVE FOR CHANGE 395 (Oxford/Portland, Oregon: Hart Publishing) (2011).
[198] FAssC, *supra* note 194, Arts. 2, 4 & 5.
[199] *Id.* Art. 5.9.
[200] The International Grains Council or ICG is the former International Wheat Council (IWC) under the older Wheat Trade Convention 1967, as subsequently amended, *supra* note 80.
[201] Professor Olivier De Schutter was the UN Special Rapporteur on the Right to Food, 2008-2014.
[202] Report of the Special Rapporteur on the right to food, Olivier De Schutter, 'Building resilience: a human rights framework for world food and nutrition security', Human Rights Council, A/HRC/9/23, 8 Sept. 2008.

## III. EXTERNAL PLANE: COOPERATION AND COORDINATION ON FOOD SECURITY AT THE INTERNATIONAL LEVEL INVOLVING THE WTO

When it comes to the role of the WTO with respect to food security, it is clear that it operates at two distinct levels, outside and within the multilateral trading system, i.e. externally and internally. On the external plane, in the wake of the global food price crisis of 2007/08, there have been a series of developments where the WTO has worked with the international community on food security in terms of strategic economic policy on matters of trade and taxes in international food markets. Principally, the WTO has responded to efforts from UN agencies, including the UN itself (through the office of the Secretary-General), the FAO, the WFS, the International Fund for Agricultural Development ("IFAD")[203] and the WFP. These inter-governmental institutions have undertaken to ensure that global food security crisis initiatives in times of price volatility in food and agricultural markets[204] are relevant to the global market for basic agricultural commodities and for food aid whilst remaining compliant with WTO trade disciplines.

Even so, the Rome-based UN food agencies (FAO, IFAD and the WFP) may no longer count as the central actors in food security governance. In the past decade, new 'modalities of governance' have arisen around food security in the international community that are characterised by a shift 'towards increasingly participatory and decentralized processes with heightened focus on national priorities'.[205] Currently, non-state actors, e.g. civil society and private sector companies, through formal advisory or consultative mechanisms, are considered part of the global consensus on food and hunger issues.[206] They function alongside intergovernmental institutions, like the UN, FAO,[207] IFAD and the WFP, or

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[203] Agreement establishing the International Fund for Agricultural Development, Rome, 13 June 1976, *in force* 30 Nov. 1977, 1059 UNTS 191, as subsequently amended.

[204] For a brief but detailed overview of the role of securitisation (or financialisation) of agricultural commodity futures in contributing to this price volatility, see Nicola Colbran, *The financialisation of commodity futures trading: the 206-08 global food crisis in* RAYFUSE & WEISFELT, *supra* note 112, at 168-89.

[205] PAGE, *supra* note 190, at 11.

[206] *Id.* at 11-12; *see also* Matias Margulis, *Global food security governance: the Committee on World Food Security, Comprehensive Framework for Action and theG8/G20 in* RAYFUSE &WEISFELT, *supra* note 112, at 238 and NORA MCKEON, FOOD SECURITY GOVERNANCE: EMPOWERING COMMUNITIES, REGULATING CORPORATIONS 11-30 (London/New York: Routledge) (2015), especially the schematic overview at 26-28.

[207] The FAO underwent a fundamental restructuring and reorientation, following the Report of the Independent External Evaluation of the Food and Agricultural Organization of the United Nations (FAO), submitted to the Council Committee for the Independent Evaluation of the FAO (CC-IEE), Sept. 2007, C2007/7A.1-Rev.1. It led to the Conference of FAO, Rome, June 15-22, 2013, *Reviewed Strategic Framework,* C 2013/7.

platforms, like the G8, in what is increasingly a multi-stakeholder approach towards food security[208] and has come to form part of the reformed CFS (see section B. below).

Thus, food security in terms of global governance and a common agreement on key principles among its stakeholders, as well as its status as a global public good,[209] is increasingly the driving force behind 'independent and autonomous decision makers'.[210] This is occurring irrespective of the location of such decision-makers within national governments, international, regional or supra-national (e.g. the European Union) organisations, non-governmental organisations or the private sector. The engagement of the WTO or any of its individual Members, on behalf of the WTO, in greater cooperation and coordination with the international community is somewhat peripheral except where it concerns the more technical side of food security, in terms of trade and taxation policies or international food markets and price information systems.

### *A. The UN-led initiative for collective action: the Secretary General's High-Level Task Force and the Comprehensive Framework for Action*

One of the consequences of the global food price crisis of 2007/08 was an acknowledgment that the existing, post-1945 institutional framework for dealing with food security was no 'longer adequate to deal with the dynamics of a changed economic and institutional environment, including the new global scale of food production systems'.[211] However, the initial response by governments to changing times was still largely *ad hoc* and piecemeal. The UN eventually moved to fill the gap and to propose collective action on food security with the establishment, by the office of the UN Secretary General ("UNSG"), of a High-Level Task Force ("HLTF" or "Task Force") on the Global Food Security Crisis.[212]

The HLTF came about as a direct response to the sharp spike in food prices on global markets, caused by the global financial and monetary crisis of 2007/08. It raised concerns about global food and nutrition security and the consequences thereof in the humanitarian, socio-economic, developmental and human rights spheres. Food and nutrition security were initially defined in terms of production

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[208] PAGE, *supra* note 190, at 12.
[209] JOSLING, *supra* note 18, at 4-5.
[210] PAGE, *supra* note 190, at 14.
[211] *Id.* at 14-15.
[212] The first meeting of the UN Secretary-General's (UNSG) High Level Task Force (HLTF or Task Force) was held in New York on 12 May 2008; a summary of that meeting is *available at*
http://www.un.org/en/issues/food/taskforce/meetings.shtml [hereinafter First Meeting of the HLTF].

capacity and the availability of food, access to food and nutrition and ensuring the stability of supply. The Task Force brought together all the major UN and other organisations, which were in some way involved with food security. Aside from the UN specialised agencies and programmes, e.g. FAO, WFS, IFAD and WFP, relevant departments in the UN Secretariat were involved as were the World Bank, the IMF, the OECD and the WTO. It should be noted that, unlike its proposed predecessor, the ITO, the WTO is not a UN agency although it does maintain functional links with the UN system.[213] The WTO is nevertheless considered to be an important actor in the process of ensuring food security in international food and agricultural markets in line with the *AoA*[214] and the *NFIDC Decision*[215] (see section IV. A. below).

The primary aim of the HLTF was to promote a unified response to the challenge of achieving global food security, by means of 'a coherent, comprehensive, and coordinated global framework for action'.[216] Its three-fold aim was to take immediate steps to increase food supplies *inter alia* through emergency food assistance; to strengthen food and nutrition security in the long term by *inter alia* improving international food markets; and to strengthen the global information and monitoring system on food security.

The inter-agency discussion also stressed 'the importance of calling on countries not to impede international exports, to help markets open up and flow freely'[217] with the WFP reporting that in several countries, food commodities, already procured for food aid purposes, had been 'trapped in export controls'.[218] At that time, the problem of certain WTO Members placing restrictions on exports of agricultural commodities, by means of quantitative restrictions or export taxes, was a major issue; it is just as contestable today, as is evident from recent WTO case law (see section IV. C. below).

In July 2008, the Task Force responded to the request for a plan of action[219] and produced the *Comprehensive Framework for Action* ("CFA").[220] This collective action

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[213] In the early days of its existence, the WTO General Council was informed on 15 Nov. 1995 of 'Arrangements for Effective Cooperation with Other Intergovernmental Organizations: Relations between the WTO and the United – Communication from the Director-General', WT/GC/W/10 (8 Nov. 1995), evidenced by an exchange of letters between the WTO Director-General and the UN Secretary-General.

[214] *See* Art 20, *AoA*, THE LEGAL TEXTS, *supra* note 15, at 46-47.

[215] *NFIDC Decision*, *supra* note 133.

[216] First Meeting of the HLTF, s*upra* note 212, ¶ 2.

[217] *Id.* ¶5.

[218] *Id.*

[219] *Id.* ¶3. This was also consistent with the G8 Leaders Statement on Global Food Security, adopted at the G8 Hokkaido Toyako Summit, held in July, 2008, *available at*

plan was designed to encourage coordinated responses to the global food price crisis as well as foreseeing actions that would meet the immediate food security needs of vulnerable populations, all the while contributing to longer-term resilience and global food and nutrition security.[221] The original *CFA* was intended to act as a catalyst for action by providing governments, international and regional organisations, and CSOs with a menu of policies and actions from which appropriate responses could be drawn.[222] However, it did not immediately provide a mechanism for a more rounded, multi-stakeholder approach to global food and nutrition security.

The overall aims of the *CFA* were aligned with 2015 MDG 1 on eradicating extreme poverty and hunger.[223] In operational terms, these aims were to be pursued by means of a twin-track approach.[224] The immediate needs of vulnerable populations would be met by activities such as investing in food assistance, nutrition interventions, social safety nets, smallholder farmer food production, tax and trade policy in export management and macroeconomic implications.[225] Longer-term structural needs would be addressed by projects like the scaling up of investment in agriculture with sustainable food production systems, regulating the role of speculative investments, food stocks, ecosystems, improving international food markets and reaching consensus on international biofuels.[226]

In late 2009, in order to move ahead with the *CFA*, the *WFS Declaration*[227] was adopted, which was based on the politically-driven 'L'Aquila' Joint Statement on Global Food Security ("L'Aquila Food Security Initiative or AFSI") that had been issued by the G8+ Summit.[228] Here too, the aim of the *WFS Declaration* was collective action by the international community to reverse recent setbacks arising

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http://www.mofa.go.jp/policy/economy/summit/2008/doc/doc080709_04_en.html.

220 U.N., High-Level Task Force on the Global Food Security Crisis, Comprehensive Framework for Action (July 2008), *available at* http://www.un.org/en/issues/food/taskforce/Documentation/CFA%20Web.pdf. [hereinafter Comprehensive Framework for Action or CFA].

221 *Id.* at 5-7.

222 *See id.* at vii.

223 MDG 1, *supra* note 160.

224 CFA, *supra* note 220, at 3.

225 *Id.* at 6-15.

226 *Id.* at 15-26.

227 FAO, World Summit on Food Security, Nov.16-18, 2009, Rome, *Declaration of the World Summit on Food Security*, WSFS 2009/2 [hereinafter *WFS Declaration*].

228 L'Aquila Food Security Initiative (AFSI), *L'Aquila Joint Statement on Global Food Security,* (10 July 2009), *available at* http://www.g8italia2009.it/static/G8_Allegato/LAquila_Joint_Statement_on_Global_Food_Security%5B1%5D%2c0.pdf.

from the global food crisis of 2007/08 and 'to set the world on a path to achieving the progressive realization of the right to adequate food in the context of national food security'.[229] It contained the five basic Principles for Sustainable Global Food Security, which covered *inter alia* fostering 'strategic coordination at national, regional and global level to improve governance, promote better allocation of resources and avoid duplication of efforts and identify response-gaps' by means of a Global Partnership for Agriculture, Food Security and Nutrition.[230] The *WFS Declaration* also called for a reformed multi-stakeholder CFS,[231] whose task was to coordinate and strengthen collaborative action at the global level among a variety of relevant stakeholders, including governments, regional organizations, international organizations and agencies, NGOs, CSOs, food producers' organizations, private-sector organizations, philanthropic organizations, and other relevant stakeholders. Furthermore, it recommended the establishment of a High-Level Panel of Experts,[232] which a reformed CFS eventually endorsed (see section B. below).

In striving to fulfil the twin-track approach to food security envisaged by the *CFA*, Principle 3 of the *WFS Declaration* called on the international community to improve the functioning of domestic, regional and international markets. As part of its approach, governments collectively agreed 'to refrain from taking measures that were inconsistent with the WTO rules, with adverse impacts on global, regional and national food security'.[233] They also reiterated support for 'a timely, ambitious, comprehensive and balanced conclusion of the Doha Development Round of trade negotiations that would be important for improving food security' and for 'full implementation of the Marrakech decision,' i.e. the *NFIDC Decision.*[234] Finally, the *WFS Declaration* supported sustained improvements towards the efficiency, responsiveness, coordination and effectiveness of multilateral institutions on food security and nutrition.[235]

While WTO Members have not heeded the call in Principle 3 of the *WFS Declaration* to bring the DDA to a successful conclusion nor has there been full implementation of the *NFIDC Decision*, the WTO has been part of the HTLF from the very beginning albeit that it is the WTO Secretariat that participates in the

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[229] *WFS Declaration*, *supra* note 227, Preamble ¶ 2.
[230] *Id.* at 3, ¶ 11.
[231] *Id.* ¶ 12. Since late 2009 the reformed CFS is a multi-stakeholder committee, reporting to the FAO Council that may include *inter alia* members of the FAO, WFP or IFAD, representatives of UN agencies or bodies with specific mandates concerning, or with linkages to, food security.
[232] *Id.* ¶ 15.
[233] *Id.* ¶ 22.
[234] *Id.*
[235] *WFS Declaration*, *supra* note 227, ¶¶ 31-35.

*CFA*. It does so through the *CFA* working group on 'Trade and Taxation Policies and International Food Markets', which is tasked with studying the effects of trade and taxation policies on the poor, consumers and smallholder farmers, including the realisation of their right to food, and their implications for government revenues, international food markets and commitment to enhanced international trade.[236] This particular working group is aimed at minimising the use of export restrictions that may arise in food crisis situations, thereby increasing the volatility of international prices, depressing incentives for farmers to invest in food production, encouraging smuggling, and undermining progress towards multilateral trade reforms and freer trade in the agriculture sector. Other than the Secretariat's involvement in this working group, there is no involvement by WTO Members in either the working group or in other parts of the *CFA*, where collective action is called for.

At the end of 2009, the HLTF, mindful of the vast array of bodies working on food security-related issues, sought an update of the *CFA* to reflect better on the ways in which those in the UN system 'advise and interact with national authorities and numerous other stakeholders'.[237] The *Updated Comprehensive Framework for Action* ("UCFA"), which was concluded in 2010,[238] continues to follow the twin-track approach. However, its coverage is more detailed, extending to all aspects of food and nutrition security and prioritising other policy areas such as environmental sustainability, gender equality, improved nutrition and the needs of those least able to enjoy their right to food. The *UCFA*'s approach to food security could best be described as a human security one, which has become increasingly influenced by the turn towards a more human rights-based approach. Owing to its emphasis on the prioritisation of flanking socio-economic and sustainable development policies, it could also be said to lean in the direction of the Sen's entitlements-based approach to food security (see section II.B. above).

The *UCFA* also embraces an even broader array of UN agency, inter-governmental and non-governmental partners to include UN human rights agencies, and recognises that the private sector, NGOs and civil society have a critical role in ensuring food and nutrition security. Its aim is to coordinate food security among the Task Force member agencies at the country level and to improve the accountability of the international system. Intended as a guiding

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[236] *See* Report of the High Level Task Force on Global Food Security, Food and Nutrition Security: Comprehensive Framework for Action, Aug. 2011, including Summary of the *Updated Comprehensive Framework for Action*, August 2011, 14, *available at* http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_1887.pdf.

[237] PAGE, *supra* note 190, at 17.

[238] Updated Comprehensive Framework for Action or UCFA, September 2010, *available at* http://un-foodsecurity.org/sites/default/files/UCFA_English.pdf.

document, and supportive of food security as a public good for all participants in the HLTF, the *UCFA* was presented to WTO Members in an information session in November 2010.[239]

*B. Knowledge transfer, information exchange and technical cooperation relating to food price volatility: the High-Level Panel of Experts and the Agriculture Market Information System*

As is clear from the previous section, the main UN agencies in New York and Geneva (UN General Assembly, UNCTAD, the International Labour Organization ("ILO") and the UNDP) had begun to take an active role in the coordination of the multilateral policy response to global food security in the wake of the 2007/08 financial crisis.[240] This exercise in international 'forum shifting'[241] presented the traditional Rome-based food and agricultural agencies (FAO, WFP and the IFAD) with a challenge when it came to their ongoing role as a force in the international community, in securing global food and nutritional needs. In particular, the relevance of the CFS, the main committee on world food security at the FAO, had waned over time. A significant moment came in 2009 when the international community undertook to reform the CFS,[242] thereby allowing it to become the foremost inclusive international and intergovernmental platform to a broad range of committed stakeholders dealing with global food security and nutrition. It also strives for a 'world free from hunger where countries implement the voluntary guidelines for the progressive realization of the right to adequate food in the context of national food security'.[243] The food and agricultural community is thus signalling its continued support for a human rights-based approach to global food security (see section II.D, above).

Thus, while the CFS remains an intergovernmental committee of the FAO, its outreach is by means of a multi-stakeholder approach. It therefore includes, *inter alia,* Members of FAO, WFP and IFAD, representatives of UN agencies or bodies whose work is related to food and nutritional security as well as those agencies

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[239] HLTF (2010), *Presentation of the Updated Comprehensive for Action (UCFA) to the WTO*, 18th Nov. 2010, details of which are available on the WTO web-site at http://www.wto.org/english/news_e/news10_e/agri_18nov10_e.htm.

[240] JOSLING, *supra* note 18, at 12.

[241] Forum shifting may be used to shift decision-making from one multilateral forum to another or in the context of international organisations and agencies, to move a regulatory agenda, abandon an organisation or to (deliberately) pursue an agenda in more than one forum; for more details, *see* JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 28-9, 564-77 (Cambridge: Cambridge University Press) (2000).

[242] FAO, Committee on World Food Security, Rome, Nov. 14, 15 & 17, 2009, *Reform of the Committee on World Food Security – Final Version*, Agenda Item III, 35th Sess., CFS: 2009/2 Rev.2.

[243] *Id.* Vision, ¶ 4.

whose work is more specifically connected to the right to food, e.g. the Special Rapporteur on the Right to Food, the Office of the UNHCR, WHO, UNICEF and UNDP. As a multi-stakeholder platform, the CFS may also include other intergovernmental organisations such as the IMF, World Bank and the WTO, as well as civil society and NGOs, private sector associations and private philanthropic foundations.[244]

The reform of the CFS has been described as 'an attempt (so far successful) to rescue the Committee from the cutting floor',[245] i.e., from oblivion. The move to broaden its participatory base has also led to it addressing a wider range of subject matter, including food security, nutrition, food sovereignty and the right to food, but at the same time it 'embraces a range of social issues that could hamper the ability of the CFS to get agreement on specific actions'.[246] Moreover, the fact that the CFS has been re-conceived as a multi-stakeholder forum does not necessarily imply that decisions will be reached any faster – if anything they may be slower – and may prove more difficult to implement in the long run, if at all.

One immediately glaring problem faced by CFS members was that there was insufficient technical knowledge about food security in the structure of the reformed Committee. It therefore decided to establish a High-Level Panel of Experts on Food Security and Nutrition ("HLPE") to reinforce the substantive and qualitative aspects of the work undertaken by the Committee. One of the first tasks that the HLPE undertook was a study on food price volatility, its causes and consequences, which was published in July 2011.[247]
Although nominally a member of the CFS, the WTO does engage with the Committee, but has not put its weight behind the work of the HLPE, despite the latter's more technical and functional focus. Instead, it has been involved in the preparation of an inter-agency report on 'Price Volatility in Food and Agricultural Markets: Policy Responses', produced by the OECD at the request of the G20.[248] While price volatility may have been identified as one of the key problems in securing global food security there was disagreement in the report as to 'the role of

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[244] *Id.* Members, ¶¶ 8-10 & Participants, ¶ 11.
[245] JOSLING, *supra* note 18, at 3.
[246] *Id.*
[247] 'Price volatility and food security: A report by the High Level Panel of Experts on Food Security and Nutrition', July 2011 [hereinafter HLPE Report], *available at* http://www.fao.org/fileadmin/user_upload/hlpe/hlpe_documents/HLPE-price-volatility-and-food-security-report-July-2011.pdf.
[248] FAO, OECD *et al.,* Paris, June 2, 2011 *Price Volatility in Food and Agricultural Markets: Policy Responses,* Policy Report [hereinafter OECD Price Volatility Report], *available at* http://www.oecd.org/tad/agricultural-trade/48152638.pdf.

financial speculation as a driver of agricultural commodity prices increases and volatility'.[249]

As a result of the changing disequilibria in global cereal supply, the G20 Agriculture Ministers, in their 'Action Plan on Food Price Volatility and Agriculture', adopted in June 2011("G20 Action Plan"),[250] accepted one of the recommendations contained in the inter-agency report[251] when they agreed to launch the Agricultural Market Information System ("AMIS").[252] AMIS is an information system to which the WTO and seven other international bodies, including the FAO, IFAD, the OECD, UNCTAD, the WFP, the World Bank, the International Food Policy Research Institute ("IFPRI") and the HLTF belong. In order to enhance food market transparency, AMIS is designed to detect abnormal market conditions in grains such as wheat, rice, maize, and soybeans (so-called 'AMIS Crops'), that might affect global food security, and to devise well-informed, coordinated strategies to deal with such abnormal conditions.

Its governance structure consists of: an International Food Markets Information Group, which meets twice a year; the Rapid Response Forum, which meets annually and promotes early discussion among decision-level officials about critical market conditions and encourages coordination of government policies; and a Secretariat, formed by ten international organisations and supported by a Steering Committee, including one representative from each of the participating organisations (in the case of the WTO this is a representative from the Agriculture and Commodities Division of the WTO Secretariat). The WTO mainly contributes to AMIS through its Secretariat by sharing trade policy information that its Members have notified to the WTO.

Meanwhile, the FAO has remained focused on monitoring and policy advice, with significant resources being devoted to the development of early warning systems. One example where the agency has taken the lead is in implementing AMIS to coordinate market intelligence and share advance warnings about commodity shortages; AMIS Crops remain the responsibility of the FAO's Trade and Market Division where the Secretariat is housed. Another example is the FAO Initiative

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[249] *Id.* ¶ 27.

[250] Ministerial Declaration, Action Plan on Food Price Volatility and Agriculture, Meeting of G20 Agriculture Ministers, Paris, 22 and 23 June 2011 [hereinafter *G20 Action Plan*], *available at* http://agriculture.gouv.fr/IMG/pdf/2011-06-23_-_Action_Plan_-_VFinale.pdf, at ¶ 26 under 'Market information and transparency'.

[251] OECD Price Volatility Report, *supra* note 248, ¶¶ 67-73.

[252] For more information about the Agricultural Information System (AMIS), see http://www.amis-outlook.org/.

on Soaring Food Prices ("ISFP") that aims to help governments find better ways of dealing with price shocks.[253]

### C. *Individual WTO Members' attempts to provide political guidance on trade-related food security*

Aside from the developments already noted, progress by WTO Members in advancing the relationship between international trade and food security in the aftermath of the 2007/08 global food crisis has been incidental and unsuccessful. In the run-up to the Eighth WTO Ministerial Conference, held in Geneva in December 2011,[254] two trade-related food security proposals, led by the EU and Egypt, were aimed at addressing export restrictions that one causal factor in the surge in food prices globally.

The EU formally proposed that WTO Members provide 'political guidance' to the international community by agreeing to ban export barriers, by means of export restrictions or extraordinary taxes on food exports, on WFP purchases for non-commercial, humanitarian purposes.[255] G20 Agricultural Ministers had specifically called on the WTO to adopt a declaration to this effect[256] earlier in the year. The proposal eventually faltered when several Members argued against transposition of the G20 language to the WTO without prior consultation and negotiation. Others claimed that it failed to address all the factors that negatively affect food security – and hence its impact on the delivery of food aid – such as subsidies, commodity speculation and biofuels. Egypt's proposal, on behalf of the NFIDCs, African and Arab Groups, called for the establishment of 'a comprehensive, fact-based, result-orientated and time-bound work programme that would examine the impact of food price volatility on LDCs and NFIDCs'.[257] One suggested element of the work programme was 'to explore the possibility of developing rules to exempt purchases of LDCs and NFIDCs, authorized by their governments under conditions to be defined, from quantitative export restrictions invoked under Article XI.2(a) of the GATT 1994[258] by other WTO Members, which are major exporters of the specific

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[253] The Initiative on Soaring Food Prices (ISFP) was set up by the FAO in December 2007; for more details see https://agriskmanagementforum.org/org/fao-initiative-soaring-food-prices.

[254] WTO, Ministerial Conference, Eighth Session, Geneva, 15-17 Dec. 2011.

[255] 'Food export barriers and humanitarian food aid by the World Food Programme (WFP) – Communication from the European Union', WT/GC/138 (18 Nov. 2011).

[256] *G20 Action Plan*, *supra* note 250, ¶ 40.

[257] WTO response to the impact of the food crisis on LDCs and NFIDCs – Communication from the NFIDCs, African and Arab Groups, WT/GC/140/Rev.1 (25 Nov. 2011) [hereinafter *Egypt's Proposal*].

[258] The *General Agreement on Tariffs and Trade 1994* [hereinafter *GATT 1994*], in Annex 1A to the *WTO Agreement*, consists *inter alia* of the GATT 1947, twelve separate agreements on

foodstuffs concerned.' Another proposal was 'to explore, in coordination with competent institutions, the mechanisms required to provide financing, including on concessional terms, to address the short-term difficulties the LDCs and NFIDCs face in financing their food imports.' A third area for consideration was work 'aimed at addressing the challenges encountered by other vulnerable developing countries like NFIDCs and facing critical situation of food insecurity'.[259] Eventually, both the EU and the Egyptian proposals failed to gain the necessary consensus ahead of MC8 and were eventually dropped from the proposed Ministerial Declaration. Both proposals overlooked the crux of the trade-related security debate at the WTO, which was well-captured by the former UN Special Rapporteur on the Right to Food, Olivier De Schutter in his report *'Rapporteur, on the WTO and the post-global food crisis of November 2011'.*[260] In that report, he criticised the WTO for operating in isolation without sufficient consideration of the consequences of the global food crisis for agricultural trade and food security;[261] the various WTO and other responses to that report are taken up in the next section.

### *D. WTO's response to a human-rights based approach to international trade-related food security*

From the beginning of the Millennium onwards there has emerged a rights-based approach towards food security in the international community despite the fact that current policies on food and nutrition security, and more particularly on food aid for humanitarian purposes, retain a strong human security element. Even so, when it comes to WTO Member governments the prevailing view among many of them is that food security *per se* is not strictly a trade-related issue. In particular, there has been an aversion by some, mostly developed WTO Members, towards the adoption of a rights-based approach to food security.

In some instances this has been expressed in the relevant international *fora*. For example, when the food and agriculture community met in Rome in 2002, and

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trade in goods (sectoral and additional rules/disciplines), six understandings aimed at clarifying certain GATT provisions and the GATT Schedules of tariff bindings. However, GATT 1947 is known as '*GATT 1994*'; *see GATT 1994*, THE LEGAL TEXTS, *supra* note 15, 17-19.

[259] *Id.*

[260] Olivier De Schutter, UN Special Rapporteur, Report on *The Right to Food, the WTO and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Food System*, Activity Report, 2011, *available at* http://www.srfood.org/images/stories/pdf/otherdocuments/20111116_briefing_note_05_en.pdf [hereinafter Special Rapporteur's Report, 2011].

[261] *Id.* at 16, with reference to HÄBERLI *supra* note 137.

adopted its *Declaration of the WFS+5*,[262] calling for a set of voluntary guidelines to be drawn up to achieve the progressive realisation of the right to adequate food in the context of national food security, the US issued a statement reserving its position. As a non-signatory to the ICESCR (and Article 11 on the Right to Adequate Food), the US wanted the issue of adequate food to be 'viewed in the context of the right to a standard of living adequate for health and well-being' under the UDHR only. In its view, the 'right to an adequate standard of living [was] a goal or aspiration to be realized progressively that [did] not give rise to any international obligation or any domestic legal entitlement, and [did] not diminish the responsibilities of national governments towards their citizens.'[263] Accordingly, the US believed that the 'sterile debate over "Voluntary Guidelines" would distract attention from the real work of reducing poverty and hunger'.[264]

At other times, WTO Members have responded directly to stakeholders from the human rights community who have sought to advance a rights-based approach to trade-related food security. One example is the engagement with the former UN Special Rapporteur on the Right to Food, Olivier de Schutter, who undertook a mission to the WTO in the wake of the 2007/08 global food security crisis. In his 2008 report, he examined the relationship between the WTO and the human right to adequate food.[265]

De Schutter summarised the macro and microeconomic impacts of trade liberalisation on different societies in WTO Member countries and called for limiting the dependency of states on international trade.[266] Instead, he argued for maintaining flexibilities in trade negotiations and for controlling market power in global food supply chains to insulate domestic markets from the volatility of prices on international markets. Such efforts would, he believed, help counteract the risk of what he called the increased 'dualization' of the farming sector (small farmers and large agro-industrial producers).[267] De Schutter also pleaded for the inclusion of social and environmental incentives in the multilateral trading system.[268] Several WTO Members, notably Brazil, Uruguay, Australia, Paraguay, Pakistan, Argentina, the EU, Costa Rica, South Africa and Mali, were critical of De Schutter's

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[262] *Declaration of the WFS+5*, *supra* note 165.
[263] *United States of America, U.S. Mission to the UN Agencies for Food and Agriculture, Rome, Reservation to operative paragraph 10 of the Declaration of the WFS+5*, *id*, at 32.
[264] *Id.*
[265] Report of the Special Rapporteur on the right to food, Olivier De Schutter, Mission to the World Trade Organization, Presented to the Human Rights Council, A/HRC/10/5/Add.2 (9 Feb. 2009).
[266] *Id.* at 10-12, ¶¶ 20-24.
[267] *Id.* at 12-14, ¶¶ 25-28.
[268] *Id.* at 14-15, ¶¶ 29-32.

statements about the lack of compatibility between WTO rules and national food security.[269]

The 2011 report by the former UN Special Rapporteur went further in assessing the compatibility between WTO rules and efforts to protect the human right to adequate food, as part of the post-crisis food security agenda,[270] drawing further criticism from the WTO and from scholars. Of particular concern was his insistence on the WTO redefining the way in which food security is treated in the multilateral trade agreements. In De Schutter's view, policies 'to achieve food security and the realization of the human right to adequate food should no longer be treated as derivations from but as recognized principal objectives of agricultural trade policy.'[271]

At the WTO, the then Director-General, Pascal Lamy, publicly criticised the report's protectionist recommendations in an open letter on the WTO web-site (with reference to written comments by the WTO Secretariat on an earlier draft of the report).[272] He struck out at the way in which De Schutter had advocated that WTO members should limit their excessive reliance on international trade to achieve food security objectives. Additionally, Lamy rebutted the Special Rapporteur's suggestions for pro-food security policies for all developing countries, such as public stockholding for food security purposes, TRQs, SSMs and SPs and the use of marketing boards. This was because if such measures were used improperly, they could introduce market distortions, leading to an exacerbation in the negative impact of high food prices on consumers.

Besides, as Lamy explained, around 60 per cent of developing countries' agricultural exports are to other developing countries. Thus, these types of market interventions could increase the vulnerability of agricultural producers in exporting to developing countries by reducing access to their main export markets. Lamy also signalled surprise at what he called the 'quasi-absence of reference' in the Special Rapporteur's report 'to rules applicable to export prohibitions and restrictions on food product',[273] i.e. control of export quotas and export taxes, which can be highly distortionary.

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[269] *See* WTO: 2009 NEWS ITEMS, *UN rapporteur and WTO delegates debate the right to food*, July 2, 2009, *available at* http://www.wto.org/english/news_e/news09_e/ag_02jul09_e.htm.

[270] Special Rapporteur's Report, 2011, *supra* note 260.

[271] *Id.* at 17, ¶ 1 of 3, Conclusions and Recommendations.

[272] *See* WTO: 2011 News Items, *Lamy rebuts UN food rapporteur's claim that WTO talks hold food rights "hostage*", Dec. 14, 2011, which includes his open letter at http://www.wto.org/english/news_e/news11_e/agcom_14dec11_e.htm.

[273] *Id.*

Scholars were also critical of some of De Schutter's recommendations for public measures to address market failures, such as food dumping of rich country surpluses, which can drive food prices up and lead to the excessive reliance by some developing countries on cheap food imports.[274] Some of his proposed remedial measures, such as food reserves or orderly market management arrangements, e.g. marketing boards,[275] might permanently shield domestic producers from all competition, but might not necessarily improve food security nor ensure lower prices for consumers – possibly they could have the reverse effect.[276] Besides, De Schutter appears to have studiously avoided any reference to export prohibitions and restrictions[277] in the form of quotas or taxes. It is an issue that is often seen as the root cause of the 2007/08 global food security crisis[278] and has definitely not gone away.

However, as Robert Howse and Tim Josling observe, De Schutter's 'notion that states should seek food security through self-sufficiency in food production' may, in the long run, imply that, 'from a human rights or global justice perspective, no state would have any claim on food security grounds to import food produced elsewhere'.[279] Indeed, De Schutter's point of view is further questionable from a human rights perspective because it supports the idea that self-sufficiency in food production, as an ultimate goal of food security, could lead to the violation or non-fulfilment of other human rights, such as the right to a healthy, safe and sustainable environment or raise the problem of internal displacement. It could also be a regressive step in achieving the socio-economic aspects of the right to development.[280] Similarly, from an economic perspective, 'the UN-enshrined *Right to Food* potentially implies 'a right to *self-sufficiency* regardless of competitiveness, trade distortions and (domestic) consumer prices'.[281] It is to this aspect that we turn in the following sections to discover what a right to self-sufficiency means

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[274] Christian Häberli, *The WTO and food security: what's wrong with the rules? in* RAYFUSE & WEISFELT, *supra* note 112, at 149-67, 150, and 156-57 [hereinafter HÄBERLI *Food Security*].
[275] Special Rapporteur's Report, 2011, *supra* note 260, at 18, Point 3.
[276] HOWSE & JOSLING, *infra* note 279, at 156-61.
[277] See the open letter from Lamy, *supra* note 272.
[278] HÄBERLI *Food Security*, *supra* note 274, at 150.
[279] ROBERT HOWSE & TIM JOSLING, AGRICULTURAL EXPORT RESTRICTIONS AND INTERNATIONAL TRADE LAW: A WAY FORWARD INTERNATIONAL FOOD AND AGRICULTURAL TRADE POLICY COUNCIL, 10, 33 (2012) *available at* http://www.agritrade.org/Publications/documents/Howse_Josling_Export_Restriction_final.pdf [hereinafter HOWSE & JOSLING].
[280] *Id.* at 10-11.
[281] Christian Häberli, AFTER BALI: WTO RULES APPLYING TO PUBLIC FOOD RESERVES 2 (FAO Commodity and Trade Policy Research, Working Paper No. 46, 2014) [hereinafter HÄBERLI *After Bali*].

when it comes to trade-related food security. For this, we need to look at developments at the WTO and within the multilateral trading system.

## IV. INTERNAL PLANE: TRADE-RELATED FOOD SECURITY, THE WTO AND THE MULTILATERAL TRADING SYSTEM

On the internal plane, when it comes to trade-related food security in the multilateral trading system- more generally and in the WTO in particular, the picture is fragmented. First, there is the incomplete agricultural reform programme within the multilateral trading system, which is supposed 'to establish a fair and market-orientated agricultural trading system'.[282] As part of their market access commitments, WTO developed country Members agreed to take into account 'the particular needs and conditions of developing country Members' and to undertake those commitments 'in an equitable way […] having regard to non-trade concerns, including *food security*'.[283] Efforts to achieve this latter objective have yet to reach fruition and must also be measured against attempts to secure food security for net-food importing and LDCs under the *NFIDC Decision*,[284] which remains largely inchoate and ineffective.

Second, some key developing country Members, like India have reverted to public stockholding for food security purposes and domestic food aid in pursuit of revisionist food sovereignty policies. In this context, food security goes beyond famine and poverty and is subject to regulatory capture by governments. Initially seen as 'a reaction to ... the trade liberalization agenda for agriculture by a large number of farmer and peasant organizations',[285] food sovereignty has again 'entered a general public discourse, and national legislation'.[286]

This development has been especially prominent in the run up to the Ninth Ministerial Conference, held in Bali in 2013, and the eventual adoption of a *Ministerial Decision on Public Stockholding for Food Security Purposes*.[287] The impetus for change acquired a new, more political focus. Henceforth, for some developing

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[282] Preamble, recital 2 *AoA*, THE LEGAL TEXTS, *supra* note 15.
[283] *Id.* Preamble, recital 5,6.
[284] *NFIDC Decision*, *supra* note 133.
[285] Bipul Chatterjee & Sophia Murphy, *Trade and Food Security in* THE E15 INITIATIVE, STRENGTHENING THE MULTILATERAL TRADE SYSTEM, AGRICULTURAL AND FOOD SECURITY GROUP, PROPOSALS AND ANALYSIS 38 (Bali, Dec. 2013) [hereinafter CHATTERJEE & MURPHY].
[286] HÄBERLI *After Bali*, *supra* note 281, at 3.
[287] WTO, Ministerial Decision of 07 December, 2013 on Public Stockholding for Food Security Purposes, WT/MIN(13)/38, WT/L/913 7 (2013) [hereinafter *Bali Ministerial Decision on Public Stockholding*].

country Members, national food sovereignty lies at heart of the debate about access to adequate food.

Third, for many WTO developing country Members there is often a disjuncture between their domestic law and policy, which may include domestic support measures and export restrictions, and market access for agricultural products and commodities. Yet, as Christian Häberli notes, '[M]any developing countries derive substantial earnings from agricultural exports'. Hence, '[T]heir food security grows in parallel with increased market access for their cash crop exports, because their export earnings allow food procurement at the cheapest, i.e. world market prices.'[288] It therefore, does not make sense for them to apply export restrictions in the form of quotas or taxes because this stifles export competition and may ultimately impact on their ability to ensure for their citizens adequate access to food supplies at affordable prices.

Fourth, and not insignificant in the context of trade-related international food security, new alliances and coalitions have arrived on the scene, displacing traditional WTO developing country groupings such as the African Group, the Group of Least-Developed Countries ("LDC Group") and the African, Caribbean and Pacific Group ("ACP Group").[289] From 2001 onwards more than 40 of these new alliances, including Friends of the Development Box (advocating special treatment for agricultural products from developing countries and LDCs),[290] Friends of Fish,[291] and the LDC and Sectoral Initiative in Favour of Cotton (from a small group of West African Members), now known as the 'Cotton-4',[292] have submitted proposals or negotiated with a common position of one sort or another. This occurrence reflects the new-found bargaining power of WTO developing

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[288] HÄBERLI, *supra* note 137, at 303.

[289] For the members of the African Group, the LDC Group and the ACP Group, *see* GROUPS IN THE WTO (updated Sept. 10, 1994) at https://www.wto.org/english/tratop_e/dda_e/negotiating_groups_e.pdf [hereinafter Groups in the WTO].

[290] Friends of the Development Box (FDB) was established in 1999 and by the time of the Doha Round in 2001 consisted of Cuba, Dominican Republic, El Salvador, Haiti, Honduras, Kenya, Nicaragua, Nigeria, Pakistan, Peru, Senegal, Sri Lanka, Uganda, Zimbabwe; *see also* Germanwatch & FIAN, Weltladen-Dachverband, *Securing Food - For a "Development Box" in the WTO Agreement on Agriculture* (Position Paper, 2005), *available at* https://germanwatch.org/en/3907.

[291] Friends of Fish (FoF) support reduction in fisheries' subsidies. It includes both developed and developing countries, *see* Groups in the WTO, *supra* note 289.

[292] The Cotton-4, consisting of Benin, Burkina Faso, Chad and Mali, promotes cuts in subsidies and tariffs on cotton; *see also* Groups in the WTO, *id.*

countries beyond the traditional major interests of the industrialised developed countries.[293]

As a result of this development, WTO negotiations on agriculture have become more complex and broader-based, due to the divergent interests of developing countries vis-à-vis traditional industrialised developed countries, and also among themselves.[294] Aside from a divergence in position between food exporting developing countries/LDCs and NFIDCs (see next section) there has been a further 'shift in some developing countries' negotiating strategy from a defensive stance to a more aggressive and forward-looking position in the WTO [that] is particularly exemplified by the Cairns Group and the G-20'.[295]

At the Cancún Ministerial Conference in 2003,[296] several developing members who were tired of Australia and Canada's insistence on a deal being reached with the EU and the US in agricultural negotiations, broke away to form the G-20 group of developing countries.[297] While the G-20 initially sought to maintain a bargaining position on market access, domestic support and export competition, cracks soon appeared; accordingly, G-20 members had 'difficulties in reconciling their heterogeneous agricultural interests'.[298] There were G-20 members like India, which maintained an additional, protectionist stance towards agriculture, while Brazil shifted towards a more aggressive approach, favouring agricultural trade liberalisation. South Africa sought to broker a power deal between these two BRICs, by fostering strong developing country coalitions in an attempt to balance American and European power.[299]

### *A. Food security and market access under the agricultural reform agenda*

Food security in the multilateral trading system, especially at the WTO, is defined more narrowly than elsewhere in the food and agricultural community or under UN-led initiatives. Rather than being geared to the alleviation of poverty and freedom from hunger which is based on any form of entitlements, human security

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[293] Mary E. Footer, *The WTO as a "living instrument": the contribution of consensus decision-making and informality to institutional norms and practices in* GOVERNING THE WORLD TRADE ORGANIZATION: PAST, PRESENT AND BEYOND DOHA 217-240, 233 (THOMAS COTTIER & MANFRED ELSIG eds.) (Cambridge: Cambridge University Press) (2011).

[294] Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support* 48(2) HJIL 483-551, 498 (2007) [hereinafter ROLLAND].

[295] *Id.* at 494.

[296] WTO Ministerial Conference, Fifth Session, Cancún, Mexico, 10-14 September 2003.

[297] For an up-to-date list of current members of the G-20, *see also* Groups in the WTO, *supra* note 289.

[298] ROLLAND, *supra* note 294, at 494-95.

[299] *Id.* at 495.

or human rights-based approach, food security is still essentially understood in terms of adequate supplies of food into WTO Members' territories.

Even so, what constitutes food security in terms of market access under the agricultural reform is not undisputed. For example, many members of the Cairns Group of agricultural exporting countries,[300] who support liberalisation and a strong market orientation, favour the elimination of trade distortions arising from the removal of agricultural support mechanisms by developed country Members. Ironically, the removal of agricultural subsidies may have an inflationary impact whereby discontinuance of such policies distorts trade and production in agricultural products, thereby leading to potential price rises on world markets. This could impede long term food security in developing country and LDC Members that rely on imports of subsidised grains and oil seeds from developed country Members.[301] Some of them may even be tempted to introduce subsidies to encourage imports to enable consumers to purchase foreign-imported foodstuffs.[302]

Furthermore, in terms of trade-related food security NFIDC and LDC interests may 'not necessarily [be] aligned with those of large agricultural exporting countries in two different spheres'.[303] Firstly, this may be because food exports to the EU have varying impacts on agricultural producing developing country and LDC Members, depending on whether they benefit from an EU preference scheme, e.g. the Generalised System of Preferences ("GSP").[304] Second, 'the effect of a decrease in EC and US subsidies on the composition of food-importing and food-

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[300] Named after the Australian city where the first meeting of the group was held, the Cairns Group of agricultural exporting countries currently consists of a mixture of developed and developing countries - Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Pakistan, Paraguay, Peru, Philippines, South Africa, Thailand, Uruguay and Vietnam; *see also* Groups in the WTO, *supra* note 289.

[301] *See* Communiqué issued at the 38th Cairns Group Ministerial Meeting, Bali, 2 December 2013,¶ 5, *available at* http://www.cairnsgroup.org/pages/131202-communique.aspx, [hereinafter Cairns Group, Bali Communiqué],

[302] JOSLING, *supra* note 18, at 7.

[303] ROLLAND, *supra* note 294, at 494.

[304] Formally legalised under the GATT, as a derogation from MFN, on a temporary basis in 1971, the provision was made permanent in 1979 at the end of the Tokyo Round by means of the *Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries*, Decision of the Contracting Parties, 28 Nov. 1979, GATT Doc. L/4903, *BISD* 26S/203 (1980), which is better known as the 'Enabling Clause'. As of Jan. 1, 2014, new EU GSP preferences apply under Council Regulation (EU) 978/2012 of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008 [2012] OJ L 303/1.

exporting groups' may also be significant where some NFIDC become exporters.[305]

Moreover, the benefits that food-exporting developing country and LDC Members may directly derive from WTO-induced market access may be further limited, especially where agreed tariff reductions have failed to create new trade opportunities. One exception is the TRQ (see section II.C above). The TRQ acts as a 'minimum market access' condition, which ensures that primary agricultural imports can compete with domestic production at relatively low, or 'in-quota', tariff rates for at least 3% of domestic consumption, rising to 5% after the implementation period.[306]

Developing country and LDC Members have also voiced doubt about the future operation of 'Special Products' ("SP"), especially given their contentious nature in terms of their sensitivity. Initially proposed by the G33,[307] SP would consist of certain agricultural products that would be eligible for more flexible treatment in terms of exemption from tariff reduction or domestic support requirements while benefitting from an expansion of TRQ. The crops in question would be designated by developing country Members on the grounds of their importance to food and livelihood security and rural development; include staple crops consumed in their natural form; allow consumption to be met through domestic production; and ensure that they provide employment for a significant proportion of the agricultural population.[308]

Similarly, they remain sceptical about the proposed framework agreement for a 'Special Safeguard Mechanism' ("SSM"), which would allow for the temporary imposition of higher duties on agricultural imports when volumes rise or prices fall below a certain level, without having to prove a causal link of serious injury.[309] The G33 sees the SSM as being fairly straightforward and operationally effective because it would operate very much like the special agricultural safeguard,[310] currently being used by only a few, mainly developed country Members. However,

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[305] ROLLAND, *supra* note 294, at 494.

[306] Annex 5, *AoA*, THE LEGAL TEXTS, *supra* note 15, at 55-58; *see further* HÄBERLI, *supra* note 137, at 303 and fn. 11; *see also* CHATTERJEE & MURPHY, *supra* note 285, at 44, as to how to improve upon the current TRQ.

[307] The G33 countries (also called 'Friends of Special Products' in agriculture) is a group of WTO Members pressing for flexibility for developing countries to undertake limited market opening in agriculture.

[308] CHATTERJEE & MURPHY, *supra* note 285, at 42.

[309] *Id*.; HÄBERLI, *supra* note 137, at 304.

[310] Art. 5, *AoA*, THE LEGAL TEXTS, *supra* note 15, at 36-38; *see also* CHATTERJEE & MURPHY, *supra* note 285, at 44.

there is uncertainty about product coverage, possible triggers for the use of the SSM and available remedies.[311]

Finally, Article 20 of the *AoA* deals with non-trade concerns and issues of 'multifunctionality' in agriculture, alongside special and differential treatment for developing countries and the objectives of establishing a fair and market-orientated agricultural trading system, as mentioned in the Preamble.[312] One of those objectives is to undertake commitments equitably, 'having regard to non-trade concerns, including food security'.[313]

Of particular concern in this respect is the right of LDCs and net-food importing developing countries, both WTO and non-WTO Members, most of whom are in sub-Saharan Africa. By prohibiting quantitative export restrictions and promoting the 'binding' of tariffs (possibly including export duties), WTO rules may promote the supply of basic foodstuffs for LDCs and NFIDCs but do not necessarily secure effective access to food by poor people. Furthermore, the gains they may have made in the WTO from the liberalisation of agricultural export trade may be offset by increased demand domestically.

The *NFIDC Decision*, which is a Ministerial Decision adopted at Marrakesh in 1994,[314] already anticipated the problem that the agricultural reform programme could mean that many LDCs and NFIDCs might experience 'negative effects in terms of the availability of adequate supplies of basic foodstuffs from external sources on reasonable terms and conditions, including short-term difficulties in financing normal levels of commercial imports of basic foodstuffs.'[315] A series of specific measures which WTO Member governments have agreed upon in order to operationalise the *NFIDC Decision* are taken up in the body of the Decision. They can be broken down into four operational areas: food aid;[316] technical and financial assistance;[317] special and differential treatment within the framework of any agreement on agricultural export credits;[318] and short-term difficulties in financing normal levels of commercial imports.[319] Monitoring of the *NFIDC Decision* is undertaken by the WTO Committee on Agriculture on an annual basis, with input

311 HÄBERLI, *supra* note 137, at 304.
312 Art. 20(c), *AoA,* THE LEGAL TEXTS, *supra* note 15, at 46-47.
313 *Id.* at 33, Preamble, recital 6.
314 *NFIDC Decision*, *supra* note 133.
315 *Id.* ¶ 2.
316 *Id.* ¶ 3.(i).
317 *Id.* ¶¶ 3(ii), (iii).
318 *Id.* ¶ 4.
319 *Id.* ¶ 5.

from the main agencies involved in its implementation, i.e. the IGC, the IMF, the WFP and the World Bank.[320]

The FAC 1986 (as amended to FAC 1999), which is referenced in the *NFIDC Decision*, no longer exists. It was effectively replaced (or displaced) in 2012 by the FAssC, which has chosen the WTO as the 'preferred forum for addressing the link between food aid donations and distortions of agricultural trade' (see section II. D above). In other words, WTO disciplines take precedence in any conflict between them and the FAssC.

The FAssC may give the WTO the upper hand in any conflict situation, but there is no getting away from the fact that the *NFIDC Decision*, as conceived and implemented, remains a weak instrument. Above all, the *NFIDC Decision* is a political commitment. It is couched in soft language that does not convey the language of legal commitment or obligation; instead, it is somewhat amorphous or inchoate. Even so, it may be more than a best endeavours clause.[321]

It has also been argued by Häberli that the four operational areas under the *NFIDC Decision* do not really fall 'within the realm and competence of the WTO', with the possible exception – in terms of trade-related food security – of agricultural export credits that may negatively affect domestic production.[322] This is contestable, given that both food aid and short-term difficulties in financing normal levels of commercial imports[323] are all part of the equation when it comes to securing food supplies and ensuring their distribution to the hungry and undernourished in the developing world. The Cairns Group of agricultural exporters are leaning in this direction too, when in their 2013 Bali Communiqué they stated their support for the central role of the FAO in the global governance of food security. They then went on, however, to recognise that 'trade policy reform has a role to play in addressing food security',[324] which I believe it most certainly does.

On the issue of agricultural export credits, Häberli maintains that its inclusion in the *NFIDC Decision* could lead to the formulation of new disciplines on export credits arising from the DDA negotiations that could allow exporting countries to continue providing credits – at least to LDCs and NFIDCs on the basis of the

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[320] *Id.* ¶ 6.
[321] *See* PROWSE, *supra* note 5, at 278.
[322] HÄBERLI, *supra* note 137, at 308.
[323] This situation may also be a consequence of a failure by some developing countries to harness requisite trade financing. A suggestion for provision on trade finance in a potential FSA is made by JOSLING, *supra* note 18, at 16 and for further details, *see* main text below.
[324] Cairns Group, Bali Communiqué, *supra* note 301, ¶ 5.

'differential treatment' language contained therein.[325] Another possibility put forward by some commentators is for a separate Code of Conduct[326] or a plurilateral Agreement on Food Security[327] to be negotiated at the WTO, either of which would exempt food aid from export policies on four key staples – wheat, rice, corn and soybeans (the AMIS Crops) – in the form of export restrictions, such as export taxes.

For example, Tim Josling supports a plurilateral Food Security Agreement ("FSA") to allow exporters of AMIS Crops to permit certain restrictions on their export policies,[328] contrary to their obligations under Article XI:1 *GATT 1994*. These restrictions could include placing no export quotas, export taxes, etc. on any of these crops when purchased for the WFP or any other food aid agency recognised by the CFS. Similarly, FSA signatories could ensure that no quantitative or other export restrictions would be placed on sales of these crops to or from LDCs, recognised by the WTO. Developing countries which are experiencing a serious state of food insecurity as a result of poor harvests or another domestic reason might be similarly exempted, provided the CFS declares such a state of food insecurity to exist. Finally, exporting Members under the FSA could provide assistance where needed in facilitating trade finance to importing Members to purchase supplies of these vital commodities.[329]

### *B. Safeguarding domestic food security through national policy space: public stockholding and the multilateral trading system*

This brings us on to the next point, which is the extent to which the multilateral trading system makes allowances for national policy space, where measures are taken to protect domestic production in order to ensure food security. This covers matters such as food production involving input credits and domestic subsidies, the protection of domestic food markets through food price stabilisation schemes, or a return to the widespread use of commodity agreements for basic staples, all of which barely feature in the trade paradigm.

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[325] *NFIDC Decision*, *supra* note 133, ¶ 4.

[326] CHATTERJEE & MURPHY, *supra* note 285, at 45.

[327] JOSLING, *supra* note 18, at 16. It will be recalled that an Annex 4 plurilateral agreement is only applicable to those WTO Members who have elected to accept it and on whom it is binding. Thus, it is possible to confine its benefits to its signatories without having to extend them to *all* Members on an MFN basis; *see also* FOOTER, *supra* note 28, at 25, 95-96.

[328] JOSLING, *supra* note 18.

[329] *Id,* at 16-17, which includes further coverage of the proposed Food Security Agreement or FSA.

As noted previously, certain Green Box measures[330] under the *AoA* allow WTO Members to engage in 'public stockholding for food security purposes',[331] provided that they have 'no, or at most minimal, trade-distorting effects or effects on production'.[332] Public stockholding for food security purposes must 'form an integral part of a food security programme identified in national legislation' and 'be made at current market prices'.[333]

A definition of and the conditions for public stockholding, are as follows:

> '… governmental stockholding programmes for food security purposes in developing countries whose operation is transparent and conducted in accordance with officially published objective criteria or guidelines […] including programmes under which stocks of foodstuffs for food security purposes are acquired and released at administered prices, provided that the difference between the acquisition price and the external reference price is accounted for in the AMS[334] (i.e. under the Amber Box[335]).'

However, the AMS (under the Amber Box) is calculated as the *difference* between the price of government support (Minimum Support Price or "MSP"), which may be no more than the prevailing market rate, and the External Reference Price ("ERP"), which is based on the 1986-88 reference price, *multiplied by* total agricultural production that is eligible for support, according to Annex 3 of the *AoA*.[336] However, fixing the ERP based on the 1986-88 reference price and taking into account the permissibility of government subsidisation provided it does not exceed a developing country *de minimis* of 10%,[337] is both outdated and inequitable.[338]

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330 It will be recalled that these are measures that seek to balance agricultural trade liberalisation and WTO Member governments' pursuit of legitimate agricultural policy goals, including non-trade concerns. They require no reductions at all. See further, *supra* note 106.

331 Annex 2, ¶ 3, *AoA*,THE LEGAL TEXTS, *supra* note 15, at 49.

332 *Id.* at 48, Annex 2, ¶ 1.

333 *Id.* at 49, Annex 2, ¶ 3.

334 *Id.* at 49*,* footnote 5.

335 For a definition of the Amber Box, i.e. domestic support measures that are considered to distort production and trade, see *supra* note 127.

336 Annex 3, ¶¶ 1, 5-9, *AoA*, THE LEGAL TEXTS, *supra* note 15, at 53-54.

337 *Id.* at 39, Article 6:4(b), where it is stated that for developing countries the resulting amount has be within 10% of the value of production.

338 *See* Saloni Khanderia-Yadav, *Ramifications of the Bali Ministerial Conference on Food Security and Public Distribution Schemes: Is India Skating on Thin Ice?* 11(2) MANCHESTER JIEL 201-214, 206 (2014).

The few WTO developing country Members, like India, that started off with higher support levels subsequently ended up with agreed AMS limits that are above the 10% *de minimis* level. Additionally, in the case of India, its low ERP for rice and wheat is also subject to the effects of inflation and exchange rate fluctuations, both of which have had an impact on the methodology used to calculate AMS, thereby rendering any comparison between the base year of 1986-88 and the current year AMS figures meaningless.[339]

Additionally, there is a provision under the *AoA* for domestic food aid where 'sections of the population [are] in need'.[340] Such domestic food aid will not be subject to WTO limitations or reduction commitments, but, there must again be 'clearly-defined criteria related to nutritional objectives' before domestic food aid can be considered as WTO-compatible.[341]

Back in November 2012, the G33 Group of Countries proposed that food stocks purchased for public stockholding purposes in developing country Members should be placed in the Green Box with a view 'to supporting low-income and resource-poor producers, including at higher than local market prices'.[342] The main driver behind the proposal was India with its National Food Security Act, 2013 (or 'Right to Food' Act)[343] although other countries, like Brazil, which has achieved self-sufficiency in food production but suffers from high levels of malnutrition among its population (as does India), supported the proposal.[344] The US, Thailand, Pakistan[345] and the Cairns Group of agricultural exporters[346] were distrustful of the proposal because they saw it as a relaxation of the disciplines on price and product support, which would counteract the agricultural reform process under Article 20

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339 *Negotiations on the WTO Agreement on Agriculture: Proposals by India in the areas of: (i) Food Security, (ii) Market Access, (iii) Domestic Support, and (iv) Export Competition* 8,G/AG/NG/W/102 (15 Jan. 2001), § Proposal on Domestic Support, ¶¶ 12-13.

340 Annex 2, ¶ 4, *AoA*, THE LEGAL TEXTS, *supra* note 15, at 49.

341 *Id.* Again, there is a fn. 6, which states that this includes 'the provision of foodstuffs at subsidized prices with the objective of meeting food requirements of urban and rural poor in developing countries on a regular basis at reasonable prices'.

342 HÄBERLI *After Bali*, *supra* note 281, at 6.

343 National Food Security Ordinance, No. 7 of 2013, July 5, 2013 (signed into law Sept. 12, 2013, with retroactive force to July, 5 2013), also known as the 'Right to Food' Act, aims to provide subsidised grains to approximately two-thirds of India's 1.2 bn. population and to encourage. According to HÄBERLI, the other reason for action was that India had just raised the minimum producer price for rice and could foresee the risk of exceeding its Amber Box limits in 2013.

344 CHATTERJEE & MURPHY, *supra* note 285, at 39.

345 HÄBERLI *After Bali*, *supra* note 281, at 6.

346 *See* Cairns Group, Bali Communiqué, *supra* note 304, ¶ 5.

*AoA* and the DDA. Besides, they were of the view that the Green Box criteria for stockpiling and domestic food aid were sufficient to accommodate food security concerns without market distorting effects.[347]

Interestingly, India's Food Security Act is a manifest example of the resurgence in food sovereignty among some developing country Members (see the opening remarks to this section D.). It builds on both -Sen's entitlements approach and the human rights-based approach to food security – in the latter case also endorsing the UN Special Rapporteur's recommendation to seek food security through self-sufficiency in food production.[348] The 2013 Act could serve as a template for other developing country and LDC Members. However, such a proposition must be weighed against the possibility that it might prove more divisive than enabling or cooperative for future collective action on food security among this group of countries, an issue to which we return at the end of this section.

In fact, notwithstanding India's adoption of national legislation on food security, negotiations for a Decision on Public Stockholding for Food Security moved at a fast pace during the Bali Ministerial Conference – at several points proceeding in parallel with negotiations on what would become the most substantial outcome of the whole Conference – the *Agreement on Trade Facilitation*.[349] Eventually, agreement was reached on the *Bali Ministerial Decision on Public Stockholding*,[350] which puts in place an 'interim mechanism' designed to regulate governmental support for 'traditional staple food crops[351] in pursuance of public stockholding programmes for food security purposes'.[352] It also sets up a Work Programme 'to negotiate an agreement for a permanent solution, for the issue of public stockholding for food security purposes for adoption by the Eleventh Ministerial Conference',[353] i.e. four years hence, in 2017.

The most prominent aspect of the *Bali Ministerial Decision on Public Stockholding* is the introduction of a so-called 'peace clause' for developing country Members, who may have breached the Green Box criteria, i.e. domestic support measures, in the form of public stockholding for food security purposes. This is because the public

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347 HÄBERLI *After Bali*, *supra* note 281, at 6.

348 Special Rapporteur's Report, 2011, *supra* note 260, at 17, recommendation 5 and accompanying text in the Report itself.

349 World Trade Organisation, *Agreement on Trade Facilitation*, Ministerial Decision WT/MIN(13)/36**,** WT/L/91 (7 Dec. 2013),WTO Ministerial Conference, Ninth Session, Bali, 3-6 Dec. 2013 [hereinafter *Agreement on Trade Facilitation*].

350 *Bali Ministerial Decision on Public Stockholding*, *supra* note 287.

351 *Id.* at ¶ 1, fn. 2 indicates that this means 'primary agricultural products that are predominant staples in the traditional diet of a developing Member'.

352 *Id.* ¶ 1.

353 *Id.* ¶¶ 8-10.

stockholding in question may nevertheless have led to distortions in production or trade for a developing Member that is 'exceeding or … risk exceeding either its AMS limits (bound AMS or the *de minimis* level)'.[354] Essentially, it means that any developing country or LDC Member that breaches the relevant AoA rules will be shielded from challenge by other Members in the WTO dispute settlement system for a period of at least four years, but is this workable?

Several difficulties arise. One is that the *Bali Ministerial Decision on Public Stockholding* is silent on any challenge that may be brought against a developing country or LDC Member under the *Agreement on Subsidies and Countervailing Measures* (*SCM*).[355] This possibility cannot be excluded since Article 13 of the *AoA* specifically permits screening of agricultural subsidies (both domestic and export),[356] which might lead to a challenge under the relevant provisions of the *AoA*.[357] The discipline of the *SCM* is also more stringent since it 'prohibits subsidies with a causal injury effect on other countries, including world market prices'.[358]

Another difficulty is that public stockholding for food security purposes must remain consistent with Green Box criteria at all times to avoid being in breach of the peace clause under the *Bali Ministerial Decision on Public Stockholding*. There is also an important notification requirement to other Members (through the Committee on Agriculture) should any developing country or LDC Member wish to rely on the *Bali Ministerial Decision on Public Stockholding*. This requirement may be something of a Trojan horse because developing country and LDC Members wishing to invoke the peace clause are putting their fellow Members on notice that they are in violation of WTO law, thereby inviting complaints against them.[359]

The same issue arises in the context of Article 25 *SCM* where WTO Members are required to notify other Members of their subsidies annually.[360] However, where

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[354] *Id.* ¶ 3.a.

[355] *Agreement on Subsidies and Countervailing* Measures, THE LEGAL TEXTS, *supra* note 15, at 231-74.

[356] *Id.* at 43-44, Art. 13.

[357] *Id.* at 236, 238, Arts.6.3, 7.2(b).

[358] HÄBERLI *After Bali*, *supra* note 281, at 8.

[359] For the extent to which the *Bali Ministerial Decision on Public Stockholding* could be characterised may derive its validity from being a 'subsequent agreement' between the parties to the *AoA*, *see* Mary E. Footer, *The Making of International Trade Law in* RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAW-MAKING (CATHERINE BRÖLMANN & YANNICK RADI eds.)(Cheltenham: Edward Elgar Publishers) (forthcoming 2015), with reliance on *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Appellate Body, WT/DW469/AB/R, adopted 24 Apr. 2012 (*US – Clove Cigarettes*), ¶¶ 260, 263, 267.

[360] *See* Arts. 25.1, 25.2 *SCM*, THE LEGAL TEXTS, *supra* note 15, at 259.

the *Bali Ministerial Decision on Public Stockholding* differs from Article 25 *SCM* is that the latter has a cross-notification element, which allows a Member that 'considers that any measure of another Member [is] having the effects of a subsidy', which has not been notified*, to bring the matter to the attention of that Member, i.e. to raise a challenge under the SCM whereas the Bali Ministerial Decision* does not. When it comes to the operation of the peace clause in practice the *Bali Ministerial Decision on Public Stockholding* may be honoured more in the breach than in its observance but that would not necessarily mean that another Member would refrain from notifying an infringing developing Member, such as India, under the *SCM*, notwithstanding the language of the peace clause in the *Decision*.

In practice, this is unlikely to happen unless there is an egregious breach of the *Bali Ministerial Decision on Public Stockholding*, especially given that this Decision is a temporary arrangement, but it cannot be precluded. When it comes to India,[361] in exchange for its agreement not to block adoption of the *Agreement on Trade Facilitation*,[362] the US agreed in November 2014, not to challenge India's public stockholding for food security purposes until talks on a final solution have been concluded.[363] This effectively grants India an indefinite peace clause for its food security programme, envisaged under the Right to Food Act.

Nevertheless, India's action in enacting national food security legislation is widely seen as potentially creating 'a range of incentives for the Indian government to act inconsistently' with the *Bali Ministerial Decision on Public Stockholding.*[364] For example, this could come about by India 'releasing stockpiles of food [that] can reduce domestic prices and affect the competitiveness of imports' or alternatively dumping 'unneeded food on global markets, depressing food prices in other markets and resulting in farmers in importing countries planting less in response'.[365] It is reported that some developing countries 'have privately expressed concern that India and other large stockholders' might do exactly this, along the same lines as Thailand is reported to have done with respect to rice.[366]

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[361] Rajesh Roy & Carol E. Lee, *India, U.S. Reach Agreement on Food Stockpiling, Clearing Way for WTO Deal*, Wall Street Journal, New Delhi, Nov. 13, 2014, *available at* http://www.wsj.com/articles/india-u-s-reach-agreement-on-food-stockpiling-clearing-way-for-wto-deal-1415861725.

[362] *Agreement on Trade Facilitation*, *supra* note 349.

[363] The General Council adopted the draft Decision on Public Stockholding for Food Security Purposes, WT/GC/W/688 (24 Nov. 2014).

[364] Joshua Meltzer, *Improving Indian Food Security: Why Prime Minister Modi Should Embrace the WTO', Opinion*, Brookings Institute, May 16, 2014, http://www.brookings.edu/research/opinions/2014/05/16-world-trade-organization-india-food-security-meltzer#ftnte7 [hereinafter MELTZER].

[365] *Id.*

[366] CHATTERJEE & MURPHY, *supra* note 285, at 46.

Additionally, and perhaps more worryingly, the issue of public stockholding for food security purposes, especially when it comes to India's action, may have driven a wedge between developing country and LDC Members in claiming 'more policy space in the pursuance of a development objective'.[367] This matters when it comes to the ability of those members to take collective action to ensure that food security remains an attainable public good and one that is compatible with their trading relations.

### *C. Export competition and international trade-related food security: the final frontier*

Another shortcoming of the *Bali Ministerial Decision on Public Stockholding* is that 'it does not directly address the impact of export restrictions on food security'.[368] There is plenty of reason to be worried about the export competition aspect of trade-related food security and the developing world.[369] First, it may just be that there is simply a fundamental incompatibility between efforts to enhance food security in the multilateral trading system and the WTO's bias towards 'an export-biased rule system [that] does not and cannot address trade distortions otherwise than through more free trade'.[370]

Second, given the difficulty so far in the DDA of trying to improve trade disciplines on export restrictions, including through the July 2008 Draft Modalities (since December 2008 known as the *Revised Draft Modalities*),[371] the conventional wisdom is that 'existing disciplines are largely meaningless or even non-existent (with some exceptions such as China's Protocol of Accession to the WTO)'.[372] The *Revised Draft Modalities* have made very modest procedural proposals to modify Article 12 *AoA*,[373] and thereby to revise the agricultural exception of Article XI:2(a) *GATT 1994* that relates to temporary export prohibitions or restrictions for the relief of critical shortages of foodstuffs.[374] It will be recalled that Japan was

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[367] HÄBERLI *After Bali*, *supra* note 281, at 9.
[368] MELTZER, *supra* note 364.
[369] HOWSE & JOSLING, *supra* note 276, at 10; HÄBERLI, *supra* note 137, at 315,318-9.
[370] HÄBERLI *After Bali*, *supra* note 281, at 162.
[371] Committee on Agriculture in Special Session, Revised Draft Modalities for Agriculture, TN/AG/W/4/Rev (6 Dec. 2008) (*Revised Draft Modalities*). The focus of the 'special and differential treatment provisions' of the *Revised Draft Modalities*, in respect of (a) importing LDCs and NFIDCs and (b) exporting developing countries their export credits, are taken up in Annex j; *see further* HÄBERLI, *supra* note 137, at 315.
[372] HOWSE & JOSLING, *supra* note 276, at 10.
[373] Art. 12, *AoA*, THE LEGAL TEXTS, *supra* note 15, at 43, contains the current text disciplining export prohibitions and restrictions on agricultural products.
[374] Article XI:2 (a), *GATT 1994* (previously *GATT 1947*), *id.*, 437.

sanctioned in the late 1970s, in the *GATT-12 case*, for relying on ArticleXI:2(a) *GATT 1947*.[375] As yet, there are no restrictions on export taxes.[376]

Third, it is clear that new or revised rules on export restriction of agricultural products must be part of any comprehensive outcome on food security in the DDA.[377] Whether there are, as Howse and Josling suggest, 'clear indications of an emerging norm that it is not appropriate for a state to respond to a food crisis in a manner that is simply indifferent to the effects of its actions on the food security of other states,'[378] is debatable. Anyhow, as they and other commentators point out,[379] the absence of an outcome on export restrictions in the *Revised Draft Modalities* does not mean that agricultural exports are not subject to any rules concerning their restriction.

Lacking final disciplines on export competition, the WTO Appellate Body in the decision of *China – Raw Materials* case,[380] made clear that the WTO already contains important rules on export restrictions, which could be applied to export restrictions on food and feedstuffs in times of price spikes or critical shortages of foodstuffs. Whereas the *China-Raw Materials* dealt with *inter alia* export duties and export quotas imposed by China on certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc, i.e. were non-agricultural products, the Appellate Body's ruling could be equally applicable to all similar export restrictions, including those on food and feed stuffs.

Of significance for the future of export competition and trade-related food security is the way in which the Appellate Body addressed the meaning of the exception in Article XI:2(a) *GATT 1994*[381] in respect of Chinese export restrictions on refractory-grade bauxite. It also addressed the relationship between what is usually known as 'the agricultural exception' to quantitative restrictions (including export restrictions) under Article XI:2(a) *GATT 1994* and Article XX(g) *GATT 1994*,[382] which is the general exception relating to the conservation of exhaustible natural resources in order to justify an otherwise prohibited export restriction.

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375 *See GATT-12 case*, *supra* note 116, and accompanying main text.
376 HÄBERLI, *supra* note 137, at 318.
377 MELTZER, *supra* note 364.
378 HOWSE & JOSLING, *supra* note 276, at 11.
379 *Id.*; MELTZER, *supra* note 364; HÄBERLI *After Bali*, *supra* note 281, at 162.
380 *China –Measures Related to the Exportation of Various Raw Materials*, WTO Appellate Body, WT/DS394/AB/R, WT/DS396/AB/R and WT/DS398/AB/R, adopted 22 Feb. 2012 (hereinafter *China –Raw Materials*).
381 Article IX:2(a) GATT 1994, THE LEGAL TEXTS, *supra* note 15, at 437.
382 Article XX(g), GATT 1994, THE LEGAL TEXTS, *id.*, at 455.

The Appellate Body pointed out that it is not up to WTO Members to make a self-determination as to when they are facing critical shortages. Instead, any such decision may need to be scrutinised by a WTO panel for its consistency with the GATT Article XI:2(a) *GATT 1994* requirement that such restrictions are 'temporarily applied' in order to prevent or relieve 'critical shortages' of food stuffs or other essential products. As Howse and Josling point out, the Appellate Body is of the view that invoking 'GATT exceptions to justify export restrictions as a response to the scarcity of essential commodities must be carefully policed and circumscribed' and dealt with on a case-by-case basis.[383]

Equally important is the relationship between Article XI:2(a) *GATT 1994* and Article XX(g) *GATT 1994*, which have different functions. Whereas the agricultural exception of Article XI:2(a) *GATT 1994* is aimed at preventing or relieving 'critical shortages' of food stuffs and other essential products, Article XX(g) *GATT 1994* requires that such export restrictions are measures relating to the conservation of natural resources as an exception to justify an otherwise GATT-inconsistent measure. According to the Appellate Body in *China – Raw Materials* the text of Article XI:2(a) *GATT 1994* '*shall not extend* to the items listed under subparagraphs (a) to (c)', thereby narrowing down the scope of the Article XI:2(a) 'carve out' from the general elimination of quantitative restrictions. Thus, Article XX(g) *GATT 1994* can never be applied because 'no obligation exists'. Furthermore, since 'the reach of Article XI:2(a) is different from that of Article XX(g)', an export restriction could operate 'simultaneously with a conservation measure complying with the requirements of Article XX(g)'.[384]

Since the Appellate Body was not dealing with export restrictions on food or agricultural products under *China – Raw Materials*, it had no opportunity to consider how Article XI:2 (a) *GATT 1994* might interact with Article 12 *AoA*. In particular, the language of the first paragraph of that provision might come into play where there are export restrictions on food or agricultural products but 'due consideration' must be given to 'the effects of such prohibition or restriction on [the] importing member's food security'.[385]

Arguments have been advanced for taking the linkage seriously,[386] given that there is a potential interaction between Article XI:2 (a) *GATT 1994* and the non-discrimination principle, enshrined in the MFN obligation of Article I *GATT*

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[383] HOWSE & JOSLING, *supra* note 276, at 14; *see China- Raw Materials*, *supra* note 380, ¶¶ 323-8.
[384] *Id.* ¶¶ 334 and 337 respectively.
[385] Article 12:1(a), AoA, THE LEGAL TEXTS, *supra* note 15, at 43.
[386] HOWSE & JOSLING, *supra* note 276, at 16.

*1994*.[387] Equally, and this brings us back to the issue of food aid, the international community is moving towards exempting 'humanitarian' food shipments from export restrictions. As Howse and Josling argue,[388] on the basis of the Appellate Body's report in *EC – Tariff Preferences*,[389] where the Appellate Body sought to determine the basis for different kinds of treatment for different countries, resort could be had to 'multilateral instruments adopted by international organisations'. The latter could serve as standards or benchmarks, and could include resolutions of international bodies (in this case those of the FAO, WFP, etc.)

While such matters remain speculative, there are two factors to consider. First, food security in developing country and LDC Members' territories, where export restriction are in place, may temporarily increase for domestic consumers, thereby offsetting hunger and malnutrition but in terms of domestic production it may have negative effects.[390] Second, failure to discipline export restrictions could be especially damaging to food security if the final outcome of the DDA makes importers more vulnerable to market distortions arising from export restrictions.[391] It is therefore vital that WTO Members act to resolve such inequities relating to export competition in the system of trade-related international food security.

## V. MAIN FINDINGS AND CONCLUSIONS

This article has examined the issue of trade-related international food security and the developing world. Using a historical narrative, it has been noted that at various times over the course of six decades, the international community and the GATT/WTO multilateral trading system has adopted different approaches towards international food security. The closest that the food and agricultural and trading communities came to a coordinated approach on the matter was in the immediate aftermath of the Second World War. With the birth of the FAO as a specialised UN agency in 1945 and the emergence of the GATT 1947, in the place of the stillborn ITO, international food security was defined by supply-side economics. With an emphasis on food sovereignty, there was a move in the developed world to build up domestic food stocks, which eventually led to a persistent over-production of basic commodities, such as wheat, and efforts to dispose of surplus stocks.

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387 Article I, *GATT 1994*, THE LEGAL TEXTS, *supra* note 15, at 424.
388 HOWSE & JOSLING, *supra* note 276, at 16.
389 *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, Appellate Body, WT/DS246/AB/R, adopted 20 Apr. 2004 (*EC – Tariff Preferences*).
390 HÄBERLI, *supra* note 137, at 319.
391 *Id.*

International cooperation on the supply-side approach came about when the UN intervened through the UN General Assembly, the FAO and the nascent WFP in order to address critical food shortages by means of the (re-)allocation of food surpluses and multilateral food aid to developing countries. However, such efforts were only partially matched by developments in the multilateral trading system. The Kennedy Round MTN (1963-1967) failed to deliver much by way of trade disciplines and nothing by way of food security even though an attempt to address the asymmetry in trade between developed and developing countries did result in a major amendment to the GATT so as to introduce a new Part IV on Trade and Development.

Spurred on by the world food crisis of the 1970s, and the appearance of Sen's entitlements-based approach towards food security, significant strides were made by the international community to address the issue of food insecurity during the following two decades. However, the GATT contracting parties remained ineffective at enforcing disciplines on domestic/export subsidies and the prohibition of quantitative restrictions, which was critical if there was to be a successful rebalancing of the terms of agricultural trade, especially affecting developing countries. Twenty years after the end of the Uruguay Round MTN (1986-1994), and the entry into force of the WTO, the much-touted agricultural reform process, whereby all non-tariff measures on agricultural products are subject to a process of tariffication, is still incomplete.

Meanwhile, in the international community during the 1990s, the emphasis shifted on access to food and the importance of well-being that food and nutritional security could provide. The FAO, the WFP and the IFAD, as the three major food and agricultural agencies, worked closely on a human security approach, which ensures that food security exists 'when all people at all times, have physical and economic access to sufficient, safe and nutritious food'. This shift in approach failed to resonate with the trade community. During the Uruguay Round MTN, the GATT contracting parties grappled with a fundamental reform of the trade in food and feedstuffs so as to correct and prevent restrictions and distortions in world agricultural products, which led to the adoption of the *AoA*. Food security was relegated to a relatively minor place by means of the *NFIDC Decision*, which recognised that the agricultural reform process could have consequences for LDCs and NFIDCs. The primary means of addressing the issue in the *NFIDC Decision* was to ensure the availability of non-commercial food transactions in the form of food aid, including concessional sales, which are potentially trade-distorting and disruptive for local markets.

Divergent approaches towards global food security appeared at the turn of the Millennium. The international food and agricultural community favoured a closer link between human rights and food and nutritional security, and there was broad

support for MDG 1 on the eradication of extreme poverty and hunger by 2015. This right-based approach to international food security culminated in the adoption in 2004 of the *Voluntary Guidelines* [*on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*]. Even so, during the following decade, the Rome-based food and agricultural agencies lost some ground to the main UN agencies in New York and Geneva, the G20 Agricultural Ministers and the G8, all of whom took a more active role in the coordination of multilateral policy responses towards global food security in the wake of the 2007/08 financial crisis.

The WTO, seeking to quicken the pace of the agricultural reform process and to improve the terms of agricultural trade for developing countries under the *AoA*, launched the Doha Development Round in 2001. Aside from the fact that completion of the agricultural reform process and the results of the DDA remain elusive as ever, there has been little or no support for a rights-based approach to food security in the WTO. Instead, the WTO Secretariat has to some extent been active on the external plane in supporting the UNSG's HLTF, arising from the global food price spike in 2007/08, and AMIS [Agricultural Market Information System].

More recently the WTO has agreed to step up collaboration with the FAO on trade and food security with a nominal contribution to the FAO's flagship publication on the *State of Agricultural Commodity Markets*. In particular, this will include an examination of the role of open and strengthened food markets in support of food security objectives.[392] While welcome, this is still a minimal effort on the part of the WTO in terms of broader engagement with the international community on trade-related food security.

At the same time it should be noted that WTO Members have been less successful in making any real progress on the DDA or with implementing the *NFIDC Decision*. Instead, some WTO members have retrenched their domestic policies based on food sovereignty, which include public stockholding for food security purposes, as in the case of India, and the maintenance of the supply-side approach to addressing potential food insecurity alongside a re-adjustment of the terms of export competition through dispute settlement.

Based on the foregoing findings, the extent to which the international community and the multilateral trading system interact on the matter of international food security is marked by further developments both in the global economy and in the

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[392] 'WTO and FAO announced enhanced cooperation on trade and food security', WTO: 2015 News Item, 17 Apr. 2015, *available at* <https://www.wto.org/english/news_e/news15_e/igo_17apr15_e.htm>.

WTO. Some of the further findings and conclusions that follow from this study are as follows.

First, the issue of food insecurity across the globe has abated in recent years. The most recent edition of *The State of Food Insecurity in the World*, which is produced annually, under the auspice of the three Rome-based food and agricultural agencies, recorded a significant fall in the number of chronically undernourished people globally in 2014.[393] Overall, the incidence of undernourishment fell 'from 18.7 percent to 11.3 percent at the global level, and from 23.4 percent to 13.5 percent in developing countries'.[394] While the MDG 1C hunger target might appear within reach, globally there is insufficient time left to achieve the WFS target of halving the number of undernourished people by 2015[395] and there has been 'insufficient progress towards international hunger targets, especially in the sub- Saharan region, where more than one in four people remain undernourished'.[396]

Second, as Hilal Elver, the current Special Rapporteur on the Rights to Food has pointed out, there are new threats to international food security alongside traditional ones. One is the combined issue of '[C]limate change, sustainable resource management and food security', which is considered to be 'among the most complex, interdependent and urgent global policy'.[397] Another is the fact that 'the world is currently blighted by a plethora of ongoing humanitarian crises and armed conflicts', which are devastating the lives of millions of people across the globe, and for which the international community needs to take greater responsibility in terms of emergency food crises'.[398]

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[393] The figure of 805 million chronically undernourished people in the period 2012-14, which was given at the beginning of this article, has actually come down by more than 100 million over the last decade and by 209 million since 1990–92; *see State of World Food Insecurity*, *supra* note 2, at 9.

[394] *Id.*

[395] *See also supra* note 113 and accompanying main text.

[396] *State of World Food in security, supra* note 2, at 9.

[397] Statement by Hilal Elver, Special Rapporteur on the Right Food at the 69th Session of the UN General Assembly, Third Committee, Item 68 (b & c) (Oct., 29, 2014), *available at* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15256&LangID=E.

[398] *Id.* The CFS is seeing to promote a set of principles on the matter; *see also* C-Chair's Proposals Second Draft, Framework for Action for Addressing Food Insecurity and Malnutrition in Protracted Crises, *available at* http://www.fao.org/fileadmin/templates/cfs/Docs1415/a4a/CFS_A4A_Second_Draft_EN.pdf.

Third, since the turn of the century, there has been a greater degree of policy coherence and consistency between the food and agricultural and human rights communities. This can be traced back to the explicit recognition of the importance of access to adequate food at the international level in CESCR General Comment No 12 on the Right to Adequate Food.[399] Elaborating on the normative content of Article 11, ICESCR, General Comment No 12 states that: '[T]he right to adequate food is realized when every … [individual], alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement.'[400] The human rights-based approach was endorsed by the international food and agricultural community with the adoption of the *Voluntary Guidelines* in 2004, which some WTO Members, like the US, refused to support.

Fourth, what may not be working so well in the international community is the multi-stakeholder CFS. Five years after its reform, an assessment by the Civil Society Movement ("CSM"),[401] highlights some of the challenges the CFS faces, including a greater need for implementation and monitoring of the Committee's decisions. Among its other challenges, the CFS needs to ensure greater food security policy coherence, most strikingly where it concerns the impact of trade policies and WTO agreements on food security. Not only do such trade policies challenge the notion of coherence but also increasingly influence CFS processes through government intervention. Currently, as we have previously noted, the WTO is nominally a member of the CFS, but has not thrown its weight behind the work of the HLPE.[402]

Fifth, and following on from the previous point, the crucial link between 'accessibility to food' and 'food and nutritional adequacy' finds no counterpart in the multilateral trading system. Instead, there are policy tensions in the WTO centred on 'food availability' in four areas of the agricultural reform process:[403] 'non-trade concerns'; 'special and differential treatment to developing country Members'; 'a fair and market-orientated agricultural trading system'; and other objectives' mentioned in the Preamble to the *AoA*.[404] The latter include such things as 'substantial progressive reductions in agricultural support and protection', e.g. export subsidies and domestic farm support, and 'correcting and preventing

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399 CESCR *General Comment No. 12*, *supra* note 156.

400 *Id.* ¶ 6.

401 Secretariat of the Civil Society Movement (CSM)for relations with the UN Committee on World Food Security (CFS), *Civil Society at CFS, Contributions and Assessments of the Civil Society Mechanism (CSM)* on the 41st Session of the UN Committee on World Food Security (CFS), 7, *available at* http://www.csm4cfs.org/files/News/217/ingleseweb.pdf.

402 *See also* note 247 and accompanying main text.

403 Art. 20(c) *AoA*, THE LEGAL TEXTS, *supra* note 15, at 46.

404 *Id.* Preamble, recital 3.

restrictions and distortions in world agricultural markets', e.g. disciplines on export restrictions.

In the case of export subsidies some progress has been made thorough the process of tariffication but work is incomplete. Export restrictions raise potential concerns about food availability. There has been next to no attempt to constraint them despite some recent case law, such as *China – Raw Materials*, which was a potential shot across the bows concerning the interaction between the exception for critical food shortages in Article XI:2 (a) *GATT 1994* and the discipline on export prohibitions and restrictions in Article 12 *AoA*.

Sixth, any interaction between food security and international trade in the multilateral trading system manifests itself at two levels – external and internal to the WTO. There exists a greater level of inter-agency coordination and cooperation on trade-related international food security on the external plane, potentially as a result of the AMIS system, which counts the WTO (through its Secretariat) and seven other international agencies as its participants. Established after the 2007/08 financial crisis, where an inordinate amount of speculation arose[405] because of poor information about commodity stocks, AMIS is designed to improve market intelligence and to share advance warnings about commodity shortages in four staple crops - wheat, rice, maize and soybeans. Provided that individual countries continue to supply the relevant market intelligence to AMIS, which appears to be the case, the system can continue to play a vital role in improving the global market trading in these staple crops, thereby reducing the potential for commodity speculation that may arise out of asymmetrical market information.

Seventh, on the internal plane, the *NFIDC Decision*, which was intended as a collective action decision to address potential shortcomings in the agricultural reform process for LDCs and NFIDCs, remains ineffective. Despite the earlier proposal by Egypt to exempt LDCs and NFIDCs from quantitative export restrictions invoked under Article XI:2(a) *GATT 1994*[406] by other WTO Members, who are major exporters of the specific foodstuffs concerned, and by the EU proposal for a coordinating mechanism to provide financing to LDCs and NFIDCs facing short-term difficulties with normal levels of commercial food imports, there has been no further movement on either proposal. This is partly due

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[405] HLPE Report, *supra* note 247.

[406] Article XI.2(a) *GATT 1994*, THE LEGAL TEXTS, *supra* note 15, at 437. It will be recalled that the provision provides an exception for any WTO Member (not just developing and LDC Members) to temporarily apply export prohibitions or restrictions 'to prevent or relieve critical shortage of foodstuffs or other products essential to the exporting [Member]'.

to a lack of political will from other WTO Member governments and partly due to the fact that in terms of trade-related international food security, NFIDC and LDC interests are not necessarily aligned with those of large agricultural exporting Members nor even among the developing country Members, many of whom also belong to the latter category.[407] Even so, more could be done to revise the *NFIDC Decision* in order to implement it more effectively, possibly by turning it into a plurilateral FSA (Food Security Agreement) as suggested by Tim Josling.

Eighth, and possibly more significant than the previous point, is the fact that some key WTO developing and transitional economy members, like India[408] have insisted on their sovereign right to resort to public stockholding for food security purposes, thereby also providing market price support to domestic producers. Their stance eventually led to the adoption of the *Bali Ministerial Decision on Public Stockholding* in December 2013,[409] which is an interim solution to shield measures from challenges, including from other Members under the WTO dispute settlement system, until a permanent solution can be reached.[410]

While it may be argued that some WTO Members have done this under domestic political pressure from farmers and peasant organisations, as a reaction to a liberal agricultural trade agenda,[411] the real reason is the current means for calculating the AMS. Not only is it based on the outmoded reference price of 1986-1988 but also the methodology used takes no account of the price inflation that has occurred since initial thresholds on trade distorting support were agreed upon nearly two decades ago. Over time, above-average inflation and price volatility can augment AMS figures making countries, like India, more vulnerable to breaching their AMS limits.[412]

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[407] For details of the different coalitions and alliances in the negotiations under the DDA, *see* ROLLAND, *supra* note 294, and accompanying main text.

[408] Raul Montemayor, *Public Stockholding for Food Security Purposes: Scenarios and Options for a Permanent solution*, Issue Paper No. 51at 34 (Geneva: ICTSD)(2014) [hereinafter MONTEMAYOR], *available at* http://www.ictsd.org/sites/default/files/research/Public%20Stockholding%20for%20Food%20Security%20Purposes%20Scenarios%20and%20Options.pdf, as far back as 2005 Korea reportedly abolished its government procurement programme for rice and converted it into a public stockholding programme that would henceforth qualify as a Green Box measure. For Green Box measures and accompanying main text, see *supra* note 128.

[409] *Bali Ministerial Decision on Public Stockholding*, *supra* note 287.

[410] *Id.* ¶ 1.

[411] CHATTERJEE & MURPHY, *supra* note 285.

[412] MONTEMAYOR, *supra* note 407, at iv,9.

Thus, the language of the *Bali Ministerial Decision on Public Stockholding* notwithstanding, it can be expected that those developing country Members who are likely to exceed their bound total AMS or *de minimis* limits,[413] will continue to push for urgent re-consideration of the domestic support rules in their favour. Meanwhile, India's 'hold-out' position for a peace clause in the *Bali Ministerial Decision on Public Stockholding*, in support of its food security programme under the Right to Food Act, may have driven a deeper wedge in the developing country Members' camp when it comes to finalising the post-Bali work package. This may apply not only to trade-related food security matters but also to other developments, such as prompt adhesion by the WTO membership to the *Agreement on Trade Facilitation*.[414]

[413] *Bali Ministerial Decision on Public Stockholding*, *supra* note 287, ¶ 5.
[414] *Agreement on Trade Facilitation*, *supra* note 349.